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National Reporter System—State Series

THE SOUTHEASTERN REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 68

PERMANENT EDITION

CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF APPEALS OF VIRGINIA AND WEST VIRGINIA
THE SUPREME COURTS OF NORTH CAROLINA AND SOUTH
CAROLINA, AND THE SUPREME COURT AND
COURT OF APPEALS OF GEORGIA

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JUDGES

OF THE

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COURT RULES

SUPREME COURT OF APPEALS OF WEST VIRGINIA*

Amendments in Force February 1, 1910

RULE IV.

Argument Docket.

1. How Arranged. Thirty days before the first day of each regular term, the clerk shall prepare a list of the cases then ready to be heard in the grand division in which the next regular term is to be held, and distribute the printed lists as provided in section 20 of chapter 157 of the Acts of 1882, and in arranging the argument docket he shall allow for each circuit not less than as many days as one-fifth of the number of open cases on the docket of such circuit, but when there are not more than three cases on the argument docket from any one circuit, cases from another circuit may be set for hearing on the same day.

2. When Notice is Necessary. In all cases (except those of felony) when the record has been printed since the last preceding regular term of court, the party desiring a hearing must give notice to the opposite party of his intention to insist upon a hearing at the next regular term, at least thirty days before the first day of such term, and no case will be placed on the argument list and deemed ready for hearing until the second term after the record has been printed unless the notice above mentioned has been given and returned to the clerk's office thirty days before the term.

RULE V.

Briefs.

1. Time of Filing. In any case on appeal or writ of error, the counsel for the appellant or plaintiff in error at least twenty days, and counsel for the appellee or defendant in error at least ten days, before a case is called for hearing, shall file with the clerk of this court not less than ten copies of a printed brief, one of which copies shall, upon request, be furnished to each of the counsel engaged upon the opposite side. All reply and supplemental briefs shall be filed at least five days before a case is called for hearing, and not later, unless by consent of counsel.

It is also desired by the court that counsel upon each side will furnish promptly to counsel on the opposing side their respective briefs as soon as printed, but their doing so will not obviate the requirement of this rule as to filing copies in the office of the clerk, and it is recommended that the printed brief shall correspond in size of page with the printed record and bear the same docket number.

RULE XII.

Rehearing.

1. How Obtained. No petition for a rehearing will be entertained unless presented within the term at which the decision is announced, nor in any case later than thirty days after the date of the decision of the case in which it is presented (unless as otherwise authorized by law), and no rehearing will be allowed unless one of the judges who concurred in the decision shall be dissatisfied with the conclusion reached, and no petition for a rehearing will be entertained by the court in any case unless the reasons therefor are printed and filed with the petition; but if the decision complained of is announced within fifteen days of the close of the term, the printing may be dispensed with. When a rehearing is allowed, the court may fix the time and place for reargument and resubmission, notice of which shall be given by the clerk to the attorneys of record, but, in case it fails to fix such time and place, the clerk shall enter the case upon the docket as if it had never been heard.

RULE XIII.

Index to Records.

1. Must be Indexed. In making transcripts of records for appeal and writs of error, the clerks of any court making such transcript shall annex thereto a complete index, giving pages of the record on which its chief component parts are to be found, including the pages where the deposition of each witness appears in such record.

*For rules as previously amended, see 57 S. E. xvii.

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(153 N. C. 608)

MILLER et ux. v. CAROLINA MONAZITE CO. et al.

(Supreme Court of North Carolina. May 17, 1910.)

1. FRAUDS, STATUTE OF (§ 153*)—PLEADING.

In an action on a contract for the sale of a mineral interest in land, a denial in the answer of the execution of the contract is sufficient to protect the defendant from liability under the statute of frauds, and he is not required to plead the statute specially.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 367; Dec. Dig. § 153.*]

2. APPEAL AND ERROR (§ 662*)—RECORD—CONCLUSIVENESS.

A statement by the court in the record that there was no evidence of the execution of the contract sued on must be accepted as true by the appellate court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2851; Dec. Dig. § 662.*]

3. FRAUDS, STATUTE OF (§ 115*)—MEMORANDUM OF SALE—SIGNATURES—"PARTY TO BE CHARGED."

The vendee in a contract of sale is the "party to be charged" thereon, within the meaning of the statute of frauds, and he can plead such statute to defeat an action by the vendor on such contract.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 244-246; Dec. Dig. § 115.*]

For other definitions, see *Words and Phrases*, vol. 7, p. 6513.]

Appeal from Superior Court, Burke County; M. H. Justice, Judge.

Action by Jesse Miller and wife against the Carolina Monazite Company and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

S. J. Ervin and J. M. Mull, for appellants.
Avery & Ervin, for appellees.

WALKER, J. This action was brought by the plaintiff to recover of the defendant the purchase money for certain mineral interests in the land which is described in the pleadings, and which the plaintiff alleges he contracted to sell to the defendant. It was contended by the latter that what the plaintiff alleges was the contract to sell the mineral interests was merely an option or a uni-

lateral contract, which was never signed nor executed by the defendant, and that the time limited in the option for the payment of the purchase money had expired. Whether it was an option or a contract to sell is not material to the decision of the question which was argued before us and which is presented by the record, as it appears in the statement of the case on appeal that no proof of the execution of the contract by the defendant was shown, nor attempted to be shown. As the defendant denied the execution of the contract, it was incumbent upon the plaintiff to introduce evidence to the effect that the contract had been signed by the defendant, as a denial of the execution of the contract in the answer was sufficient to protect the defendant from liability under the statute of frauds, and it was not necessary to plead the statute specially. *Morrison v. Baker*, 81 N. C. 76; *Browning v. Berry*, 107 N. C. 231, 12 S. E. 195, 10 L. R. A. 728; *Haun v. Burrell*, 119 N. C. 544, 26 S. E. 111; *Winders v. Hill*, 144 N. C. 614, 57 S. E. 456. At the close of plaintiff's evidence, the court, on motion of the defendant, ordered a judgment of nonsuit to be entered under the statute, upon the ground that the execution of the contract by the defendant had not been shown. In the case of *Winders v. Hill*, supra, we held that as the defendant had taken issue with the plaintiff, concerning the execution of the contract, by denying the allegation to that effect in the complaint, he could avail himself of the statute of frauds without specially pleading it, as it had been settled by numerous adjudications of this court, which are cited in the opinion, that if a contract is denied, or a contract different from that alleged is set up, or if the contract is admitted and the statute of frauds is specially relied on by plea, or now by answer, parol evidence of the contract is incompetent, and, as the contract cannot be proved, it cannot be enforced.

The court states as a fact in the record that there was no evidence of the execution of the contract by the defendant, and we

must accept this as true. An examination of the testimony which is set out in the case will show that there was, in effect, no sufficient evidence that the defendant had executed the instrument which had been lost, even if it contained a contract between the parties and was not a mere option to buy the mineral interests in the land.

It has been settled by this court that in a suit against the vendee to recover the purchase money agreed to be paid for land, or any interest therein, he is the party to be charged within the meaning of the statute of frauds, and can plead the same in order to defeat the plaintiff's recovery; the party to be charged within the meaning of the statute being the person against whom it is sought to enforce the obligation of the contract. *Hall v. Misenheimer*, 137 N. C. 183, 49 S. E. 104, 107 Am. St. Rep. 474.

There was no error in the ruling of the court, and we affirm the judgment.

Affirmed.

(152 N. C. 608)

BOWMAN v. WARD et al.

(Supreme Court of North Carolina. May 17, 1910.)

1. JUSTICES OF THE PEACE (§ 119*)—JUDGMENT—INVALIDITY.

Where neither the summons by which an action in justice's court was begun, nor the attachment subsequently issued, was served personally or by publication, a judgment rendered several months after the return day of the summons and attachment was void; the proceeding having been discontinued before the judgment.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 375; Dec. Dig. § 119.*]

2. JUSTICES OF THE PEACE (§ 128*)—INJUNCTION—ATTACK ON JUDGMENT.

Where a judgment of a justice of the peace is void, the court will restrain a sale of land under execution on the judgment, at the suit of one acquiring the land before the judgment.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 402; Dec. Dig. § 128.*]

Appeal from Superior Court, Henderson County; M. H. Justice, Judge.

Action by Elizabeth Bowman against W. C. Ward and another. From a judgment dissolving a temporary restraining order, plaintiff appeals. Reversed.

Brown Shepherd, Geo. A. Shuford. and C. F. Toms, for appellant.

BROWN, J. The plaintiff sues to restrain the selling of her land under execution, upon a judgment rendered by a justice of the peace and docketed in the superior court of Henderson county, in a cause entitled *W. C. Ward v. A. C. Peacock*. Plaintiff claims under a deed from said Peacock dated September 2, 1909. It appears that on March 29, 1909, the aforesaid action before the justice of the peace was commenced by issuing a

summons returnable March 30th. This summons was not served, as appears by the return on it. A warrant of attachment was issued, returnable March 30th, and on April 2d it was levied on the land by defendant Blackwell, sheriff. No service of the summons or of the attachment has ever been made, either personally or by publication, and no publication made. On September 30, 1909, after plaintiff had purchased the land and had her deed recorded, the justice rendered final judgment against Peacock, although it appears of record that no publication or service of any kind has been made either of the summons or attachment. The judgment was docketed, execution issued and levied upon the land conveyed to plaintiff, and the same advertised for sale. His honor denied the injunction upon the ground that the proceeding was void on its face. We agree with him that the judgment is void, because it appears affirmatively upon the face of the record that no service personally or by publication has ever been made, either of the summons or attachment. The proceeding was discontinued before the judgment was rendered. *Etheridge v. Woodley*, 83 N. C. 11; *Best v. British & American Co.*, 128 N. C. 352, 38 S. E. 923; *Penniman v. Daniel*, 91 N. C. 431, 20 S. E. 336; *Finch v. Slater* (this term) 67 S. E. 264. To same effect are decisions in other states having statutes similar to ours. *Taylor v. Troncoso*, 76 N. Y. 599; *Dist. Co. v. Ruser*, 61 Hun, 625, 16 N. Y. Supp. 50, 51; *Mojarietta v. Saenz*, 58 How. Prac. (N. Y.) 505; *McLaughlin v. Wheeler*, 2 S. D. 379, 50 N. W. 834; *Millar v. Babcock*, 29 Mich. 526. We think, however, his honor should have restrained the sale, as the plaintiff is entitled to have the question finally determined as to the liability of her land for the judgment, and not be made to take the chance of losing it by forced sale under execution. If her land is liable for the judgment, she should have the opportunity to pay it after a judicial determination. This question is fully and lucidly discussed by Mr. Justice Manning in the recent case of *Crockett v. Bray*, 151 N. C. 617, 66 S. E. 666, and need not be further discussed now.

Let the injunction issue from the superior court of Henderson county enjoining the sale. Reversed.

(152 N. C. 537)

WILSON LUMBER CO. v. HUTTON et al.
(Supreme Court of North Carolina. May 11, 1910.)

1. BOUNDARIES (§ 3*)—COURSES AND DISTANCES—NATURAL BOUNDARY.

Courses and distances must, as a general rule, give way to a call for a natural boundary, because a natural boundary, if fixed, is unchangeable, and more likely to be the true call than courses and distances.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 12; Dec. Dig. § 3.*]

2. BOUNDARIES (§ 3*)—COURSES AND DISTANCES—"NATURAL BOUNDARY."

A well known and established line of an adjacent tract is a "natural boundary" within the rule that courses and distances give way to a natural boundary, because the line is more certain than course and distance.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 12; Dec. Dig. § 3.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4664, 4665.]

3. BOUNDARIES (§ 3*)—COURSES AND DISTANCES—"NATURAL BOUNDARY."

Where the call in a grant was for 100 poles to a stake in a boundary line not known to the surveyor or grantee, the call for distance would not yield to the call for the stake, where to do so would make the distance 274 poles, especially where, as a matter of fact, the line had never been run to the stake.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 38; Dec. Dig. § 3.*]

4. BOUNDARIES (§ 3*)—COURSES AND DISTANCES—ACREAGE.

Under Revisal 1905, §§ 1716, 1734, requiring the surveyor to make two plots and record thereon the courses and distances, and providing that one shall be attached to the grant and the other filed in the office of the Secretary of State, the plots are evidence; and, where the plots, the courses, and distances and the acreage correspond, they control, and there will be no attempt to give a preference to a call for a line not known by the surveyor or the grantee.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 3-41; Dec. Dig. § 3.*]

5. BOUNDARIES (§ 3*)—ACREAGE—CONCLUSIVE-NESS.

The rule that acreage is usually postponed to other descriptions in a grant is subject to the exception that quantity becomes important where the location or boundary is doubtful, and in doubtful cases quantity may have weight to aid the description, and in some cases may even have a controlling effect.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 41; Dec. Dig. § 3.*]

6. BOUNDARIES (§ 3*)—ACREAGE—CONCLUSIVENESS.

Where the courses and distances in a grant not actually surveyed agree with the quantity described as conveyed, and with the plot attached to the grant, the quantity will be given weight, and will not be discarded where to do so the quantity would be increased 14 times by giving effect to calls for lines.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 41; Dec. Dig. § 3.*]

7. BOUNDARIES (§ 36*)—EVIDENCE—ADMISSIBILITY.

Where on an issue as to a boundary the grantee in a state grant testified that he entered only 50 acres, and had never claimed any more, a tax list was competent to show that he gave in the tract for taxation 50 acres to corroborate his testimony.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 160-162, 164, 166-176; Dec. Dig. § 36.*]

8. BOUNDARIES (§ 3*)—COURSES AND DISTANCES.

Where there is more than one description in a deed, and they turn out on the evidence not to agree, the description which is the most certain must be adopted, and course and distance from a given point is certain in itself, and will not be departed from, unless there is something else which proves that the course and distance given was stated by mistake.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 3-41; Dec. Dig. § 3.*]

9. BOUNDARIES (§ 3*)—COURSES AND DISTANCES.

Where a grantee in a state grant did not know, at the time of taking out the grant, where a line called for in the grant was, and there was no general reputation at the time of its location, the call for the line would not displace course and distance, though it can be ascertained mathematically.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 38-40; Dec. Dig. § 3.*]

Hoke and Walker, JJ., dissenting:

Appeal from Superior Court, Caldwell County; Council, Judge.

Action by the Wilson Lumber Company against one Hutton and others. From a judgment for defendants, plaintiff appeals. Reversed.

Jones & Whisnant and Finley & Hendren, for appellant. Mark Squires, W. O. Newland, M. N. Harshaw, E. B. Cline, and J. T. Perkins, for appellees.

CLARK, C. J. On June 30, 1868, the state issued to John Crisp a grant for "50 acres of land" in Caldwell county, described as follows: "On dividing ridge between John's river and Mulberry creek, adjoining his own land. Beginning on a black pine near the flatrock, and runs N. 35 degrees W. 100 poles to a stake in Daniel Moore's line; then W. 80 poles to a stake in Jesse Gragg's line, then S. 35 degrees E. 100 poles to stake in his own line; then E. with said line to the beginning." The beginning corner of said grant is not in dispute, but is admitted to be at the black pine "A," as shown on the map. The line of said grant, if run according to the contention of the plaintiff—that is, by course and distance—would embrace 50 acres. If run according to the contention of the defendants, the grant would cover about 700 acres, or 14 times as much as was granted. The grantee, John Crisp, testifies that he took out a grant for only 50 acres, with the view of adding a flat cove to his adjoining land. He stated that he never claimed more than 50 acres; that he had listed the land and paid taxes for only 50 acres; that he paid the state for only 50 acres, and in conveying it he only conveyed it for 50 acres. At the time the survey was made for the grant, no lines were in fact run, and the land was plotted merely from the courses and distances recited in the entry and grant. The defendants contend that course and distance should be disregarded, and the acreage also, and all the above facts, and that the first line should be extended to Daniel Moore's line, though this would be 274 poles instead of 100 poles, as stated in the grant; that instead of the second call in the grant, 80 poles W. to a stake in Jesse Gragg's line, "the second line should be run S. 35 degrees W. 319½ poles to a corner of Jesse Gragg's line," though the evidence is that this corner was in dispute at the time that the grant was taken out, and

therefore not established. In running this second line as contended by the defendants, it would cross through two older tracts of lands which belonged at the time of the survey to Daniel Moore, showing that the surveyor did not know where either Moore's or Gragg's line was. Indeed, John Crisp expressly so testified. The third line according to the grant is S. 35° E. 100 poles to a stake in Crisp's own line. Running by this course and distance, it would strike a point in Crisp's line which would run thence east to the beginning. But run as contended by the defendants, it would cut in half another tract of Daniel Moore's, and run 338 poles instead of 100 poles, as called for in the grant. The fourth line according to the grant would be with Crisp's line east to the beginning. But if run according to the defendants' contention, instead of running east 80 poles to the beginning (as called for in the grant), the line would run five different courses with Crisp's line, and in all about 400 poles, to get back to the beginning. Instead of the 50 acres granted Crisp, the defendants would get 700 acres, 650 of which the plaintiffs have paid the state for, and for only 50 of which the grantor of the defendants paid the state.

It is true that the general rule is that course and distance must give way to a call for a natural boundary, and that the line of an adjacent tract, if well known and established, is a natural boundary. But this is because such natural boundary is usually considered more certain, being at a fixed and definite place, if "established and known," and therefore unchangeable and more likely to be the true call in the deed than course and distance which may, by inadvertence, be incorrectly written down. The reason of the law is the life thereof. "*Ratione cessante, cessat et lex.*" The rule of construction which ordinarily prefers the call for the boundary of another tract to course and distance is based upon the reason that the former is usually more certain than the latter, and applies only when the boundary of the other tract is established and well known.

It will be noted that the first call in this grant is for 100 poles, whereas to go to the Daniel Moore line would be 274 poles. In *Brown v. House*, 116 N. C. 859, 21 S. E. 938, and *s. c.*, 118 N. C. 870, 24 S. E. 786, the court refused to extend a 20-mile line $1\frac{1}{4}$ miles beyond the distance called for, because of a call for a stake "in Stokely Donelson's line" (an extension of one-thirtieth of the distance). Here the defendants asked to extend the distance from 100 poles to 274 poles, and there is not the further provision which there was in *Brown v. House*, "and thence with Daniel Moore's line." Then, in this case, there is the evidence that as a matter of fact the line was never run to Daniel Moore's line, and that neither the grantee nor the surveyor knew where it was. The call is not even for a monument or a marked tree in Daniel Moore's line, but only for a stake.

If Daniel Moore's line was established at that time, it was not known to the surveyor and grantee where it was, and hence it was not established so far as they were concerned.

The second call of the grant, "80 poles W. to a stake in Jesse Gragg's line," cannot possibly be filled by running from a stake, an unknown point, "S. W. $319\frac{1}{2}$ poles to Gragg's corner" (a point which was in dispute and unsettled at the time of the survey), and cutting in half a tract of Daniel Moore's to do so. The third call in the grant, "S. 35 degrees E. 100 poles to a stake in John Crisp's line," cannot be filled by running from a disputed point of Gragg's line "338 poles to a stake in John Crisp's line." Nor can the last call, "then E. with Crisp line to the beginning" (which by the course and distance in the grant would be 80 poles, for the grant by the plot attached thereto and the acreage is a parallelogram), be filled by running five different courses 400 poles to the beginning, as the defendants contend.

The plot which is attached to the grant shows a parallelogram 80 poles by 100 poles, with boundaries and acreage exactly corresponding to those set out in the grant. The statute (Revisal 1905, § 1716) requires the surveyor to make two plots, and record thereon the courses, distances, and water courses crossed, and section 1734 requires that one of these plots shall be attached to the grant, and the other filed in the Secretary of State's office. This makes the plots evidence. *Redmond v. Mullenax*, 113 N. C. 512, 18 S. E. 708; *Higdon v. Rice*, 119 N. C. 631, 26 S. E. 256. When these plots, the courses, and distances and the acreage all correspond, as they do in this case, they are more certain than the wild result which would be obtained by departing from them in attempting to give a preference to the call for Daniel Moore's line, when there was no actual survey, and the surveyor and grantee did not know where it was.

While acreage is usually postponed to other descriptions, there are cases in which the court has held that it was a potent, if not a conclusive, factor. It was so held in *Cox v. Cox*, 91 N. C. 256. In *Baxter v. Wilson*, 95 N. C. 137, it was held that the number of acres in some cases may have a controlling effect. In *Peebles v. Graham*, 128 N. C. 227, 39 S. E. 27, the court says: "The general rule is that the quantity of land stated to be conveyed will not be considered in determining locations or boundaries. But there is a well-known exception to this rule that is as firmly established as the rule itself. And that is this: Where the location or boundary is doubtful, quantity becomes important. *Brown v. House*, 116 N. C. 866 [21 S. E. 938]; *Cox v. Cox*, 91 N. C. 256." The court further said, quoting from *Mayo v. Blount*, 23 N. C. 283, "a perfect description, which fully ascertains the corpus, is not to be defeated by the addition of further and false descriptions." Certainly no stronger case for the application

of this principle can be found than in this, where the courses and distances given in the grant of the tract which was not actually surveyed are found to agree exactly with the quantity of 50 acres described as conveyed, and with the plot attached to the grant, and where to discard them would increase the quantity of land to 14 times that for which the state was paid.

In *Brown v. House*, 116 N. C. 866, 21 S. E. 938, where to extend the line to a stake in the boundary of another tract which was called for would have increased two to three times the acreage stated in the grant (which also corresponded with the acreage obtained by following the courses and distances), the court refused to discard course and distance and follow the call for a stake in the boundary of another tract "and thence with such boundary." In the same case on rehearing (118 N. C. 870, 24 S. E. 786) the court reaffirmed its ruling, and cited *Harry v. Graham*, 18 N. C. 76, 27 Am. Dec. 226, "where the distance called for gave out 30 poles short of the line of the other tract, the court refused to extend the line 30 poles, and held that it must terminate at the end of the distance called for." It also cited *Carson v. Burnett*, 18 N. C. 546, 30 Am. Dec. 143, which held that "the course and distance called for must control unless there is another call more definite and certain than course and distance," and cited *Kissam v. Gaylord*, 44 N. C. 116, *Spruill v. Davenport*, 44 N. C. 134, *Cansler v. Fite*, 50 N. C. 424, and *Mizell v. Simmons*, 79 N. C. 182, all to the same effect. The facts of this case are entirely different from those in *Whitaker v. Cover*, 140 N. C. 280, 52 S. E. 581, which recognizes merely the general rule, which is not denied, but to which the facts make this case an exception. The tax list for the year 1873 was competent to show that John Crisp gave in the tract of land for taxation for 50 acres, and to corroborate his testimony that he entered only 50 acres, and had never claimed any more.

The plaintiff asked the court to charge:

"(1) If there be more than one description in the deed or grant, and they turn out upon evidence not to agree, that is to be adopted which is the most certain. Course and distance from a given point is certain description in itself, and therefore not to be departed from, unless there be something else which proves the course and distance stated in the deed or grant was thus stated by mistake. *Harry v. Graham*, 18 N. C. 80 [27 Am. Dec. 226].

"(2) If the jury shall find from the evidence that the grantee at the time of taking out the grant did not know where the Moore line was, and there was no general reputation at the time of its location, the call for such line would not displace course and distance, although it can now be ascertained mathematically, because it does not furnish as probable and rational evidence as course

and distance; it would be appealing from evidence, certain to a common intent, to a thing altogether unknown to the parties at the time. *Carson v. Burnett*, 18 N. C. 558 [30 Am. Dec. 143].

"(3) If the jury shall find from the evidence that at the time of making the survey and taking out the grant, the location of the Daniel Moore line was unknown to the grantee, John Crisp, and there was no general reputation of such location, although John Crisp may have known that Daniel Moore had land somewhere in that direction, and may have supposed the line of the same to be at the end of 100 poles from the black pine, whereas, as has been since ascertained, it is 274 poles to Daniel Moore's line, then the court charges you that the course and distance is more certain than the call for Daniel Moore's line, and the termination of the first line would be at the end of 100 poles marked 'Chestnut Oak' on the map."

"(8) In doubtful cases, quantity may have weight over circumstances in aid of the description, and in some cases may have a controlling effect.

"(9) The first call in defendants' grant being N. 35° W. 100 poles to stake in Daniel Moore's line, and the distance from the point of beginning being nearly three times as far, or 274 poles, coupled with the testimony of John Crisp that at the time of the survey no line was actually run, except for the distance of a few poles, and that he did not know where the Daniel Moore line was, the jury are instructed that this call is too vague and uncertain to vary the distance called for in the grant, and the first line should terminate where the 100 poles give out.

"(10) The second call in defendants' grant being west 80 poles to a stake in Jesse Gragg's line, and Jesse Gragg's line being unknown at the time, and it being necessary, in order to reach any line of Jesse Gragg's from a point where defendants claim their first line should run, to change this course and distance from due W. to S. 35° W., or almost run at right angles, and to run 319½ poles instead of 80 poles, or nearly four times as far, and so doing to cross the lines of older grants twice, the jury are instructed that this call is too vague and uncertain to vary the course and distance called for in defendants' grant, and that defendants' second line should run 80 poles W. as called for in the grant.

"(11) The third call in defendants' grant being S. 35° E. 100 poles to stake in his own line, and it being necessary, in order to reach the nearest point in his own line, to run 338 poles instead of 100 poles, or more than three times as far, and in so doing again cross the line of an older tract, providing the line is run from a point in Jesse Gragg's line where defendants claim their second line terminates, the jury are instructed that this call is too vague and uncertain,

to vary the course and distance called for in the defendants' grant, and the defendants' third line should run S. 33° E. 100 poles as called for in the grant from a point 80 poles W. of the point marked 'Chestnut Oak' on the map.

"(12) To vary the course and distance as called for in defendants' grant, so as to increase the distance of the first line from 100 poles to 274 poles, to change the course of the second line from due west to S. 28° W., or nearly turn at right angles, and to increase the distance of said line from 80 poles to 319½ poles, or nearly four times as far, to increase the distance of the third line from 100 poles to 338 poles, with the result that the lineal measurement of defendants' fourth line, or southern boundary thereof, is practically 354 poles instead of 80 poles, said southern boundary being changed from a line 80 poles long running due east to an irregular line, and with the further result that the quantity of land embraced in defendants' grant would be increased from 50 acres to 700 acres, or practically 14 times the amount called for in the grant, such a variation from course and distance is so great as to shock probability, to sacrifice the certain for the uncertain; and the jury are instructed that the boundaries of defendants' grant are to be located with reference to the courses and distances named therein."

In failing or refusing to give above prayers, there was error.

HOKE, J. (dissenting). As I understand and interpret the testimony it shows that both the lines of the Daniel Moore tract and of the Jesse Gragg tract called for as indicating the termini of two of the lines of defendants' grant were fixed and established; and, where this is true, our decisions have been well-nigh uniform to the effect that such calls as a rule will control course and distance, and applying this generally accepted principle, I am of opinion that according to our precedents, the case was correctly tried below, and the judgment should be affirmed.

WALKER, J., concurs in dissenting opinion.

(152 N. C. 535)

FOY v. BLADES LUMBER CO.

(Supreme Court of North Carolina. May 11, 1910.)

1. ESTOPPEL (§ 77*)—CLAIMS UNDER DEED.

Where defendant obtained possession of certain land, or cut timber therefrom by virtue of deeds from plaintiff, which defendant had fraudulently procured, defendant was bound in good faith to surrender possession to plaintiff on the deeds being declared fraudulent, and, not having done so, could not contest plaintiff's title, even if defendant was not estopped by merely receiving the deeds from plaintiff.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 198-208; Dec. Dig. § 77.*]

2. PRINCIPAL AND AGENT (§ 161*)—FRAUD OF AGENT.

Where defendant's agent obtained deeds to certain land from plaintiff by fraud for defendant's benefit, defendant, while retaining the benefit of the agent's fraud, could not assail plaintiff's title to the land.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 617; Dec. Dig. § 161.*]

3. TRESPASS (§ 67*)—CUTTING TIMBER—FRAUD—QUESTION FOR JURY.

In an action for wrongfully cutting timber from land which plaintiff alleged he had been induced by the fraud of defendant's agent to convey to defendant, whether defendant obtained the deeds fraudulently held for the jury.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 67.*]

4. ESTOPPEL (§ 29*)—DEEDS—GRANTEES.

Where plaintiff, claiming to be the owner of certain land, sold to the defendant a restricted interest therein, to wit, the standing timber of a given dimension, and defendant bought the timber in recognition of plaintiff's ownership of the land, both claimed under a common source, which precluded defendant from denying plaintiff's title.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 69-73; Dec. Dig. § 29.*]

Appeal from Superior Court, Jones County; Cooke, Judge.

Action by W. F. Foy against the Blades Lumber Company. Judgment for defendant, and plaintiff appeals. Reversed.

T. D. Warren and Simmons, Ward & Allen, for appellant. W. W. Clark and Moore & Dunn, for appellee.

WALKER, J. This action was brought by the plaintiff to recover \$25,000, as damages for unlawfully and wrongfully cutting and removing from his land a large quantity of trees, wood, and lightwood. The plaintiff alleges that on May 27, 1904, he executed to the defendant a deed for a part of said lands, and on October 21, 1904, he executed a contract, in the form of a deed, to the defendant, by which, for the nominal consideration of \$1 and the further consideration of \$1 per 1,000 feet for all timber cut and delivered by the defendant, he sold to the defendant all the timber on the other tract of land described in the pleadings, above the size of 12 inches at the base when cut, and which was then, or which may be during the next 10 years, standing and growing on said land. The timber was to be cut within 10 years unless the time was extended. Rights of way over and through said land and all other lands of the plaintiff were granted, with the right to build any structure, railroad, or tramways for the purpose of cutting and removing the timber.

In 1907 the plaintiff brought an action against the defendant, and in his complaint

alleged that the said deeds were obtained from him under false and fraudulent representations of the defendant's agent, to the effect that the lands which the plaintiff claimed to own did not contain the number of acres set forth in said deeds, to wit, 437½ acres, but only 125 acres; that the plaintiff was ignorant as to the number of acres in the said tracts of land, and the defendant, by its agent, taking advantage of the plaintiff's said ignorance, by the said false and fraudulent representations, and by other false and fraudulent representations then and there made, induced the plaintiff to execute the said deeds to the defendant; that the said agent also falsely and fraudulently represented, in the manner aforesaid, that the defendant did not own but 125 acres of the said land, and that taking advantage of the ignorance of the plaintiff, as to the extent of his ownership, and well knowing that the representations made by him as to the ownership and the acreage, and the other representations then and there made, were false, and the plaintiff really owned about 437½ acres, unlawfully and wrongfully induced the plaintiff to execute the said deeds to the defendant. The plaintiff, in his said complaint, prayed that the deeds be declared fraudulent and void and that they be adjudged to be canceled. The defendants denied the material allegations of the complaint, and the issues raised by the pleadings were submitted to the jury, as follows: (1) Was the deed from the plaintiff to the defendant, dated May 27, 1904, procured by misrepresentation and fraud, as alleged in the complaint? (2) Was the deed from the plaintiff to the defendant, dated October 21, 1904, procured by misrepresentation and fraud, as alleged in the complaint? The jury, for their verdict, answered the first issue, "Yes," and the second issue, "Yes," and thereupon the court adjudged the said deeds to be null and void, and that they be canceled. There was evidence in the case tending to show that the said deeds covered the land described in the complaint in this action, and that the defendant cut the timber on the said land and removed the same therefrom after the said deeds were executed.

At the close of the plaintiff's evidence, the court entered a judgment of nonsuit, on the motion of the defendant, upon the ground that the plaintiff did not show any title or right of possession to the land, or any ownership of the timber thereon, by estoppel or otherwise, and this was the question presented and argued before us. We think that there was some evidence upon which the plaintiff might have recovered, and that he was entitled to have the same submitted to the jury, in order that they might find the facts. Let it be conceded, for the sake of argument and for the present, that the defendant was not estopped by merely receiving the deeds from the plaintiff. *Averill v.*

Wilson, 4 Barb. (N. Y.) 180. It sufficiently appears in the case, we think, that it obtained the possession, or cut the trees from the land, by virtue of the deeds which it had fraudulently procured from the plaintiff, and good faith requires that the defendant should surrender the possession of the land to the plaintiff and not be permitted to contest his title until he has done so, as the deeds through which he obtained possession of the land have been set aside and canceled, because of the false and fraudulent representations of defendant's agent that the plaintiff was not the owner of the land claimed by him, and the jury found, and the court has adjudged in the former suit between the same parties, that the said representations were false and fraudulent, and that the plaintiff was, in fact, as between him and the defendant, the owner of the land described in his complaint. It would be inequitable for the defendant to obtain possession of land or the permission or right to cut trees thereon and remove the same for the purpose of profit, upon the false and fraudulent representation of its agent, and then be allowed to contest the title of the plaintiff to the land or the trees, and continue to hold the possession or right thus fraudulently acquired. Assuming even that no estoppel is created, as against the grantee, by the mere execution of the deeds, even if thereunder the defendant entered upon the land and cut the trees, it appears that the deeds were procured by a false and fraudulent representation. The question of the plaintiff's ownership of the trees cut by the defendant was directly involved in the issues submitted to the jury in the former suit in this way. If the plaintiff was not the owner, then the representation was not false and fraudulent, but true; but, if he was the owner, then the verdict was right, and the representation was false and fraudulent. As the deeds have been canceled, it would be permitting the defendant to take advantage of its own fraud and wrongful act to permit it to assail the plaintiff's title until it had surrendered the possession which it had obtained by the same fraud of its agent, for which it is responsible. Whether the verdict and judgment in the former suit constitute an estoppel of record as to the ownership of the land, we need not decide; but we think there was some evidence in this case that the possession of the land was wrongfully obtained by the defendant through its agent's acts, and that it is under a duty to surrender the possession to the plaintiff, and is liable for any damages which the plaintiff may show he sustained by the cutting of the timber. Whether the defendant may show, in reduction of the damages, that the plaintiff is not the owner of the land or the trees, is a question which may arise at the next trial; but it is not presented now. It will depend somewhat upon the nature of the findings in the other

suit and the conclusiveness of the verdict and judgment therein upon the plaintiff.

There is some evidence in this case, fit to be considered by the jury, that the plaintiff was induced by the representations of the defendant's agent to execute the deeds, surrender the possession of the land, and permit the defendant to cut the timber. To allow the defendant now to dispute the plaintiff's right to the possession and to damages, when he gained possession in such a way, would be as inequitable as to permit a tenant to deny his landlord's title. *Dills v. Hampton*, 92 N. C. 566. It may be true that the two cases are not strictly analogous in law, as, in the case of landlord and tenant, there is the relation of tenure, and the tenant owes fealty to his landlord; but he acquires his possession by means of the lease, and the same principle of morality is common to both cases. As we are reviewing a judgment of nonsuit, we leave open and undecided the question whether the defendant can show in diminution of damages, or for any other purpose, that the plaintiff did not have the title, either by showing title in another or in itself. We do not think the defendant has succeeded in its attempt to show title in itself. The evidence is too vague and uncertain and lacks the probative force which entitles it to be considered by the jury. *Byrd v. Express Co.*, 139 N. C. 273, 51 S. E. 851. It has not shown an adverse and continuous possession of seven years by Rebecca Oldfield under color of title.

It may be that the jury will find, upon the evidence introduced at the next trial, that the defendant did not acquire possession by fraudulently obtaining the deeds from the plaintiff. As the case now stands, there is some evidence of that fact.

As to the second tract of land, we do not see why the principle stated in *Sample v. Lumber Co.*, 150 N. C., at page 164, 63 S. E. at page 732, does not apply. The court there says: "In *McCoy v. Lumber Co.*, 149 N. C. 1 [62 S. E. 699], this court held, in effect, that where one having a deed for real property, or being in possession, claiming to own the same in fee, conveys or grants to another a lesser estate in the property or a restricted interest therein, and there is evidence tending to show that the grantee took in recognition of the grantor's right as the true owner, the parties to such a transaction, in any litigation between them involving the title, come within the principle very generally recognized that, when it appears that both parties to a suit claim under the same title, neither, as a general rule, shall be heard to deny or question the validity of the common source of their respective claims. In the present case there is, on the face of the instrument, evidence which tends to show that the plaintiffs, claiming to be the owners of the property, sold to the defendant a restricted in-

terest therein, to wit, the standing timber of a given dimension, and that defendant bought the timber in recognition at the time of plaintiffs' claim as owner of the land, and there was no error, therefore, in denying the motion for nonsuit, made by defendant on the ground that there was no evidence tending to sustain plaintiffs' claim of title."

In any view of the case, the court erred in adjudging, at the close of the evidence, that a nonsuit be entered against the plaintiff.

Error.

(152 N. C. 765)

PEGRAM v. HESTER.

(Supreme Court of North Carolina. May 17, 1910.)

1. APPEAL AND ERROR (§ 719*)—ASSIGNMENTS OF ERROR—RULES OF COURT.

Sup. Ct. rule 27 (66 S. E. viii), requiring the errors relied on to be assigned in the record, will be strictly enforced, and the merits will not be considered where it is not complied with.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2968-2982; Dec. Dig. § 719.*]

2. APPEAL AND ERROR (§ 753*)—FAILURE TO MAKE ASSIGNMENTS OF ERROR—EFFECT.

Where no error appears in the record proper, and there are no assignments of error in the record as required by Sup. Ct. rule 27 (66 S. E. viii), the judgment will be affirmed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3086-3089; Dec. Dig. § 753.*]

Appeal from Superior Court, Forsyth County; E. B. Jones, Judge.

Action by L. W. Pegram against G. W. Hester. From a judgment for defendant, plaintiff appeals. Affirmed.

J. S. Grogan, for appellant. Lindsay Patterson, for appellee.

PER CURIAM. There are no assignments of error in the record as required by rule 27 of this court (66 S. E. viii). The appellant moves to affirm the judgment on that ground, and the motion must be allowed; there being no errors apparent on the face of the record proper. At the last term, in *Smith v. Manufacturing Company*, 151 N. C. 261, 65 S. E. 1009, Walker, J., said: "We must insist upon a strict compliance with the rule, which requires an assignment of errors relied on in this court." Then, after giving the reason for the rule, he adds that without such assignments of error the court would not enter upon a consideration of the case on its merits, but would examine the record proper only, and if no errors appeared thereon, would affirm the judgment, as the court had heretofore done, citing *Davis v. Wall*, 142 N. C. 450, 55 S. E. 350; *Marable v. Railroad*, 142 N. C. 564, 55 S. E. 355; *Lee v. Baird*, 146 N. C. 361, 59 S. E. 876; *Thompson v. Railroad*, 147 N. C. 412, 61 S. E. 286; *Ullery v. Guthrie*, 148 N. C. 417, 62 S. E. 552.

The judgment is therefore affirmed.

(152 N. C. 535)

DOWNING v. STONE.

(Supreme Court of North Carolina. May 11, 1910.)

1. MALICIOUS PROSECUTION (§ 27*)—ELEMENTS—"MALICE."

"Malice," as an element of malicious prosecution, does not necessarily mean anger, wrath, or vindictiveness, but, while any such ill feeling may constitute malice, it need be no more than the antithesis of bona fides, and hence particular malice or malicious or wrongful purpose, in the sense of personal ill will or malevolence existing toward the person prosecuted, by the prosecutor is not required.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 60; Dec. Dig. § 27.*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4298-4304; vol. 8, pp. 7712-7716.]

2. MALICIOUS PROSECUTION (§ 21*)—DEFENSES—ADVICE OF COUNSEL.

Advice of counsel on a statement of facts, however full, does not as a matter of law afford protection to one who has instituted an unsuccessful prosecution against another; such advice being only evidence for the jury on the issue as to malice and probable cause.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 40-44; Dec. Dig. § 21.*]

3. MALICIOUS PROSECUTION (§ 24*)—PROBABLE CAUSE—DISCHARGE BY COMMITTING MAGISTRATE.

When a committing magistrate examines a criminal complaint and discharges accused, his action establishes a prima facie case of want of probable cause in an action for malicious prosecution, but such is not the effect of a verdict and judgment of acquittal by a court having jurisdiction to try and determine the guilt or innocence of accused, so that, where accused was tried and acquitted by a justice of the peace having final jurisdiction, the justice's docket in an action for malicious prosecution was admissible only to show that the prosecution had terminated, and was not relevant to the question of probable cause.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 49-55; Dec. Dig. § 24.*]

4. MASTER AND SERVANT (§ 67*)—ABANDONMENT OF WORK—ADVANCES—OFFENSES.

Under the statute providing that if any person, with intent to cheat and defraud another, shall obtain advances under promise to begin work or labor, etc., and shall then unlawfully and willfully fail to commence or complete the work, he shall be guilty, etc., an instruction that, accused having commenced the work and labor according to the contract of employment, he was not indictable for failure to complete it was erroneous; mere commencement of the work not being an absolute defense.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 67.*]

Appeal from Superior Court, Robeson County; Lyon, Judge.

Action by T. L. Downing against Scott Stone. Judgment for plaintiff, and defendant appeals. Reversed; venire de novo.

There was evidence tending to show that on or about April 25, 1908, the defendant had caused the arrest and imprisonment of plaintiff, on a charge of having obtained from said defendant as landlord, with intent to cheat and defraud, advances and supplies to

plaintiff as tenant. The prosecution having been instituted under section 3481, Revisal 1905, which gives a justice final jurisdiction, the evidence further showed that the plaintiff had been acquitted by the justice who tried the case. There was evidence on the part of plaintiff tending to show that he had acted throughout in good faith, that he had left defendant's premises for good cause, and that, as a matter of fact, he did not owe defendant anything for advancements or supplies at the time he moved away. There was evidence on the part of defendant that plaintiff, having agreed to become tenant of defendant, obtained goods and money by way of advancements, and had shortly thereafter abandoned the place without cause or excuse, and defendant, having consulted counsel, placing the facts truthfully and fully before him, and being advised that on the facts as stated a prosecution would be under the statute, had instituted the same, etc.

The jury rendered the following verdict:

"(1) Did the defendant Scott Stone cause the arrest and prosecution of the plaintiff T. L. Downing as alleged? Answer: Yes.

"(2) Was the same done without probable cause? Answer: Yes.

"(3) Was the same done with malice? Answer: Yes.

"(4) Has the criminal action terminated? Answer: Yes.

"(5) What damages, if any, has plaintiff sustained thereby? Answer: Twelve hundred and fifty dollars."

Wishart, Britt & Britt and McIntyre, Lawrence & Proctor, for appellant. McLean, McLean & Snow and W. H. Kinlaw, for appellee.

HOKE, J. The defendant excepted for that the court refused to charge the jury as requested that, in order to answer the issue as to malice for the plaintiff, it was required that plaintiff should establish particular malice against the defendant, insisting that the term "particular malice" in this connection should be understood in the sense of personal ill will or grudge towards the defendant, and charged instead: "Particular malice means ill will, grudge, a desire to be revenged. Malice within the meaning of this issue does not necessarily mean ill will, but a wrongful act, knowingly and intentionally done the plaintiff without just cause or excuse, will constitute malice, and should you find from the evidence, and by the greater weight thereof, the burden being on the plaintiff, that the defendant, Stone, was actuated by malice towards the plaintiff in taking out the warrant and causing the plaintiff's arrest, you will answer the third issue, Yes. If you do not so find, you will answer the third issue, No." The rulings

of the court below on both of these questions find support in an express decision of this court (*Stanford v. Grocery Co.*, 143 N. C. 419, 426, 427, 55 S. E. 815), and the position is supported by the better reason, and is in substantial accord with the great weight of authority (*Wills v. Noyes*, 29 Mass. 324; *Vinal v. Core & Compton*, 18 W. Va. 1; *Burhans v. Sanford & Bram*, 19 Wend. [N. Y.] 417; *Frowman v. Smith*, Litt. Sel. Cas. 7, 12 Am. Dec. 265, note 1; *Gee v. Culver*, 13 Or. 598, 11 Pac. 302; *Pullen v. Glidden*, 66 Me. 202; *Harpham v. Whitney*, 77 Ill. 32; *Hadrick v. Hestop*, 64 E. C. L. 266; *Johnson v. Ebberts* [C. C.] 11 Fed. 129; 19 A. & E. 675; 26 Cyc. 48, 49; *Hale on Torts*, 354; *Cooley on Torts*, 338).

In *Hale on Torts*, supra, treating of malicious prosecution, it is said: "'Malice,' as here used, is not necessarily synonymous with 'anger,' 'wrath,' or 'vindictiveness.' Any such ill feeling may constitute malice. But it may be no more than the opposite of bona fides. Any prosecution carried on knowingly, wantonly, or obstinately, or merely for the vexation of the person prosecuted, is malicious. Every improper or sinister motive constitutes malice in this sense. The plaintiff is not required to prove 'express malice' in the popular sense. The test is: Was the defendant actuated by any indirect motive, in preferring the charge or commencing the action against the plaintiff?" In *Cooley*, supra, the author says: "Legal malice is made out by showing that the proceeding was instituted from any improper or wrongful motive, and it is not essential that actual malevolence or concept design be shown." In *Vinal v. Core & Compton*, supra, the court, on this question, held: "(6) By the last requisite, malice, is meant, not what this word imports, when used in common conversation, nor yet its classical meaning, but its legal and technical meaning, that is, some motive other than a desire to secure the punishment of a person believed by the prosecutor to be guilty of the crime charged, such as malignity, or a desire to get possession by such means of the goods alleged to be stolen, when the charge is larceny, or any other sinister or improper motive." In *Gee v. Culver*, supra, it was held: "(1) Malice, in the enlarged sense of the law, is not restricted to anger, hatred, and revenge, but includes every unlawful and unjustified motive. And in an action for malicious prosecution any motive, other than that of simply instituting a prosecution for the purpose of bringing a party to justice, is a malicious motive. (2) In actions for malicious prosecution, there is no such thing as implied malice, but malice in fact must be proved, and its existence is purely a question of fact for the jury, but such malice may be inferred from any improper or unjustifiable motives which the facts disclose influenced the conduct of the defendant in instituting the prosecution.

And the act itself, with all the surrounding facts and circumstances, may be inquired into for the purpose of ascertaining such motive." And Lord, J., delivering the opinion, said further: "But the term 'malicious' has in law a twofold signification. There is what is known as malice in law, or implied malice, and malice in fact, or actual malice. Malice in law denotes a legal inference of malice from certain facts proved. It is a presumption of malice which the law raises from an act unlawful in itself which is injurious to another, and is declared by the court. Malice in fact, or actual malice, relates to the actual state or condition of the mind of the person who did the act, and is a question of fact upon the circumstances of each particular case to be found by the jury. In actions for malicious prosecution, there is no such thing as malice in law, but malice in fact must be proved, and its existence is purely a question of fact for the jury. *Ritchey v. Davis*, 11 Iowa, 124. But in this form of action, malice is not considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives. *Mitchell v. Jenkins*, 5 Barn. & Adol. 594. To prove actual malice, it is not necessary, therefore, that the prosecution complained of should proceed from hatred or ill will to the plaintiff; but it may be inferred from any improper and unjustifiable motives which the facts disclose influenced the conduct of the defendant in instituting the prosecution. 'But it is well established,' said Libby, J., 'that the plaintiff is not required to prove express malice in the popular signification of the term, as, that defendant was prompted by malevolence, or acted from motives of ill will, resentment, or hatred towards the plaintiff. It is sufficient if he prove it in its enlarged sense. In a legal sense, any act done willfully and purposely to the prejudice and injury of another, which is unlawful, is as against that person malicious.' *Commonwealth v. Snelling*, 15 Pick. [Mass.] 327. 'The malice necessary to be shown in order to maintain this action is not necessarily revenge, or other base or malignant passion. Whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party is in legal contemplation malicious.' *Wills v. Noyes*, 12 Pick. [Mass.] 324."

We were referred by counsel to the cases of *Savage v. Davis*, 131 N. C. 162, 42 S. E. 571, and *Brooks v. Jones*, 33 N. C. 260, as authorities in support of their position, and in which it is said that "particular malice" must be established in cases of this character. In so far as these cases hold that a malicious or wrongful purpose must exist prompting the particular prosecution, which is the subject of inquiry, the decisions may be upheld, but, to the extent that they countenance the position that on an issue of this character it is

necessary to show there was personal ill will or malevolence existing with the plaintiff towards the original defendant, the cases are not well considered.

Nor was there any error in refusing to give another instruction prayed for by defendant, as follows: "If the jury find from the evidence that the defendant, Scott Stone, before causing the warrant to be issued for the arrest of the plaintiff, Downing, consulted a reputable practicing attorney, making to him a full and fair disclosure of the facts, and was advised by said attorney to procure a warrant for Downing's arrest, and that the defendant acted in pursuance of said attorney's advice in causing the warrant to be issued, this would constitute probable cause for issuing the warrant, and you will answer the second issue, No." The decisions of this state have uniformly held that advice of counsel, however learned, on a statement of facts, however full, does not of itself, and as a matter of law, afford protection to one who has instituted an unsuccessful prosecution against another; but such advice is only evidence to be submitted to the jury on the issue as to malice. *Smith v. Bldg. & Loan*, 116 N. C. 74, 20 S. E. 963; *Davenport v. Lynch*, 51 N. C. 545; *Beal v. Robeson*, 30 N. C. 276. And where it is proven that legal advice was taken by a prosecutor, this, too, is a relevant circumstance in connection with other facts, admitted or established, to be considered by the court in determining the question of probable cause. *Morgan v. Stewart*, 144 N. C. 424, 57 S. E. 149; *Railroad v. Hardware Co.*, 143 N. C. 58, 55 S. E. 422. This restriction as to the advice of counsel learned in the law on facts fully and fairly stated does not seem to be in accord with the weight of authority as it obtains in other jurisdictions (*Cooley on Torts*, 328; *Hale on Torts*, 357), but it has been too long accepted and acted on here to be now questioned, and we are of opinion, too, that ours is the safer position. The exception, therefore, is overruled.

Again it was objected that the court, having admitted the docket and judgment of the justice who tried and disposed of the case, refused on request to confine such evidence to its proper effect as testimony for the purpose only of showing that the action had terminated, but allowed it to be used on the issue as to probable cause. We think this objection must be sustained. It is well established with us that when a committing magistrate, as such, examines a criminal case and discharges the accused, his action makes out a prima facie case of want of probable cause—that is the issue directly made in the investigation—but no such effect is allowed to a verdict and judgment of acquittal by a court having jurisdiction to try and determine the question of defendant's guilt or innocence, and the weight of authority is to the effect

that such action of the trial court should not be considered as evidence on the issue as to probable cause or malice. In this case the justice had final jurisdiction to try and determine the question. The judgment is necessarily admitted, because the plaintiff is required to show that the action has terminated, but it should be restricted to that purpose, and the failure to do this constituted reversible error. *Morgan v. Stewart*, 144 N. C. 424, 57 S. E. 149; *Bell v. Percy*, 33 N. C. 233; *Bekkeland v. Lyons*, 96 Tex. 255, 72 S. W. 56, 64 L. R. A. 474; *Philpot v. Lucas*, 101 Iowa, 478, 40 N. W. 625; *Anderson v. Friend*, 85 Ill. 135; *Taylor on Evidence*, § 1667; 19 A. & E. 685.

There was further error in charging the jury as follows: "It being admitted in this case that plaintiff, Downing, commenced the work and labor according to the contract of employment, the court charges you that he was not indictable for failure to complete the work." The language of the statute is: "If any person with intent to cheat and defraud another shall obtain advances under a promise to begin work or labor," etc., "and shall then unlawfully and willfully fail to commence or complete said work, shall be guilty," etc. To allow the commencement of work by plaintiff to operate as an absolute protection to him is thus in direct contravention of the express provision of the statute, and must be held erroneous. It is no doubt, an inadvertence on the part of the court, but the objection is distinctly and explicitly made.

These are the principal questions presented and argued on the appeal. Most of the other exceptions are to rulings of the court on questions of evidence. They do not seem to be in any way controlling or determinative, and, as they may not arise in another hearing, it is not considered necessary or desirable that they be now passed upon.

For the errors indicated, defendant is entitled to a new trial of the cause, and it is so ordered.

Venire de novo.

(153 N. C. 603)

BAILEY v. MEADOWS CO. et al.

(Supreme Court of North Carolina. May 17, 1910.)

MASTER AND SERVANT (§ 177*)—INJURIES TO SERVANT—FELLOW SERVANTS.

Plaintiff when injured was working for a railroad construction company, and with his fellow servants was loading rails on a car under orders of a foreman. Plaintiff testified that he and his fellow workmen had their hands under a rail, and that they were so close that they dropped a rail on plaintiff's hand before he could get it out. *Held*, that plaintiff's injury resulted from the negligence of his fellow servants, for which he could not recover.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 352, 353; Dec. Dig. § 177.*]

Appeal from Superior Court, McDowell County; Webb, Judge.

Action by W. D. Bailey against the Meadows Company and another. Judgment for plaintiff, and defendants appeal. Reversed.

Hudgins, Watson & Johnston, for appellants. Pless & Winborne, for appellee.

BROWN, J. Taking the plaintiff's evidence in the most favorable view for him, we are of opinion that the motion to nonsuit should have been sustained. The plaintiff was working on the construction force engaged in building a railroad. The railroad was not in operation, as the rails were then being laid. Plaintiff and two fellow servants were engaged in loading rails on a car by order of a foreman. Plaintiff states that "we had our hands under the rail, and they were so close that they dropped the rail on my hand before I could get it out." It is plain from plaintiff's own evidence that his injury was caused by the negligence of his fellow servants, or else that it was the result of an unavoidable accident. In neither event would defendants be liable. As the road was being constructed and not operated, the principles laid down in *Nicholson v. Railroad*, 138 N. C. 516, 51 S. E. 40, and reiterated at this term in *O'Neal v. Railroad*, 67 S. E. 1022, bar a recovery.

The motion to nonsuit is sustained.

Reversed.

(153 N. C. 416)

BUTLER v. F. R. PENN TOBACCO CO.
et al.

(Supreme Court of North Carolina. April 27, 1910.)

1. RAILROADS (§ 75*)—RIGHT OF WAY—RIGHT TO EXTEND.

A railroad company cannot extend its tracks beyond its right of way into a street in absence of legislative authority, even for public purposes.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 183; Dec. Dig. § 75.*]

2. MUNICIPAL CORPORATIONS (§§ 680, 681*)—OBSTRUCTION OF STREETS—POWER TO AUTHORIZE.

Since a town holds its streets in trust for the public convenience, it cannot, in absence of statutory authority, permit the obstruction of a street so as to inconvenience the public, for either public or private purposes, and hence cannot authorize a railroad company to construct its tracks in a street to a manufacturing plant in order to facilitate its operation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1459-1466; Dec. Dig. §§ 680, 681.*]

3. MUNICIPAL CORPORATIONS (§ 680*)—OBSTRUCTION OF STREETS—REMEDIES OF PROPERTY OWNER—INJUNCTION.

A property owner may enjoin the construction of a railroad siding in a public street for use by an industrial plant, where such use impedes the street by filling it with cars, etc..

though he is not an abutting owner on such street.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1477, 1478, 1880; Dec. Dig. § 689.*]

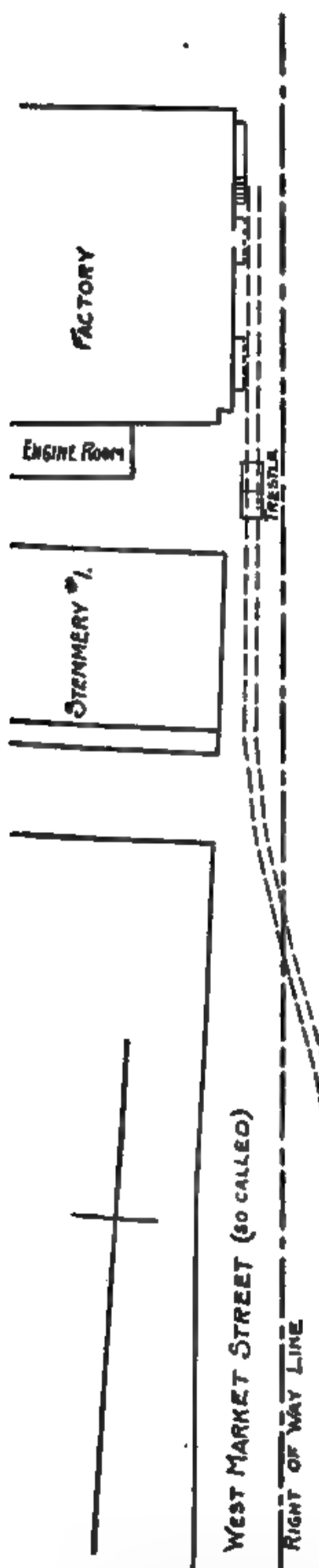
Appeal from Superior Court, Rockingham County; Long, Judge.

Suit by James L. Butler against the F. R. Penn Tobacco Company and another to enjoin the construction of a railroad in a street. From a judgment dissolving a temporary injunction, plaintiff appeals. Reversed.

W. P. Bynum and R. C. Strudwick, for appellant. Manly & Hendren, for appellee Railway Co. A. L. Brooks, H. P. Lane, and C. A. Hall, for Town of Reidsville. Justice & Glidewell, for appellee Tobacco Co.

CLARK, C. J. The plaintiff since 1903 has been the owner, and in possession, of a house and lot on West Market street in Reidsville, whereon he has continuously resided since that year; said street with its sidewalks is and has been for more than 30 years one of the principal thoroughfares of said town, and has been continuously used by the plaintiff as his only convenient and practical route from the said residence to the post office and other public places in said town; the defendant tobacco company applied to the board of commissioners of said town for permission to construct upon West Market street, outside of the right of way of the defendant railroad company, and for a part of the distance upon the sidewalk of said street, a private side track running from the line of the railroad to the door of the factory of said tobacco company and making no other connection whatever. On October 9, 1909, the said board of commissioners undertook to grant such license to said tobacco company, and thereafter on December 1, 1909, the said tobacco company entered into a written agreement with said town, whereby it undertook to construct said side track at its own expense, and it further contracted with the defendant railroad company to build said track in consideration of \$1,062 to be paid to it by said tobacco company. Acting under said alleged license said tobacco company and the railroad were at the beginning of this action proceeding to construct said side track between the main business portion of the town and the warehouse of the said tobacco company, about 600 feet distant from the plaintiff's residence on the same street. It further appeared, according to affidavits filed for the plaintiff, that the said side track, if built and operated as proposed, would impair the value of plaintiff's lot, would greatly injure and partially destroy the right or easement of plaintiff to pass and repass along the said street, and would entirely destroy the right of plaintiff to use said sidewalk. The relative positions of the line of the railroad company, West Market street, and the side-

walk, the factory of the tobacco company, and the property of the plaintiff will appear from the map herein.



RIGHT OF WAY LINE

the defendant the town of Reidsville has the power to grant license to the defendant the Penn Tobacco Company to build on the public street and upon the sidewalk thereof a private side track from the railroad track to the warehouse of the said tobacco company, for its use and benefit, whereby the plaintiff, a resident upon said street, is deprived of his right of easement to freely pass and re-pass along said street and sidewalk, and the value of his house and lot impaired. Nearly all of the 670 feet of the proposed side track is off of the right of way of the defendant railroad company, whose track, right of way, and depot in Reidsville have been located for nearly 50 years. It has no power to exceed its right of way, in the absence of legislative authority, even for public purposes. In *Griffin v. R. R.*, 150 N. C. 312, 64 S. E. 16, the defendant was authorized to lay its track along a street to make connection at a union depot, which had been ordered by the Corporation Commission under the authority of the statute, and the board of aldermen were empowered to grant such permission by the terms of the charter of the city. *Dewey v. R. R.*, 142 N. C. 392, 55 S. E. 292. Besides it was a public purpose. Here it does not appear that the charter of Reidsville confers such authority on its board of commissioners. Certainly no authority is shown by statute or order of Corporation Commission empowering the defendant railroad company either to lay or operate a side track, not upon its right of way, for the purpose of reaching the tobacco company's warehouse.

In *White v. R. R.*, 113 N. C. 610, 18 S. E. 330, 22 L. R. A. 627, 37 Am. St. Rep. 639, cited with approval in *Staton v. R. R.*, 147 N. C. 437, 61 S. E. 458, 17 L. R. A. (N. S.) 949, it was held established that "the use of a street by steam railroads is not a legitimate use for public purposes, and it must of course follow that the city has no right in the exercise of its usual and ordinary powers relating to highways to authorize the entry and occupation of the street by the defendant, and the bare license of the city can afford no justification."

The town authorities hold the streets in trust for the purposes of public traffic, and cannot, in the absence of statutory power, grant to any one the right to obstruct the street to the inconvenience of the public, even for public purposes, and not for private purposes at all. *Moose v. Carson*, 104 N. C. 435, 10 S. E. 689, 7 L. R. A. 548, 17 Am. St. Rep. 681; *Feld v. Barling*, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406, 41 Am. St. Rep. 311; *Service Co. v. Murphy*, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 374. The city cannot (in the absence of statutory power) authorize the use of the streets by a private railroad. *Gustafson v. Hamm*, 56 Minn. 334, 57 N. W. 1054, 22 L. R. A. 565; *Mikesell v. Durkee*, 36 Kan. 97, 12 Pac. 351. Permission by a city to a private individual to occupy a public street with a

The plaintiff appealed from the order dissolving the restraining order theretofore granted. The question presented is whether

railroad switch, to be used for his private business, is void. *Swift v. R. R.*, 66 N. J. Eq. 34, 57 Atl. 456. Such power may be granted to a municipality by legislative authority, but in the absence of legislation the town authorities cannot grant any use of the streets for private purposes (*Elliott, Roads and Streets* [2d Ed.] § 653), for the entire street, "from side to side and from end to end, belongs to the public" (Id. § 645). The use of the street for a street railroad is in aid of, and facilitates its use for, public traffic and travel. *Hester v. Traction Co.*, 133 N. C. 291, 50 S. E. 711, 1 L. R. A. (N. S.) 981; *Merrick v. R. R.*, 118 N. C. 1081, 24 S. E. 667.

The *Industrial Siding Case*, 140 N. C. 239, 52 S. E. 941, is not in point. There the Corporation Commission, under statutory authority, ordered the railroad company to establish such siding, having, after investigation, found this to be to the public interest. But it does not follow that because a public agency is empowered to order the establishment of such sidings on a railroad's right of way, or on land acquired by it for that purpose, that a railroad company may lay down its track in the streets of a city, under contract with any individual or manufacturing company, to facilitate the operation of such private business, by the permission of the town authorities, who have no legislative power to that end conferred upon them. 28 Cyc. 873, and numerous cases there cited; 27 A. & E. Enc. 176.

No reason is shown why the defendant railroad company cannot lay the side track upon its right of way to a point abreast the warehouse of the tobacco company. This would necessitate that company carrying its goods a few feet from its door to the side track; but there are facilities for that. Certainly the defendants cannot take the public street and sidewalk, which would greatly inconvenience the public, because it would serve their own convenience. Though the plaintiff is not an abutting proprietor, the use of this street and its sidewalk for a siding for the tobacco company and filling it up, at times, with cars, shifting about or standing, will impede the use of the street, and he is entitled to an injunction to prevent it. *McManus v. R. R.*, 150 N. C. 661, 64 S. E. 766; *Tise v. Whittaker Co.*, 144 N. C. 511, 57 S. E. 210; *Corby v. R. R.*, 150 Mo. 457, 52 S. W. 282; *Longworth v. Sedevic*, 165 Mo. 221, 65 S. W. 260; *Fleld v. Barling*, 149 Ill. 569, 37 N. E. 850, 24 L. R. A. 400, 41 Am. St. Rep. 311; *Elliott R. & S.* (2d Ed.) §§ 664, 665. This is especially true, as no action for damages lies against the city for an unauthorized grant or license. 2 Dillon, Mun. Corp. (4th Ed.) 710.

The owner of a lot, whose use of a street is interfered with by an obstruction therein, is entitled to an injunction, although his lot is not immediately adjacent. *Conrad v.*

Land Co., 126 N. C. 461, 776, 36 S. E. 282; *Collins v. Land Co.*, 128 N. C. 563, 39 S. E. 21, 83 Am. St. Rep. 720; *Hughes v. Clark*, 134 N. C. 461, 46 S. E. 956, 47 S. E. 462.

The order dissolving the restraining order is reversed.

(152 N. C. 832)

STATE v. WEST.

(Supreme Court of North Carolina. May 17, 1910.)

1. CRIMINAL LAW (§§ 308, 552*)—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY.

Every one is presumed to be innocent until the contrary is proved, and where there is any reasonable hypothesis, under which the circumstances established by circumstantial evidence are consistent with the innocence of accused, he should be acquitted.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 731, 1261; Dec. Dig. §§ 308, 552.*]

2. CRIMINAL LAW (§ 552*)—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY.

To justify a conviction on circumstantial evidence, the jury must be satisfied that the facts shown and their relations and combinations are reasonably clear and satisfactory, and the testimony must be clear, convincing, and conclusive, so as to exclude all rational doubt of accused's guilt.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1261; Dec. Dig. § 552.*]

3. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—APPLICATION TO EVIDENCE.

An instruction, the refusal of which is assigned as error, must contain not only a correct statement of law, but must be sustained by and be applicable to some view of the evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1979; Dec. Dig. § 814.*]

4. CRIMINAL LAW (§ 814*)—EVIDENCE—INSTRUCTIONS—APPLICABILITY.

Where the state relied on the confession of accused and on circumstances showing an opportunity to commit the crime charged, and accused relied on an alibi, instructions on circumstantial evidence, though correct as abstract propositions, were properly refused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1883; Dec. Dig. § 814.*]

5. HOMICIDE (§ 310*)—EVIDENCE—INSTRUCTIONS—APPLICABILITY.

Where, on trial for secret assault with intent to kill, the state showed that accused in the nighttime followed prosecutor and a third person, slipped through the woods, hid himself, and fired his gun loaded with shot directly at prosecutor and the third person and at close range, hitting the prosecutor in the eye, a charge that it is not common sense or law to infer the worst intent which the facts admit of was properly refused.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 660; Dec. Dig. § 310.*]

6. HOMICIDE (§ 89*)—ASSAULT WITH INTENT TO KILL.

Where one intending to shoot one person secretly, shot another and destroyed an eye, he was guilty of assault with intent to kill.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 116; Dec. Dig. § 89.*]

Appeal from Superior Court, Burke County; Council, Judge.

Will West was convicted of secret assault

with intent to kill, and he appeals. Affirmed.

The defendant was indicted, tried, and convicted of a secret assault upon one J. D. Morgan, with intent to kill, on the night of the 24th of January, 1910, in Burke county. The prosecuting witness, Morgan, testified that he, in company with several other men, was walking along a road, he and one Fisher in front; that a gun fired; his eye was shot out, leaving him totally blind, as he had previously lost the sight of one eye; that it was between 9 and 10 o'clock at night; there were bushes on the side of the road which concealed the presence of the person who shot; that he did not know of the presence of the man who shot him, or see or hear him until he was shot. Blackwood Warlick testified for the state that he saw the defendant the morning after the shooting, and heard him say that he had shot at Wyatt Fisher and could not shoot Fisher without hitting Morgan, and described how he slipped along through the woods and bushes until he got opposite Fisher and Morgan, when he shot. There were other witnesses offered by the state, who testified to similar statements of the defendant, and who detailed other circumstances connecting the defendant with the shooting. The only witnesses for the defendant were himself and his wife. This evidence tended to prove an alibi. The jury returned a verdict of guilty, and from the judgment, the defendant appealed.

R. L. Huffman, for appellant. Attorney General Bickett and Geo. L. Jones, for the State.

MANNING, J. The assignments of error insisted upon by the defendant are to the refusal of his honor to give three special instructions. There were no exceptions taken to the evidence, and two of the errors assigned to the charge are abandoned in the brief of the learned counsel for the defendant. The defendant requested the judge to charge the jury: "That every man is presumed to be innocent until the contrary is proven, and it is a well-established rule in criminal cases that if there is any reasonable hypothesis upon which the circumstances are consistent with the innocence of the accused, the jury should render a verdict of not guilty." The particular part of the instruction which defendant insists should have been given by his honor is that "if there is any reasonable hypothesis," etc. The prayer correctly states the rule of law which has been approved by this court in *State v. Mussey*, 86 N. C. 653, 41 Am. Rep. 478; *State v. Smith*, 136 N. C. 686, 49 S. E. 336. The third rejected prayer was as follows: "That before you can convict the defendant upon the circumstantial evidence relied upon by the state you must be satisfied that such circumstantial testimony, the facts, their relations, connections, and

combinations are reasonable, clear and satisfactory, and the court further charges you that, when circumstantial evidence is relied upon to convict, it should be clear, convincing, and conclusive in its connections and combinations, and such as to exclude all rational doubt as to defendant's guilt." This instruction embodies substantially the language of Chief Justice Merrimon in *State v. Goodson*, 107 N. C. 798, 12 S. E. 329; *State v. Wilcox*, 132 N. C. 1120, 44 S. E. 625. It is essential, however, that an instruction, the refusal to give which is assigned as error, should contain not only a correct statement of law, but that it should be sustained by and be applicable to some view of the evidence. *State v. McDuffie*, 107 N. C. 885, 12 S. E. 83; *State v. Hicks*, 130 N. C. 705, 41 S. E. 803. The state relied upon the confessions of the defendant, as well as evidence of threats, declarations, and opportunity to commit the crime; the defendant relied upon an alibi. The state said to the defendant: "You had the opportunity, and you confessed that you committed the crime." The defendant said: "I did not have the opportunity and did not commit the crime, because I was in another place when the crime was committed." In this conflict of the evidence, unless the evidence of the state carried to the minds of the jury conviction of its truth, and satisfied them beyond a reasonable doubt of defendant's guilt. It was their duty to acquit. We do not, therefore, think it was error to refuse the instructions prayed in this case, as the state relied upon direct evidence—the defendant's confessions—supported by circumstances showing opportunity to commit the crime. *State v. Flemming*, 130 N. C. 688, 41 S. E. 549; *State v. Crane*, 110 N. C. 536, 15 S. E. 231; *State v. Shines*, 125 N. C. 730, 34 S. E. 552. Another rejected instruction of which defendant complains is taken from *State v. Neely*, 74 N. C. 423, 21 Am. Rep. 496, that "it is neither charity nor common sense, nor law, to infer the worst intent which the facts admit of." This doctrine was applied in that case to a state of facts very different from the present case. How can but one intent be inferred when the defendant, in the darkness of the night, followed Morgan and Fisher, slipping through the woods, hiding himself, and when the favorable moment came, fired his gun, loaded with shot, directly at them and at close range? If the jury believed the defendant was the man who fired the shot, charity should not be invoked to acquit him, but the law, so grossly violated, demanded his conviction. The correctness of the judge's charge that, if the defendant, intending to shoot Fisher, shot Morgan, he would be guilty as charged, was not questioned in this court, and we think it could not be successfully challenged. The jury have convicted the defendant, and, as we find no error, the judgment is affirmed.

No error.

(152 N. C. 609) *

PAYNE v. FLACK.

(Supreme Court of North Carolina. May 17, 1910.)

1. MECHANICS' LIENS (§ 73*)—PROPERTY OF WIFE—CONTRACT TO SUPPORT.

Revisal, § 2016, providing that the provisions of the mechanic's lien law shall apply to the property of a married woman when it shall appear that a building was erected or repaired on her land with her consent or procurement, and that in such case she shall be deemed to have contracted for such improvement, a formal contract by the wife is not essential to support a mechanic's lien; it being sufficient if she consented to the act of another in contracting for such improvements.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 88; Dec. Dig. § 73.*]

2. MECHANICS' LIENS (§ 99*)—SUBCONTRACTORS—NOTICE OF LIEN.

Where a wife contracted with her husband to make repairs on a building on the wife's land, and paid the husband the full amount due on such contract, and the husband employed another to make the repairs, the person so employed was a subcontractor, and not an original contractor with the wife; and, where he failed to give notice to the wife before settlement as required by Revisal, § 2020, in the case of subcontractors, no mechanic's lien attached to the property.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 131, 132; Dec. Dig. § 90.*]

Appeal from Superior Court, Rutherford County; Webb, Judge.

Action by one Payne against one Flack. From a judgment for defendant, plaintiff appeals. Affirmed.

J. L. C. Bird and J. T. Perkins, for appellant. Pless & Winborne and D. F. Morrow, for appellee.

CLARK, C. J. In *Weir v. Page*, 109 N. C. 220, 13 S. E. 773, the court felt constrained to hold, as the law then stood, that, where a party under contract with the husband did work and furnished material in the construction of a building on the wife's property, he could file no valid lien against the house, though the wife, knowing that the work was being done and material furnished, had made no objection. This was because of the fact that "the work and labor had not been done and the material furnished under a contract allowed by law." But the court, speaking through Judge Davis, in order to prevent further frauds of this kind being perpetrated, suggested in the opinion to the consideration of the Legislature whether a married woman's liabilities might not be "made commensurate with her rights, and whether such alterations in the law (in this particular) would not prevent much injustice and many frauds." The result was the enactment of a statute (which is now the last paragraph in Revisal, § 2016), which is as follows: "This section shall apply to the property of a married woman when it shall appear that such building was built or repaired on her land with her consent or pro-

curement and in such cases she shall be deemed to have contracted for such improvements." This statute does not make her house liable to lien only upon a contract by her, but provides that, when she "consents or procures" the building to be erected or material furnished, she shall be deemed to have contracted for such improvement, and that her property thereupon becomes subject to lien, if filed. In *Finger v. Hunter*, 130 N. C. 529, 41 S. E. 890, this statute was held constitutional and was enforced, and that case has been approved in *Ball v. Paquin*, 140 N. C. 96, 52 S. E. 410, 3 L. R. A. (N. S.) 307, and other cases.

In the present case, however, the plaintiff put in evidence the feme defendant's testimony, in another trial, that she made a contract with her husband to put these repairs upon the building, and had paid him the full amount due on such contract before the plaintiff gave her notice of his claim. This evidence was furnished by the plaintiff, and was not contradicted, and therefore must be taken as true. It was also in evidence without contradiction that the plaintiff sold the material to the husband. Therefore the plaintiff was a subcontractor, and, having failed to "give notice before settlement" (Revisal, § 2020), the defendant contends, in his brief, that the wife is not liable any more than any one else would be.

This is not a case of a married woman standing silent when improvements are being placed upon her house, receiving the benefit, and then defying the contractor because she had made no valid express contract. In such case the statute now makes her property subject to lien, upon the implied contract arising upon her conduct, as it would in regard to any one else under the same circumstances. But here she paid the contractor in full before receiving notice from the subcontractor, the materialman, and is freed from liability to him as any one else would be upon the same state of facts. *Pinkston v. Young*, 104 N. C. 102, 10 S. E. 133.

Upon the plaintiff's evidence, the judgment of the nonsuit was proper.

Affirmed.

(153 N. C. 835)

STATE v. GREENE.

(Supreme Court of North Carolina. May 17, 1910.)

1. HOMICIDE (§ 179*)—TEMPORARY INSANITY—EVIDENCE—ADMISSIBILITY.

Where the defense to a prosecution for murder was temporary insanity, induced by defendant's wife informing him of decedent's raping her, it was competent for defendant to prove the communication made to him by the wife shortly before the homicide to show an adequate cause for his state of mind at the time, together with his appearance and acts immediately thereafter, and up to the time of the homicide, but

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the truth of the wife's statements as an independent fact could not be shown.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 380; Dec. Dig. § 179.*]

2. HOMICIDE (§ 169*)—TEMPORARY INSANITY—EVIDENCE—ADMISSIBILITY.

Where accused relied on temporary insanity induced by his wife informing him of decedent's raping her the night before the homicide, and the wife testified that she saw accused early in the morning of the day of the homicide, and before she had informed him of the assault, walking with decedent to the latter's house, and that she went after accused and called him, and walked with him to their home, evidence of her reason for going to the home of decedent for accused was properly excluded.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 341-350; Dec. Dig. § 169.*]

3. CRIMINAL LAW (§ 377*)—EVIDENCE OF GOOD CHARACTER—ADMISSIBILITY.

Accused may offer testimony of his good character though he does not testify.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 840; Dec. Dig. § 377.*]

4. HOMICIDE (§ 179*)—EVIDENCE—ADMISSIBILITY.

Where accused relied on temporary insanity, induced by his wife informing him a few hours before the homicide of decedent's raping her, evidence that accused was drunk on the morning of the homicide, and that when drunk he was violent in speech and conduct, was competent to contradict his defense.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 380; Dec. Dig. § 179.*]

5. CRIMINAL LAW (§ 696*)—EVIDENCE—OBJECTIONS.

Where the answers of a state's witness are not responsive or are not in themselves competent, accused must move to strike the answers and request the court to direct the jury not to consider them.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1639-1644; Dec. Dig. § 696.*]

Appeal from Superior Court, Mitchell County; Council, Judge.

Woodfin Greene was convicted of murder in the second degree, and he appeals. Affirmed.

Indictment for murder tried before Council, J., and a jury at November term, 1909, of the superior court of Mitchell county. The prisoner was convicted of murder in the second degree, and from the judgment of the court appealed. The evidence tended to prove that the prisoner shot and killed Ed. L. Young on September 9, 1909, about 12 o'clock in the day; that prisoner entered the house of the deceased while he was asleep, shot twice in the ceiling of the room, presumably to awaken the deceased, and then shot him four times. Death resulted in a few minutes. As prisoner walked out of the house he was asked what was the matter, and he replied that "there was a man hurt and hurt bad, and that I had better come and take care of him." The prisoner, not having offered himself as a witness, rested his defense upon the plea of insanity—transitory insanity; that this condition of irresponsibility was occasioned by a statement to the prisoner by his

wife a few hours before the homicide. The prisoner was engaged in working at night at, in, or about the Cranberry mine, and on the morning of the 9th of September, about 6 o'clock, he came to his home, met the deceased at his gate, and walked with him to his home, a distance of about 300 yards; in a short time prisoner's wife came for him; they went to their house, ate breakfast, and, as was his custom, prisoner went to his bedroom to sleep. In a short time prisoner's wife came in the room, lay down on another bed, and, thinking the prisoner asleep, began to cry. The prisoner was not asleep, but upon his inquiry as to what was the matter the wife narrated this occurrence: "Fin, Ed. Young made me drunk last night and overpowered me, and threw me back on the bed and in spite of my efforts and my telling him to leave, he accomplished his purpose." "Young said to me, 'God damn you, I have fixed you.'" That the prisoner jumped up in the floor, wringing his hands and saying, "I want my pistol, I want my pistol! My life is wrecked! My home is ruined." That she refused to give him the pistol, having hidden it; that prisoner demanded it and struck her; that she ran to her sister's, and then to her father's; that prisoner followed her demanding his pistol; that she had a difficulty with him, and threw an ax at him; that finally she told him where his pistol was, when he left her, and the next thing she heard was that he had killed deceased. There was much evidence of prisoner's excited condition, and his wild looks and his open threats to kill Young. There was evidence on the part of the state tending to prove that prisoner had been drinking that morning; that he said he was two-thirds drunk, and that when drunk he was very rowdy. The testimony of prisoner's unusual condition came from nonexpert witnesses—his kinpeople who saw him that day before the homicide. Immediately after the homicide the insanity seems to have passed away as he was apparently as rational as ever, and escaped to the woods where he remained for a day when he surrendered himself. There was evidence of previous threats made by prisoner against deceased; and there was also evidence of very friendly relations between them. Both men drank whisky to excess. The contest between the state and the prisoner was over the defense of insanity, and both state and prisoner offered much evidence tending to support the one theory or the other.

Chas. E. Greene and S. J. Ervin, for appellant. The Attorney General, Geo. L. Jones, and W. C. Newland, for the State

MANNING, J. The record contains no exception to the refusal of the trial judge to give special instructions, and no exception to his honor's charge to the jury. The entire charge is included in the record, and it con-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tains an able and elaborate presentation of the law of the case as applicable to facts as the jury should find them to be. The contentions of both state and the prisoner are stated fully and impartially. We have, therefore, a verdict resting upon a charge so clear and just and able that the learned counsel of the prisoner have not complained to us of any error in it prejudicial to the prisoner's rights. The errors assigned by the prisoner are directed solely to the admission of incompetent, and the rejection of competent, testimony. The trial judge permitted the prisoner's wife to rehearse to the jury, in minute detail, everything she told the prisoner about the conduct of the deceased the night before. The prisoner offered to prove as a substantive and independent fact the truth of the narrative by the wife, but this was excluded by his honor. His honor's ruling is, we think, clearly sustained by the decision of this court in *State v. Banner*, 149 N. C. 519, 63 S. E. 84, in which this court held: "When the defense is a plea of insanity and not self-defense, a witness may not testify, as tending to show self-defense, that he had seen deceased armed, on a dark night, at a place where the prisoner would likely pass, some two weeks before the occurrence, though he may testify that he had told the prisoner concerning it, and what the prisoner said and did in consequence, only so far as it may affect the question of insanity, and for that purpose alone." In *People v. Wood*, 128 N. Y. 249, 27 N. E. 362, Judge Peckham, in a learned and elaborate opinion, held that it was competent for a defendant to offer evidence of communication made to him (in that case the communications offered were of a similar character to those in this case), "for the purpose of showing an adequate cause for the state of mind existing subsequent to the communication. The subsequent conduct, appearance, and conversation of the person to whom the communication is made are the proper subjects of proof, for the one purpose of showing what effect upon him such communications had, and that it rendered him insane within the legal definition of the term at the very time of the commission of the deed." The evidence was held competent "for the reason that all the facts are material for the purpose of enabling the jury to say what was the condition of mind of defendant when the deed was perpetrated." This being the sole purpose of the evidence, the truth or falsity of the communication is not material, and it is not competent to inquire into it. It is, of course, competent to challenge the fact of communication, but not its truth or falsity. In the present case, his honor permitted the prisoner to show in minute detail the communication to him by his wife, and his conduct, appearance, utterances, and acts immediately thereafter and to the time of the homicide. This was, in our opinion, as far as it was permissible to go. There was no evidence of any disorder of the brain prior to

the morning of September 9th, the day of the homicide; the evidence tended to show the prisoner to be a man possessed of an ordinarily normal mind, except occasional outbursts when intoxicated. In a few hours after the homicide, the prisoner's mind seemed to recover its balance and to resume its normal condition. It was the contention of the prisoner that the sudden "brain storm," which was so violent as to dethrone reason and make him irresponsible for his acts, was caused by his wife's communication. Of its truth or falsity he could know nothing, and could not have been influenced by such knowledge. The theory of the defense and its plea is that he believed it so strongly and so absolutely that the prisoner was made insane. If the purpose was to show the character of the deceased for violence, it was inadmissible because it did not fall within one of the exceptions to the rule settled in this state for admitting such evidence. *State v. Banner*, supra; *State v. Turpin*, 77 N. C. 473, 24 Am. Rep. 455; *State v. Byrd*, 121 N. C. 683, 28 S. E. 353; *State v. McIver*, 125 N. C. 646, 34 S. E. 439. In our opinion, therefore, the offered testimony of the wife that the occurrence communicated by her to the prisoner, her husband, was true as an independent and substantive fact was properly excluded. Nor do we think there was error in refusing to permit the prisoner's wife to give her reason for going to the house of deceased for her husband, whom she had seen, early in the morning of the homicide, go there with the deceased, and before she had communicated to him the occurrences of the night before. She testified that she saw her husband walk with the deceased to his house, that she went after him, called him out of the house, and they walked together to their home. The prisoner objected to certain testimony offered by the state that when drinking he was violent in speech and conduct. The state offered evidence tending to show that prisoner was "two-thirds" drunk on the morning of the homicide. The prisoner, not having been at the trial examined as a witness, offered testimony of his good character. It was competent for him to do so. *State v. Hice*, 117 N. C. 782, 23 S. E. 357. This evidence offered by the state as to the effect produced upon prisoner by whisky was directed to his plea of "transitory insanity." We cannot see that its admission was prejudicial to the prisoner or that it was incompetent for the purpose it was offered. If the answers of some of the witnesses were not responsive, or not, in themselves, competent, the prisoner's right was to move to strike out such answers, and to request his honor to direct the jury not to consider such answers in reaching their verdict. We have carefully read the entire record and examined all the cases cited by the learned counsel of the prisoner, and we find no error committed at the trial prejudicial to the prisoner's rights. The jury of his county, who saw the witnesses and their

demeanor, who heard the entire testimony, have, by their verdict, given to the sudden "brain storm" of the prisoner, created by his wife's communication, such weight and influence as to acquit the prisoner of the capital felony, but not to acquit him of all responsibility for his act. We find no error in the record, and the judgment is affirmed.

No error.

(152 N. C. 604)

BOWERS v. BRYAN LUMBER CO.

(Supreme Court of North Carolina. May 17, 1910.)

1. APPEAL AND ERROR (§ 907*)—STATEMENT OF FACTS—ABSENCE OF—PRESUMPTION.

In the absence of a statement of facts, it will be presumed that the trial court found such facts as would support its judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3673; Dec. Dig. § 907.*]

2. APPEAL AND ERROR (§ 901*)—PRESUMPTION OF ERROR—BURDEN OF PROOF.

The burden is on appellant to show error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3670; Dec. Dig. § 901.*]

3. PRINCIPAL AND SURETY (§ 55*) — SURETY COMPANIES — UNAUTHORIZED ACTS OF AGENTS—LIABILITY OF COMPANY.

Where a surety company intrusted its agents with a surety bond, to which its corporate seal had been affixed, and it was licensed to do business in the state, the corporation put it into the power of the agents to induce others to believe that they had authority to execute a bond in its behalf as surety, even if the signatures of the agents were necessary to make it a valid bond as against the company, after it had affixed its corporate seal, and its corporate name had been signed to the bond, so that it was legally responsible for the act of the agents in issuing the bond as security on dissolution of an attachment, though in fact their act was beyond the scope of their authority.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 55.*]

4. PRINCIPAL AND AGENT (§ 99*)—ACTS OF AGENT—APPARENT SCOPE OF AUTHORITY—LIABILITY OF PRINCIPAL.

It is sufficient to charge the principal if his agent is acting within the apparent scope of his authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 254-261; Dec. Dig. § 99.*]

5. APPEAL AND ERROR (§ 1024*)—MOTION TO SET ASIDE—FACTS—DUTY OF LOWER COURT.

The facts upon a motion to set aside a judgment must be found by the court below.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1024.*]

6. PRINCIPAL AND SURETY (§ 55*) — SURETY COMPANIES — SURETY BOND — RECEIPT OF PREMIUM—ACTS OF AGENT—RATIFICATION.

Where a surety company received the premium for an indemnity bond, it was put upon inquiry as to whether its agents acted within the scope of their authority and ratified what they had done, since it could not accept the benefit of their act in executing a bond for it as surety, and when liability was incurred, repudiate what its alleged agents had done in its behalf.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 55.*]

Appeal from Superior Court, Mitchell County; Council, Judge.

Action by V. B. Bowers against the Bryan Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Hudgins, Watson & Johnston, for appellant. L. D. Love and C. E. Greene, for appellee.

WALKER, J. This was a civil action, prosecuted by the plaintiff against the defendant for a debt of \$1,650. A warrant of attachment was levied upon 125,000 feet of lumber which belonged to the defendant, and while the property so levied upon was in the custody of the sheriff, the defendant filed with the clerk of the superior court a bond in the sum of \$3,700, executed by the defendant as principal, and the Title Guaranty & Surety Company, by D. H. Willard and D. A. Vines, who professed to be its agents. This bond was approved by the clerk of the superior court, and filed as a part of the record, and thereupon the attachment was dissolved, and the lumber was released and shipped out of the state by the defendant. At July term, 1909, of the superior court, when the case was called, it appeared that the plaintiff had filed a verified complaint, and the defendant had filed no answer. The court rendered judgment by default in favor of the plaintiff, and against the defendant, for the amount of the debt and the costs of the action, and also against the Title Guaranty & Surety Company for the amount of its bond, to be discharged upon the payment of the judgment; that is, the debt and costs. At November term, 1909, the Title Guaranty & Surety Company moved to strike out or set aside the said judgment, so far as the same affected the said company, and assigned as the ground for its motion that D. H. Willard and D. A. Vines were the agents of the said company in Tennessee, and did not reside in this state, but at Johnson City in the said state of Tennessee, and that Willard and Vines acted without authority in executing the said bond. Affidavits were filed by the parties, and an order was granted staying the execution until the motion of the Guaranty & Surety Company could be heard. At the hearing of this motion, Judge Council rendered a judgment denying the same, and dissolving the restraining order, but in his judgment there are no findings of fact, nor does it appear anywhere in the record that the appellant requested the judge to find and state the facts. In what is termed a case on appeal, there appears to have been some colloquy between the court and counsel, as to the ground of the motion, and as to the reasons why the Guaranty & Surety Company was entitled to have the judgment against

it vacated, but there are no findings of fact which relate to the authority of Willard and Vines to act in behalf of the said company in the execution of the bond by it as surety. This court ordered the original bond to be sent up, in order that it might ascertain, from an inspection of it, whether the corporate seal of the company had been affixed thereto, and we find, upon an examination of the bond, that the corporate seal of the company had been affixed.

In the present state of the case, we are of the opinion that the Guaranty & Surety Company is bound by the act of Willard and Vines, because the corporate seal was affixed to the bond; and, in the absence of any statement of facts, we must presume that his honor found such facts as would support his judgment, and therefore found that Willard and Vines were invested with the necessary authority to execute the bond. We do not presume that error was committed in the court below, and the burden is on the appellant to show error. The Guaranty & Surety Company intrusted Willard and Vines with a bond, to which its corporate seal had been affixed and it was licensed to do business—that is, to execute an indemnity bond—in this state. When this was done, the Guaranty & Surety Company put it in the power of Willard and Vines to induce others to believe that they had the power and authority to execute a bond in its behalf as surety, even if the signatures of the said agents were necessary to make it a valid bond as against the company after it had thus affixed its corporate seal, and its corporate name had been signed to the bond. This case is not in principle, unlike *Havens v. Bank*, 132 N. C. 214, 43 S. E. 639, 95 Am. St. Rep. 627, in which it appeared that spurious bank certificates had been issued by the cashier of the defendant bank; they having been left with him after having been signed in blank by the president and secretary. In that case, and with reference to its facts, we held that the bank was legally responsible for the fraudulent acts of its cashier, and that the mere fact that he was not in the performance of his master's business, but was acting outside of the scope of his agency, did not alter the case nor change the result, for "this would be true as to all fraudulent acts, and as to all acts done not strictly within the line of duty. The correct principle is that it will be quite sufficient to charge the employer with liability, if all the acts of the employé are done within the apparent, though not real, scope of his agency." We further said that as the certificates had been signed by the president and delivered to the cashier, the bank had given to the latter the power to commit the fraud, and must answer for its negligent act, upon the principle that "whenever one of two innocent persons must suffer by the act of a third, he who has enabled such

third person to occasion the loss must sustain it." *Lickbarrow v. Mason*, 2 T. R. 70.

It was said by Lord Holt in *Hearn v. Nichols*, 1 Salk. 239: "For as somebody must be a loser by this deceit, it is more reason that he who employs and puts a trust and confidence in the deceiver should be the loser than a stranger." In *Railroad v. Kitchin*, 91 N. C. 39, we held that "where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposed a confidence, or by his negligent act made it possible for the loss to occur, must bear the loss." The principle is well stated in the case of *Railroad v. Bank*, 60 Md. 36, as follows: "It may be conceded, and was doubtless the case, that the agent had no authority in fact to issue such certificate; he had no real authority as between himself and his principal, or other parties conusant of the facts, for doing the particular acts complained of, but the company by its own act and, as it turned out, misplaced confidence, placed the agent in the position to do, and procure to be done, that class of acts to which the particular act in question belongs; and in such case, where the particular act in question is done in the name of, and apparently in behalf of, the principal, the latter must be answerable to innocent parties for the manner in which the agent has conducted himself in doing the business confided to him. Upon no other principle could the public venture to deal with an agent. In such case the apparent authority must stand as and for real authority." And again: "Where he issued such a certificate and delivered it to a third party, who acted without knowledge and in good faith, paying value for it, such party had the right to act upon the presumption that the representations of such certificates were truthful, and not false and fraudulent. Having confided to him the said trust of executing the business, the agent was held out to the public as competent, faithful, and worthy of confidence; and, though he deceived both his principal and the public by forging and issuing false certificates, it is but reasonable that the principal, who placed him in the position to perpetrate the wrong, should bear the loss." We think the principle is also well supported by the reasoning of the court in *McNeil v. Bank*, 46 N. Y. 325, 7 Am. Rep. 341. Willard and Vines, who professed to act as agents of the corporation in executing the bond for it as surety, must be taken, under the facts and circumstances of this case, so far as they appear, to have had full authority to do and perform the act which the Guaranty & Surety Company now attempts to repudiate, for they were acting apparently within the scope of their authority; the company having placed in their possession evidence which would indicate to an innocent person dealing with them that they

had the necessary power to act as they did. It is sufficient to charge the principal, if his agent is acting within the apparent scope of his authority. *Bank v. Hay*, 143 N. C. 326, 55 S. E. 811.

We cannot examine the affidavits with a view to finding the real facts in this case, as it has been well settled that the facts upon a motion to set aside a judgment must be found by the court below. We said, in *Oldham v. Sneed*, 80 N. C. 15, that: "In the absence of any facts found, we only see from the case sent up that the judge refused to vacate the judgment, but why he did so, or whether with or without any mistake or misapplication of the law, cannot be seen."

The Guaranty & Surety Company received the premium or consideration for this indemnity bond; and, having done so, it was put on inquiry as to whether Willard and Vines had acted within the scope of their authority, and in such a case it must be held to have ratified what they had done. It is not permissible, nor is it sound morality, for the company to accept the benefit of what they did in executing the bond for it as surety, and, when a liability is incurred on the bond, to repudiate what their alleged agents had done in their behalf.

We find no error in the record.

Affirmed.

(86 S. C. 52)

Ex parte PHOENIX INS. CO.

MAYFIELD et al. v. SOUTHERN RY. CO.,
CAROLINA DIVISION.

(Supreme Court of South Carolina. May 11, 1910.)

INSURANCE (§ 606*)—SUBROGATION—ENFORCEMENT.

Insured, having instituted suit in her own behalf against a railroad company to recover damages for fire in so far as such damages exceeded the amount of insurance collected by her on the property destroyed, the insurer being entitled to subrogation to her claim against the railroad to the extent of the insurance paid, was bound to assert such claim by motion to be made a party to the suit, and to compel the amendment of the complaint so as to plead the facts on which its equity of subrogation depended.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1516; Dec. Dig. § 606.*]

On rehearing. Rehearing granted. Judgment reversed.

For former opinion, see 67 S. E. 134.

WOODS, J. In this case an original complaint appears at the beginning of the record under the title "Ex parte Ins. Co., In re Mrs. Leda K. Mayfield v. Southern Ry. Co., Carolina Division." The complaint sets out the destruction of property of Mrs. Mayfield by fire, the liability of the Southern Railway Company for the resulting loss, the payment

of insurance by the Phoenix Insurance Company, and its right of subrogation to the extent of the payment. The court received the impression from the caption that this complaint was filed on behalf of the insurance company, and this impression was confirmed by the appearance in the record of another complaint under the same caption, called "Supplemental Complaint." With this understanding of the pleadings this court affirmed the judgment of the circuit court. A petition for rehearing has been filed, and we are now convinced that the first complaint printed in the record was in fact a complaint filed by Mrs. Leda K. Mayfield, and that the only pleading filed by the Phoenix Insurance Company was the complaint improperly designated "Supplemental Complaint." This state of the pleadings is vital, and requires a change in the judgment of the court.

Mrs. Leda K. Mayfield brought her action against the Southern Railway Company, Carolina Division, for the loss of certain property which she alleged was destroyed by fire communicated by sparks from the defendant company's locomotives. Her complaint set out that part of the loss had been paid by the Phoenix Insurance Company under its policy, and her demand was for judgment for the difference between the alleged value of the property lost and the insurance received. Afterwards the Phoenix Insurance Company filed what is termed in the record a "supplemental complaint," setting out more fully the facts upon which it claimed the right of subrogation. In the complaint judgment was demanded for \$7,250, the entire alleged value of the property. The defendant answered this complaint by a general denial, and by the allegation that there was another action pending for the same cause of action. This complaint was entitled, "Ex parte Phoenix Ins. Co., In re Mrs. L. K. Mayfield and Phoenix Ins. Co. v. Southern Railway Co., Carolina Division. Supplemental Complaint." In this state of the pleadings Judge Wilson refused a motion made on behalf of the Phoenix Insurance Company to join that company as a party plaintiff in the action of Mrs. Mayfield, and to allow the supplemental complaint to be made a part of the pleadings in that case. The ground upon which the motion was refused does not appear in the record. While a simpler method might have been found, we think the procedure adopted by the Phoenix Insurance Company is in substantial compliance with the views expressed in *Mobile Insurance Company v. Columbia, etc., Ry. Co.*, 41 S. C. 408, 19 S. E. 858, 44 Am. St. Rep. 725. It was there held that, where the equity of subrogation exists in favor of the insurance company, the insured after receiving payment from the insurer becomes a trustee of the insurer to that extent, and to that extent is bound to assign to the insurance company the claim against the rail-

road company; and, if the insured fails to make the assignment, the insurer as cestui que trust may sue in the name of the insured as trustee. The court indicated further that the cause of action in such a case is not divisible, and that the rights of all parties interested in the loss should be adjudicated in one action. From this it follows that, when the insured has instituted an action in his own behalf to recover only the difference between the loss and the insurance paid, the insurer should assert its claim to subrogation by a motion to be made a party, and to require the complaint amended so as to set out the facts upon which it claims the equity of subrogation. It is, of course, understood that this opinion does not bear at all on the question whether Mrs. Mayfield or the Phoenix Insurance Company have any cause of action against the Southern Railway Company.

The judgment of this court is that the judgment of the circuit court be reversed.

(67 W. Va. 368)

MORRIS v. DUTCHESS INS. CO.

(Supreme Court of Appeals of West Virginia.
April 26, 1910.)

(Syllabus by the Court.)

1. INSURANCE (§ 559*) — PROOFS OF LOSS — WAIVER—DENIAL OF LIABILITY.

Denial by a fire insurance company, within the sixty days given the insured to furnish preliminary proofs of loss, of its liability on other grounds, is in legal effect a waiver of the conditions of the policy requiring such proofs.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1391; Dec. Dig. § 559.*]

2. INSURANCE (§ 559*) — PROOFS OF LOSS — WAIVER—AUTHORITY TO MAKE.

But such denial and notice thereof to the insured to bind the insurance company must be by some officer, or agent having authority, express or implied. Neither the declaration of a local soliciting agent nor of an adjuster not shown to have authority to make such denial will bind the insurance company, or excuse the insured from compliance with the conditions of the policy to furnish such preliminary proofs.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1391, 1392; Dec. Dig. § 559.*]

3. INSURANCE (§ 612*)—ACTION ON POLICY—CONDITIONS PRECEDENT—PROOFS OF LOSS.

Furnishing of the preliminary proofs of loss as required by the conditions of a policy of fire insurance is a condition precedent to any right of action thereon, and unless waived an action on the policy does not accrue to the insured until such proofs have been furnished.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1521; Dec. Dig. § 612.*]

Error to Circuit Court, Harrison County.

Action by Mary L. Morris against the Dutchess Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

E. D. Lewis and D. J. Carter, for plaintiff in error. Davis & Davis and E. B. Templeman, for defendant in error.

MILLER, J. In an action on a policy of fire insurance defendant, in addition to the general issue, filed a statement, as provided by section 64, c. 125, Code 1906, that it would also rely, by way of defense, first, on the fact that the insured had not given immediate notice in writing to defendant of the loss, and had not within sixty days after the fire nor at any time furnished proofs of the loss, as required by the provisions of the policy, wherefore no right of action thereon had ever accrued to plaintiff; second, on the fact that the building covered by the policy sued on had been allowed to be and become vacant and unoccupied and to so remain for a period of more than ten days, in violation of the conditions of the policy, rendering the same void.

Plaintiff did not claim or prove on the trial that she had ever furnished defendant with proofs of loss required by the terms of the policy, but on the trial, without having filed any statement in writing specifying the same, as required by section 65 of said chapter 125, Code 1906, insisted that defendant had waived such proofs of loss by denying, within the sixty days given by the policy for furnishing such proofs, any and all liability under the policy for the loss incurred.

Issues being joined on the pleadings filed the jury on the trial returned a verdict for plaintiff for \$1,145, which upon the defendant's motion was set aside and a new trial awarded.

To test the correctness of the judgment below, plaintiff has brought the case here upon a writ of error.

Said section 65, c. 125, Code 1906, provides that "if plaintiff intends to rely upon any matter in waiver, estoppel or in confession or avoidance of any matter which may have been stated by the defendant, * * * he "must file a statement in writing, specifying in general terms the matter on which he intends so to rely" verified by affidavit. The point is not made that plaintiff did not give notice of waiver by defendant of her promissory warranty to furnish proofs of loss, but it is doubtful whether under the provision of the statute, she should now be permitted to rely on such alleged waiver. We need not decide this question, however, for in our judgment the facts proven do not amount to a waiver by defendant.

This proposition, many times decided, that "denial by an insurance company of its liability on other grounds, within the time allowed for furnishing preliminary proofs of loss, is in law a waiver of the conditions of the policy requiring such proofs," is not controverted. *Medley v. Insurance Co.*, 55 W. Va. 342, 47 S. E. 101 (Syl., point 11); *Deitz v. Insurance Co.*, 33 W. Va. 526, 11 S. E. 50, 25 Am. St. Rep. 908 (Syl., point 4); *Sheppard v. Insurance Co.*, 21 W. Va. 368 (Syl., point 14);

Cleavenger v. Insurance Co., 47 W. Va. 595, 610, 35 S. E. 998. Defendant, however, denies that within the sixty days given for furnishing preliminary proofs of loss it or any one authorized by it denied its liability on other grounds. It is not claimed by plaintiff that any such denial is contained in any letter or notice in writing received from defendant company. The evidence relied on is that on the day following the fire plaintiff's husband, for her, verbally notified a local agent of defendant of the loss; that this agent notified the general agents at Charleston of the loss by letter, acknowledged by them, and that a few days afterwards they sent their adjuster, a special agent, to the place of the fire, who after viewing the premises, did not see or communicate with the insured or her husband, but stated to the local agent on his return from the place of the fire, that he had learned that the property was vacant, and that defendant would deny liability under the policy for that reason. The local agent on the stand as a witness for plaintiff would not say that he was authorized by defendant or the adjuster to notify plaintiff that the defendant denied its liability. Failing to show authority of the local agent to act in the relation to the loss, objections were properly sustained by the court below to questions propounded to D. M. Morris, plaintiff's husband and agent, as to whether the local agent had at any time advised him that defendant would not pay the loss, and the evidence fails to show any notice by defendant to plaintiff at any time within the sixty days, through any local or special agent or otherwise of any denial by defendant of its liability. On the contrary the evidence shows that when written to by plaintiff on April 13, 1905, within the sixty days, the special agent and adjuster who had been sent to see the property, wrote her April 17, 1905, saying: "In reply would say, the contract in your possession will give you the information necessary as to what steps to take." Her answer, April 19, accused the adjuster of evasion, threatening suit, and saying "I suppose you intend to try to beat us out of our money on some technicality."

This was practically all that occurred showing or tending to show denial of liability by defendant until in June, 1905, long after the expiration of the sixty days, when the matter was again taken up by counsel directly with defendant company, and being by it referred to its general agents at Charleston, correspondence between counsel and agents ensued resulting then in a denial by its agents of any liability on the part of defendant. In the meantime no proofs of loss were furnished.

The policy specifically provides that "no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such

as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under the policy exist or be claimed by the insured unless so written or attached." Another provision of this policy says: "No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." This includes the furnishing of preliminary proofs of loss. It has been held that under such a provision an adjuster could not waive any of the conditions of a policy. *Weed v. London, etc., Co.*, 116 N. Y. 106, 22 N. E. 229. Nor can a local soliciting agent do so. *May on Ins.* § 129. In *Medley v. Ins. Co.*, 55 W. Va. 342, 47 S. E. 101, this court said: "As to promissory warranties, conditions for the violation of which the policy is rendered non-effective after it has become effective and operative, such limitation clause is not only notice to the insured of want of authority in the agent to waive them, but also a stipulation between the parties that the agent has not, and shall not have, any such power." Failure to make proof of loss required by the terms of the policy as a condition precedent to right of action thereon is not excused by a claimed waiver, not in writing, by an agent of the company not shown to have any express authority to make it and whose action was not ratified by the company. *Insurance Co. v. Encampment Smelting Co.*, 166 Fed. 231, 92 C. C. A. 139; *Ruffner Bros. Co. v. Insurance Co.*, 59 W. Va. 432, 53 S. E. 943, 115 Am. St. Rep. 924.

These authorities make it clear that no act or declaration of either the adjuster or the local agent of the defendant relied on but not shown to have been authorized or ratified by it bound the defendant or excused the plaintiff from furnishing the required proofs of loss, and hence no cause of action has as yet accrued, for the furnishing of such proofs is a condition precedent to action or recovery. *Adkins v. Globe Fire Ins. Co.*, 45 W. Va. 834, 32 S. E. 194 (Syl., point 5); *Peninsular Land Co. v. Franklin Ins. Co.*, 35 W. Va. 666, 14 S. E. 237 (Syl., point 9).

No right of action on the policy having accrued to plaintiff at the time of the suit brought it will be wholly unnecessary for us to consider the question, elaborately argued, whether the policy sued on was rendered void for violation by the assured of the provision of the policy against allowing the property to become vacant and unoccupied

and to so remain for a period of more than ten days.

Finding no error in the judgment below it must be affirmed.

(67 W. Va. 373)

PRICE et al. v. LAING.

(Supreme Court of Appeals of West Virginia.
April 26, 1910.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 429*)—RIGHTS OF GENERAL CREDITOR — BILL AGAINST EXECUTOR.

A general creditor of a deceased person cannot maintain a bill in equity against the personal representative to charge in his hands the personal estate only, without showing some ground of equity jurisdiction, such as inadequacy of the legal remedies, inability to obtain satisfaction of his debt by pursuit thereof to judgment and execution, or necessity for discovery.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1677; Dec. Dig. § 429.*]

2. EXECUTORS AND ADMINISTRATORS (§ 65*)—FAILURE TO FILE INVENTORY — BILL FOR DISCOVERY.

Mere failure of a personal representative to return an inventory of the personal estate within the time in which the law requires him to do so will not sustain a bill for discovery and relief in such case. Such a bill must comply with the rule requiring a showing of necessity for the discovery due to indispensability of the evidence sought and inability to obtain it otherwise than by discovery.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 314; Dec. Dig. § 65.*]

Appeal from Circuit Court, Greenbrier County.

Bill by S. L. Price and others against Thomas K. Laing, administrator. Decree for defendant, and plaintiffs appeal. Affirmed.

Henry Glimmer and J. A. Preston, for appellants. T. K. Laing and File & File, for appellees.

POFFENBARGER, J. S. Lewis Price and others filed their bill in the circuit court of Greenbrier county, against Thomas K. Laing, administrator with the will annexed of the estate of James Laing, deceased, to recover a minimum royalty or rental accruing to them under a lease of coal lands made to the said James Laing in his lifetime and dated January 10, 1906. The amounts claimed are \$750, with interest from January 1, 1908, \$1,000, with interest from April 1, 1908, and \$1,000, with interest from July 1, 1908. Liability to rentals to accrue in the future under the lease is also set up. The only fact alleged as a special ground for jurisdiction in equity is the failure of the administrator to return any appraisement or inventory of the estate of his testator within the time in which he is required by law to do so with the additional charge that the plaintiffs do not know what assets came or

should have come to his hands applicable to the payment of the testator's debts. The court having sustained a demurrer to the bill and dismissed it, an appeal has been taken.

It is earnestly insisted upon the authority of *Poling v. Huffman*, 39 W. Va. 320, 19 S. E. 421, and *Hale v. White*, 47 W. Va. 700, 35 S. E. 884, that the failure of an administrator to file an inventory, render an account of sales or make the settlements required by law, or any other omission of duty on his part, gives a creditor a right to sue him in equity on the theory of a trust, disregarded or abused, for satisfaction of his debt out of the personal estate. The first of said cases was brought by a creditor within six months from the date of the appointment of the administrator, and the question for actual decision was whether the right of the administrator given by statute to institute a suit to subject the real estate of his decedent to the payment of his debts in the event of a deficiency of personal estate to pay them is exclusive during that period of six months. In discussing that question, Judge Dent undertook to state briefly the ancient remedies of a creditor of a decedent's estate. In this connection he said such a creditor might maintain a separate bill in chancery to compel payment of his individual debt out of the funds in the hands of the personal representative, a bill on behalf of himself and other creditors to ascertain and distribute both the real and personal estate, or a bill of discovery against the personal or real representatives of the estate to discover the assets liable to the payment of his debts. For the first proposition he cited no Virginia or West Virginia authority. For the last one he cited Virginia decisions. None of this was matter of actual decision, except the second proposition above stated. That is settled doctrine, for which no authority need be cited. The real estate can be proceeded against only in equity. In *Hale v. White* the effort was to charge the administrator by a bill in equity in respect to personal property only. There Judge Dent had occasion to review and accurately define what he meant by the statement made in *Poling v. Huffman*; and his conclusion was that equity has no jurisdiction of such a case, unless some special ground therefor, such as necessity for discovery or the existence of an equitable demand, is shown. Point 1 of the syllabus emphatically declares this, saying: "A general creditor of a deceased person cannot sustain a bill in equity on a purely legal demand, unless he shows that he has exhausted his legal remedy, or that such remedy, for some good cause, would be inadequate or unavailing."

It is suggested in the opinion in that case that failure to return an inventory may confer such jurisdiction on the ground of dis-

covery, but this is necessarily an obiter dictum, as such failure of duty was not disclosed by the bill. To lack of necessity for decision of such a question we may attribute the indefiniteness of the terms in which the suggestion is couched. It is not tested by, nor analyzed in the light of, the rules applicable to bills for discovery and relief, and there is added the significant qualification, "and the creditor is thus prevented from knowing the true condition of the estate." Taken all together, we think the opinion, as well as the syllabus, declares the bill must make out a case for discovery as ground for relief, or set up some other equity. Lack of an inventory does not necessarily deprive the creditor of information, enabling him to determine whether there are sufficient assets in the hands of the personal representative to satisfy his debt. He may know all about the condition of the estate, notwithstanding such omission of duty, or enough to make certain his ability to obtain satisfaction of his debt by pursuit of the legal remedies, and that is all the interest he has in the estate. Such knowledge suffices his purposes and demands fully. The exact condition of the estate is a matter of no importance to him if he has sufficient knowledge to enable him to collect his debt; that being the full extent of his interest in the estate. Moreover, if it were, he may be abundantly able to prove the exact condition of the estate by competent witnesses other than the defendant. A bill for discovery and relief must show indispensability of the information sought from the defendant and inability to obtain it otherwise than by discovery. *Prewett v. Bank*, 66 S. E. 231; *Dudley v. Niswander & Co.*, 65 W. Va. 461, 64 S. E. 745; *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795.

Some authority from other jurisdictions for the position that a single creditor may sue the personal representative in equity for satisfaction of his debt without showing any special ground of equity jurisdiction upon the theory of right to an accounting from the personal representative as a trustee, or right to go into equity to enforce the due administration of a trust, is cited and insisted upon as being founded upon reason and sound principle. There are many instances, no doubt, in which the trust relation suffices to give jurisdiction in equity, but we are unable to see that the application of this principle is broad enough to cover a case of this kind. In law the personal representative is not the agent of the creditor. There is no relation of express or direct contract between them upon which a special duty to render an account can stand. Their relation is that of debtor and creditor, which makes the legal remedies applicable and available. While the personal representative is in a sense a trustee, his trust is

created, not by contract, but by law. It is not a simple ordinary trust, such as falls exclusively within the equity jurisdiction. Moreover, practically all the authorities relied upon found the jurisdiction upon a right to a discovery of assets or to subject the real estate of the decedent in the hands of the heirs. The leading case in this country is *Thompson v. Brown*, 4 Johns. Ch. (N. Y.) 619. The bill in that case averred the necessity of discovery. The same is true of the bill in *Kennedy v. Creswell*, 101 U. S. 641, 25 L. Ed. 1075. Most of the Virginia cases relied upon were bills to charge the real estate, as well as to administer the personal estate, on the theory of a deficiency of personal property. *Rice v. Hartman*, 84 Va. 251, 4 S. E. 621; *Hurn v. Keller*, 79 Va. 415; *Carter v. Hampton's Adm'rs*, 77 Va. 631; *Duerson's Adm'r v. Alsop*, 27 Grat. (Va.) 229. An exception to this rule, and authority for the position taken in the brief, may be found in *Beverly v. Rhodes*, 86 Va. 415, 10 S. E. 572, but that case is not clear on this point. The opinion is short, and does not set forth the pleadings. The heirs seem to have been made parties, importing an attempt to charge the real estate. For all that we can see, the bill may have shown deficiency of personal estate, and necessity of resort to the real estate. *Pomeroy's Eq. Jur.* § 156, is relied upon and seems to say the right of a creditor of a decedent to go into equity for satisfaction of his debt is never denied, on the ground of want of jurisdiction, but, if this is the correct reading of the text, it is admitted, in a subsequent part of the section, that "throughout the great majority of the United States, however, this jurisdiction of equity, even where not expressly abrogated, has become virtually obsolete." Whatever the doctrine may be elsewhere, *Hale v. White*, cited, the only decision of this court bearing directly on the question, denies such jurisdiction in this state, and a suit in equity, under such circumstances, is contrary to our practice.

Perceiving no error in the decree appealed from, we affirm it.

(67 W. Va. 388)

TRI-STATE TRACTION CO. v. PITTSBURG, W. & K. R. CO. et al.

(Supreme Court of Appeals of West Virginia.
April 26, 1910.)

(Syllabus by the Court.)

1. RAILROADS (§ 91*)—CROSSING WITH OTHER ROADS—SUIT TO DETERMINE—PARTIES.

In a suit pursuant to Code 1906, c. 52, § 11, for decree fixing the crossing of one railroad by another, the holders of the mortgage bonds of the defendant railroad are not necessary parties when the trustees in the mortgage are made parties.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 91.*]

2. RAILROADS (§ 91*)—CROSSING WITH OTHER ROADS—SUIT TO ESTABLISH—PLEADING.

An allegation of the bill in such suit which merely states that certain original mortgage trustees are dead and that defendant trustees have been appointed in their stead contains sufficient particularity as to the fact.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 91.*]

3. RAILROADS (§ 91*)—CROSSINGS—ACTION TO ESTABLISH—EVIDENCE.

If the proposed crossing is within a city, it is not incumbent upon the plaintiff company to show that the municipal government has specifically granted permission to make the same, when a franchise from the city for the construction of plaintiff's railroad at the place of the crossing is shown.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 91.*]

4. RAILROADS (§ 89*)—CROSSINGS—STEAM AND ELECTRIC ROADS.

An electric railroad may be decreed the right to cross a steam railroad. The physical character of the railroad seeking the crossing, or that of the railroad proposed to be crossed, has nothing to do with the applicability of the statute.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 89.*]

5. RAILROADS (§ 90*)—GRADE CROSSINGS.

Grade crossings are not prohibited but are authorized by the law of this state. Where the facts warrant a crossing at grade, its construction and operation may be decreed.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 90.*]

Appeal from Circuit Court, Brooke County.

Bill by the Tri-State Traction Company against the Pittsburg, Wheeling & Kentucky Railroad Company and others. Decree for plaintiff, and defendants appeal. Affirmed.

J. B. Sommerville, for appellants. Henry M. Russell and J. F. Cree, for appellee.

ROBINSON, P. In the construction of an electric railroad from Steubenville to Wellsburg, the Tri-State Traction Company deemed it necessary to cross at grade the right of way and tracks of the Pittsburg, Wheeling & Kentucky Railroad Company, on 27th street in Wellsburg. The companies could not agree upon a crossing. By bill in equity, pursuant to Code, c. 52, § 11, the Tri-State Traction Company sought a decree for the establishment of the crossing desired. Upon a hearing of the cause, the plaintiff company was decreed the right to cross at grade the property of the other company at the place designated, by the payment of damages to be ascertained according to the provisions of chapter 42 of the Code. The manner of the crossing was particularly prescribed, and the respective rights of the parties in relation to the matter were definitely fixed and determined. From this decree the Pittsburg, Wheeling & Kentucky Railroad Company, and its lessee, the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, have appealed. Let us notice the points presented by the assignments of error.

The bill is not insufficient because the holders of the mortgage bonds of the Pittsburg, Wheeling & Kentucky Railroad Company are not made parties. The trustees in the mortgage deed of trust are parties to the bill. Their presence as parties suffices for the protection of the interests of the bondholders. "Indeed, whenever the rule obliging all parties interested to be parties is, from their number, impracticable, or extremely difficult, it is so far dispensed with, or rather modified, as to require only sufficient parties to secure a fair contest, by *representing* all the separate interests." 4 Minor's Inst. (4th Ed.) 1396. Generally, in a suit for foreclosure of a railroad mortgage the bondholders are not necessary parties. Why should they be in a case like this one? There is no more reason for making them parties here than in a foreclosure suit. "A trustee for bondholders represents their interests, and when made a party to a suit affecting their interests, they are as much bound by the decree rendered in the suit as if they were individually made parties to the suit." Jones on Corporate Bonds and Mortgages, § 398. "It would be impracticable to make the bondholders parties in a suit to foreclose a railroad mortgage and there is no rule in equity which requires it to be done." Vose v. Bronson, 6 Wall. 452, 18 L. Ed. 848. It is just as impracticable to make the bondholders parties to a suit like the one before us. This suit is of the nature of a condemnation proceeding. Its purpose is to prepare the way for a proper condemnation of the property sought to be taken. "Ordinarily, in proceedings to subject trust property to public use, the trustee is the proper party to represent the trust estate, and it is not necessary that the beneficiaries be made parties." 7 Enc. Pl. & Pr. 513.

Nor is the bill insufficient in its allegations relative to the fact that two of the defendant trustees were appointed to succeed trustees originally named in the deeds of trust. The bill alleges that those original trustees are now dead and that these defendant trustees have been appointed in their stead. We deem this sufficient particularity in a pleading having for its object that which is sought by this bill. And we find the bill entirely sufficient in its allegations relative to the franchise obtained by the plaintiff company from the municipal government of Wellsburg. The bill shows that the plaintiff company has been granted a right to construct its road within that city, and to construct that road at the place therein where the crossing is proposed to be made. It is not incumbent upon the plaintiff company to specifically show a grant by the city of the right to cross the tracks of the other company.

The point is made that the statute under which this suit is brought does not contemplate the crossing of a steam railroad by an

electric railroad. So, it is contended that this suit by an electric railroad is not authorized by law. There is no weight in this contention. The statute expressly applies to "any railroad" which deems a crossing of "any other railroad" necessary. The physical character of the railroad, the service rendered, or the motive power used, has nothing to do with the applicability of this statute. The road of the plaintiff company is a "railroad," though it renders a somewhat different service from that of the other company and is operated by a different motive power.

It is insisted that the plans for an overhead crossing at another point which were proposed by the company whose property is sought to be taken should have been adopted and a decree entered accordingly. Whatever may be said against the propriety of grade crossings because of the dangers and inconveniences attending them, we must observe that our law expressly authorizes crossings at grade. *Railroad Co. v. Traction Co.*, 56 W. Va. 18, 48 S. E. 746. Where the facts warrant a decree for a crossing of that character there is certainly no error in the court making such decree. A considerate review of the evidence in this case justifies the conclusion that the circuit court reached and warrants its decree in the premises. The sound discretion vested in the court in such case as the one under consideration has not been abused.

The assignments are not well taken. An affirmance of the decree will be ordered.

(57 W. Va. 386)

MCGRAW v. LAKIN et al.

(Supreme Court of Appeals of West Virginia.
April 26, 1910.)

(Syllabus by the Court.)

1. TAXATION (§ 414*)—ASSESSMENT LIST—TAX DEED—VALIDITY.

In an assessment and sale list for taxes in the surnames of two joint owners, as "Cofran & McGraw," the mere omission of their Christian names does not render a deed under a tax sale void.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 691; Dec. Dig. § 414.*]

2. TAXATION (§ 764*)—ASSESSMENT—CERTAINTY IN DESCRIPTION.

In case of separate ownership of minerals, an assessment and sale for taxes of "mineral rights" in a tract of land is a sufficient description of the ownership of the property in such minerals, and such description does not render a tax deed void because of uncertainty in description.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1519-1522; Dec. Dig. § 764.*]

3. TAXATION (§ 530*)—MINERAL RIGHTS—PAYMENT OF TAXES BY SURFACE OWNER.

Payment of taxes on a tract of land by the surface owner is not payment of taxes on minerals in it owned by another person and separately assessed with taxes in the name of the owner of the minerals.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 530.*]

(Additional Syllabus by Editorial Staff.)

4. WORDS AND PHRASES—"MINING RIGHT."

"A 'mining right' is a right to enter upon and occupy ground for the purpose of working it, either by underground excavation or open working, to obtain from it the minerals or ores which may be deposited thereunder. By implication, the grant of such a right carries with it whatever is incident to it and necessary to its beneficial enjoyment. The term may also include licenses and the rights of the owner of the minerals."

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 5, p. 4522.]

Appeal from Circuit Court, Preston County.

Bill by John T. McGraw against James S. Lakin and others. Decree for defendants, and plaintiff appeals. Affirmed.

Mollohan, McClintic & Mathews and Linn & Byrne, for appellants. Wm. G. Conley and P. J. Crogan, for appellees.

BRANNON, J. John T. McGraw brought a chancery suit in the circuit court of Preston county against James S. Lakin and others to set aside a tax deed for minerals in two tracts of land adjoining, making up a solid tract of 300 acres. The circuit court dismissed McGraw's suit without relief, and McGraw appeals.

There was a demurrer to the bill and amended bill. We consider the bill defective. The original bill, which, in this respect, is not helped by the amended bill, is very general. It simply charges, in general words, that the clerk of the county court without any legal authority made a conveyance, and that the assessment was illegal, null, and void, but wherein the bill does not tell us. There is no specification of defect, as there must be. *Gerke Brewing Co. v. St. Clair*, 46 W. Va. 93, 33 S. E. 122. The bill does say that the clerk conveyed more than the tax sale authorized; precisely wherein it does not say. I think the bills insufficient, and that the demurrer was well taken because of their uncertainty and indefiniteness. But let us waive the demurrer and come to the merits. The claim is as argued here that the assessment was too general and indefinite. No exhibit of that assessment is made; but, if we assume from the list of sales that the assessment was the same, what do we find? We find a charge for the years of 1895 and 1896 in the names of "Cofran & McGraw," a charge of real estate in quantity 300 acres in fee in Reno district, and the subject charged "Mineral Right." As to the name of the party charged, I will say that the record discloses that John T. McGraw and Leroy Cofran became owners of the minerals in said tract of land. The entry on the tax list in the names of Cofran and McGraw is not misleading, and it signifies to the common understanding, and certainly to both McGraw and Cofran, that they were charged with taxes. It did not mislead them. In prior years it had been so taxed, and they knew it, because they paid

taxes under such charge. Our statute says that an irregularity, such as will impair a tax sale, must be such as to mislead the taxpayer. There is no evidence that this irregularity, if we call it even an irregularity, is such as did in fact mislead the owners. It would be very technical to sustain this failure to give the Christian names as a fatal defect. The surname is the substance—the Christian name minor or subordinate. A part of the name, the surname, if correct, is sufficient without the Christian name. Shall the name of each of a dozen owners be given, or a hundred, if there be so many? Shall a host of heirs be each one named in the narrow compass of an assessment list? I think not. It is enough if the name be plainly significant of the owners, so as not to mislead. But in truth the bills do not exhibit an assessment list or even a list of the sale. A sale list is printed in the record, but not made an exhibit. But the main complaint seems to be based on the theory that the assessment in the words "Mineral Right" is uncertain and indefinite. Now, what do those words import to the common understanding? I answer that they signify title or right to all that is mineral in the land. What otherwise should the entry say? Should it be minerals? What would that indicate except right and title to the minerals? I do not see how it could be plainer or more definite. "A 'mining right' is a right to enter upon and occupy the ground for the purpose of working it, either by underground excavation or open working, to obtain from it the minerals or ores which may be deposited thereunder. By implication the grant of such a right carries with it whatever is incident to it and necessary to its beneficial enjoyment." *Clark v. Duval*, 15 Cal. 86; *Smith v. Cooley*, 65 Cal. 46, 47, 2 Pac. 880; *Sholl Bros. v. People*, 194 Ill. 24, 61 N. E. 1122. "So these incorporeal rights to mine are sometimes described merely as mining rights, though that term may include licenses and the rights of the owner of the minerals." *Barringer and Adams, Mines and Mining*, p. 54. "The rule is laid down broadly that a reservation of minerals or mining rights is to be construed as a grant, and this may be taken to apply equally to an exception." *Same*, p. 83. So we regard this assessment of "mining right" specifying the tract, the district of its location, and the names of the owners sufficient.

As to the claim that the clerk conveyed more than the sale authorized, the argument is that the assessment and sale of "mineral rights" could not warrant the clerk to convey to the tax purchaser all the minerals in the land, or the absolute title to any such minerals. The very authority cited for this proposition contradicts it. One authority is *Gibson v. Tyson*, 5 Watts (Pa.) 37. It says: "'Minerals' means all ores and other metallic substances which are found beneath the sur-

face of the earth, and all substances which are the object of mining operations." Another is *Smith v. Cooley*, 65 Cal. 46, 2 Pac. 880. Another is *L. & N. R. Co. v. Massey*, 136 Ala. 156, 33 South. 896, 96 Am. St. Rep. 17, saying that: "Mining rights must include incorporeal hereditaments lying in grant, but not in seisin; such as rights of way over the surface, the right to dig and drive slopes and entries, and the like rights of an intangible nature, incapable of being delivered by the sheriff, or of possession by the owner." That authority does not say that "mining rights" does not include the minerals themselves. On the contrary, it means that "mining rights" include not only the minerals, but right of way and other uses of the surface necessary for the enjoyment of title to the minerals. Now, the deed in this case recites the purchase by Lakin, Coogle, and Pickenpaugh "of the mineral under" the tract specifically described in the deed, and then says: "The mineral only under said tract is hereby intended to be conveyed." That conveyed all the mineral, and the assessment and sale of the "mineral rights" would be as broad as the deed. The deed did not convey more than the sale authorized. If the sale list were exhibited with the bills, it would correspond with the deed. We have considered the case on its merits, though the bill does not warrant it. The argument that we must presume that the surface owner paid the tax on the land, and that this would pay the tax on the mineral, will not hold, because that is the case where there has been no separation of minerals from the body of the land. In this case is a separate assessment and sale of minerals. And there had been such separate assessment for prior years.

We have struggled to decide the case otherwise, so as to prevent the loss to McGraw of valuable property for the failure to pay a pittance of a few dollars to the state; but we find ourselves unable to decide in McGraw's favor, and therefore we affirm the decree.

(87 W. Va. 285)

**McCLAUGHERTY v. BLUEFIELD WATER-
WORKS & IMPROVEMENT CO.**

(Supreme Court of Appeals of West Virginia.
March 22, 1910. On Rehearing,
May 18, 1910.)

(Syllabus by the Court.)

**1. MANDAMUS (§ 148*)—WHEN GRANTED—
COMPELLING WATER COMPANY TO FURNISH
WATER.**

A resident of a city may, in his own name, maintain mandamus against an incorporated water company to compel it to furnish him water as required by its franchise from the city to construct and operate its works in the city.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 289; Dec. Dig. § 148.*]

**2. WATERS AND WATER COURSES (§ 202*)—
RULES OF WATER COMPANY—VALIDITY.**

A rule of a water corporation requiring a consumer of water to repair service pipes leading from its main pipe in a street to the property of the consumer, assented to by him, and made a part of the contract between him and the corporation, is valid; the franchise giving power to make such rule.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 276; Dec. Dig. § 202.*]

Petition of N. H. McLaugherty for writ of mandamus against the Bluefield Waterworks & Improvement Company. Writ refused.

McLaugherty & Peters and Ritz & Ritz, for petitioner. Sanders & Crockett and A. W. Reynolds, for respondent.

BRANNON, J. The Bluefield Waterworks & Improvement Company is a corporation supplying the city of Bluefield with water. N. H. McLaugherty is a resident of that city owning a lot fronting on one of its streets. He had a contract with the water company to furnish his residence with water. He filed a petition in this court alleging that the water company had cut off the water from his premises, and asking a mandamus to compel the water company to restore water to his premises. The company laid a main pipe for carriage of water along that street.

A law question of importance is raised by the water company. It is that McLaugherty as an individual cannot maintain mandamus to compel the performance of its duties by the water company. By no means can we accede to this proposition. Seeing that McLaugherty is peculiarly and individually interested in the performance of its public duty under the franchise granting the water company admission to the city for supplying the public with water, he must be accorded some adequate remedy for the failure of the company to do its duty to him as a resident of the city. What other effective remedy can he have? A suit for damages? That is a slow process, and does not restore the water to his premises. He needs some prompt and effective remedy that will enforce the supply of water. We find in 26 Cyc. 401 the statement that in some jurisdictions such proceeding must be instituted by the city or a public officer, but that, where a private individual has a special and peculiar interest in the enforcement of the right or the performance of the duty apart from his interest as one of the general public, he may resort to mandamus. This principle is obvious. It is like that principle as to public nuisances, that an individual merely because of his right as one of the general public cannot maintain injunction against a public nuisance; but if he lives on a road which is a means of access to his home or land, impeded by an obstruction, or is in any way peculiarly and indi-

vidually interested, he can have injunction. *Pence v. Bryant*, 54 W. Va. 263, 46 S. E. 275. High, Extra Remedies, § 433, and *Farnham on Waters*, § 159d, pointedly say that such an individual may enforce this right against a water company by mandamus. We are told that this defense of the water company can be sustained by sections 28cI and 28cII, c. 47, Code 1906. There we find that mandamus may be awarded at the instance of the city in its corporate name to compel a water company to perform its duty, and it is said that, as the writ is there given to the municipality, that excludes the right of an individual. This cannot be conceded. The law as just stated is clear that the common law gives an individual the right to maintain mandamus to vindicate his right. Can it be said that this statute was designed to take away from the individual this important privilege of self-protection and the enforcement of his just rights? Not with reason. What rule of construction would sustain this proposition? That citizen cannot lose such an important power without plain words from the Legislature. I think that that statute is perhaps only declaratory of what would be the law without it, which would accord the city right to this writ to enforce the public right under the public franchise for public good, and that the statute is only a precautionary declaration of the right of the city, which would exist without the statute. At any rate, we cannot hold that a remedial statute, made to make the remedy more expressive and clear in behalf of the municipality, can be construed to destroy the individual's action. Moreover, I see that said statute says that it "shall not be construed to deprive such county, city, town or village, or any inhabitant thereof, of any other remedy to compel such individual, association or corporation to comply with the terms, conditions and agreements of such right, privilege, license or franchise, or of the right to recover damages for their failure so to do." This preserves all legal rights existing in an individual. Its intent is to save any existing right of action. We cannot say that the words "any other remedy" saves all other remedies than mandamus and thus takes it away. Why should the Legislature be thought to have singled out that action and taken it away, and left all others? It did not mean to save only the action for damages, for that is expressly saved. The statute is remedial and must be construed as giving the city mandamus, and saving to individuals a like writ existing under the common law.

A leak appeared in the street in front of McLaugherty's residence. The water company sent its hands to investigate the leak; it being supposed that it might be in the main. The hands excavated, and in doing so cut off the water from McLaugherty's service pipe for the purposes of investigation.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

They discovered that the leak was not from the main pipe, but somewhere in the service pipe connecting McClaugherty's residence with the main pipe. McClaugherty, being informed of this, asked the company to give him a little time and he would make the repair. Later he informed the company that he had thought that a few inches of pipe would cure the leak, but, finding out otherwise, he would have nothing more to do with it. He did not demand then that the company turn on the water. Thus declining to make the repair, the company allowed the water to remain cut off. Whose duty was it to cure this leak?

This water company adopted a set of rules for the conduct of its business. Among them was a rule requiring the consumer of water to put in service pipes from the main in the street to his residence, and to keep them in repair. When McClaugherty filed an application to the company to supply him with water, which application calls itself "Application and Contract of Consumer," he signed that application or contract. There were two of them, each for one year. When these contracts were signed, the rule requiring the consumer of water to keep the service pipe in repair was in force. That contract makes McClaugherty ask the company to supply him with water, and for the permission to make the connection and to attach the same to the pipe of the company. Not only that, but by that contract McClaugherty "covenants and agrees to strictly abide by the rules of the company," referring to the rules to be had at the office. This is a part of the body of the contract. These rules are posted for the open inspection of all. These two contracts signed by McClaugherty make this rule a part of his contract. If it is to govern, clearly the case is with the water company. Counsel for McClaugherty states unquestionable law when he says that: "There is no question but that the respondent in a case like this has the right to adopt all such rules as it may deem proper or necessary for the conduct of its business, and it is likewise true that such rules must be reasonable ones." It is well settled that a corporation has power to make all necessary rules and regulations for its government and operation, though such power may not be expressly conferred in its charter, in the statute of its creation or any other statute. It is regarded as a power that is included in the grant of the capacity of being a corporation. It is generally said to be an incident to a corporation. Corporate by-laws must not contravene those principles of common right embodied in the common law or its franchise or law. By-laws must operate equally upon all persons of the class which they are intended to govern. The rule must not be unreasonable, oppressive, or extortionary.

Now, what is there in this rule that contravenes law or public policy? Why is it not

within the power of this corporation to contract with the consumer that he shall keep the service pipe in repair? Counsel says this rule is contrary to public policy. This thing of overthrowing a contract as against public policy is a tender thing. It has been called "an unruly horse, astride of which you are carried into unknown and uncertain paths, and here that horse would be carrying us beyond all limits ever reached before, if respondent's position should meet with our approval. While contracts opposed to morality or law should not be allowed to show themselves in courts of justice, yet public policy requires and encourages the making of contracts by competent parties upon all valid and lawful considerations, and courts so recognizing have allowed parties the widest latitude in this regard; and, unless it is entirely plain that a contract is violative of sound public policy, a court will never so declare. 'The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.' *Richmond v. Dubuque, etc., R. R. Co.*, 26 Iowa, 191. 'Before a court should determine a transaction which has been entered into in good faith, stipulating for nothing that is malum in se, to be void as contravening the policy of the statute, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical.' *Kellogg v. Larkin*, 3 Pin. [Wis.] 125, 56 Am. Dec. 164. 'No court ought to refuse its aid to enforce a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people.' *Swann v. Swann* [C. C.] 21 Fed. 299." *Stephens v. Southern Pacific Railroad Company*, 109 Cal. 86, 41 Pac. 783, 29 L. R. A. 751, 50 Am. St. Rep. 19. The Supreme Court of the United States, in *Baltimore Ry. Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, said: "It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare."

I again ask why could not this company agree with McClaugherty that he should repair this service pipe, beneficial to his own use? What is there unreasonable in it? I may safely say it is the general rule in cities and towns. Counsel for McClaugherty, admitting the power to make these rules, if reasonable, tells us that this particular rule operates to put upon the consumer a duty

which otherwise rests on the water company. The ordinance granting the franchise puts no such duty on the company. It may be that in the absence of a contract the company would be called upon to lay and repair service pipes to the line of the consumer. For this position we are cited to *Water Co. v. Standley*, 7 Idaho, 155, 61 Pac. 518. It so holds incidentally. A late Virginia case (*Vinton-Roanoke Water Co. v. City*, 66 S. E. 835) looks the other way. There the water company agreed as a part of its contract of franchise to furnish the city buildings and fire hydrants with water. It was held that the city must make the service pipes to its buildings and hydrants, and that the water company had fulfilled its duties when it had laid its mains along the streets. But we do not have to pass on this question of what would be the duty of the company in the absence of this contractual rule. We say the rule governs this case. This proposition is supported by *Gleason v. Waukesha*, 108 Wis. 225, 79 N. W. 249, and *Prindiville v. Jackson*, 79 Ill. 337. Counsel for McClaugherty cites us *International Water Co. v. City of El Paso* (Tex. Civ. App.) 112 S. W. 816, for the proposition that it is the duty of the water company to construct its pipes to the line of the consumer's property. But that case does not help McClaugherty. It is against him. In that case there was an ordinance requiring the company to furnish water to consumers without provision as to payment for service or connecting pipes, and no rule upon the subject. The court distinctly said: "The contract nowhere provides that the consumer shall pay for such work. * * * We think the failure to provide that the consumer should pay said rates and also the cost of making said connection with his property indicates that he was not to bear the cost of the latter. * * * Primarily the duty to furnish water to property owners on streets containing mains carried with it the duty to do what was necessary to be done to place the company in position to furnish the property with water. It could not do this without connecting to the property line. We think, in order for the respondent to be able to claim immunity for this consequence, there would have to be some provision in the grant or contract which unmistakably, or at least by fair implication, taking into consideration all the provisions bearing on the subject, would relieve it." This admits that if there had been a contract, as in this case, the consumer must furnish and repair the service pipe. To show that McClaugherty is not bound by this contract, we are cited to *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 363. There a party signed a contract for the supply of water in a village adjacent to Chicago contracting to pay certain rates. The village was incorporated with Chicago, and the council of Chicago passed

an ordinance lowering water rates. The company claimed that the party must pay the higher rate fixed by the contract; but the Illinois court held that, the rate having been lowered by law, the party should only pay what others paid. However, I notice that the application for water in that case said that it was "subject to the rules and regulations of the company now in force or hereafter to be enacted or adopted, which rules and regulations are hereby made and declared to be part of the contract" between the parties. Of course, that gave the party the right to the lower rates. The very letter of the contract demanded no more.

It is argued that the duty of making and repairing the connecting pipes rests on the company from the consideration that the individual would not have the right to dig up the street to lay his pipe without the city's permission. We cannot accede to this position. The very grant of the franchise necessarily means that the company could dig up the streets for connecting pipes, or that the consumer contracting with it for water might do so under the privilege accorded the company. When the company contracts with the consumer to furnish water, that alone implies that the company makes the consumer its agent to lay the service pipe, and gives him authority to do so, else the franchise would be practically worthless. Dillon on Municipal Corporations, § 56, says that the abutting owner has a right of passage and also rights not shared in by the public at large, "special and peculiar to himself, and which arose out of the very relation to his lot to the street in front of it, and that these rights were rights of property. * * * In cities the abutting owner's property is especially dependent upon sewers, gas, and water connection." The abutting owner has a right of access to his premises through the street for coal or wood or other necessary things; the right of ingress for persons; and why may we not call this right to use the street to lay his pipe for conveyance of water a right of access constituting a property right in the street, which he may use and of which he cannot be divested or denied? We recognize this full right of use of the street for the purposes of ingress and egress for all necessary purposes connected with the use of the lot in *Pence v. Bryant*, 54 W. Va. 263, 46 S. E. 275.

For these reasons we refuse the peremptory mandamus and dismiss the alternative mandamus.

On Rehearing.

A petition for rehearing makes as its strong point that the application and contract signed by McClaugherty, binding him to the company's rule that each consumer of water must furnish and repair service pipes, is invalid because without consideration. I would

think that when, at the request of McClaugherty, the parties made a contract by which the water company bound itself to supply McClaugherty with water, and he bound himself to buy water and pay for it, there was benefit and detriment to each contracting party, a mutuality of obligation and benefit, a mutual consideration, a part and element of which contract was the rule alluded to. The company was to make the outlay of furnishing water, a detriment to it, and get pay for it, a benefit; whilst McClaugherty was to pay, a detriment to him, and get the water, a benefit. That seems plain to me. "Anything which confers benefit on a party to whom a promise is made, or loss or inconvenience on the party promising, is a valuable and sufficient consideration," is a sound definition of consideration given by Judge Green in *Hornbrooks v. Lucas*, 24 W. Va. 497, 49 Am. Rep. 277. "Anything that may be detrimental to the promisee or beneficial to the promisor in legal estimation will constitute good consideration for a promise." 3 Va. & W. Va. Ency. Digest, 338. "A benefit to the party promising, or an injury, loss, charge, or inconvenience, or the risk thereof to the party promised," we said, in *Rutherford v. Rutherford*, 55 W. Va. 60, 47 S. E. 242, citing 3 Minor's Inst. 183. "Benefit to be derived by each party to a contract furnishes a sufficient consideration for it." *Rowan & Co. v. Hull*, 55 W. Va. 335, 47 S. E. 92, 104 Am. St. Rep. 998.

But the petition for rehearing, as an additional argument to show no consideration, puts the proposition that, when this water company got its franchise, it was bound by law to furnish service pipes in order to perform its public duty as a part thereof, and that the consumer was not bound to do so, and that this contract makes McClaugherty do what he was not bound to do, and relieves the company of its obligation, and is without law to support it, and is without consideration; that is to say, that this rule requiring the consumer to furnish water is against public policy as relieving an incorporated company of public service from its duty. I should think the party could bind himself by such a contract. But a decisive answer to that proposition is found in the franchise granted to the company, which gives the company power to maintain its works and supply the city and citizens with water, "upon any terms and conditions that from time to time may be agreed upon by and between the said Bluefield Waterworks & Improvement Company, its successors and assigns, and the said city of Bluefield and other patrons and customers of the said Bluefield Waterworks & Improvement Company." Under that clause of its franchise the company could make such rule as that involved in this case. It was thus given full authority to do so. The rule is thus binding.

(87 W. Va. 475)

KENNEDY v. MERCHANTS' & MINERS' BANK et al.

(Supreme Court of Appeals of West Virginia. May 3, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1002*)—REVIEW—QUESTIONS FOR JURY.

In trial of right to property levied on, conflicting facts and circumstances in relation to fraud vitiating claimant's title as against creditors are properly determinable by the jury and their verdict upon such facts and circumstances will not be disturbed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. CORPORATIONS (§ 442*)—SALE OF CORPORATE PROPERTY.

When all the stockholders of a corporation informally but plainly authorize a sale of all the corporate property, a transfer thereof on behalf of the corporation in pursuance of the authority so given is the corporate act and passes title.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 442.*]

Error to Circuit Court, Fayette County.

Action by Bettie Kennedy against the Merchants' & Miners' Bank and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Hubard & Lee and Payne & Hamilton, for plaintiffs in error. Osenton & McPeak and Charles E. Hogg, for defendant in error.

ROBINSON, P. Executions were levied on personal property as belonging to the Allegheny Bottling Company, a corporation. These writs were issued on judgments against that company. G. L. Hooper was its president and general manager. While suits were pending in which the judgments were obtained he, acting ostensibly for the corporation, sold and transferred to his sister-in-law, Bettie Kennedy, all the property that it owned. When the officer took charge of the property under the levies, she sought to establish her ownership thereto by petition pursuant to the statute. The justice found that she was not the owner; but on appeal a trial by jury in the circuit court resulted in verdict and judgment for her. The execution creditors have obtained the writ of error we must now consider.

It was personal property only that the corporation owned and Hooper sold. He executed and delivered to his sister-in-law a written bill of sale for it. That writing is made by him as president and general manager of the corporation. It plainly purports to have been made on behalf of the corporation by its authority duly given. The consideration for the sale was the surrender of two notes made by Hooper to his sister-in-law, for borrowed money. These parties assert that the corporation in fact assumed the repayment of this money, and that the corporation ac-

tually did repay it by the transfer of the property in satisfaction of the debt. After the sale was consummated, Hooper was employed by the new owner and took charge of the property for her.

The ownership of the claimant is attacked upon two grounds. It is submitted that the sale was a fraudulent and invalid one as far as creditors were concerned—that the transfer was made for the manifest purpose of defeating creditors. Then, it is insisted that the sale of the property was not by corporate action and that therefore the whole transaction was ineffectual to pass title to the corporate property.

The question of fraud is foreclosed by the determination of the jury. It was properly submitted to them and plainly called to their attention by an instruction. They saw the witnesses and judged of their credibility. There is nothing in the evidence so admittedly contrary to their finding as to call for a disturbance of that finding. But there is evidence sufficient to uphold the verdict in this particular. The purchaser testified that she had no knowledge whatever of the claims of creditors other than herself, that she bought the property in good faith, and that she paid a valid consideration therefor. In all this she is not directly contradicted. Other facts and circumstances in the case tended to overthrow her claims in these particulars, but the jury evidently found that these facts and circumstances did not overthrow her direct evidence. It was peculiarly their province so to find if they believed the evidence warranted the conclusion.

It is true that the sale was not made by formal corporate action. The corporation appears to have had practically no existence but in name. Though it was duly chartered there was no formal and regular corporate organization. The stock belonged wholly to two persons, it is proved. Hooper owned two-thirds of it, and another party, Blizzard, owned the other third. The wives of these two and a brother of Hooper were originally merely nominal stockholders, for the purposes of incorporation. The corporation simply succeeded a partnership composed of Hooper and Blizzard, which had been carrying on the identical business under the same name that the corporation assumed. No more in fact was done than to make the name a corporate one instead of a partnership one. Hooper continued as in the partnership to exercise the power to do everything about the business which he saw fit without regard to formal corporate action. He was indeed the mind of the corporation. He was the majority stockholder, the sole director, and the only officer.

Was the sale by corporate action? The contract evidencing it is executed ostensibly by the corporation. The officer who executed the contract professedly in its behalf was the appropriate one to execute such a contract in behalf of the corporation. The law, under

these circumstances, presumes a precedent authorization regularly and rightfully made, if the corporation itself had the power to make such contract. 10 Cyc. 1003. Certainly a corporation legally may make a sale of its property, such as is evidenced by this writing. So the written contract or bill of sale is clearly prima facie evidence of the corporate act which it evidences. But it is shown pretty clearly that no meeting of the stockholders was formally held at which the execution of this writing could have been authorized. Thus its regularity and efficiency is attacked. For, under our law action by the stockholders is essential to the authorization of a sale of the property and assets of a corporation.

But it was proved before the jury that Hooper and Blizzard owned all the stock of the corporation and that they both assented that the sale should be made. As to these facts parol evidence was admissible. *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227. The corporation did not necessarily cease to exist because the number of stockholders became reduced to a number less than five. Code 1906, c. 53, § 17. It had not been dissolved. Then, was the joint assent and authorization of all the stockholders, obtained other than at a meeting regularly called as provided by law, a sufficient authority for the sale and the execution of the writing in that behalf? We are of the opinion that it was.

Our statute expressly empowers the stockholders of a corporation to authorize a sale of its property. In this case the corporate property was sold by the authority of the stockholders. The irregularity of the corporate organization—the failure to maintain a board of directors or whatever it may be—does not annihilate this power, if the corporation actually exists. If there are stockholders they may authorize a sale, provided they do so by an observance of the true purposes of the statute. The language of that statute is: "On the affirmative vote, in person or by proxy, of the holders of at least sixty per centum of the outstanding stock of the corporation, such corporation may sell, transfer or assign in good faith, all of its property and assets; but a smaller majority shall not have the right to make such a sale, transfer or assignment. But no sale, transfer or assignment of property and assets of such corporation shall be made, except at a general or special meeting of the stockholders, called in the manner provided by law." Code 1906, c. 54, § 83. Does this law demand that in all cases there shall be a formal meeting, called in the manner therein stated? If such meeting is called in the manner provided, the sale may be authorized by a vote of the holders of at least sixty per cent. of the stock; but is such formally called meeting essential to the sale when all the stockholders clearly assent that it be made by the corporation and in truth authorize it? May not all the stock-

holders voluntarily assemble, express their assent to a sale, and direct that some officer or agent execute the same on behalf of the corporation? This statute is to be construed in the light of its evident purpose. It directs a meeting, called in the manner provided by law, so that each and every stockholder may have the opportunity to express his views and cast his vote upon the question of a proposed sale, and so that it may thus be ascertained fairly that the holders of at least sixty per cent. of the stock do in fact authorize a sale. Its object is the protection of the minority stockholder. It exists for his protection. By it he is given the opportunity to be heard by argument and vote. The formal call of a meeting is directed in order that each and every stockholder shall have a say. Only for that purpose does the statute require a formally called meeting. But when all the stockholders informally but plainly authorize a sale of all the corporate property on its behalf, as we must assume the jury found was true in this case, then the very object of the statute does not demand its technical application. In the case before us, all the stockholders had an opportunity to be heard on the question of a sale and all of them assented to it, we may say from the verdict. That is even more than the statute demands. It does demand the opportunity for all to be heard, but not the assent of all. If the statute had been technically followed, the same result would have been reached. Its spirit has not been violated. The statute undoubtedly says that the stockholders may authorize a sale. When they all do so in a manner not formally in accord with the directions of the statute but just as clearly and as fairly as it requires, why should not the act be sustained as a valid one by the corporation?

We have heretofore held that a stockholder who owns more than sixty per cent. of the stock of a corporation cannot, in justice to public policy, bindingly contract to sell all the corporate property before a meeting and vote as required by law. *Bias v. Atkinson*, 64 W. Va. 486, 63 S. E. 395. But even by the qualifications expressed in that decision it appears that such contract may be made if the contracting stockholder is acting for all the other stockholders and by their consent.

Let it be distinctly observed that we do not hold that stockholders have such title to the corporate property that they may pass it by a sale to which all of them assent. They do not own the property. The title is in the corporation. But we do hold that assent by all the stockholders, clearly and fairly expressed, may constitute corporate action for the sale of all the corporate property and assets and may authorize the corporate title to be passed. 7 *Thompson on Corporations*, §§ 8402, 8403; *Clark on Corporations*, § 9; *Cunningham v. German Ins. Co.*, 101 Fed. 977, 41 C. C. A. 609.

If the sale in question was one in good faith and one which every stockholder authorized after an opportunity to be heard. It was legally made by the corporation itself. And if there was evidence upon which the jury could find these conditional facts to be true, the verdict in this particular was also justified. Clearly there was before the jury sufficient evidence upon which to base a finding of these facts. The facts which we must assume that the jury found, and the law applicable thereto, characterize the sale as an honest and valid one between the corporation and the purchaser. Though its effect may have been to prefer a creditor of the corporation, under the finding of facts by the jury it is nevertheless valid as between the parties to pass title to the property. How far it may have been affected by suit in equity under the statute relating to preferences we cannot here properly inquire.

No error for which the judgment should be reversed is perceived. An affirmance, therefore, will be ordered.

(7 W. Va. 407)

CASTLEMAN'S ADM'R v. CASTLEMAN
et al.

(Supreme Court of Appeals of West Virginia.
May 3, 1910.)

(Syllabus by the Court.)

1. JUDICIAL SALES (§§ 31, 52*)—CONFIRMATION—CURE OF IRREGULARITIES—MISTAKE IN AMOUNT OF LAND SOLD—REMEDY OF PURCHASER.

If commissioners authorized by a court decree to make sale of land decreed to be sold undertake without specific authority given to sell the land by the acre, and the sale is so reported to and confirmed by the court, such confirmation will cure any irregularities of the commissioners in making such sale, and if by mistake resulting from the actions of court and commissioners less land be sold than was bid for and supposed to be sold the purchaser will be entitled to a proportionate abatement of the purchase money.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. §§ 66, 100; Dec. Dig. §§ 31, 52.*]

2. JUDICIAL SALES (§ 52*)—MISTAKE IN AMOUNT OF LAND SOLD—REMEDY OF PURCHASER.

Such relief may be obtained by the purchaser upon petition filed in the cause, by way of defense on a rule to show cause why the land should not be resold to pay the balance of purchase money, or by way of defense when sued on the purchase money notes, or by any other appropriate remedy.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 100; Dec. Dig. § 52.*]

3. JUDICIAL SALES (§ 52*)—CAVEAT EMPTOR—APPLICATION OF RULE.

The rule caveat emptor does not apply to mistakes in the quantity of land sold by the acre at a judicial sale, as it does to defects of title.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. §§ 100-103; Dec. Dig. § 52.*]

4. JUDICIAL SALES (§ 52*)—MISTAKE IN AMOUNT OF LAND SOLD—LACHES.

Nor as a general rule will the rule of laches be applied to a purchaser at such judicial sale, if no equities have intervened and the rights of no one will be injuriously affected by a proportionate abatement of the purchase money, so long at least as the purchaser still retains in his hands, unpaid, sufficient of the purchase money out of which such abatement can be made.

[Ed. Note.—For other cases, see Judicial Sales, Dec. Dig. § 52.*]

5. VENDOR AND PURCHASER (§ 176*)—QUANTITY OF LAND SOLD—ALLOWANCE TO COVER ERRORS IN SURVEYS.

The arbitrary rule of allowing five per cent to cover inaccuracies reasonably imputable to variations of instruments and small errors in surveys, referred to in *W. M. & M. Co. v. Peytona C. C. Co.*, 8 W. Va. 406, 437, and recognized in *Pratt v. Bowman*, 87 W. Va. 715, 721, 17 S. E. 210, is inapplicable to sale by the acre of valuable farming lands. In such cases only such allowance should be made as, considering the inequality of the ground and other obstacles hindering an accurate survey, may reasonably be imputable to such variations of instruments and small errors in surveys.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 333-340; Dec. Dig. § 176.*]

(Additional Syllabus by Editorial Staff.)

6. JUDICIAL SALES (§§ 1, 31*)—NATURE.

In judicial sales, the court is the vendor and contracting party on the one hand and the purchaser on the other, the commissioners being merely the creatures of the court, and a sale is never complete until reported to and confirmed by the court.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 1, 59; Dec. Dig. §§ 1, 31.*]

Appeal from Circuit Court, Jefferson County.

Action by James J. Singleton, administrator of H. W. Castleman, against Dewanna Castleman and others. Decree for defendants, and plaintiff appeals. Reversed and rendered.

Forrest W. Brown, for appellant. R. T. Barton, for appellees.

MILLER, J. This is an appeal from a decree of the circuit court, pronounced February 18, 1908, denying to a purchaser abatement of purchase money on account of alleged deficiency of acres sold and purchased.

By decree of August 8, 1887, and another supplementing it of October 14, 1892, special commissioners appointed were authorized to make sale, upon the terms prescribed, of "396 acres, 1 rood and 26 perches, Home Tract, and the 419 acres Mountain Tract of land in the bill and proceedings mentioned." By the latter decree the commissioners thereby appointed in place of those appointed by the former decree were directed to proceed to execute the same with such further powers as were given thereby, to-wit: To "make sale as a whole or in parcel of all the real estate in the bill and proceedings mentioned, free from the widow's dower on terms of one third cash, one third in one year, and one

third payable six months after the death of Dewanna Castleman, both of said deferred payments to bear interest from date, and on the latter the interest is to be paid annually to the said Dewanna Castleman during her life, and both of said deferred payments to be evidenced by bonds of the purchaser, and secured by the retention of the title to the property until paid, or at the option of the purchaser, a deed will be made to said property, and a deed of trust taken to secure the deferred payments."

The report of the commissioners to whom the cause was referred, on August 3, 1887, reported the Home Farm as "containing 396 acres, 1 rood and 26 perches, value \$55.00 per acre"; but the report of the commissioner appointed to assign dower to the widow, returned June 7, 1892, with accompanying plat and survey made by T. G. Baylor, surveyor, shows the Home Tract by metes and bounds to contain 409.85 acres.

The commissioners in their published notice of sale, set for November 15, 1892, described the Home Tract as composed of three several tracts as follows: (1) 250²/₁₀ acres of fine farming land, with some woodland, but no improvements, lying south of the river road; (2) 152²/₁₀ acres of No. 1 land, with the improvements lying north of the river road; (3) 6 acres of land with grist and saw mill and dwelling lying on both sides of turnpike, aggregating 408⁷/₁₀ acres. They also gave notice that in making sale the first two tracts would be offered together, then all three tracts together, the choice of bids to be accepted, and referred prospective purchasers to plats of the land in their possession at Charles Town.

Parthenia Singleton became the purchaser, and the commissioners on the day of sale entered into a contract in writing with her, made a part of and returned along with their report to the court of said sale.

In their report to the court the commissioners say that they offered the land in the bill and proceedings mentioned in accordance with said decrees, as shown by the attached advertisement, and that said "Parthenia Singleton's bid was the best obtained, which was \$40.25 per acre for the home farm and \$4.00 per acre for the mountain land, as shown by her agreement" which was in writing and therewith submitted. The contract says that the "Home tract of 409.85 acres was knocked down to said Parthenia Singleton at the bid of \$40²⁵/₁₀₀ dollars per acre (\$40-¹/₄) and the Mountain Tract of 419 acres was knocked down to said Singleton at four dollars (\$4.00) per acre, the amount for both tracts amounting to the sum of \$18,172.66."

The decree confirming said sale, December 2, 1892, rectifies the sale and purchase by said purchaser "of the land in the proceedings mentioned, to-wit: a tract of four hundred

and nine acres and eighty five hundredths, at the price of forty dollars and twenty five cents per acre, and the Mountain tract of four hundred and nineteen acres at four dollars per acre." This decree also directs the commissioner to "at once proceed to complete said sale by making and delivering to the purchaser a deed for said lands, and taking from her her bonds for the deferred payments secured by a deed of trust upon said lands."

A subsequent decree of December 14, 1892, overruling exceptions to a Master Commissioner's report, adjudged that Barton and Boyd should be paid \$1,000 with interest thereon, and Marshall McCormick be paid the like sum of \$1,000, with interest thereon, being in addition to sums previously decreed to be paid them, and then provides how the residue of the purchase money, including the last payment to be made on the death of the widow, should be distributed, first to creditors, and then to the heirs and distributees of the decedent.

The deed made, executed and delivered by said special commissioners to Mrs. Singleton, the purchaser, December 23, 1892, recorded in Jefferson county, April 29, 1893, recites the sale of said lands "according to the terms and conditions required by said decrees, at which sale the said Singleton became the purchaser for the sum of Eighteen thousand one hundred and seventy two 68-100 dollars;" the confirmation thereof by the subsequent decrees of December 2 and 14, 1892, and describes said Home Tract by metes and bounds as containing $409\frac{5}{100}$ acres, and the Mountain tract as containing 419 acres, and also recites that the said first tract is according to the survey of said T. G. Baylor, in 1892, and that the bounds of the mountain land were according to a survey of Jas. M. Brown in 1847.

The first order relating to the original petition of Mrs. Singleton praying for an abatement of purchase money entered in the cause March 2, 1894, is as follows: "This the 2nd day of March, 1894, came Parthenia Singleton and asked leave which was granted to file her petition in the above entitled cause." No order is found in the record formally filing said petition, but it is copied into the record by the clerk, following this order; on November 26, 1901, the following order was entered: "This cause coming on to be heard this 26th day of November 1901 upon papers formerly read and the petition of Parthenia Singleton filed at a former term, it is ordered that the Clerk of this Court issue process to all parties interested in said petition returnable to next term of Court, and an order of publications may issue against non-resident parties." So far as the record shows process never issued on this petition. Parthenia Singleton died March 25, 1902, a little less than three months after the entry of the last order. No further proceedings appear to have been taken upon said petition until October 19,

1906, when James J. Singleton, administrator, intervened by filing his petition, in which he refers to the former petition of his decedent, makes the same part of his petition, reaffirms each and every allegation of her petition as if in his petition again set out in full, prays that said proceedings be revived in his name, and makes parties thereto those appearing from said proceedings to be creditors, administrators and heirs at law of H. W. Castleman, deceased, and the personal representatives of those who had died pending said proceedings. He also makes the prayer of her petition the prayer of his petition and prays for process and general relief. On the day he presented this petition an order was entered filing the same, and reviving the cause in his name as administrator, and remanding the same to rules for process. Process was sued out thereon November 12, returnable to December Rules, 1906, was duly accepted or served upon all resident defendants, and there was order of publication published and posted against all non-resident defendants, and the case regularly matured and set for hearing.

After setting forth the interests of the defendants as disclosed by the record, and the several orders, decrees and proceedings aforesaid, the petition specifically charged that about January 1, 1893, information was first brought to her attention, which led the purchaser to believe that an error had been made in the acreage of the home farm as sold to her; that she employed S. Howell Brown, county surveyor, to make a survey thereof, who ascertained and reported to her that the same contained only $398\frac{3}{4}$ acres, and which she alleged was a true and accurate survey, showing a shortage or deficiency of 11.60 acres in the number of acres sold to and purchased by her. Petitioner filed with her petition as a part thereof the survey and plat of said land, so made by the county surveyor, with his affidavit thereto, that he believed his survey to be correct. Defendants did not plead to or answer the petition.

Thus is presented the question whether the purchaser upon the petitions filed is entitled as prayed for to credit upon the last purchase money bond of \$6057.55, with the sum of \$466.90, the price of 11.60 acres at the rate of \$40.25 per acre with interest.

Clearly the sale was a sale by the acre, not in gross. True as argued the original decrees of sale did not specifically authorize a sale by the acre, but the special commissioners assumed to make a sale of the land in that way. They so reported the sale to the court, and it was so confirmed as sale by the acre. This would entitle the purchaser to an abatement of purchase money if there is a deficiency. 24 Cyc. 54, § note 7. This authority, supported by court decisions cited in the note, says: "When by mistake resulting from the actions of the court or the misrepresentations of its agents less land is sold

than was bid for and supposed to have been sold, the purchaser will be allowed a proportionate abatement of the purchase price when the property was sold by the quantity, but not when sold in gross as a specific tract." When the court confirmed the action of its commissioners in making sale by the acre it thereby adopted and approved their act. In all judicial sales the court is the vendor and contracting party on the one hand, and the purchaser on the other. The commissioners are merely the creatures of the court, and the sale is never complete until it is reported to and confirmed by the court. *Core v. Strickler*, 24 W. Va. 689, 696, citing *Blair v. Core*, 20 W. Va. 265, and *Kable v. Mitchell*, 9 W. Va. 492. Confirmation cures irregularities and gives the sale the same validity and effect as if made upon the precise terms of the decree. *Rorer on Judicial Sales*, §§ 122, 127; *Robertson v. Smith*, 94 Va. 250, 26 S. E. 579, 64 Am. St. Rep. 723; *Langyher v. Patterson*, 77 Va. 470.

It is the universal rule, and many cases in this state and in Virginia so decide, that if a deficiency in quantity is found, where the sale has been by the acre the purchaser will be entitled to an abatement, and that a court of equity will, even after deed made, abate the deficiency from the unpaid purchase money. See cases collated in 13 Cyclopedic Dig. 525, 9a. And this rule is applicable alike to sales by the court and under court decrees, as to sales by individuals. *Watson v. Hoy*, 28 Grat. (Va.) 698, Va. Rep. Ann. 220, and note; *Crislip v. Cain*, 19 W. Va. 438; *Cooper v. Hargis* (Ky.) 45 S. W. 112; *Carmody v. Brooks*, 40 Md. 240; *Brown v. Wallace*, 4 Gill. & J. (Md.) 479, 508; *Marbury v. Stone-street*, 1 Md. 147; *Strodes v. Patton*, 23 Fed. Cas. 237, No. 13,538; *Myers v. Lindsay*, 73 Tenn. 331; *Trigg v. Jones' Adm'r*, 102 Ky. 44, 42 S. W. 848.

But it is said that although the purchaser, in 1894, obtained leave to do so she never in fact filed her petition; that the order of November 26, 1901, treating it as having been filed at a former term, and directing process thereon, was a misrecital, and that no process having been in fact issued thereon, defendants were not bound thereby, and that not only these proceedings, but the proceedings upon the amended petition filed by the administrator in 1906, the purchaser in her petition admitting knowledge of the alleged deficiency as early as January, 1893, came too late, and that relief was rightfully denied under the rule caveat emptor, and because of laches, and because the decrees confirming the sale and distributing the proceeds thereof to creditors and distributees being final were not reviewable, except upon bill of review filed in time and with proper averments.

The authorities do not support the position of counsel. A purchaser at a judicial sale is not precluded by such decree from obtaining relief from such mistake. Relief may be ob-

tained in such cases by defense to a rule against the purchaser to show cause why the land should not be resold to pay the balance of purchase money. *Jones v. Tatum*, 19 Grat. (Va.) 720; *Crislip v. Cain*, supra. Also by petition filed in the cause by the purchaser. *Watson v. Hoy*, supra; *Marbury v. Stone-street*, supra; *Brown v. Wallace*, supra. While the rule caveat emptor is applicable to all judicial sales so far as title is concerned, it has never been applied either in Virginia or in this state so far as we can find to cases of deficiencies in quantity of land where sold by the acre. *Watson v. Hoy*, supra, page 710 of 28 Grat. In the case just cited the court below appears to have been of a different opinion, but Judge Burks, referring thereto, says: "I cannot agree to this. It is true that in Virginia the general rule would seem to be that objections by purchasers to judicial sales for defect of title must be made before the sale is confirmed by the court, and that such objections afterwards made came too late." citing cases. "But," says he, "I apprehend the rule has no application to the equity of a purchaser arising from after discovered mistake, fraud, or other like matter. Courts of equity are always ready to relieve innocent injured parties in such cases, unless by reason of acquiescence, laches or other special circumstances, relief would be inequitable. There were no such circumstances precluding relief in this case." And, at page 711 of 28 Grat., he further says: "The mistake can be rectified and compensation made to appellant by allowing for the ascertained deficiency a proper abatement of the balance of purchase money still owing by him; and thus, while doing justice to him, no harm will be done to others. It would be singular indeed if this could not be done by a court of equity which by its agents is a party to a mistake it is called upon to relieve against."

Nor do we think the rule respecting laches applicable. No one can be injuriously affected by the abatement. At least no equities appear, and none are alleged by way of defense. The last payment of purchase money is still in the hands of the purchaser, or her representative. She is not suing to recover back money paid. Within a year after sale and confirmation thereof, and after discovering the mistake, she presented and obtained leave to file her petition setting up the mistake and praying for an abatement, thus making a record in the cause of her claim; and though she afterwards delayed suing out process and bringing the matter to an issue the last payment was not due and did not become due, except the interest, until the death of the widow. No one has been prejudiced or injured by the delay, so far as appears, and if a mistake was actually made there is nothing to preclude the court in granting the relief prayed for. In a general creditors suit the filing of a petition by a creditor in a pending suit stops the running of the statute

of limitations. *Jackson v. Hull*, 21 W. Va. 601. In *Ewing v. Ferguson*, 33 Gratt. (Va.) 548, it was decided, that the first action taken by a party for the assertion of his claim by legal process, whether that be by the issuing of process commencing suit, or the filing of a petition in a suit already commenced, is treated as the institution of a suit, and from that time the statute of limitations ceases to run against him. These cases it is true were creditors suits, and the petitions were creditors petitions filed therein, and are not strictly applicable to cases like the one we have here. However, when the purchaser asked and was given leave to file her petition in the cause, that was a step which she had the right to take, was the assertion of her right negating abandonment thereof, or acquiescence therein, and gave notice to the court, her vendor, of her claim to abatement of purchase money, and of which the court took notice by giving her leave to file it, and by afterwards treating her petition as filed, and directing process thereon. The petition thus became a part of the record. *Parks v. Petroleum Co.*, 25 W. Va. 108. But the petitioner was not bound to have filed any petition. She might have waited until sued on her bond, or was proceeded against by rule to resell the property. So long as she had the money in her hands time did not run against her right to defend the collection of the purchase money. *Smith v. Ward*, 66 S. E. 234.

It is further contended, in support of the decree below, that petitioner did not make out a case for relief, that the petition was not sworn to as it is claimed a bill of review or petition to rehear, based on after discovered evidence, is required to be. The petition is not a bill of review, nor a petition to rehear the decrees, and the rules applicable thereto are inapplicable. The petition charged a mistake, a shortage in the land sold. No plea or answer of the defendants denied it. It must be treated as taken for confessed.

Another question presented by the record, but not by counsel, has given us some trouble. The shortage of 11.60 acres is less than three per cent of the total acreage sold. Should the arbitrary rule of five per cent first announced by this court in *W. M. & M. Co. v. Peytona C. C. Co.*, 8 W. Va. 406, 437, and recognized in *Pratt v. Bowman*, 37 W. Va. 715, 721, 17 S. E. 210, be applied here? If it should, the shortage being less than five per cent, petitioner did not make out a case for relief. One answer to this question, suggested in council, was that the rule was inapplicable to cases of sales by the acre, but only where land is sold as containing a definite number of acres "more or less," or "estimated to contain" a certain number of acres, or with like descriptive words. But as this allowance of five per cent is intended to cover inaccuracies reasonably imputable to variation of instru-

ments and small errors in surveys, *Pratt v. Bowman*, supra, p. 721, we do not see why upon principle, it should not be applied in cases of sales by the acre, for in either case parties must necessarily be deemed to contract with reference to all such inaccuracies. *Hilliard on Vendors* (2nd Ed.) 329. This writer says: "But, in general, on a sale of land by the acre, relief is to be granted for all deficiencies, not reasonably imputable to the variation of instruments and small errors in surveys, whether the purchaser has expressly retained an election to have the tract surveyed or not." Citing therefor *Nelson v. Carrington*, 4 Munt. (Va.) 332, 6 Am. Dec. 519. But where and how did this arbitrary rule of five per cent originate? Judge Hoffman in *W. M. & M. Co. v. Peytona C. C. Co.*, supra, at page 437 of 8 W. Va., says: "It is settled, in Virginia and West Virginia, that when a person has sold and conveyed a tract of land, described as containing a definite quantity, at a specified price, it is presumed that the estimated quantity was believed to be substantially correct—within five per cent of exact accuracy; that it constituted a material element in the determination of the price; and that, unless it appear that considerable uncertainty or actual risk as to the quantity was contemplated or intended; if in fact the quantity is afterwards ascertained to be materially less, and the purchaser properly asserts his right in a reasonable time and under reasonable circumstances, a court of equity will grant him relief. Though the sale be not by the acre, but by the tract in gross, this nevertheless is now the rule of decision. But in many—perhaps most cases of sales by trustees and other fiduciaries or officers, it may be different. This, however, it is not necessary now to determine." No cases, however, are cited by Judge Hoffman declaring this arbitrary rule. He likely deduced it from the decided cases in which relief has generally been denied where the deficiency has been less than five per cent. But we do not think that in this day of improved methods and instruments, such an arbitrary rule should be applied, especially when involving valuable lands like those involved here. A shortage of more than eleven acres of very valuable farm lands, practically level, in a survey of 409 acres, or 398 as the case may be, is entirely too much of a discrepancy to reasonably impute to variations of instruments or small errors in surveys. Certainly lands of the character of these lands can and should be surveyed with more accuracy than that. The deficiency here we do not think can reasonably be imputed to such inaccuracies, and if not the relief ought to be granted. *Hilliard on Vendors*, supra; *Young v. Craig*, 2 Bibb (Ky.) 270; *Grundy v. Grundy*, 12 B. Mon. (Ky.) 269.

In the absence of any showing to the contrary we think the petitioner was entitled to

the relief prayed for. The decree below will therefore be reversed, and such decree as the circuit court should have entered will be entered here.

(57 W. Va. 403)

J. C. ORRICK & SON CO. v. DAWSON.
(Supreme Court of Appeals of West Virginia.
May 3, 1910.)

(Syllabus by the Court.)

1. SET-OFF AND COUNTERCLAIM (§ 32*)—RECOUPMENT—BREACH OF CONTRACT.

Defendant cannot recoup damages if they depend on the breach of a contract different from, and independent of, the one on which suit is brought.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 53; Dec. Dig. § 32.*]

2. SET-OFF AND COUNTERCLAIM (§ 32*)—RECOUPMENT—CONTRACTS.

In an action by plaintiff for the price of goods sold and delivered, defendant cannot recoup damages for plaintiff's refusal to accept other goods sold to plaintiff by defendant under a separate and independent contract.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 53; Dec. Dig. § 32.*]

3. EVIDENCE (§ 441*)—PAROL EVIDENCE—CONTRADICTING WRITTEN CONTRACT.

Parol testimony is inadmissible to prove an unwritten agreement made at the time of, or prior to, a written agreement, for the purpose of varying or contradicting the terms of the latter.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719-1845, 2030-2047; Dec. Dig. § 441.*]

Error to Circuit Court, Morgan County.

Action by the J. C. Orrick & Son Company against W. E. Dawson. Judgment for plaintiff, and defendant brings error. Modified and affirmed.

Forrest W. Brown, for plaintiff in error.
Faulkner, Walker & Woods, for defendant in error.

WILLIAMS, J. Writ of error to circuit court of Morgan county. Action of assumpsit by the J. C. Orrick & Son Company, a corporation, against W. E. Dawson. Judgment for plaintiff, and defendant brings error.

Plaintiff is a wholesale dealer in cans and canned fruits and vegetables in the city of Cumberland, Md., and defendant is engaged in growing and canning fruits and vegetables in Morgan county, W. Va. Plaintiff sold a lot of cans and solder to defendant, and also bought from him some canned goods. The action is to recover the balance on account which plaintiff claims is due it. There is no dispute concerning the items of account as shown by plaintiff's bill of particulars, except an item of \$28 for car demurrage, which plaintiff abandoned. The controversy is concerning the right of defendant to recoup damages for the alleged failure of plaintiff to accept canned goods

from defendant in payment of the cans and solder which it had sold him, with the understanding, as defendant claims, that they were to be thus paid for, but which agreement, it is contended, plaintiff refused to carry out. A trial was had at the July term, 1906, which resulted in a verdict in favor of plaintiff for \$1,043.74, upon a demurrer by plaintiff to defendant's evidence. The court took time to consider of its judgment upon said demurrer until the April term, 1907, when it decided in favor of plaintiff, and rendered judgment for the amount of the verdict.

Defendant took two several bills of exceptions to the action of the court in refusing to permit him to give oral testimony to prove the following facts, viz.: That he had purchased the cans and solder from plaintiff with the understanding that they were to be paid for in canned goods in the season of 1903, as per agreement or order dated March 24, 1903. That J. C. Orrick, president of plaintiff company, had inspected and approved the canned goods at defendant's cannery. That defendant had shipped to plaintiff one car load of the goods. That it had the other goods ready to ship, but did not do so because plaintiff refused to accept them, and that, on account of such refusal to comply with its contract, defendant was compelled to sell the goods to another purchaser at a less price than that for which he had previously sold the same goods to plaintiff, after the season was over, and that he thereby suffered damages as set out in detail in his notice of recoupment, which amount of loss claimed is \$1,877.85.

Was it error to exclude this testimony? Is it consistent with the facts stated in the notice of recoupment filed by defendant? Although the defense of recoupment, especially in an action of assumpsit, may be made under the general issue, and need not be specially pleaded (*Franklin v. Lilly Lumber Co.*, 66 W. Va. 164, 66 S. E. 225; *Sterling Organ Co. v. House*, 25 W. Va. 64), still the evidence offered in support of the damage sought to be recouped should be consistent with the facts alleged in the written notice of recoupment. Defendant could not file notice of one state of facts as his grounds for recoupment, and then introduce evidence of a different state of facts. Such notice, while not a technical plea, is still in the nature of a plea to the extent, at least, that the probata would have to correspond with the allegata in the notice. Such rule is necessary to prevent a surprise to plaintiff. *Powell v. Love*, 36 W. Va. 96, 14 S. E. 405; *Sterling Organ Co. v. House*, 25 W. Va. 64. Defendant filed, as part of his notice of recoupment, a copy of the written contract of sale by him to plaintiff of "4,000 cases of

full standard 3 lb. Tomatoes at 72¢ per dozen, labeled." The contract was dated March 24, 1903, and the goods were to be delivered f. o. b. in Morgan county, W. Va., during the packing season of 1903. This would be some months after the date of the contract. The terms of sale expressly stated are: "Net cash on receipt of goods." Plaintiff's suit is for the price of cans and solder sold to defendant, and defendant contends that the sale of the tomatoes and the purchase of the cans are parts of one and the same transaction, constituting one contract; in other words, that the sale of the tomatoes was the consideration for the purchase of the cans; and that he was damaged by the subsequent failure of plaintiff to take the tomatoes. On the other hand, plaintiff contends that they are two separate transactions, made at different times, and therefore independent of each other. If defendant's contention be right, he would be allowed to recoup whatever damages he actually suffered resulting from plaintiff's breach of the contract, not to exceed plaintiff's claim. *B. & O. R. R. Co. v. Jameson*, 13 W. Va. 833, 31 Am. Rep. 775; *Logie v. Black*, 24 W. Va. 1; *Dillon v. Eakle*, 43 W. Va. 502, 27 S. E. 214; *Bunting v. Cochran*, 99 Va. 558, 39 S. E. 229; *Clark's Cove Guano Co. v. Appling*, 33 W. Va. 470, 10 S. E. 809; *Natural Gas Co. v. Healy*, 33 W. Va. 102, 10 S. E. 56. But, if plaintiff's contention is correct, defendant could not recoup damages for plaintiff's failure to receive the tomatoes in the present action, which, as above stated, is a suit for the price of the cans. Before a defendant can be allowed to recoup damages against a plaintiff's demand, it must be shown that the damages sought to be recouped grow out of a breach of the same contract on which plaintiff sues, or out of some other agreement so intimately related to it as to be a part of it. *Logie v. Black*, supra. Consequently, in order to determine whether or not defendant's testimony was properly excluded, we must consider (1) whether the sale of the tomatoes and the purchase of the cans and solder are one and the same, or whether they are independent contracts; and (2) whether or not, if they are one, or parts of one, transaction, or agreement, the oral testimony offered and excluded contradicts the terms of the written contract for the sale of the tomatoes. The written contract shows that the sale of the tomatoes was made on March 24, 1903, and that they were to be paid for in "net cash on receipt of goods." There is no mention made of the cans in this contract. It then becomes material to

know when the cans were purchased. Was it at the same time of the sale of the tomatoes, or a later date? If they were purchased later, and with the understanding or agreement that they were to be paid for with the tomatoes, we have no doubt that the two transactions might then be regarded as one for the purpose of recoupment, because such subsequent oral contract would then operate as a modification of the previous one, changing the terms of payment for the tomatoes from "net cash" to a payment in cans, or at least to a part payment in cans. Such a subsequent oral modification of a written agreement is allowable in law, and would make the two agreements related parts of one contract for the purpose of recouping damages for a breach of either, in an action upon the other. But, if the purchase of the cans was made prior to or at the time of the sale of the tomatoes, it should have been incorporated in the written contract, otherwise oral proof of it cannot be received to contradict the writing. 1 *Greenleaf on Evidence*, § 275. The rejected testimony of defendant would prove, if admissible, that the two contracts were either made at the same time, or, if not at the same time, that the cans were purchased prior to the sale of the tomatoes. He says "that he purchased cans and solder in the bill of particulars mentioned with the understanding that they were to be paid for with canned goods in the season of 1903, and be used in the preparation of said goods, and with the understanding that the plaintiff should purchase from said defendant 4,000 cases of canned tomatoes as per an agreement or order, dated March 24, 1903." The language, "that the plaintiff should purchase from said defendant," etc., implies that it had not then purchased. The verb "should purchase" denotes future time, and negatives the idea that a purchase of the tomatoes had then been made. If the written contract had been made prior to the time, with reference to which defendant was testifying, he would not have spoken of a future purchase of the tomatoes, because that contract shows a sale as of its date, providing for a future delivery.

The circuit court committed no error in excluding defendant's testimony, and its judgment will be modified to the extent of providing that it shall not prejudice the right of defendant to bring an independent action against plaintiff for its alleged breach of the contract for the purchase of the 4,000 cases of canned tomatoes, and, as so modified, it will be affirmed, with costs to appellee.

(67 W. Va. 456)

HOGG v. MCGUFFIN et al.(Supreme Court of Appeals of West Virginia.
May 3, 1910.)*(Syllabus by the Court.)***1. SPECIFIC PERFORMANCE (§ 5*)—EXCHANGE OF STOCK—INADEQUATE LEGAL REMEDY.**

Equity will decree specific performance of a contract for exchange of shares of stock in corporations when legal remedy is not adequate because the stock sought is of special and peculiar value, or is not readily purchasable in the market, or has no certain ascertainable value, or a money judgment against the party would be worthless because of his insolvency, or other circumstance in the case calling for specific performance as the only adequate relief.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 5-8; Dec. Dig. § 5.*]

2. SPECIFIC PERFORMANCE (§ 127*)—RELIEF AWARDED—RIGHT TO LIEN.

If one is entitled to have specific performance of a contract for exchange of stock in corporations, and one of the parties transfer to an innocent purchaser the stock which he is to transfer in exchange, equity will give the other party to the contract a charge or lien upon the purchase money yet in the hands of such purchaser.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 408-411; Dec. Dig. § 127.*]

Appeal from Circuit Court, Mercer County.

Bill by Gory Hogg against R. M. McGuffin and others. Decree for defendants, and plaintiff appeals. Reversed and remanded.

Hubard & Lee and A. W. Reynolds, for appellant. H. A. Ritz, Sanders & Crockett, Dillon & Nuckolls, and S. L. Walker, for appellees.

BRANNON, J. A written contract was made between R. M. McGuffin and Gory Hogg by which McGuffin agreed to sell to Hogg 50 shares of the stock of the Pike Collieries Company at the par value of \$100 each; and the contract provided that McGuffin would, at the expiration of two years from the date of contract, if Hogg should so request, sell and transfer to Hogg 50 shares of the stock of the Harvey Coal & Coke Company, in exchange for the stock of the Pike Collieries Company, which latter stock Hogg agreed to transfer to McGuffin in case of such exchange. Hogg paid McGuffin for the Pike Collieries stock \$5,000 by check to him. Certificate of stock was issued to Hogg by the Pike Collieries Company. At the date of the contract McGuffin owned a large amount of stock in the Pike Collieries Company, and he owned 75 shares of stock in the Harvey Coal & Coke Company. The written contract declared on its face that the 50 shares of stock in the Harvey Coal & Coke Company sold by McGuffin to Hogg stood on the books of the Harvey Company in the name of McGuffin. Some time after this written contract a written contract was made between J. A. McGuffin, R. M. McGuffin, A. P. Gibson, S. C. Wilson, and

Gory Hogg, parties of the first part, and S. Dixon, of the second part, by which J. A. McGuffin, Gibson, and Wilson sold Dixon certain shares in the Dunn Loop Coal Company and in the Prudence Coal Company and the Harvey Coal & Coke Company; and R. M. McGuffin sold Dixon 75 shares in the Harvey Coal & Coke Company and 30 shares in the Dunn Loop Coal Company and 200 shares in the Prudence Coal Company; and Gory Hogg sold Dixon 20 shares in the Prudence Coal Company. For the shares of stock sold to Dixon by R. M. McGuffin Dixon paid some cash, and executed to McGuffin four notes payable in the future, amounting to the sum of \$89,950. The contract last mentioned provided that the stock sold to Dixon by the parties should be deposited with the notes as collateral security for the payment of the notes, and in pursuance of that clause of the contract the said notes made by Dixon and the certificates of stock sold to him by the selling parties were deposited in the hands of the Citizens' National Bank of Charleston, with the understanding or upon the trust that the bank should receive payment from Dixon of the notes, and when paid deliver to him the certificates of stock. Afterwards, within two years from the date of the sale by McGuffin to Hogg of the Pike stock, Hogg notified McGuffin of his desire to make the exchange of stock provided for by the contract, and expressed his readiness to transfer to McGuffin the Pike stock, and demanded of McGuffin that he transfer to Hogg the 50 shares of stock in the Harvey Coal & Coke Company. McGuffin responded to this request and demand that he had sold the Harvey stock to Dixon, and that he could not make the exchange on that account, but offered to repay Hogg the \$5,000 which Hogg had paid him for the Pike stock, with interest. Hogg declined such adjustment, and he brought this suit against McGuffin making him and the Citizens' National Bank of Charleston and W. M. Williamson, its cashier, defendants. The relief asked by the bill is that an injunction be awarded restraining McGuffin from collecting any money on the notes of Dixon, held by Williamson and the bank, calling them trustees, or from making any transfer of the notes, and that Williamson and the bank be enjoined from disbursing or disposing of any money that might be paid on the notes, and that the notes in the hands of Williamson and the bank and the funds arising from them be attached and garnished in the hands of such trustees, and applied as the court might decree, and that the funds arising therefrom be held intact to satisfy any decree in the case, and that the contract between Hogg and McGuffin be specifically enforced, in so far as possible, and that if the court should be unable to compel performance of the contract between Hogg and McGuffin by compelling a transfer of the 50 shares of

stock of the Harvey Company, McGuffin be required to pay Hogg the full market value of the stock, and upon his failure to do so that the amount be paid out of the funds arising from the said notes in the hands of said trustees, and that the status of the parties be preserved and complete determination of the questions involved be made. I will further state that the plaintiff sued out a writ of attachment against the estate of McGuffin basing it upon the allegation that McGuffin had fraudulently incurred the liability for which the suit was brought. Williamson and the bank were designated as persons indebted to or having in their possession effects of R. M. McGuffin, and the attachment was served on them as garnishees. The result of the suit was that the attachment was quashed and the bill dismissed without relief. Gory Hogg appeals.

We think that the attachment was properly quashed, as the facts show no fraudulent incurrence of the liability. Surely there was no fraud in the contraction of the liability in the sale by McGuffin to Hogg of the Pike stock, and the affidavit does not say so; but was there any fraudulent incurrence of liability in the sale by McGuffin of his stock in the Harvey Company to Dixon? If McGuffin had secretly sold such stock, Hogg not knowing of it, there would be plausibility in charging that McGuffin thereby fraudulently incurred liability to Hogg because of such secret sale; but the fact is that Hogg well knew of such sale, and we can by no means say that the sale was secret or fraudulent. But eliminate the attachment. The question then comes, Can Hogg support this suit in equity without the aid of that attachment? That attachment if good would fasten or clinch the fund in the bank's hands to answer the ultimate decree; but has Hogg other ground for fastening his claim upon that fund? We have concluded that he has. We cannot assert that legal title to the stock was in Hogg, but had he no right therein, as viewed in equity? We deem it, firstly, pertinent to inquire whether, if McGuffin had not sold the Harvey stock to Dixon, Hogg could enforce the transfer by McGuffin to him of the said stock. As a general rule we admit that specific enforcement of a contract for the sale of corporate stock will not be made in a court of equity; but that is a general rule and is subject to exceptions. In the first place, this particular stock is identified. I note just here the fact that the contract by which McGuffin sold Hogg the Pike stock, and promised exchange of it for Harvey stock, recited on its face that the stock so sold was stock "which now stands on the books of said Harvey Coal & Coke Company in the name of the said party of the first part." That clause makes the contract single out the stock from all other stock. It identifies it. We may say it separates it from all other stock, and enables any one to put his finger upon it, because it stood in the name of McGuffin on the

stock book of the corporation, separated from the stock of every other stockholder, and the certificate had its distinctive number. Hogg had an option to acquire it, and McGuffin must keep the stock to answer that option. In the next place, it is said that equity will not enforce such transfer where the remedy at law is adequate. Suppose a lawsuit by Hogg against McGuffin. In it, in order to fix damages, it would have to be made to appear, not only what was the value of the Harvey stock, but also the value of the Pike stock, and the difference between them would be the damages. But without detailing the evidence I can assert that it would be impossible to fix the value of the Pike stock. It was not on the stock market list. As McGuffin himself admits it had no fixed value. Not a syllable of evidence gives any value to it. The company became indebted, and was thrown into the hands of a receiver, and large debt judgments against it and McGuffin as its surety were rendered, and if that stock had any value whatever it would be far below par, practically worthless, and any value of it unascertainable. Whilst McGuffin says it would be worth something, what that something would be he does not pretend to say. If worth anything at all, its worth is problematical—unascertainable. True, if entirely worthless, it would not be deducted from the value of the Harvey stock; but I say that its value could not be ascertained, which brings it under the rule spoken by many authorities. This would be an impediment to adequate remedy at law.

Again, the Harvey stock was not upon the stock list, and in that respect had no stock list value. It may be said that none was for sale, none could be purchased. The Harvey stock was very valuable. The company was very little indebted, the corporation a going concern and earning a great deal of money, and paying fine and increasing dividends. Its stock had a peculiar value, worth three or four for one. "If it appears that corporate stock contracted for is desired for special and legitimate personal purpose, or that its market value cannot be fixed with certainty because the stock is not upon the market, it is manifest that a judgment in damages would be inadequate and impracticable, and specific performance may be granted." 22 Am. & Eng. Ency. L. (1st Ed.) 993. Fairly, Hogg could say—had the right to say—that he wanted this Harvey stock because of its present and promising prospective value. That is one consideration for specific performance.

Another consideration calling for specific performance is that this Harvey stock was a *close corporation*. Only a few stockholders held it. Not a case of great corporations like the great railroads or the United States Steel Corporation, with millions of dollars of stock on the stock list and purchasable in the open market. This Harvey stock

could not be purchased in the open market, and the evidence shows it was not purchasable. What does the law say under this consideration? Cook on Corporations, § 338, says: "Where the value of the stock is not easily ascertained, or the stock is not to be obtained readily elsewhere, specific performance will lie." We find in 28 Am. & Eng. Ency. L. 122, this statement: "Specific performance of a contract for the purchase or sale of stock will not be decreed where the stock is purchasable on the market, or has money value which may be readily computed." "Specific performance will not be decreed if the shares are readily obtainable in the market." 6 Pomeroy, Eq. Rem. § 752. But such is not the case with the Harvey stock. Taylor on Corporations, § 790, says: "Further, a contract for the sale of shares will be specifically enforced in equity, if it is not unconscionable or against public policy, when from the scarcity of the shares or other reasons the purchaser cannot go into the market and purchase similar ones. But if shares similar to those which are the subject of the sale are readily purchasable in the market, equity will not, as a general rule, specifically enforce the contract; but will leave the parties to their remedies at law." In 1 Cook on Corporations, § 338, we find it stated that if the stock "is easily obtained in the market, and there are no particular reasons why the vendee should have the particular stock contracted for, he is left to his action for damages. But where the value of the stock is not easily ascertainable, or the stock is not to be obtained readily elsewhere, or there is some particular and reasonable cause for the vendee's requiring the stock contracted to be delivered, a court of equity will decree a specific performance and compel the vendor to deliver the stock." This law is well stated in *Safford v. Barber* (N. J. Ch.) 70 Atl. 371. I refer for the same purpose to *Northern C. R. Co. v. Walworth*, 193 Pa. 207, 44 Atl. 253, 74 Am. St. Rep. 683. In *Manton v. Ray*, 18 R. I. 672, 28 Atl. 998, 49 Am. St. Rep. 811, it is held that if the value of the stock is uncertain and not easily ascertainable specific performance will be decreed; but the "true standing of a corporation is seldom known outside of its own officers. A stranger would, in most cases, find it difficult, if not impossible, to prove the real value of its stock, unless it is one that is rated for sale in the market. He has no access to its books; he cannot know its assets and liabilities; and although he is willing to take the stock for a price he might be quite unable to prove that it was worth that or any other price. No one can say that the remedy of damages in such a case is an adequate remedy." I cite the case of *Watkins v. Rober'son*, 105 Va. 269, 54 S. E. 33, 5 L. R. A. (N. S.) 1194, 115 Am. St. Rep. 880, holding as follows: "An option under seal for the sale of shares in a joint-stock

company is a binding offer from which the promisor cannot recede during the time stipulated for in the option, and, if accepted during that time, constitutes a contract the specific performance of which a court of equity will compel." Another reason found for specific performance as stated in 22 Am. & Eng. Ency. L. (1st Ed.) 992, is the insolvency of the defendant, citing *Avery v. Ryan*, 74 Wis. 591, 43 N. W. 317, and *Clark v. Flint*, a Massachusetts case found in 22 Pick. 231, 33 Am. Dec. 733, holding that, "Remedy by damages against one actually insolvent is not adequate legal remedy such as will prevent a resort to equity." The evidence practically shows McGuffin to be insolvent. He is under thousands of dollars of liability by judgments and executions against him as surety for the Pike Collieries Company. True, he gives evidence that he had a very considerable amount of property; but the whole case shows that his solvency is very problematical and doubtful. Now, is Hogg to be compelled to take a mere personal judgment which would be subordinate to these prior liens? Equity ought not to say so. The case is different from mere ordinary personal property, such as horses or wheat, or other tangible property, because such property can be readily bought, and one horse is as good as another in this sense. How different with stock. Hogg had right to the very stock in this valuable Harvey coal mine—a particularly valuable one. But on this question of specific performance of contracts for the sale of stock I need hardly have gone further than to cite our own case of *Bumgardner v. Leavitt*, 35 W. Va. 194, 13 S. E. 67, 12 L. R. A. 776, where it was held that there might be specific performance in the case of stock in a steamboat company, a case similar to this. That case asserts that there may be specific performance under special circumstances.

If it be necessary to show, as I think it is, that if McGuffin yet owned the stock Hogg could compel him to transfer it, I think I have shown, by ample authority, that he could have done so. I assert the proposition that by the contract McGuffin agreed to keep that stock ready, to answer Hogg's call for it. Hogg was entitled to demand the very stock itself. He had an option to buy it by exchange. When he elected to make that exchange, and thus purchase the stock, the option was converted into an actual contract, and made Hogg's right a property right. But McGuffin sold the stock. What then? Hogg became entitled to the money proceeds. It is a trust fund. Hogg has a lien upon it, because we may regard it as money emanating from his property. Hogg may follow that fund. If not, what is his remedy? A mere decree for money against McGuffin, and he insolvent. But aside from that consideration Hogg has right to follow that fund. He has no adequate remedy at law;

but he is not driven to any remedy at law, doubtful or not, because he has a right to go for that fund independent of considerations of solvency or remedy at law. In *Bartlett v. McAllister*, 33 W. Va., on page 759, 11 S. E., on page 228, where a party had an option for land and the optioner sold it, the court declared the right of the optionee to follow the purchase money, and said: "This is entirely consistent with equity practice. On the execution of a contract of sale of real estate, the vendor becomes trustee for vendee, and, if he sells subsequently to a third party, the proceeds will be affected with the trust, and the vendee is entitled to require that they shall be paid over to him in lieu of the estate which had been placed beyond his reach." This court said in *Ballard v. Ballard*, 25 W. Va. 477, "If, therefore, the vendor should again sell the estate of which he is such trustee he will be considered as selling it for the benefit of the vendee, and the second vendee if he has notice, or the conveyance to him is without valuable consideration, will hold the estate subject to the first contract and be compelled to convey it to the first purchaser." "In contracts of sale upon the purchaser's option the question whether or not a conversion is effected at all cannot, of course, be determined until the purchaser exercises his option; but the moment when he does exercise it, the conversion as between the parties claiming title under the vendor relates back to the time of the execution of the contract." 3 *Pomeroy*, Eq. § 1163. The same principle is stated in *Minor on Real Property*, § 474. Section 1047, *Pomeroy*, Eq., says as follows: "By the well-settled doctrines of equity a constructive trust arises whenever one party has obtained money which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it; as, for example, when money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or violation of fiduciary duty and the like. It is true the beneficial owner can often recover the money due to him by a legal action upon implied assumpsit, but in many instances a resort to the equitable jurisdiction is proper and even necessary." And the same book (section 1051) says: "As a necessary consequence of this doctrine, whenever property subject to a trust is wrongfully sold and transferred to a bona fide purchaser so that it is freed from the trust, the trust immediately attaches to the price or proceeds in the hands of the vendor, whether such price be a debt yet unpaid due from the purchaser or a different kind of property taken in exchange, or even a sum of money paid the vendor, as long as the money can be identified and reached in his hands or under his control." Thus I repeat that that fund is a

trust fund in the bank which Hogg may subject to his claim.

It is suggested that Hogg joined in the paper by which McGuffin and others sold stocks to Dixon, and thus is estopped to make the claim sought to be asserted in this suit. Of course, that would estop Hogg as to Dixon from specific execution by transfer to Hogg of the stock, on the principle of estoppel that where a party stands by when he sees another buying property, and does not set up his claim and give warning to the purchaser, he is estopped from claiming to that purchaser's prejudice. For that reason Hogg cannot claim the Harvey stock, as also for the reason that Dixon is an innocent purchaser. But that has nothing to do with this case. Hogg's consent to the sale was no release of the obligation of McGuffin to him; no waiver of his right under another and different contract. He did not sign the scratch of a pen or utter a word by which he released the contract between him and McGuffin or the obligation of McGuffin to him. We cannot take away from Hogg his vested property right without some action of his plainly so operating. It does not appear that Hogg knew at the time of the sale to Dixon that McGuffin was selling all his Harvey stock; he might have thought he had yet enough left to answer his demand.

But it occurred to me whether he should not have inquired whether McGuffin yet owned enough stock to answer his right to 50 shares. On further reflection I conclude that that is immaterial; for even if he knew that McGuffin was disposing of all his stock, still that would not bar his claim, because he had the right to look to that fund for payment. He did not release his rights.

It is argued on the point put by *Jones v. Tunis*, 99 Va. 220; 37 S. E. 841, and *Pomeroy's Eq. vol. 6*, § 837, that Hogg knew, when he sued, that McGuffin had sold the stock to Dixon, and could not have specific performance. We admit this as a general rule, but we do not decree specific performance, and ask, Does that principle repel Hogg from recourse to the fund coming from his property?

It is argued that the contract was not really a sale by McGuffin, but a subscription to stock, a contract with the Pike Collieries Company, and that the contract was only intended to indemnify Hogg to the extent of his outlay, a guaranty only for the Pike stock. That would deny the very word of the contract, and the fact that McGuffin personally got the money for it. It is argued that there was no consideration for this promise to exchange, and a want of mutuality forbidding the enforcement of the exchange. Obviously this cannot be so, because Hogg paid McGuffin the large sum of \$5,000, constituting a consideration not only for the Pike stock, but also for that cove-

nant of the same contract providing that McGuffin would exchange Harvey stock for Pike stock. And we ask how McGuffin can complain of our action when it only does that which he promised to do for large consideration.

These views conduct us to the reversal of the decree of the circuit court of Mercer county, and, having done this, this court rendering such decree as the circuit court ought to have rendered, it is by this court adjudged, ordered, and decreed that R. M. McGuffin do pay to Gory Hogg the sum of \$16,620 with interest from the 25th day of November, 1908, and the costs of said Hogg about his suit in the circuit court of Mercer county expended, and that said Hogg has right to have paid to him said sum and interest and costs, as also his costs in this court expended, out of the four promissory notes made by S. Dixon to R. M. McGuffin, three of them for \$25,125 each, and one of them for \$14,575, all dated the 30th day of April, 1906, and in the record described, and that the moneys called for by those notes constitute a trust fund for payment of said sum and costs, and that Gory Hogg has a lien and charge upon said notes and the money called for by them for satisfaction of the same, and that the Citizens' National Bank of Charleston may collect of said notes a sufficient sum to satisfy said sum and interest and costs, and out of such collection make payment of said sum, interest and costs to Gory Hogg, and such payment as it may make out of the collection of said notes shall stand valid to the credit of said bank and to the protection of said bank against any demand by R. M. McGuffin; and, further, that the said bank, if it collect said notes, shall and must pay out of its collection to Gory Hogg the said sum, interest and costs. It is further adjudged, ordered, and decreed that R. M. McGuffin be enjoined and prohibited from collecting or transferring said notes, or in any wise disposing of them, or the money called for by them, unless and until he discharge to Hogg said sum, interest, and costs, or until the same shall be discharged from collections made by said bank, and that said notes and the money called for by them remain intact in the hands of said bank as a trust fund to answer this decree. It is further adjudged, ordered, and decreed that R. M. McGuffin has right, on such payment, to the 50 shares of stock in the capital stock of the Pike Collieries Company owned by Gory Hogg, represented by the stock certificate issued by that company to Hogg on file in this case, and that, when Hogg shall have been paid said money and costs, R. M. McGuffin may withdraw from the papers of this cause remaining in the circuit court of Mercer county, and hold as his own, the said stock certificate. And this cause is re-

manded to the said circuit court for any further order found necessary to enforce and execute this decree.

(67 W. Va. 392)

PRESTON v. BENNETT.

(Supreme Court of Appeals of West Virginia.
May 3, 1910.)

(Syllabus by the Court.)

1. TAXATION (§ 786*)—TWO SALES FOR TAXES—RIGHT OF FIRST PURCHASER.

If land be sold twice at the same tax sale for two several years delinquency of taxes assessed in the names of two successive owners, and an individual buys under the sale made to satisfy the first delinquency, and, after a year, obtains a deed and records it, he will have title against the state who buys under the sale made to satisfy the second delinquency.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1554; Dec. Dig. § 786.*]

2. TAXATION (§ 641*)—SALE—NECESSARY PARTY—UNKNOWN CLAIMANT.

A claimant of land that is proceeded against as the state's land under chapter 105 of the Code, who is known or whose claim to the land can be ascertained by the use of reasonable diligence, should be made a party to the bill *eo nomine*, and, if a resident of the state, should be served with process.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 641.*]

3. TAXATION (§ 641*)—SALE—NECESSARY PARTY *EO NOMINE*.

It is error to proceed against such claimant under the general designation in the bill of "unknown claimants," and any decree that may be pronounced against him, without his appearance in the cause, will be void as to him for want of jurisdiction, and may be collaterally assailed.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 641.*]

Brannon, J., dissenting.

Error to Circuit Court, Raleigh County.

Action by A. D. Preston against L. M. Bennett. Judgment for defendant, and plaintiff brings error. Affirmed.

Charles E. Hogg and M. O. Brackman, for plaintiff in error. J. W. McCreery and W. H. McGinnis, for defendant in error.

WILLIAMS, J. This cause is here upon writ of error granted plaintiff to a judgment in ejectment rendered by the circuit court of Raleigh county on December 20, 1907, in favor of defendant. The case was tried by the court, in lieu of a jury, upon the title papers of the respective parties and upon an agreed state of facts. Plaintiff claims title by deed from J. A. Ewart, commissioner of school lands, dated February 4, 1901, and defendant claims the same land under a tax deed made to his immediate grantors bearing date the 7th of January, 1897, and recorded January 14, 1897. The question is purely one of title. The land was returned delinquent for non-payment of taxes for each one of two succeeding years in the respective names of the

successive owners, and was twice sold at one and the same delinquent tax sale. In one instance it was bought by R. V. and J. P. Buckland and G. M. Smith, who are defendants' immediate grantors, and in the other by the state, who afterwards sold it as school lands to plaintiff. The land was delinquent for nonpayment of taxes assessed thereon for the year 1893 in the name of Jessie M. Myers and Nettie M. Ferguson, the then owners, as a tract of 373 acres and 119 poles. On October 14, 1893, Jessie M. Myers conveyed her interest to Nettie M. Ferguson, and by deed dated February 5, 1894, Nettie M. Ferguson and husband conveyed the land to Margaret Ferguson, to whom it was charged on the land books with taxes for the year 1894. It was sold for the delinquent taxes of each of those years in the names of the respective owners. At the tax sale November 4, 1895, defendants' grantors became the purchasers under the sale made on account of the delinquent taxes of 1893, and the state became the purchaser under the sale made on account of the delinquent taxes of 1894. In 1898 the state instituted a suit against the land in the name of Margaret Ferguson, and in January, 1901, it was sold under a decree in that suit, and was bought by A. D. Preston to whom the school commissioner made a deed, as above stated. Neither the defendant nor his grantors were made parties to that suit.

The majority of the court are of opinion to affirm the judgment of the lower court for the following reasons:

First. Because by the previous decisions of this court in the cases of *State v. West Branch Lumber Co.*, 64 W. Va. 673, 63 S. E. 372, and *State v. Snyder*, 64 W. Va. 659, 63 S. E. 385, the state is estopped from claiming title to the land as against Bennett who claims under the tax purchasers, Buckland, and others, who had obtained their deed and placed the same on record, notwithstanding there may have been irregularity committed either by the auditor in failing to certify both years taxes together as one lien against the land to be satisfied by one sale, or an irregularity committed by the sheriff in failing to combine the two years taxes and make one sale of the land to satisfy both. Whether the two sales amounted to an irregularity which would render either one, or both, of said sales voidable, and whether or not it was the duty of the auditor to certify both years' taxes to be satisfied by one sale, they hold it is unnecessary to decide, inasmuch as the effect of the two decisions, above referred to, construing section 29 of chapter 31 of the Code, makes the tax deed to the Bucklands and Smith conclusive evidence against the right of the state to set up any title claimed to have been vested in the state prior to the time of the recordation of their tax deed.

Second. The sale of the land by the school commissioner to the plaintiff Preston is not binding on Bennett who claims by deed from the tax purchasers, for the reason that he

was not made a party to the bill in that proceeding and was not served with process, and did not come into that suit by petition at any time during its pendency. Section 6, c. 105, Code, reads in part as follows: "All such tracts or parcels of land mentioned in any such report, not exceeding in quantity one thousand acres, may be included in one suit, but a separate suit may be brought and prosecuted for the sale of each tract of land exceeding in quantity one thousand acres; and the former owner of any such tract of land at the time of the forfeiture thereof, or the person in whose name the same is forfeited, shall, if known, be made a defendant in such suit, and all persons claiming title to or interest in any such lands shall, as far as known, be made defendants therein." Bennett, the defendant in the case, at the time of the institution of the suit by the school commissioner, was a claimant of the land under deed from the tax purchaser dated May 24, 1898. His title to the land was a matter of record. Unless it be right to say that a claimant of land may be properly proceeded against as an "unknown claimant," regardless of the nature of his claim or of the place of his residence, Bennett certainly occupied the position of a known claimant. A mere casual examination of the record by the school commissioner would have disclosed the fact that Bennett was a claimant of the land under the tax deed made to his grantors pursuant to a sale of the land had at the same time of the sale under which the state claimed title, and, if in fact the school commissioner did not know that he was a claimant, he could have ascertained the fact by reasonable diligence. Bennett, therefore, occupied the position in contemplation of the statute of a known claimant, and was therefore entitled to be made a party to the bill and to be served with process. It would be too harsh a construction of the statute to interpret it to mean that a claimant of land, whose claim thereto is a matter of record and can be easily ascertained, may be proceeded against by order of publication as an "unknown claimant," and be bound by a decree which would take from him his land without more notice than such a publication. It is a fundamental principle of the common law that every person shall have an opportunity to be heard in court before he shall be deprived of his property or his liberty, and this right is guaranteed to him by both state and federal Constitutions. To divest one of his property it must be by "due process of law," which means that he must be given a reasonable notice, and a chance to be heard about his defense. By the use of the words "unknown claimants" the statute does not mean simply such persons, claimants, as may not happen to be known personally to the school commissioner at the time of filing his bill, but it means such as are not known to him, and cannot be ascertained by his reasonable diligence. To illustrate the harsh-

ness of the rule, if we should construe the statute otherwise, let us instance a case which might easily happen: Suppose a tract of 1,000 acres of land has been forfeited to the state in the name of A. for failure to enter the same on the land books, and the state proceeds against it in the name of A. and all other "unknown claimants" of the land. B. is the owner of a tract of 100 acres of land lying within the bounds of the larger tract, to which he has perfect title adverse to A.'s title, and has no knowledge of the fact that his tract lies within the larger tract. The description of the larger tract and the proceedings against it in the name of A. and all "unknown claimants" would scarcely give any information to B. that his land was included within the bounds of the larger tract, and yet, if the statute should have the effect to bind B. as an "unknown claimant" of a portion of the land, it would divest him of his title without any notice whatever, notwithstanding he may be in actual possession of the land, and may have paid all the taxes chargeable on it. The hardship of such a rule would be shocking to the conscience, yet such would be the unavoidable effect of it if the statute should be so construed as to permit such a claimant to be proceeded against, and bound by the proceeding under the general and indefinite description of "unknown claimants" simply because his claim to the land happened to be a fact unknown to the school commissioner. The statute should not be construed as intending to dispense with the common-law right of an individual to be personally served with process, or notice, when he occupies such position or relation to the property involved as would entitle him under the common law to be so served, and, being in derogation of a common-law property right, the statute should be construed most strongly in favor of the individual claiming the right. *Mosser v. Moore*, 56 W. Va. 478, 49 S. E. 537; *Millhiser Mfg. Co. v. Gallego Mills Co.*, 101 Va. 579, 44 S. E. 760; *Fork Ridge Baptist Cemetery Ass'n v. Redd*, 33 W. Va. 262, 10 S. E. 405. The evident purpose of chapter 105 is to bring in, and make parties to the suit, all claimants to the land, or any part of it, which the state is seeking to sell, regardless of their source of title or the nature of their claims, and to require the conflicting claimants to litigate their respective claims with the state and incidentally among themselves, so that a final decree in such proceeding may be conclusive upon all parties, known and unknown, who claim title by any means whatsoever to all, or to any portion, of the land proceeded against, and to create, as it were, by such a proceeding, a title in the purchaser at the sale a new title to the land as clear and as free from incumbrances as it was possible for the state to make by grant under the old patent laws of the state of Virginia to a tract of land then granted for the first time. In other words, there is a twofold purpose in the stat-

ute, viz.: (1) To sell the state's land and to confer an indefeasible title; and (2) to give the former rightful owner who has been in default in not paying his taxes, if it is ascertained there is such an one, an opportunity to redeem his land and to start him off afresh with the title which he had previous to the forfeiture, released of all claims for taxes previously charged or chargeable thereon in favor of the state. Such then being the purpose of chapter 105 of the Code, a claimant of the land who is known, or whose claim to the land is such that it can be ascertained with reasonable diligence, is entitled to be made a party *eo nomine* to the bill, and if a resident of the state is also entitled to be served with process, and unless so made a party and served with process, or unless he come into the suit and is given an opportunity to litigate his claim, he is not bound by the decree of the court.

I concur fully in the majority opinion, but I think the opportunity is clearly presented to the court in the present case to interpret section 4 of chapter 31 of the Code which sets forth the duties of the auditor in relation to certifying delinquent lands to the sheriff for sale, and thus to avoid any future trouble which might arise in cases like the present one. In my opinion the interpretation of this statute furnishes of itself a sufficient reason for upholding the tax deed to the Bucklands and Smith as against the state's claim of title to the land, and a better opportunity to construe it can hardly be again presented than is now presented by the record in this case. Its construction would also tend to settle the law in regard to the duties of the auditor in relation to certifying delinquent lands to the sheriff, and would avoid, in the future, a repetition of the irregularity and resulting conflict of claims of title that are presented in this case. If the land had remained on the land books for 1894 in the name of the same person to whom it was assessed in 1893, and had been returned delinquent by the sheriff for each year, no difficulty would have arisen, and the taxes for the two years would have been combined, and the land would have been sold once to satisfy the taxes of both years. But in the present case the confusion has arisen because of the attempt by the sheriff to make two sales of the same tract of land at one and the same tax sale to satisfy the delinquent taxes of two several years. This could not lawfully be done. It is impossible for two persons thus buying the same land to acquire title thereto. There can be but one title to the land. It seems to me either that one or the other of such sales is invalid, or that both are invalid. Section 4, c. 31, Code, reads as follows: "On or before the first day of November of each year, the auditor shall cause to be delivered to the sheriff or collector of taxes for every county two lists of the real estate therein, which, at the

time said lists are made out, shall have been returned delinquent for the nonpayment of taxes thereon for any previous year and not previously sold therefor, and on which the taxes and interest, or any part thereof, shall remain then unpaid and not released or otherwise discharged, with a statement of the several amounts due for state and state school taxes; county taxes for all purposes; school district and independent school district taxes; other district taxes for all purposes, and municipal corporation taxes for all purposes, on each tract or lot for each year with interest on each amount from the twentieth day of January in the year succeeding that in which such taxes were levied until the first day of November in the year such list is delivered as aforesaid to the sheriff, or collector, at the rate of twelve per centum per annum added thereto. But if the real estate has been sold for the nonpayment of taxes, the same shall not be charged with, or again sold on account of any taxes for any year previous to that for the taxes of which the same was made; except, that if for any cause a previous sale of real estate purchased by, or in behalf of, the state, has been or shall be set aside by any court, and the taxes for which it was or shall be sold, have not been paid, the auditor shall include in such lists all such real estate, and the same shall be sold for the taxes and interest due thereon for the years for which it was previously sold, in like manner and with like effect as the other real estate mentioned in said lists."

This section is an express direction to the auditor to include in his certificate to the sheriff all the taxes due on the land, with interest thereon up to the 1st day of November of the year in which the list is returned to the sheriff, "for each year." This means taxes and interest thereon for all the years for which taxes may be unpaid, beginning with, and including, the year for which it was first returned delinquent. The sheriff then is required to sell the land once to satisfy all those taxes. It is the auditor's duty to ascertain all the taxes due on the land which the sheriff is directed to sell, whether the land remains all the time assessed to one person, or whether it has changed ownership and is assessed for one year in the name of one person and for another year in the name of another person. I admit that in some cases this might be difficult to do, but it is a duty that evidently ought to be performed by some one, and I think the statute clearly defines it as one of the auditor's duties. There is certainly no statute directing the sheriff to do it. He is to be guided in making sale by the auditor's certificate. The auditor, in turn, is guided by the land books that come to him from the various county clerks' offices. These are duplicates of the ones remaining with the clerks of the counties, and, if the clerks have performed their

duty in noting the transfers of the lands on the land books, it is a comparatively easy matter for the auditor to keep track of, and to identify, the land. In case the land is delinquent for two several years, first in the name of one party and then in the name of his grantee, opposite the name of the person in whose name it is delinquent for the first year there will be a memorandum showing the transfer to the vendee, and opposite the name of the vendee, for the succeeding year, there will also be a memorandum on the land book giving the name of the person from whom the land was transferred. It thus becomes a very easy matter for the auditor to trace the land and the taxes assessed thereon, and to combine the taxes in one certificate to the sheriff, authorizing one sale only in the names of the two respective parties. If, as a matter of fact, the county clerks in practice do not preserve this information on the land books, the auditor has power by direction to require them to do it, and it should be done. The law certainly does not contemplate two sales of the same land at one tax sale for two separate years of delinquent taxes simply because the land happens to be delinquent for two or more years in the names of the several successive owners. It is not only impossible to give two titles to the same land to two separate purchasers, but the attempt to do so would produce confusion and litigation between conflicting purchasers, and would necessarily render more uncertain the plan of the state to collect its taxes in that way. If two purchasers should buy, there would be unavoidable conflict. Neither would apparently have a right to redeem as against the other, and the result would be that no one would want to buy and the state would have to buy to protect itself. It may be insisted that the state would ultimately get its taxes by a subsequent sale of the land as school land, to which argument I reply that the state does not want the land, but it does stand in need of its revenues and wants them as soon as they are due, and the purpose of the statute is to enable it to collect them by a sale of the land, not to herself, but to an individual. The statute was not intended to make the state a speculator in the lands of its citizens, but is purely a measure to enable it to get its revenues without unreasonable delay.

In view of the statute as it was at the time the land in question was sold, and before the statute was amended so as to require the auditor to certify to the sheriff the unredeemed delinquent lands annually, instead of biennially, the same land was twice returned to him as delinquent before he was required to certify it back to the sheriff for sale. It was properly and regularly returned, and he should have ascertained all the taxes due on the land for the several years, with interest to the 1st of November of the year in which he certified it

for sale, and should have combined all the taxes in one certificate. But his failure to do so in the present case is only such an irregularity as is cured by section 25 of chapter 31 of the Code, and the tax purchaser's deed is good by virtue of this section.

Suppose in the present case an individual, instead of the state, had bought the land in question for the delinquency for the year 1894, and that both he and the Bucklands and Smith, as tax purchasers, had gotten their deeds from the clerk and had had them recorded, the question would arise, Which then would have the title? It is suggested that the one who first recorded his deed would have the title. But, suppose both deeds were recorded at the same time, then which one would have the title? Unquestionably neither would be in a position to redeem from the other within the year allowed for redemption, because neither would be within the description of the persons entitled to redeem, neither could be said to be a former owner. Suppose, again, that in the present case the defendant Bennett and the former owner in whose name the land was sold had both appeared in the suit brought by the commissioner of school land, and had both claimed the right to redeem, whose right would be superior? In such event Bennett clearly would not have the right of redemption as against the state, because he was a tax purchaser at the same time the state took the land for its taxes for one of the years for which it was delinquent. He therefore would clearly not be a redemptioner as against the state. On the other hand, the original owner would have the right of redemption as against the state. But would he have the right of redemption as against Bennett who claimed under a tax deed apparently regular and duly recorded? I think clearly not. In such case I think the tax purchaser, claiming under a recorded tax deed, would have title against the state, and that the state would still have the right by any lien against the land for the unpaid taxes.

I am furthermore of opinion that in order to authorize the state to proceed to sell land under chapter 105, Code (1906), and to give to the decrees of the court in such proceeding a binding force upon claimants, the state must be the owner of the land. The title must necessarily be in the state before it can proceed under this chapter. Section 1, c. 105, Code. This is essential to the jurisdiction in such a proceeding, and, if the state has not title, the proceeding must necessarily be void. If the state claims the land by forfeiture of some former owner, or by purchase at a tax sale, it must have the title of such former owner before it can proceed to sell the land,

and if it has not, in fact, such title, the proceeding is without jurisdiction. In the present case the title to the land was vested in Bennett at the time of the bringing of the suit by the commissioner of school lands, and I am of opinion that the whole proceeding is void for want of jurisdiction concerning the subject-matter of the suit.

The judgment of the lower court is affirmed.

BRANNON, J. (dissenting). The decision in this case is rested on *State v. West Branch*, 64 W. Va. 673, 63 S. E. 372. My opinion of dissent in that case by accident did not appear with the court opinion, but is found in 66 W. Va. 1, and 65 S. E. 1038, to which I refer. It may be a question whether that case exactly applies to this case. It is chapter 31, § 29, of the 1906 edition of the Code, that is made the foundation of decision in that and this case. I do not know that I presented a full view of that section in that opinion. Scanning it further, I am confirmed in the opinion that the section does not conclude the state. I think its effect is that it is *prima facie* evidence as to the former owner, his heirs and assigns, and persons having right to redeem, as well as the state, and that such estate as section 25 specifies passed by the tax deed, and as to strangers is conclusive evidence of such title. Why the clause saying that the section should not bar the state and other taxing bodies from such suit as any one claiming the land could maintain to set aside the sale? It was probably not necessary, this clause, but inserted as a precaution, to prevent any construction that would absolutely bar the state. Clearly a former owner can sue to set aside a tax deed. Cannot the state do so? The same right is reserved to both. How can the court make the statute an estoppel against the state when the deed is only *prima facie*, and the right to attack it reserved? The court makes it conclusive. It is conclusive against strangers, not former owners and the state. It has been suggested that the intent was not to make the deed evidence as to the state that the title of those named in section 25 passed, as the state is not seller, or warrantor, had nothing in the land, and why make the act pass anybody's title as against her when she claimed no adverse title; but waive that, and repeat that it was intended to make the deed only *prima facie* as to the state if she could overcome it. Preston claims under the state, gets the right she had. He is not a stranger.

I think the sale for the latter year for a tax paramount to that of the former year carried the better tax title. The first purchaser should have paid the tax for the second year.

(111 Va. 232)

**HOSTER-COLUMBUS ASSOCIATED
BREWRIES CO. et al. v. STAG
HOTEL CORPORATION.†**

(Supreme Court of Appeals of Virginia. March 10, 1910.)

1. JUDGMENT (§ 713*)—RES JUDICATA.

A former judgment on the merits, rendered in an action between the same parties, is a bar as to all matters of law and fact which were, or might have been, properly put in issue and decided by such judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1234-1241; Dec. Dig. § 713.*]

2. APPEAL AND ERROR (§ 1008*)—REVIEW—JUDGMENT.

Where in a case at law neither party demanded a jury, and the whole matter of law and fact was heard and determined by the court, and the evidence, not the facts, is certified, the judgment will be given the same weight as if it were a verdict.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1008.*]

3. LANDLORD AND TENANT (§ 109*)—SURRENDER OF PREMISES—ACCEPTANCE.

There was no acceptance by the lessor of the surrender of the premises by the lessee, terminating their relation of landlord and tenant, and consequently further liability of the tenant for rent, where the lessor entered, tore down the partition wall which separated the leased premises from an adjoining room, removed temporary plumbing apparatus installed by the lessee, and leased to another the entire space formerly constituting the two rooms; there having been no surrender of the premises by the tenant at the time of the landlord's re-entry, but the tenant having declared that it would not continue business because it was unprofitable, and the landlord's acts having been with the knowledge and acquiescence and on behalf of the tenant to minimize its loss.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 350-371; Dec. Dig. § 109.*]

Error to Corporation Court of Norfolk.

Proceeding by the Stag Hotel Corporation against the Hoster-Columbus Associated Breweries Company and others. There was an order adverse to defendants, and they bring error. Affirmed.

H. C. & H. W. Davis and E. R. F. Wells, for plaintiffs in error. Leo Judson, for defendant in error.

WHITTLE, J. This is a writ of error to an order of the corporation court of the city of Norfolk, awarding execution to the defendant in error against the plaintiffs in error upon a forthcoming bond taken on a distress warrant for the amount of rent ascertained to be due from the Hoster-Columbus Associated Breweries Company, hereinafter called the "Hoster Company," to the Stag Hotel Corporation, hereinafter called the "plaintiff."

The rent which is the subject of this litigation covered the period from May 1, to October 31, 1908, and accrued under a written lease from the plaintiff to the Hoster Company for "all that certain space located on the first floor of the Haddington building in

the city of Norfolk, * * * which said space is about twenty-one feet and nine inches long by sixteen feet and six inches wide." The lease was for a term of five years at a rental of \$2,000 per annum, payable in equal monthly installments.

The Hoster Company had previously made default in payment of certain installments of rent; whereupon a distress warrant was sued out for the rent in arrear and a forthcoming bond given with the same surety as in this case, the Atlantic Trust & Deposit Company; and at the hearing the court awarded execution for the rent due, with interest and costs.

Two assignments of error are relied on here: (1) That the court erred in sustaining the motion of the plaintiff to strike out the first nine grounds of defense, and in refusing to allow the defendants to introduce evidence in support of them.

These identical defenses were interposed by the defendants in the former case, and the judgment on the merits in that case constitutes an absolute bar touching the same matters of defense relied on in this instance. The rule is too well settled to call for citation of authority that under the doctrine of res adjudicata a former judgment on the merits, rendered in an action between the same parties, is a bar to all matters of law and fact which were, or which might have been, properly put in issue and decided by the previous judgment.

It is contended (2) that the court erred in overruling the defendants' motion to strike out of the rent statement all items claimed as rent which accrued after September 30, 1908, and in rendering judgment against the defendants for an amount which included those items. This assignment is founded upon the assumption that during the month of October, 1908, after the Hoster Company had abandoned the premises, the plaintiff re-entered and tore down the partition wall which separated the leased premises from an adjoining room, and removed certain temporary plumbing apparatus which the lessee had installed, and leased the entire space formerly comprising two separate rooms to another tenant. This conduct on the part of the plaintiff, it is insisted, by operation of law constituted an acceptance of the surrender of the premises by the Hoster Company, and terminated the relation of landlord and tenant between them, and consequently there was no further liability on the Hoster Company to pay rent.

The contention, however, loses sight of the fact that the evidence on behalf of the plaintiff tends to show that at the time of re-entry by the plaintiff there had been no surrender of the premises by the tenant; that the Hoster Company, through its agent, had declared that the bar was not profitable, and for that reason it would not renew the li-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied June 9, 1910.

cense and continue business; and that the acts of the plaintiff, now set up as grounds of forfeiture, were done with the knowledge and acquiescence and on behalf of the Hoster Company for the purpose of minimizing its loss.

The trial court accepted that theory of the evidence; and the rule is well settled that in the trial of a case at law, where neither party demands a jury, and the whole matter of law and fact is heard and determined by the court, and the evidence, not the facts, is certified, the judgment of the trial court will be given the same weight as if it were the verdict of a jury. *Martin v. Richmond, etc., R. Co.*, 101 Va. 406, 44 S. E. 918.

The evidence for the plaintiff, if true, was sufficient to warrant the judgment of the corporation court, and it must be taken to be true on this writ of error.

Judgment affirmed.

Affirmed.

BUCHANAN, J., absent.

(7 Ga. App. 740)

HEITMANN et al. v. COMMERCIAL BANK OF SAVANNAH. (No. 2,502.)

(Court of Appeals of Georgia. May 12, 1910.)

(*Syllabus by the Court.*)

1. EVIDENCE (§ 462*)—PAROL EVIDENCE—CONTRADICTION WRITTEN INSTRUMENT.

When a written contract expressly recites that it is made for one purpose, it is not competent (in the absence of a claim of fraud, accident, or mistake) to show by parol that it was made for another inconsistent purpose.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2134; Dec. Dig. § 462.*]

2. APPEAL AND ERROR (§ 1203*)—PROCEEDINGS AFTER REMAND—MERGER—REVERSAL AS TO CERTAIN DEFENDANTS.

Under the facts presented, there was no error in holding that the present complaining defendants were not discharged from liability by the action that had been taken in the case as to other joint obligors on the instrument sued on.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1203.*]

3. PRINCIPAL AND AGENT (§ 123*)—PROOF OF AGENCY—DECLARATIONS.

The court did not err in directing a verdict in the plaintiff's favor.

(a) While it is permissible to prove as a part of the *res gestæ* of a transaction that one of the parties purported to act as the agent of a third person, yet his declaration to that effect is not of sufficient probative value to establish the agency, unless there be further proof, direct or circumstantial, to show that he was in fact an agent, or that his acts as agent had been ratified by the alleged principal.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 420-429; Dec. Dig. § 123.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by the Commercial Bank of Savannah against J. H. Heitmann and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Osborne & Lawrence, for plaintiffs in error. Adams & Adams and U. H. McLaws, for defendant in error.

POWELL, J. This case has been before this court previously. See *Heitmann v. Commercial Bank*, 6 Ga. App. 584, 65 S. E. 590. It will not be necessary to repeat the facts there stated; indeed, what is here said is to be read in connection with what is there said. The point decided when the case was here before was that there was error in disallowing a plea which set up that the note and the accompanying letter had never been delivered to or accepted by the bank as a complete, final contract, but was merely to be held by them, in the nature of an escrow, until another person, named Peoples, should affix his signature. It was further held that such a plea did not contradict the terms of the writing, but that the defendants would not be allowed to set up a state of facts which contradicted either the letter or the note. At the trial the defendants offered an amendment to their plea. First, they pleaded that the note was without consideration, in that it was given merely as collateral security for a past-due indebtedness, owing by the Sand Lime Brick Company to the plaintiff. Even if this plea were otherwise meritorious, it was in direct contradiction to the statement in the letter that the note sued on was given in payment of this past indebtedness, thus becoming an original obligation based on a lawfully recognized consideration.

2. The plea further set up that the defendants Heitmann, Knight, and Manning were discharged from liability, because the plaintiff had dismissed the action as to one Goette, and had also in the present suit procured judgment against O'Connell and four others of the signers of the note, without procuring judgment against the present plaintiffs in error. It should be noticed that this came about by reason of the fact that, while originally the judgment was against all of these defendants, except Goette (who had died pending the action and who was stricken on that account), this court granted a new trial as to Heitmann, Knight, and Manning only.

The Civil Code of this state (section 5041) expressly authorizes a dismissal as to a defendant dying pending the action, without affecting the liability of the other defendants. *Savannah Bank v. Purvis*, 6 Ga. App. 275, 65 S. E. 35. Nor do we think that under the facts of the case such a merger of the liability on the note resulted from this court's reversing the judgment only as to three of the defendants and its granting as to them a new inquiry as to preclude the plaintiff from proceeding on the new hearing to establish their liability and to have a judgment in the action rendered against them also. Cf. *Ellis v. Bone*, 71 Ga. 466.

3. The main point insisted on, however, is

that the court erred in directing a verdict in favor of the plaintiffs, notwithstanding the evidence offered by the defendant (in support of the plea which this court, when the case was here before, held was allowable) to prove the agreement that the note and letter were never formally delivered, and were by mutual agreement of the parties never to become a completed contract until Peoples signed. Some of the defendants offered testimony that the note was presented to them by one Comerford, who said that it was not to become a contract until Peoples signed it. Comerford, it appears, was the receiver of the corporation in payment of whose debt the present note was given. To disclose the effect of this transaction between the signers of the note and Comerford, it is best that certain other facts be stated. There had previously been some dispute between the bank and the signers of the notes preceding the one in controversy (for the indebtedness had been renewed from time to time) as to whether certain others should not have signed also. When the giving of the present note was proposed, the vice president of the bank, who was also its attorney, in order to foreclose any further dispute on this line, prepared the letter, which appears fully in the former opinion in this case, and which was to be signed by the new makers, asking the bank to accept the new note in lieu of the old one, and stating further that not all the old signers were to sign the new paper, and asking the bank to deliver to them (the new signers) the old note that they might compel contribution. This letter and the note were turned over to Heitmann and O'Connell (two of the present defendants) in order that they might be signed and returned. Later Heitmann and O'Connell, in company with Comerford (who was interested adversely to the bank, or, at least, not in privity with the bank), brought to the bank's vice president and attorney the note and letters signed as they were when sued on. He examined them, telephoned the bank's clerk that they were all right, and upon his instruction Heitmann, O'Connell, and Comerford went to the bank window, where they delivered the new note to the bank clerk and received the old note from the bank; the evidence showing that probably the physical transfer of the papers was to and from the hands of O'Connell, though Heitmann and Comerford were standing by.

The evidence was clear and unequivocal that the officials of the bank were ignorant of the representations, if any, made to any of the signers of the note to the effect that it was not to become a completed contract until Peoples signed it. It was equally clear that Comerford was not agent for the bank and was not authorized to make any statement on the bank's behalf. There is no other reasonable inference deducible from the testimony than that the note had come into Com-

erford's hands at the time he made the representations, directly or indirectly, from either Heitmann or O'Connell, who were two of the joint signers of the note. Therefore, notwithstanding he may have induced some of the defendants to sign on the understanding that the note was not to be delivered until Peoples signed it, nevertheless delivery to the bank was consummated without charging it with notice of any such condition; and the bank, acting on the apparent completeness of the transaction, delivered up the old note, thus putting the case very fairly within the principle of the case of *Lewis v. Board of Commissioners*, 70 Ga. 486.

At least one of the defendants testified that Comerford told him at the time he presented the note for signing that he was representing the bank in procuring the signatures. The court struck out this testimony. While we are of the opinion that Comerford's statement, so closely associated as it was with the act of procuring the signatures, was admissible as a part of the *res gestæ*, and that the court's action in ruling it out was abstractly erroneous, nevertheless this error is immaterial. The rule is that while such declarations are admissible as a part of the *res gestæ*, yet they are without sufficient probative value to establish the agency, until it is shown by further proof, direct or circumstantial, that the alleged principal had in fact authorized the alleged agent to act for him, or had subsequently ratified the act. *Wigmore on Evidence*, § 1777 (2); *Roebke v. Andrews*, 26 Wis. 311, 321. Cf. *White Sewing Machine Co. v. Horkan*, 7 Ga. App. 283, 66 S. E. 811; *Chattanooga R. Co. v. Davis*, 89 Ga. 708 (4), 15 S. E. 626. The elements essential to a ratification were not present in the case at bar, as they were in the two cases last cited above.

Even if the judge had admitted all of the testimony that was excluded, the proof would not have been adequate to support the plea in accordance with the former opinion of this court in the case, and his action in directing a verdict in the plaintiff's favor is affirmed.

Judgment affirmed.

(7 Ga. App. 713)

MEACHAM v. STATE. (No. 2,389.)

(Court of Appeals of Georgia. May 12, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1109*)—PETITION FOR CERTIORARI—BRIEF OF EVIDENCE.

The rules applicable to briefs of evidence incorporated in bills of exception do not apply to petitions for certiorari, and a petition for certiorari is not subject to dismissal upon the ground that the evidence adduced upon the trial is not properly briefed. A petitioner for certiorari, if he sets forth plainly what transpired upon the trial, may make his statement of the evidence as full as the facts will justify without the apprehension of any other penalty than the

probability of confusing the reviewing court by an unnecessary mass of irrelevant matter.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1109.*]

2. FALSE PRETENSES (§ 1*)—PROMISE TO DO AN ACT IN THE FUTURE.

One cannot be defrauded and cheated by the violation of a promise to perform an act in the future. The deceitful means or artful practice by which one may be defrauded and cheated must have relation to an existing fact or a past event. Ordinarily one who is induced to act by the promise of another to do a particular act in the future acts upon the promise, and not upon the false representation of fact; and, while the violation of the promise is immoral, it is not a criminal offense.

[Ed. Note.—For other cases, see False Pretenses, Dec. Dig. § 1.*]

3. FALSE PRETENSES (§ 1*)—SALE OF PERSONALTY—SUBSEQUENT FRAUDULENT CONVERSION.

One who has by a valid assignment sold personal property to another, and who thereafter, without the knowledge and consent of the purchaser, fraudulently converts the property to his own use, may be guilty of larceny, but cannot be convicted of cheating and swindling, unless deceitful means and artful practice induced the purchaser to buy something which it was not within the power of the vendor to sell.

[Ed. Note.—For other cases, see False Pretenses, Dec. Dig. § 1.*]

Hill, C. J., dissenting.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

W. T. Meacham was convicted of swindling, and brings error. Reversed.

Thos. B. Brown and Virgil Jones, for plaintiff in error. C. D. Hill, Sol. Gen., Lowry Arnold, Sol., D. K. Johnston, and Lamar Hill, for the State.

RUSSELL, J. 1. Upon the call of this case a motion was made to dismiss the writ of error upon the ground that the evidence in the record was not briefed as required by law. The only statement of the evidence is embodied in what purports to be a copy of the petition for certiorari, which was presented to the judge of the superior court, and which he declined to sanction. The petition for certiorari is properly incorporated in the bill of exceptions. As the issuance of the writ of certiorari was denied, the petition for certiorari should appear before this court in the exact form in which it was presented to the judge of the court below. If alterations of the petition were permitted, it would be, in some instances at least, impossible for this court to determine whether the lower court erred in the judgment refusing to sanction the petition. The rule which requires a proper brief of the evidence in writs of error generally has no application to petitions for certiorari. The petition must be incorporated in the bill of exceptions, and there is no rule requiring the testimony adduced upon the trial in the inferior judicatory to be briefed at all. The petitioner for certiorari is expected to set forth plainly and distinctly what occurred

upon the trial, and he may exercise this privilege ad libitum, even to the extent of presenting what Judge Bleckley calls a rigmorole of questions and answers, objections, remarks of the counsel, etc., with no other penalty attached than the probability of irretrievably confusing the court. For this reason the motion to dismiss cannot be sustained.

2. The plaintiff in error was convicted of the offense of cheating and swindling by using deceitful means and artful practice, in violation of the provisions of section 670 of the Penal Code of 1895. It appears that after having sold an account for his wages as a fireman, and after having authorized the purchaser, as his attorney in fact, to sign any and all checks, vouchers, receipts, and acquittances necessary to be signed in order to collect the account, he collected it himself. We fail to see wherein any deceitful means or artful practice was used which can be said to be the direct cause for the prosecutor's advancing the money of which it is alleged he was defrauded. To conform with the ruling of this court in *Crawford v. State*, 2 Ga. App. 185, 58 S. E. 301, the accusation in the case at bar alleges that the defendant, when he made the assignment did not intend to allow King Bros. & Co. to collect the wages covered by it, but intended to collect them himself. It is further alleged that King Bros. & Co. believed and relied upon the statements contained in said application and assignment to the effect that they were authorized to collect the wages therein mentioned, and that the statements were false, and made for the purpose of deceiving them. The principle announced in the *Crawford Case*, supra, is entirely sound and well settled; but neither the allegations of the accusation nor the evidence in the present case measure up to the rule announced in that case. Nothing is better settled than that the false representations which afford the basis for the criminal prosecution in cheating and swindling must relate to existing facts or events in the past. A representation as to a fact which it is assumed will exist in the future, or a promise which the promisee understands must be performed in the future, does not afford a basis for a criminal prosecution, because it is apparent that he who is influenced by a representation as to a fact which he knows the future must evolve contingent upon a future action of the promisor does not primarily rely on, and is not influenced by, an existing condition, but depends upon the confidence of the promisee in the ability and integrity of the promisor. In case the anticipated event does not happen, or the promise is not fulfilled, or the pledge or future performance is not redeemed, it is a case of misplaced confidence, but not a case of false representation; and the promise, if there was no false statement

of past or existent facts, cannot be said to be deceitful means or artful practice within the definition of the Penal Code, because the party to whom the representation was made had as full opportunity of determining for himself the likelihood or probability of what the future would develop as he who made the promise, and this irrespective of whether the promisor intended or did not intend to deceive the opposite party. The reason of the rule is that, if the party to whom the representation was made had full knowledge of the real condition of the affairs or chose to rely upon the promise as to a future contingency, he is not deceived by deceitful means or artful practice (because he knows all of the facts and their true relation), but his loss results from his absolute confidence in the party making the promise.

The accusation in this case states that the defendant represented that he was 21 years old; that he was employed by the Southern Railway Company; that he was employed during the month of June, 1909, and while so employed earned as salary or wages the sum of \$30; that there were no offsets or counterclaims against the account, nor any orders, drafts, garnishments, or attachments outstanding in any way affecting said account; that the account was just, true, and unpaid, and had not been sold or transferred. None of these representations or warranties were false. So far as appears from the record, each of them was true. Upon this statement the prosecutor purchased the defendant's account for wages, and, in order to effectuate the purchaser's right to collect, the defendant authorized the purchaser to sign such necessary vouchers, receipts, or acquittances as were proper. The authorization of the purchaser to collect the account for wages was not in any sense a representation of a fact. It was not artful practice. The purchasers of the account did not sustain any loss (if any at all sustained) by reason of this authorization, because the prosecutor, according to the recitals of the assignment, had already parted with his money before the assignment was made. So far as the writer is concerned, he does not look with favor upon the purchase of accounts for wages where the practical result is to afford a means by which one who is working for wages can be compelled to pay an exorbitant price for the use of money earned by his labor, by selling a portion or all of his account at a reduction below its face value, no matter how such conduct may be intended. The practical effect is to extort a usurious rate of interest, whether that be the intention of the parties or not. Interest is nothing more than a charge or price for the use of one's money, and, although there be an absolute sale of account for wages or salary, yet, where it appears that the sale is made solely for this purpose of realizing sooner than the account would ordinarily be paid, it is apparent that the seller loses the

difference for the sole purpose of obtaining the use of his money earlier than he would otherwise have received it, and that he sacrifices by the sale a portion of the account in his favor merely to pay for the use of the remainder during the interval between the time when he receives the purchase price and the time when he can reasonably anticipate the payment of his account. We realize that it is contrary to public policy to place restrictions on one's right to dispose of any property he may possess, at his own discretion and upon terms satisfactory to himself, and yet the writer cannot see any difference, in its practical effect upon the wage-earner, between paying a usurious rate of interest upon a loan and sacrificing a portion of the chose in action in order to be enabled to use the remainder.

But regardless of my personal views, and yielding full judicial assent to the prior decisions in which it has been held that only the sale of wages where the practical effect is to work a deduction greater than 5 per cent. per month is included within the inhibition of the statute which forbids usury by means of the device of purchasing accounts, it is plain in this case that, if the defendant sold the account to King Bros. & Co., it became from that instant their property, and, if thereafter the defendant wrongfully and fraudulently converted this personal property to his own use, he might be guilty of simple larceny, but could not be guilty of cheating and swindling, for the reason that, if any false representations of fact were made, which were the occasion of loss and damage to the purchaser, if any loss is attributable to his reliance upon the assignment and to the subsequent violation of its terms by the defendant, neither of these can be classed as antecedent causes of the prosecutor's loss. We think the judge of the superior court should have sanctioned the certiorari, and upon this record, if it had been sustained by the answer, should have granted the defendant a new trial.

Judgment reversed.

HILL, C. J. (dissenting). I do not concur in the opinion of my Brethren that the facts alleged and proved in this case do not show the offense of cheating and swindling, under the general section of the Penal Code of 1895 (section 870). The accusation was evidently framed in accordance with the views of this court as expressed in the case of *Crawford v. State*, 2 Ga. App. 187, 58 S. E. 303. We then thought these views were "sound and * * * fully supported by the decision of the Supreme Court in *Garner v. State*, 100 Ga. 257 [28 S. E. 24]," and I see no reason to change the opinion then expressed. The majority of the court in this case reaffirms the soundness of the principle announced in the *Crawford Case*, but think that "neither the allegations of the accusation nor the evidence in the present case measure up to the rule an-

nounced in that case." I am wholly unable to see any distinction between the facts of this case and the illustration given in that case of what would constitute a violation of this section. As held in the Crawford Case, section 670 very greatly enlarges the common-law offense of cheating and swindling by false tokens, false pretenses, and false representations. It seems to have been intended to supply deficiencies which existed in the common law in reference to this offense, as well as to embrace all other offenses of like character which were not specifically covered by other sections of the Code. The language of this section is exceedingly broad and comprehensive. "Any deceitful means or artful practice" by which another is "defrauded and cheated" is within its terms. The words "deceitful means and artful practice" are words of general use, and should be given their ordinary significance. The jury in each particular case are to determine whether the means or practice used to cheat and defraud was "deceitful or artful" in the ordinary signification and definition of these terms. I think that if the accused, at the time he sold and assigned the salary he had earned to the prosecutor and authorized the latter to collect it from his employer, the railroad company, on "pay day," had the intent, nevertheless, to himself collect it and convert it to his own use, and did accomplish this intent, he was guilty of a violation of this section. It is true he made no distinctly false representation of any fact to the prosecutor. The "deceitful means" and the "artful practice" which he employed consisted in using facts to enable him first to get the prosecutor's money, and subsequently to get the full amount of his salary from his employer. It cannot be denied that by these means he was enabled to get \$63, \$30 from the prosecutor and \$33 from his employer, when he was only entitled to \$30. The plan was very simple, was calculated to allay suspicion, and was, it seems to me, a form of artifice cunningly adopted to first get the prosecutor's money and then to collect from the employer the money which had been sold to the prosecutor. If this conduct of the defendant does not constitute "deceitful means and artful practice," I confess I do not understand the meaning of these words. To violate this statute, it is not necessary, in my opinion, that any verbal false representations or pretenses should be made. The offense can be committed by deceitful conduct as well as by deceitful words. *Jones v. State*, 97 Ga. 430, 25 S. E. 319, 54 Am. St. Rep. 433.

The majority of the court base the decision upon the construction that the defendant made merely an implied promise that he would not, after having sold his salary, himself collect it from his employer, the railroad company, and that in doing so he only broke his promise, and a broken promise is not a false pretense. Of course, it is well settled that a mere promise relating to the future cannot be the basis of a prosecution for this

offense; but, as was said by the Supreme Court in *Holton v. State*, 109 Ga. 127, 34 S. E. 358, and by Mr. Bishop in his work on Criminal Law (volume 2, § 224): "Where there is both a false pretense and a promise which acted together on the mind of the person defrauded and induced him to part with a thing of value, and he would not have done so on the promise without the pretense, such a pretense, if false, is sufficient to support a conviction for being a common cheat and swindler." And as also said by Mr. Bishop in the same work: "It would be difficult to find in actual life any case wherein a man parted with his property on a mere representation of fact, whether true or false, without an accompanying promise." Here there was blended with the implied promise of the accused—that he would not himself collect the salary from the railroad company, but would permit the prosecutor to do so—the deceitful means and artful practice of selling his salary and giving written authority to the prosecutor to collect it. This apparently honest conduct, relied on by the prosecutor, induced him to pay to the accused the amount of the salary so bought, 30 days before he could have gotten it from the employer. I think this case in principle is very similar to that of *Garner v. State*, 100 Ga. 257, 28 S. E. 24. There the accused, with intent to cheat and swindle a named person, bought from him a horse and gave him a check in payment, took possession of the horse, and stated at the time of the purchase that the check would be paid on presentation (what was this but a promise?), and after obtaining possession of the horse, with intent to cheat and swindle the purchaser, he went to the bank and stopped payment of the check so that the seller was in fact defrauded. Suppose that, instead of stopping payment of the check, he had simply drawn all of his money out of the bank, leaving nothing to pay the check he had given to the seller for the horse, would it have been any less a case of cheating and swindling? And would there not have been just as plainly a promise made or implied when he gave the check that it would be paid at the bank, and that he had funds there to pay it, as there was in this case that he would permit the prosecutor to collect the salary from the railroad company? I cannot see any substantial difference in principle in the two cases.

It is insisted by my associates that, if the accused was guilty of any offense, it was the offense of simple larceny, that the title to his wages had passed to the prosecutor under the assignment, and therefore that when he subsequently collected his salary, it was the wrongful and fraudulent taking of the personal property of the prosecutor. Was it the property of the prosecutor; that is, did he have such a legal title to the property as would have authorized him to sue the railroad company for it? This would depend upon whether the assignment or sale covered

the entire amount of salary which had been earned by the accused at the time when he made the sale or assignment, or whether it covered only a part of the amount which had been earned. I think it fairly deducible from the facts in the record that it was a partial assignment of the salary which had been earned, and that the prosecutor had only an equitable title to the amount which had been sold to him, and could not have maintained a suit against the railroad company for it. There is no evidence that the railroad company gave assent to the assignment, and as repeatedly held by the Supreme Court, and by this court, in the case of *Central Ry. Co. v. Dover*, 1 Ga. App. 240, 57 S. E. 1002, where there is a partial assignment of a chose in action, the purchaser has only an equitable title, which can only be enforced by equitable petition, with the debtor and consignor both parties. If, therefore, the assignment was only as to a part of the salary earned, the money was not the personal goods of the prosecutor, but was only property to which he had an equitable title, and the definition of simple larceny is: "The wrongful and fraudulent taking and carrying away * * * of the personal goods of another, with intent to steal the same." Pen. Code 1895, § 155. Of course, this would include personal goods to which one has the right of possession.

There being in the record ample evidence of the defendant's fraudulent intent when he assigned his salary and received the money therefor from the prosecutor, I am very clearly of the opinion that he was properly convicted of the offense of cheating and swindling under section 670 of the Penal Code.

(7 Ga. App. 711)

ASHLEY v. CENTRAL OF GEORGIA RY. CO. (No. 2,285.)

(Court of Appeals of Georgia. May 12, 1910.)

(Syllabus by the Court.)

1. CARRIERS (§ 150*)—FREIGHT DELIVERED ON RIGHT OF WAY—LIABILITY OF CARRIER—LOSS BY FIRE.

Relatively to property for carriage, railroad companies owe no duty of diligence under the law, except where the property has been delivered at stations or places designated by the company for its delivery. Where property is placed on the railroad right of way by request of the owner and solely for his convenience, and permission is given by the railroad company to place it there, by virtue of a contract in which the owner, in consideration of such permission, relieves the railroad company from any and all liability "for the loss, damage, or destruction of said property while on its right of way, whether such loss, damage, or destruction be attributable to the negligence of any agent or employe of the company, or from any cause whatever," the contract is valid; and, if the property is destroyed by fire while on the right of way, the company cannot be held liable, except for gross negligence or willful misconduct. *Holly v. Southern Ry. Co.*, 119 Ga. 767, 47 S. E. 188; 3 *Elliott on Railroads* (2d Ed.) § 1236;

Evans v. Nail, 1 Ga. App. 42, 57 S. E. 1020. (Russell, J., dissenting.)

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 654-659; Dec. Dig. § 150.*]

2. LOSS BY FIRE—EVIDENCE.

Irrespective of the contract above mentioned, the evidence in this case did not clearly show that the property was burned by the negligence of the railroad company. If there was any inference fairly deducible from the evidence sufficient to raise the statutory presumption of negligence, it was fully rebutted by the evidence in behalf of the defendant. The destruction of the property seems to have been a casualty necessarily incident to its location in close proximity to passing engines.

3. REVIEW ON APPEAL.

No material error of law was committed, and the verdict is right under the law and the evidence.

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by L. A. Ashley against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Austin Branch, for plaintiff in error. J. C. Black, for defendant in error.

HILL, C. J. Judgment affirmed.

RUSSELL, J. (concurring specially). I dissent from so much of the decision as affirms the legal validity of the contract. In my opinion, any contract which stipulates to relieve a common carrier from the results of its own negligence is contrary to the declared public policy of this state. Even if the opinion of a divided court in the case of *Holly v. Southern Ry. Co.*, supra, were a binding precedent, the fact that the plaintiff in error in that case was traveling on a free pass (thus being virtually a guest of the company, or "gratuitous bailee") distinguishes it as to its facts from this case, in which it is undisputed that the railroad company had been receiving \$6 per car for the carriage of other wood hauled from the same point, and reasonably expected to receive the same compensation as freight upon the wood which was destroyed.

(7 Ga. App. 732)

ROSSI v. STATE. (No. 2,496.)

(Court of Appeals of Georgia. May 12, 1910.)

(Syllabus by the Court.)

1. HOMICIDE (§ 300*)—MURDER—INSTRUCTIONS.

"The question of what is sufficient to reduce the grade of the crime where a killing is prompted by passion is one thing, and the question of what is sufficient to excite the fears of a reasonable man that a felony is about to be committed upon him is another and very different thing." Consequently, in a case where it is insisted that the homicide was committed by the defendant under the fears of a reasonable man, upon whom a serious bodily injury or felony was about to be perpetrated, it is error to charge the jury that "provocation by words,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

threats, menaces, or contemptuous gestures will in no case free the person killing from the guilt and crime of murder," without calling the attention of the jury to the fact that while words, threats, or menaces will not mitigate the offense, and while even the heat of passion, supposed to be irresistible, presents no excuse for homicide, nevertheless words, threats, or menaces may justify a killing if the circumstances be such as reasonably to arouse the fears of a reasonable man that a felony is about to be committed upon him.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 300.*]

2. HOMICIDE (§ 273*)—JUSTIFIABLE HOMICIDE—KILLING OF WIFE'S SEDUCER.

"If a man takes the life of another who attempts the seduction of his wife, under circumstances of direct and gross aggravation, it is for the jury to find whether the case stands upon the same footing of reason and justice as other instances of justifiable homicide enumerated in the Penal Code." *Biggs v. State*, 29 Ga. 724 (3), 76 Am. Dec. 630.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 566; Dec. Dig. § 273.*]

3. HOMICIDE (§ 123*)—JUSTIFIABLE HOMICIDE—DEFENSE OF HABITATION.

One who may rightfully eject another from his house has the right to use whatever force is necessary to accomplish that purpose. If request, persuasion, and remonstrance have proven fruitless, and the right to the possession of one's home and the protection of his family require the eviction of an intruder, the degree of force which may be employed is limited only by the necessity for its use. Even life itself may be taken if a lesser degree of force is unavailing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 182; Dec. Dig. § 123.*]

(Additional Syllabus by Editorial Staff.)

4. WORDS AND PHRASES—"MENACE."

A "menace" is defined to be the show of an intention to inflict evil. It is to act in a threatening manner, and any overt act of a threatening character, short of an actual assault, is a "menace."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4474.]

Error from Superior Court, Floyd County; Jno. W. Maddox, Judge.

Frank Rossi was convicted of voluntary manslaughter on a charge of murder, and brings error. Reversed.

Ennis & Shaw and M. B. Eubanks, for plaintiff in error. Jno. W. Bale, Sol. Gen., for the State.

RUSSELL, J. The defendant was indicted for the offense of murder, and was found guilty of voluntary manslaughter. He excepts to the judgment overruling his motion for new trial. The motion for new trial contains a large number of grounds. It is not necessary to state or discuss them in detail. In the main the charge of the learned trial judge is a lucid and impartial exposition of the law. We think, however, that the plaintiff in error is entitled to a new trial upon three of the exceptions presented.

1. In the first place, the judge charged that portion of section 65 of the Penal Code which

relates to provocation by words, threats, menaces, etc., without such explanation as was required in a case like this, where the defendant presented the defense that his action was prompted by the fears of a reasonable man that the shooting was necessary for the protection of his life. If the defense had been only that the defendant was defending against an actual assault, the section might have been charged as it was by the trial judge, without qualification. Words, threats, menaces, and contemptuous gestures of themselves will not reduce a killing from murder to voluntary manslaughter. But, as held in the *Cumming Case*, 99 Ga. 662, 27 S. E. 177, words, threats, or menaces, according as either may be accompanied by other circumstances, may generate a reasonable fear, on the part of one to whom they are directed, that he is in danger of such serious bodily harm as may amount to a felony. And in such a case, if the jury come to the conclusion that the reasonable fears actually existed, although they were generated by threats or gestures, the jury would be authorized to justify the killing and acquit the defendant. In the present case, while the state introduced testimony to the effect that the killing was unprovoked, testimony was adduced in behalf of the defendant which tended to show that the deceased was a large and powerful man, far superior physically to the defendant, and that the threat said to have been made by him was accompanied by a manifest attempt to carry the threat into execution. If the jury believed this testimony, they should have been instructed that it was for them to determine what threat and menace, if any was proved, would justify the defendant in assuming that his life was then in danger; and even if as a matter of fact the menace would not have been sufficient to authorize another to assume that his life was in danger, still, if they believed from the circumstances that the defendant at the time was honestly impressed with the belief that his own life was endangered, he would be justified.

As stated in the *Cumming Case*, supra: "The question of what is sufficient to reduce the grade of the crime where a killing is prompted by passion is one thing, and the question of what is sufficient to excite the fears of a reasonable man that a felony is about to be committed upon him is another and very different thing. The Penal Code (section 71) declares that 'a bare fear of any of those offenses to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable man.' But it does not undertake to define what circumstances shall or shall not be sufficient to excite such fears. It is true that, in order to justify a homicide, there must be

something more than mere verbal threats. There must be an appearance of imminent danger. The means of inflicting the threatened injury must apparently be at hand, and there must be some manifestation of an intention to inflict the injury presently; but it is not essential that there should be an actual assault. Mere threats and menaces may, under some circumstances, be sufficient. A 'menace' is defined to be 'the show of an intention to inflict evil'; to menace is 'to act in a threatening manner.' Webster's Dictionary. Any overt act of a threatening character, short of an actual assault, is a menace; and it will not do to say, as the court in effect did in this instance, that no such act can be considered sufficient to excite the fears of a reasonable man. If a man of reckless and violent character, who bears a grudge against me and has made threats, which have been communicated to me, that he will kill me on sight, approaches me in an angry and threatening manner, with a deadly weapon in his hand, though the weapon is not then directed or aimed at me, and declares that he intends then and there to kill me, this is no more than a menace, but the law does not say: 'You shall not take him at his word until he actually assaults you; until he does, any fear you may have that he is about to carry out his threats is unreasonable; and if you kill him, although you do so under the belief that the killing is necessary to save your own life, your fears are no defense.' To hold that this is the law would be to exclude as a defense, in such cases, the fears of a reasonable man, or to say as a matter of law that fears are unreasonable when we are not able to say it as a matter of fact. It would in many cases render the right of self-defense practically nugatory; for it would postpone the exercise of the right until it would be of no avail. In Wharton on Criminal Law (volume 2, § 493) it is said: 'A violent and perilous defense can only be employed in cases where there is an apparently violent and perilous attack. To sustain such a defense, however, the actual striking of a blow is not necessary, nor is it even requisite that the assailant be within striking distance, if the attack be apparently imminent.' Mr. Bishop, after stating the doctrine that threats with no overt act and no imminent danger will not justify a homicide, says: 'Not in conflict with this rule, a threatened blow need not be actually given.' Bishop's New Criminal Law, § 872. It has been well said that: 'It is difficult to lay down a rule strictly governing all cases, the circumstances of the cases differ so widely. The overt act that will justify a defendant in assuming that his own life is then in danger must depend upon the circumstances of each particular case. Cases may be readily supposed, and no doubt often occur, where to require a defendant to wait until his adversary actually begins the combat would be to require him to wait until there would

be but little chance left of successful defense—cases where the deadly purpose of the party is so fixed and determined, his character so reckless and bloody, his use of deadly weapons so expert and skillful, that to await his attack would be to await almost certain death; and the result of the rencounter would often depend upon which party was the quicker in action.'"

2. The learned trial judge charged the jury that "a mere indecent proposal to the defendant's wife, unaccompanied by any overt act on the part of the deceased to carry out such proposal, would not justify the defendant in killing the deceased." We are clear that this instruction was error prejudicial to the defendant. It was not within the province of the judge to say that an indecent proposal to the defendant's wife would not justify the defendant in killing the deceased. If, upon the instant of such proposal in the presence of the husband, the husband kills the attempting seducer of his wife for the purpose of protecting his honor, his home, and his marital rights, the question as to whether it is an instance standing upon a like footing of reason and justice as the protection of mere property, or the protection of one's own person against bodily harm, is a question for solution by the jury alone. We have carefully examined the cases cited by the learned counsel for the state, and in none of them is the principle stated in *Biggs v. State*, 29 Ga. 723, 728, 76 Am. Dec. 630, controverted or altered. In fact, we have been unable to find a case as similar in its facts to those of the *Biggs Case* as is the case at bar. We deem the ruling in that case as absolutely controlling in this case, and we think it well to call attention to the language of Judge Lumpkin when he says: "His honor, the presiding judge, charged the jury 'that under no circumstances of aggravation, however gross and direct, would a man be justifiable in taking the life of another, who attempts the seduction of his wife.' This instruction brings up broadly the meaning of the sixteenth section of the fourth division of the Penal Code. After treating of the various grades of homicide, murder, manslaughter—voluntary and involuntary and justifiable—it is provided that 'all other instances which stand upon the same footing of reason and justice as those enumerated shall be justifiable homicide.' What is the meaning of this section? It signifies something. And it is the duty of the courts to give it effect. It has been suggested that, to bring cases within this provision, they must be accompanied with force. But has the Legislature so limited it? Is it not more reasonable to suppose that it was their purpose to clothe the juries in criminal cases, in which they are made the judges of the law as well as the facts, with large discretionary powers over this class of offenses, and leave it with them to find whether the

particular instance stands on the same footing of reason and justice as the cases of justifiable homicide specified in the Code? Has an American jury ever convicted a husband or father of murder or manslaughter for killing the seducer of his wife or daughter? And with this exceedingly broad and comprehensive enactment standing on our statute book, is it just to juries to brand them with perjury for rendering such verdicts in this state? Is it not their right to determine whether in reason or justice it is not [as] justifiable in the sight of heaven and earth to slay the murderer of the peace and respectability of a family, as one who forcibly attacks habitation and property? What is the annihilation of houses or chattels by fire and faggot, compared with the destruction of female innocence; robbing woman of that priceless jewel, which leaves her a blasted ruin, with the mournful motto inscribed upon its frontals, "Thy glory is departed"? Our sacked habitations may be rebuilt, but who shall repair this moral desolation? How many has it sent suddenly, with unbearable sorrow, to their graves? In what has society a deeper concern than in the protection of female purity, and the marriage relation? The wife cannot surrender herself to another. It is treason against the conjugal rights. Dirty dollars will not compensate for a breach of the nuptial vow. And if the wife is too weak to save herself, is it not the privilege of the jury to say whether the strong arm of the husband may not interpose, to shield and defend her from pollution?"

According to the statement of the defendant, which in this case was corroborated by sworn testimony to the same effect, the deceased repeated indecent proposals to the defendant's wife in his very presence and hearing. Nothing should be more lightly regarded than a defense (created for the purpose of acquitting a murderer) which offers as justification for homicide a false and fraudulent claim that the sanctity of the home has been invaded. The jury should repudiate with loathing a sham defense of this kind. But if in truth and in fact the virtue of one's wife or daughter is really involved, and the destruction of the innocence and purity of either is imminent, it is for the jury, and the jury only, to say whether the circumstances are such that even the destruction of human life is necessary for its protection and preservation. If the killing of a fellow creature can be justified upon the ground that it was necessary to save human life, because that life, if lost, cannot be restored, the same reason would seem to apply where female virtue is at stake; for its loss is also irreparable. In any event, it is for the jury to determine whether the necessity for the protection of the virtue of one of those females to whom the duty of protection extends exists, in any case, and whether the circumstances are such as to

call for speedy action in order that the protection afforded may be adequate. It is well recognized, of course, that the use of force can only be justified where it is necessary for the prevention of an impending danger, and that a killing in revenge for a past wrong, no matter how grievous, is murder. We are not prepared to say, however, and no court can say, as a matter of fact, that a husband who would stand by without concern and not raise a hand to protect his wife, who was being solicited in his presence to consent to prostitution, might not feel, in such a case, that his wife would have just cause for believing that he desired her to consent. If the wife was a virtuous woman, she could justly think that she was without a protector. If she was a weak woman, the husband, so far from preventing the impending danger to his conjugal rights, might forfeit the respect of his wife to such an extent as to render her an easier prey to the seducer. In *Wilkerson v. State*, 91 Ga. 729, 17 S. E. 990, 44 Am. St. Rep. 63, in which the Supreme Court was considering the right of an adulterer to defend himself against the husband, and in which, therefore, the question now before us was not directly involved, Judge Lumpkin, delivering the opinion, says: "The law permits and will justify the homicide of another by the husband to prevent the seduction of the wife, or even to prevent the committing with her of a single act of adultery, if by his previous conduct he has not forfeited the right. Nay, more, the law will sometimes excuse the husband for slaying the seducer of his wife, immediately after the guilty act is over, if he acts promptly and in that burst of passionate indignation which overwhelms him upon discovering the outrage which has been done him."

Section 75 of the Penal Code is not a dead letter. It is not unwritten, but written, law, and leaves to the jury to determine, in every case where it is insisted that a homicide was committed in defense of the virtue of a female relative to whom the right of protection extends, the question as to whether the awful remedy of a homicide was necessary for that purpose, or whether the impending danger could otherwise have been averted, as well as whether the defense is a pretense and a sham.

3. We think the instruction of the court to the effect that the defendant would be guilty of voluntary manslaughter, if the jury found from the evidence that he was trying to eject the deceased, and that while doing so the deceased made an assault upon him, which aroused a sudden and violent impulse of passion, was injurious to the defendant, not because it is not sound law as far as it goes, but because, standing alone, it restricted his defense. Furthermore, the judge nowhere charged the jury that the defendant had the right to eject the deceased from his place of business, if the deceased refused to

go upon request, and that he had the further right to use whatever force was necessary to successfully accomplish the ejection in case the deceased resisted. The court presented no instance to the jury in which the defendant, under the evidence, would have been justifiable in ejecting the deceased. The instruction of the judge was confined to supposable cases in which the defendant, seeking to eject the deceased, was aroused and angered by a blow. According to the evidence of the state, no blow was stricken. According to the evidence of the defendant, he did not act under an impulse of passion. For this reason it does not seem to us that the charge presented the contentions of either party; and, while the judge could properly have given the instruction complained of, it was error, injurious to the defendant, to do so, unless, in connection with this statement of abstract law, the jury had been told that in a proper case the defendant might have required the deceased to leave his premises, and that, if the latter refused, the defendant would have been authorized to employ whatever force was necessary to effect the ejection. While such an instance must necessarily be rare, a case is conceivable in which even the taking of human life might be necessary to clear one's home of a hardened criminal. In such a case the right is not limited by reason of the fact that the contingency or the necessity might be most unusual.

The evidence in this case is strongly in conflict in some particulars. According to the testimony in behalf of the defendant, the deceased, a large and powerful man, under the pretense of making some purchases, entered the house which was at once the store and dwelling of the defendant, and made advances to his wife, and finally, in the defendant's very presence, solicited carnal intercourse, naming the place and a time the following morning. The defendant asked the deceased to leave his house and not to insult his wife. This the deceased declined to do, sneeringly asking the defendant if he meant his request for him; and, when the defendant informed him that he did, the deceased practically refused to leave, by answering the request with the most infamous abuse of the defendant. According to some of the testimony, the deceased followed this by seizing the defendant and choking him down behind the counter, when the defendant, after having appealed to the bystanders to take the deceased off, and fearing death or serious bodily injury, drew his pistol and fired the shots which caused the death. We do not undertake to say that this is the truth of what actually transpired. According to some testimony in behalf of the state, the case was one of unprovoked murder. But the jury should have been told that words, threats, or menaces, dependent upon the attendant

circumstances, may be sufficient to arouse such fear of bodily danger as will justify a homicide. They should have been told that, if the defendant had the right to require the deceased to leave his premises, he would have the right to use whatever force was necessary for that purpose, and even to kill the deceased, if the jury was satisfied that he could not otherwise have been ejected. They should have been told that they had the right to determine whether the slaying by the husband of one who in his presence had made indecent proposals to the wife stood upon the same footing of reason and justice as instances of defense of person or property. If the jury believed that an indecent proposal was made by the deceased, and that he was asked to leave the premises, and that, under the circumstances, nothing but the use of the weapon could move the deceased, the defendant should have been acquitted. If the jury believed that the defendant was rightfully ejecting the deceased, and could not remove him and protect his wife otherwise than by killing him, the defendant would be justified by the necessity which the deceased himself had created. And regardless of the question of the ejection, the jury should have been told that if they believed that the indecent proposals were made to the defendant's wife, in his presence, it was for the jury to determine, from the facts and circumstances of the case, whether the killing of the deceased was necessary for the preservation and protection of the virtue of the defendant's wife, and the preservation of his home.

Judgment reversed.

(7 Ga. App. 745)

LETSON v. STATE. (No. 2,562.)

(Court of Appeals of Georgia. May 12, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 656*)—CONTINUANCE.

In overruling a motion for a continuance, the trial judge may, in the statement of his reasons, include a review of the evidence adduced in support of the motion, or of that submitted by way of countershowning, or of both, and may state his opinion on the weight of such testimony and its probable effect upon the trial, without violating the terms of section 4334 of the Civil Code. While a judge should not intimate an opinion as to the truth or falsity of any testimony which may properly be submitted upon a subsequent trial, he may, in ruling upon a motion for a continuance, properly pass upon the materiality of the testimony; and therefore it is not erroneous for the court to state, in the presence of the jury, that certain evidence is not material and would do the defendant no good.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 656.*]

2. JURY (§ 89*)—QUALIFICATION—INTEREST.

That the fines and forfeitures arising in the city court of Flovilla are payable to the educational fund of the city does not disqualify

citizens of Flovilla from serving as jurors in that court.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 411, 412; Dec. Dig. § 89.*]

3. CRIMINAL LAW (§ 918*) — NEW TRIAL — GROUNDS—REMARKS OF JUDGE.

The fact that the judge, in inquiring if there was any further testimony, called the attention of the Solicitor General to the fact that one of the witnesses in behalf of the state, who had been sworn, had not been called to the stand to testify, does not require the grant of a new trial. Nor does the mere fact that the court referred to and repeated a portion of the defendant's statement require a new trial, unless it involved an expression of opinion upon the facts in the case or otherwise appears to have been prejudicial to the defendant.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2182; Dec. Dig. § 918.*]

4. DISTRICT AND PROSECUTING ATTORNEYS (§ 5*)—FEES—IN SUPREME COURT—"TAKEN UP FROM THE CIRCUIT."

The act of 1907 creating the city court of Flovilla (Acts 1907, p. 174, § 6), requiring the solicitor of that court to represent the state in all cases carried therefrom to the Supreme Court, in which the state is a party, and providing that for services rendered in the Supreme Court the solicitor shall be paid the same fees as are allowed to solicitors general (even if a writ of error would lie to a decision of that city court), has no reference to cases carried by certiorari to the superior court of Butts county. If exception be taken by writ of error to the judgment upon the certiorari, this is a case "taken up from the circuit," within the meaning of the Constitution (Civ. Code, § 5862), and it is the duty of the Solicitor General of the Flint circuit to represent the state in such cases, and he is entitled to receive the fee provided for such service.

[Ed. Note.—For other cases, see *District and Prosecuting Attorneys*, Dec. Dig. § 5.*]

(Additional Syllabus by Editorial Staff.)

5. CRIMINAL LAW (§ 656*)—TRIAL—CONDUCT OF JUDGE.

While the court may express no opinion as to what has or has not been proved, it may state that there is testimony to a certain effect, where there is no testimony to the contrary.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1524-1533; Dec. Dig. § 656.*]

Error from Superior Court, Butts County; E. J. Reagan, Judge.

Frail Letson was convicted of assault and battery, and brings error. Affirmed.

C. L. Redman, for plaintiff in error. O. M. Duke, Sol., and J. W. Wise, Sol. Gen., for the State.

RUSSELL, J. The defendant was convicted in the city court of Flovilla of the offense of assault and battery. The judge of the superior court overruled his certiorari, and exception is taken to that judgment.

1. The defendant made a motion for a continuance, which the judge of the city court overruled, and this ruling constitutes one of the exceptions presented by the petition for certiorari. It appears, from the justice's answer to the certiorari, that the witnesses had not been subpoenaed in the case then up for

trial, though they had been subpoenaed in a case in which the same defendant was charged with riot. For this reason it cannot be said that the judge of the city court erred in overruling the motion. The fact that the witnesses had been subpoenaed in the riot case did not dispense of the necessity of subpoenaing them in the assault and battery case. The plaintiff in error insists, in addition, that even if the court did not err in overruling the motion, the statement of the judge that he had heard the witnesses swear before, and that their evidence was not material and would do the defendant no good, was so prejudicial to the defendant and such an expression of opinion as to require the grant of new trial. From the answer of the judge of the city court it appears that the statement complained of was not made in the presence of the jury, as none had at that time been impaneled. We fail to see, however, that it would have been erroneous, even if the jury had been present, for the judge to give his reasons for overruling the motion for a continuance, provided he confined himself to a discussion of the evidence submitted to him. Of course the expression of an opinion upon the evidence in the presence of the jury, even antecedent to the trial itself, is to be avoided, if possible, and yet the trial judge must be allowed some latitude in expressing his judgment, and, if need be, in explaining the principles upon which it is based. His statement of his reasons for overruling a motion for a continuance may include a review of the evidence adduced in support of the motion, or of that submitted by way of counter-showing, or of both, and in stating his reasons the judge may state his opinion on the weight of such testimony and its probable effect upon the trial, without violating the terms of section 4334 of the Civil Code. While a judge should not intimate an opinion as to the truth or falsity of any testimony which may properly be submitted upon a subsequent trial, he may, in ruling upon a motion for a continuance, properly pass upon the materiality of the testimony; and therefore it is not erroneous for the court to state, in the presence of the jury, that certain evidence is not material and would do the defendant no good.

2. The defendant objected to the panel of the jury put upon him in the case, because all of the jurors resided in the city of Flovilla, and, under the terms of the act creating the city court of Flovilla (Acts 1907, p. 172), the fines and forfeitures arising in that court are paid into the city treasury for educational purposes. The defendant insists that by reason of this fact citizens of Flovilla are disqualified from serving as jurors in criminal cases. The act of 1874 (Acts 1874, p. 45), now codified as section 754 of the Political Code, declares, that "the fact of a person be-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing a citizen or resident of a municipal corporation shall not render him incompetent to serve as a juror in cases in which said municipal corporation is a party or interested." Conceding that the jurors may have been interested in swelling the educational fund of Flovilla, the state has declared that jurors are not to be deemed capable of being affected by this fact, or influenced thereby to render an unjust verdict.

3. It appears that the solicitor administered the oath to all of the witnesses for the state at the beginning of the trial, and thereafter called them to the stand. Some length of time after the last witness who had testified had left the stand, the court asked the state's counsel if he had anything else to offer, meaning thereby to inquire if he wished to offer any further evidence. The state's counsel explained his delay by stating that he was wondering whether all the witnesses for the state had yet testified. This statement being in the nature of a query, the court replied: "All you swore have testified, except Mr. Preston." Thereupon the solicitor called Mr. Preston and examined him as a witness. We do not find any cause for complaint in the conduct of the court above set forth, and there is certainly no basis for the contention that what transpired was prejudicial to the defendant, or that there was any intimation on the part of the court of any opinion as to the guilt or innocence of the defendant.

In charging the jury the judge stated that "the defendant in his statement said something about two absent witnesses, and they"—when he was stopped by the solicitor; and he thereafter said nothing more as to the contents of the defendant's statement. As we do not know what the judge intended to say, it cannot be inferred that the court would have stated anything that should not have been said in the charge to the jury. It is not to be presumed that he would have said anything expressive of his opinion upon the facts. And even if the judge was in fact prevented by the solicitor from making an improper statement (as was alleged), this fact would not require a new trial. It may be that, if the solicitor had not interrupted the judge, he might have intimated an opinion as to the weight of the defendant's evidence; but the mere fact that the court stated that the defendant had said something about two absent witnesses, if, as a matter of fact, the defendant did make such a statement, would not necessarily afford ground for reversal. It has several times been held that, while the court can express no opinion as to what has or has not been proved, he may state that there is testimony to a certain effect, where there is no testimony to the contrary.

4. A motion is made to tax the cost in this case. The writ of error comes to this court

upon a judgment overruling a certiorari in the superior court of Butts county. Under the ruling in the case of *Williams v. State*, 121 Ga. 195, 48 S. E. 938, it is the duty of the Solicitor General to represent the state in criminal cases which come from city courts by means of certiorari. We deem the ruling in the *Williams Case* to be applicable to this, and to be controlling, and therefore adjudge that the Solicitor General of the Flint circuit, and not the solicitor of the city court of Flovilla, is entitled to the fee.

Judgment affirmed.

(134 Ga. 416)

McCRAV v. STATE

(Supreme Court of Georgia. April 27, 1910.)

(Syllabus by the Court.)

1. JURY (§ 90*)—QUALIFICATIONS OF JURORS—RELATIONSHIP.

A juror upon the panel put upon the accused in a murder case, whose niece was the first wife of the father of the deceased, but who was not related in any way to the mother of the deceased, the second wife of his father, was not disqualified, by reason of relationship, to sit as a juror upon the trial of the case.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 413-422; Dec. Dig. § 90.*]

2. CRIMINAL LAW (§ 1064*)—WRIT OF ERROR—REVIEW—MOTION FOR NEW TRIAL.

A ground of a motion for a new trial, assigning error upon the admission of certain quoted testimony over the objection of the movant, without stating what the objection was upon which the trial judge ruled, is so incomplete that this court cannot pass upon it, although it may appear that a valid objection might have been made to such testimony.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2676-2684; Dec. Dig. § 1064.*]

3. CRIMINAL LAW (§ 398*)—EVIDENCE—BEST EVIDENCE.

The rule of evidence requiring the production of the best evidence obtainable is not violated by permitting the genuineness of a signature to an unattested instrument to be proved by a witness who is familiar with the handwriting of the person by whom it purports to have been made, without introducing the testimony of such person, though he may be easily accessible at the time such proof of the signature is offered.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 881; Dec. Dig. § 398.*]

4. CRIMINAL LAW (§ 451*)—EVIDENCE—OPINION EVIDENCE.

"The opinion of a witness is not admissible in evidence when all the facts and circumstances are capable of being clearly detailed and described so that the jurors may be able to form correct conclusions therefrom."

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1040-1042; Dec. Dig. § 451.*]

5. HOMICIDE (§ 156*)—ADMISSIBILITY OF EVIDENCE—STATEMENT OF ACCUSED PRIOR TO KILLING.

Testimony as to a statement made by the accused a few days before the homicide, which tended in some degree to illustrate the state of his feelings towards the deceased at the time of the homicide, and to throw some light upon the question of the motive which actuated him

when the killing occurred, was not inadmissible because such statement had not been communicated to the deceased.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 298-296; Dec. Dig. § 158.*]

6. CRIMINAL LAW (§ 451*)—EVIDENCE—OPINION EVIDENCE.

It is not permissible for a witness who testifies to a conversation between himself and another to state to whom such other person referred when in such conversation he used the pronoun "them"; the opinion of the witness on this question not being competent evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1040-1042; Dec. Dig. § 451.*]

7. CRIMINAL LAW (§ 415*)—ADMISSIBILITY OF EVIDENCE—DECLARATIONS OF DECEDENT.

Declarations made by the deceased in reference to his motive in seeking to find the accused, though made while on his way to the scene of the homicide in quest of the accused, were not admissible, over the objection of the accused, for the purpose of showing that the intention of the declarant in seeking the accused was peaceful and lawful.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 937-949; Dec. Dig. § 415.*]

8. WITNESSES (§ 217*)—EXAMINATION—PRIVILEGE—WAIVER.

Testimony which a witness has given, without objection on his part, cannot be excluded on motion of a party to the case, on the ground that the personal privilege of the witness was violated when such testimony was elicited from him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 780; Dec. Dig. § 217.*]

9. WITNESSES (§ 374*)—CREDIBILITY—ADMISSIBILITY OF EVIDENCE TO SHOW INTEREST.

It was not error, in view of the evidence in this case, to admit in evidence, to be considered solely on the question as to the credibility of a witness testifying in behalf of the accused on trial, an indictment against him and such witness, charging them jointly with the offense of assault with intent to murder, alleged to have been committed upon a named person, who, the evidence in the case on trial showed, accompanied the deceased at the time he was killed, and was assaulted as he was leaving the scene of the homicide.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1201, 1202; Dec. Dig. § 374.*]

10. HOMICIDE (§ 309*)—INSTRUCTIONS—VOLUNTARY MANSLAUGHTER.

Under the evidence in the case, the law of voluntary manslaughter was involved therein.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 309.*]

11. HOMICIDE (§ 300*)—INSTRUCTION—SELF-DEFENSE—DUTY TO LIMIT.

Relatively to the plea of self-defense alone, in a murder case, an instruction that it was important for the jury to determine "whether the offense, if any, the defendant acted in fear of was a felony or not," was not erroneous. But such instruction, if applied to the defense that the homicide was committed in defense of the habitation of the accused against the deceased and another, who were manifestly intending and endeavoring, in a riotous and tumultuous manner, to enter the same for the purpose of assaulting or offering personal violence to some one dwelling or being therein, would be erroneous. The court should have made it clear to the jury that this instruction was intended to apply only to the defense first

above indicated, and did not apply to the last-mentioned defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

12. PROPER INSTRUCTIONS.

The instructions which were excepted to upon the ground that they deprived the accused of the benefit of his defense which is last mentioned in the next preceding headnote, and the instructions which were excepted to upon the ground that they placed improper limitations or restrictions upon this defense were not subject to the assignments of error made upon them, as in none of these instructions was the court dealing with the law applicable to the homicide in defense of one's habitation, and the court did elsewhere in the charge deal with this defense of the accused, and no complaint is made that the instructions on this subject were erroneous or were not full and explicit.

13. HOMICIDE (§ 300*)—JUSTIFIABLE HOMICIDE—STATUTORY PROVISIONS.

The law of justifiable homicide as found in Pen. Code 1895, §§ 70, 71, is not qualified or limited by the law upon the separate branch of the same subject laid down in section 73; and it is error for the court, upon the trial of one indicted for murder, to so charge the jury as to confuse the defense of justifiable homicide under the fears of a reasonable man, based upon the provisions of the two related sections first mentioned, with the defense of absolute necessity to kill, in order to save one's own life, which is contained in section 73.

(a) Under the evidence contained in the record, the law laid down in section 73 was not involved in this case.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 300.*]

(Additional Syllabus by Editorial Staff.)

14. ARREST (§ 65*)—ON CRIMINAL CHARGE—PERSON ENTITLED TO SERVE WARRANT.

One whose name appears upon a warrant as prosecutor, and who, though not named as such in the warrant, is to all intents and purposes a prosecutor in the case in which the warrant is issued, is not a proper person to execute it.

[Ed. Note.—For other cases, see Arrest, Dec. Dig. § 65.*]

15. ARREST (§ 65*)—ON CRIMINAL CHARGE—SERVICE OF WARRANT BY PRIVATE PERSON.

If a private person relies upon his having in his possession a warrant, and upon being deputized to execute it, to justify his making an arrest, he must inform the person sought to be arrested that he is acting by virtue of such warrant.

[Ed. Note.—For other cases, see Arrest, Dec. Dig. § 65.*]

Evans, P. J., and Atkinson, J., dissenting in part.

Error from Superior Court, Bryan County; P. E. Seabrook, Judge.

Brunswick McCray was convicted of murder, and brings error. Reversed.

Brunswick McCray was tried under an indictment charging him with the offense of murder; the person alleged to have been killed by him being Zenas S. Warnell. The jury found him guilty of the offense charged in the indictment, whereupon he made a motion for a new trial, which was overruled, and he excepted. According to the evidence contained in the record, Zenas S. Warnell, the de-

ceased, and his brother, D. B. Warnell, were engaged in operating a turpentine farm. J. B. Boatright was employed by them as "woodsman," and boarded with Zenas Warnell. Brunswick McCray, the accused, had been for several years prior to the homicide employed as a laborer upon the turpentine farm by the Warnells. On several occasions he had left their premises, or, in the language of Boatright, who was the main witness for the state, had "run off," and the deceased "had gone after him." Two or three weeks prior to the homicide he again left the premises of the Warnells, and on this occasion he went to the turpentine farm of J. H. Blitch, 14 or more miles from that of the Warnells. A few days prior to the homicide, he returned to the Warnell place (where the evidence indicates his wife had still remained) at night, and, upon being seen there the next morning by D. B. Warnell, was by him furnished with some rations from the commissary, and was sent in a wagon in charge of Barker, an employé of the Warnells, to the woods to work. He apparently did not want to go to the woods to work, and said to Barker: "I have done left here, and I am going to leave again. They claim an account against me, but I don't owe them anything. Anyhow, if I do, I am not going to pay them." He also said: "The man who goes after me, it will be judgment with them." Shortly after this conversation he did leave the Warnell place. Barker testified: "He [McCray] remained on Mr. Warnell's place only that night." One night after he left Z. S. Warnell went to the bedside of Boatright, "woke him up," and asked him to go with him "for Brunswick." Boatright testified that Warnell then told him that he had a warrant, but "said he 'wanted to go to get Brunswick to come back to work for him.' That was the purpose he had in view in going for Brunswick, was to get him to come back and work for him. That was all the purpose that was disclosed to me." Another witness for the state, who lived on the Blitch place, testified that, after Warnell and Boatright got to that place, Warnell told the witness that he had come to get Brunswick McCray to go back to work for him, and did not say that he had come to arrest McCray or that he had a warrant for him. Z. S. Warnell and Boatright, the former armed with a repeating rifle and the latter with a revolver, rode in a buggy to the Blitch place, and to a two-room house thereon, which was the home of Webster McKinney, a brother-in-law of McCray's wife, and his wife and four children. Brunswick McCray and his wife were in this house at the time; the wife having joined the husband there during the night. It was between "daylight and sunup" when Warnell and Boatright got there. Warnell hailed several times at the gate in front of the house without getting any response. He and Boatright then went to the door, where Warnell again hailed several times. Finally, Webster McKinney "pok-

ed his head out of the door." Warnell asked him if "Brunswick McCray was there," to which McKinney responded, "Yes; he is here." Then, according to Boatright's version of what occurred, Warnell walked in the house, but, when Boatright started to enter also, McKinney tried to close the door on him and keep him out, but he "pushed on in there anyhow, and got in the house." According to the testimony of McKinney, when he opened the door, Warnell asked him if Brunswick McCray was in the house, and he answered, "Yes, sir," and then "asked him did he want to see Brunswick, but he did not say anything," and McKinney said: "If you want to see him, I will get him out here to you, because don't come in the house and disturb my wife and children. They are all asleep. I am the only one who is up." But McKinney testified that "they came right on in." "They got in the house by shoving the door open and coming right on in," and, when they came in, McKinney, as he testified, went out. "McCray and his wife slept in that room that night, the first room." Boatright testified that Warnell entered the house with his rifle in his left hand, the muzzle pointing downward, and he (Boatright) entered with his pistol in his right hand, having pulled it out of his pocket when McKinney tried to close the door on him. Warnell, closely followed by Boatright, walked through the front room to the door leading into the back room, pushed this door open, and stepped into the room, calling as he did so, "Come out here, Brunswick," and just then a gun was fired by some one in this room and Warnell was killed, his brains being blown out; the evidence clearly indicating that the person who fired the gun was Brunswick McCray. There was evidence as to a paper purporting to be a warrant for the arrest of Brunswick McCray, with blood on it, having been taken from an inside coat pocket of the deceased by a person who arrived at the scene of the homicide about 1 o'clock in the afternoon of the day it occurred, and who then made an examination of the dead body. This paper was introduced in evidence by the state, but is not copied in the record sent up to this court. The evidence indicates that there were evidences of erasures and alteration on this paper. At the time when witnesses for the state were being questioned in reference to the finding of this paper upon the dead body, there appears to have been another paper pinned to it, but the witnesses who testified as to the discovery of "the warrant" testified that they did not know whether the other paper was attached to it then or not, and it does not appear that this attached paper was introduced in evidence. There was other testimony not necessary to be stated here.

Oliver & Oliver and F. A. Morgan, for plaintiff in error. Williams & Giles, N. J. Norman, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

FISH, C. J. (after stating the facts as above). 1. One ground of the motion for a new trial complains because the court refused to set aside for cause a juror who was upon the panel put upon the accused after the juror had informed the court that the first wife of the father of the deceased was the juror's niece, but that the juror was not related to the mother of the deceased, who was the second wife of his father. It is clear that it does not appear from the statement of the juror that he was related either by consanguinity or affinity to the deceased, nor does it appear that he was related to the prosecutor, who was D. B. Warnell, a brother of the deceased. The objection to his competency was therefore not well taken.

2. The second ground of the amended motion complains of the admission of certain testimony, objected to by the accused, without stating, however, what the objection made was. While we can conceive of a valid objection to this testimony, we cannot, without knowing what the objection which the court overruled was, decide whether the ruling complained of was right or wrong.

3. One ground assigns error because the court over the objection of counsel for the accused permitted a witness to testify that the signature upon a document purporting to be a warrant for the arrest of the accused which the state contended the deceased had in his pocket and was attempting to execute at the time he was killed was the signature of the magistrate by whom the document purported to have been issued. The ground of the objection was "that an effort was being made to lay the foundation for the introduction of the paper, that Mr. Eyer [the magistrate] was on the court grounds, that there was higher and better grounds and better evidence accessible to prove whether or not the signature was that of Mr. Eyer," and the proof offered was secondary and incompetent. While it may seem rather singular that in a case of this extreme gravity the state, while insisting that the deceased at the time that he was killed had in his possession, and was endeavoring to execute, a warrant for the arrest of the accused, and had been lawfully deputized to make the arrest by the magistrate who issued the warrant, should in seeking to lay the foundation for the introduction of the paper claimed to be the warrant have failed to introduce the magistrate by whom it purported to have been issued, when he was so near at hand, and when, as the record shows, the judge during the progress of the trial informed the counsel in the case that the magistrate was present in the courtroom, and could be introduced as a witness, yet the objection to the testimony which the state did offer for the purpose of proving the genuineness of the warrant was not well taken. The rule of evidence requiring the production of the

best evidence obtainable is not violated by permitting the genuineness of a signature to be proved by a witness who is familiar with the handwriting of the person by whom it purports to have been made without introducing the testimony of such person, although he may be easily accessible at the time such proof is offered. *Royce v. Gazan*, 76 Ga. 79 (4); *Lefferts v. State*, 49 N. J. Law, 26, 6 Atl. 521; *McCaskle v. Amarine*, 12 Ala. 17; *Smith v. Prescott*, 17 Me. 277; *Ainsworth v. Greenlee*, 8 N. C. 190; *McCully v. Malcom*, 9 Humph. (Tenn.) 187; *Foulkes v. Commonwealth*, 2 Rob. (Va.) 836. In *Royce v. Gazan*, above cited, objection was made to proving the execution of certain notes and drafts by proving that the signatures of the purported maker of the same were in his handwriting; the objection being that he was present in court, and that his evidence would be the best evidence of their execution. It is true that in that case the maker of the notes and drafts was the defendant in the case, and this court held that it would be especially wrong to require a party to call his adversary to prove his own handwriting, and thus make that adversary his own witness, but this was merely given as being in that case an additional reason for the ruling that, "if there be no witness to a writing, anybody who knows the handwriting of the maker may prove it." The identical question made in the present case—that is, whether the genuineness of the signature of a magistrate to a criminal warrant may be shown by proof of his handwriting by another person, when the magistrate is himself within call at the time of the trial—was made in *McCully v. Malcom*, supra, and decided in the affirmative. In *Ainsworth v. Greenlee*, supra, a judgment of a justice of the peace in a criminal case was proved by calling witnesses who were acquainted with his handwriting, although the justice was within reach of the processes of the court.

4. A witness who had examined the body of the deceased about 1 o'clock in the afternoon of the day he was killed, and who testified that he found the paper purporting to be a warrant for the arrest of Brunswick McCray in an inside pocket of the coat of the dead man, was asked by counsel for the state whether, from what he saw and the examination that he made, this paper was in Mr. Warnell's pocket at the time he was killed. The witness answered: "The way the warrant was in there and the way the blood was on it, I don't see how it could be placed in any other time. In my opinion it was there at the time." This testimony was objected to upon the ground that the opinion of the witness upon this question was not competent, and the objection was overruled. The court clearly erred in this ruling. This was not a question for opinion evidence. Whether this paper was in the pocket of the deceased at the time he was

killed, as the state contended, or had been subsequently surreptitiously placed there, as seems to have been the contention of counsel for the accused, was for determination of the jury alone, who were just as competent as the witness to form an opinion from the facts to which he testified relative to this matter whether the paper in question was in the pocket of the deceased at the time he was killed. *Mayor, etc., of Milledgeville v. Wood*, 114 Ga. 370 (2), 40 S. E. 239; *O'Neil Mfg. Co. v. Harris*, 127 Ga. 640, 56 S. E. 739, and cases cited; *Brunswick & Birmingham R. Co. v. Hoodenpytle*, 129 Ga. 174 (5), 59 S. E. 705; *Churchill v. Jackson*, 182 Ga. 666 (4), 64 S. E. 691.

5. A witness was permitted to testify to a statement made to him by the accused a few days prior to the homicide, which was to the effect that the Warnells claimed to have an account against him, but he did not owe them anything, and that, if any one came after him to force him to again return to the turpentine farm of the Warnells, where he had been employed as a laborer, "it would be judgment with them." This testimony was objected to upon the ground that the statement of the accused to the witness was irrelevant, unless it had been communicated to the deceased; that, if it had no influence or effect upon the deceased, it could not be material. In view of the evidence in the case as to the circumstances under which the homicide occurred, we think this testimony was admissible as tending in some degree to illustrate the state of feeling of the accused toward the deceased at the time the homicide occurred, and to throw some light upon the question of the motive of the accused when he fired the shot which took the life of the deceased.

6. The court, over the objection of counsel for the accused, allowed this witness to testify that the accused referred to "Mr. Z. S. Warnell," the deceased, "when he said he was expecting them." This was clearly a mere opinion, surmise, or conjecture of the witness, and was inadmissible. He could state what the accused said, but had no right, as a witness, to put his own interpretation upon the language of the latter.

7. The court allowed a witness to testify that the deceased on the morning that the homicide occurred, and while he was in quest of the accused, in a conversation with the witness, "said he did not believe Brunswick would hurt him, nor did he want to hurt Brunswick. All he wanted was to have Brunswick go back and work out his money what he owed; and, if he did that, he would be satisfied." These were merely declarations made by the deceased about his own conduct, not communicated to the accused, and were inadmissible over the objection of the latter.

8. Counsel for the accused moved to rule out certain testimony of one of the witnesses for the accused on the ground that the wit-

ness was not compellable to testify to anything that might tend to disgrace or humiliate him, and that the testimony in question was of that nature. This motion was properly overruled. It may be that this testimony was subject to objection by the accused upon other grounds, but it could not be excluded merely on his motion upon the ground urged. Granting that the testimony in question could have been withheld or excluded at the instance of the witness under his personal privilege, he had not claimed the protection of his privilege, and the accused could not avail himself of it in order to have the testimony excluded from the consideration of the jury. The personal privilege of a witness cannot be set up by a party to the cause on trial as a ground for excluding testimony which the witness gives without claiming the protection of his privilege. *Taylor v. State*, 83 Ga. 647 (4), 10 S. E. 442.

9. An indictment wherein McCray, the accused in the present case, and the witness McKinney, who testified in his behalf, were jointly charged with the offense of assault with intent to murder, alleged to have been committed upon Boatright, the principal witness for the prosecution, was offered in evidence by the state. Objection was made to its admissibility, which objection was overruled, and on this ruling error is assigned. If it appeared that the indictment was based on a part of the same transaction on which the indictment for murder was founded—that is, if it charged McCray and the witness McKinney jointly with committing an assault with intent to murder on Boatright immediately after the homicide and as he was leaving the scene of the same—the evidence was admissible for the purpose of being considered by the jury in determining the bias of the witness McKinney. It was not admissible merely as being an indictment against McCray or against McKinney. An indictment is a mere charge or accusation by a grand jury, and is no evidence of guilt. Its introduction, therefore, could not be used as tending to show that McCray was guilty of another offense than that for which he was on trial, or as tending to impeach his character, or for the purpose of showing that McKinney was guilty of any offense. The sole purpose for which it was admissible was to show that McKinney had been indicted in connection with McCray for a part of the same transaction about which he testified, so that the jury could consider whether his testimony was given in the light of that fact and of the fact that he was subject to trial under the indictment, and whether his testimony was biased thereby. If the indictment was based on Boatright's testimony that McCray shot at him as he was leaving the scene of the homicide, and that McKinney instigated or urged him thereto, such testimony would tend to show that McKinney was an accomplice. He could not be convicted of the offense charged if the person

who was charged with doing the actual shooting could not be convicted. The transactions immediately preceding such shooting might have weight in tending to show whether the person who did the shooting was guilty of the offense charged, or whether, if he was, it should be mitigated, or whether he would be found guilty of any offense or of a lower grade of offense than that charged. If he was found not guilty McKinney, under the testimony of Boatright, could not be found guilty, and, if the person doing the shooting were found guilty of a lower grade of offense than that charged in the indictment, it would inure to the benefit of McKinney. So it was competent to show that McKinney testified in the light of the fact that he was thus jointly indicted with McCray, was subject to trial on that indictment, and that the testimony which he gave in the present trial might benefit or injure him on his own trial.

The court will doubtless carefully instruct the jury so as to limit them in considering the evidence to the purpose for which we have held it could be legitimately introduced, and inform them that they cannot consider it as proving or tending to prove that McCray or McKinney was guilty of the offense therein charged, or that McCray was guilty of the alleged offense for which he was on trial. But the fact that evidence which is admissible may be considered for an improper purpose, unless the judge shall correctly guard it and instruct the jury in regard to it, is not a ground for its rejection. See *Cochran v. State*, 113 Ga. 726 (2), 39 S. E. 332; *Watts v. State*, 18 Tex. App. 381. The ruling made in *City Bank of Macon v. Kent*, 57 Ga. 283-285 (12), is obiter, as the record in that case on file in this court shows that no assignment of error was made upon the admissibility in evidence of the indictments referred to in the ruling. Moreover, the decision was rendered by only two judges, and therefore would not be binding authority even if it were not obiter.

10. Some of the grounds of the motion raise the question whether it was error for the court to instruct the jury in reference to the law upon the subject of voluntary manslaughter; but the accuracy of the specific instructions given upon this subject is not attacked; and hence we express no opinion thereon, but simply determine that, under the evidence in the case, the law of voluntary manslaughter was involved therein. We deem it proper to say in this connection, however, that neither the paper claimed by the state to be a warrant for the arrest of Brunswick McCray, the accused in the present case, nor the paper said to have been attached to it, which are referred to by some of the witnesses for the state, is before us. The alleged warrant, although introduced in evidence by the state, is not set out in the record, and, so far as the record discloses, the other paper never became a part of the evidence in the case. If,

however, the document claimed to be a warrant was really a warrant for the arrest of Brunswick McCray, and the deceased had it in his possession at the time that he was killed, and he was himself the prosecutor, or the other member of the firm of which he was a member had sworn out the warrant for an offense alleged to have been committed against the partnership, it was not lawful for him to attempt to execute it, even if the magistrate who issued it had undertaken to deputize him to do so. One whose name appears upon a warrant as prosecutor, or who, though not named as such in the warrant, is to all intents and purposes a prosecutor in the case in which the warrant is issued, is not a proper person to execute the warrant. *Davis v. State*, 79 Ga. 767, 4 S. E. 318. Furthermore, if a private person relies upon his having in his possession a warrant and being deputized to execute it to justify his conduct in seeking to make an arrest, he must inform the person sought to be arrested that he is acting by virtue of such warrant. *Davis v. State*, supra. In the present case, if the deceased at the time he was killed really had a warrant for the arrest of the accused and was seeking to execute it, he in no way disclosed this fact to the accused, nor did he even so much as intimate to the accused, or to any one else at the place where the homicide occurred, that he had a warrant or that he intended to arrest the accused. In this connection, it is due to the trial judge to say that in his charge he instructed the jury that, under the evidence submitted, the deceased had no authority to arrest the accused, and that the state did not contend that, if an arrest had been made, it would have been lawful. It is by no means clear from the evidence that the deceased was attempting to arrest the accused, but there is evidence tending to show that he was simply attempting to compel the accused to return and resume work for him. If this was the fact, if he really was attempting to force the accused to return to work for the firm of which he, the deceased, was a member, and not merely attempting to arrest him for an alleged offense, the existence of the warrant or its possession by the deceased would afford no justification whatever for his conduct. There is a vast difference between an honest, though mistaken, effort of one who has a warrant in his possession to execute it and an effort upon his part to forcibly take the person against whom the warrant has been issued and compel such person to work for him. It is perhaps proper to state here that, besides the theory of an attempted arrest under a warrant, the state also contended that when the deceased, armed with a repeating rifle, and accompanied by a companion and employé, armed with a loaded revolver, started from the home of the deceased at 2 o'clock in the morning to find the accused, his purpose was to persuade the accused to return and resume work for him, and that

this was the sole motive which inspired and governed his conduct at the scene of the homicide. It will be seen, however, that these two theories were directly conflicting.

11. Exception was taken to the following instruction: "It is important in determining whether your verdict should be murder, voluntary manslaughter, or not guilty that you should consider and determine whether the offense, if any, the defendant acted in fear of was a felony or not. If the evidence shows that there was an intention to commit a serious injury, it must also appear that the defendant acted under the influence of those fears, and not in a spirit of revenge." One exception to this instruction is, in effect, that it is erroneous, because it is not necessary for the justification of one who kills another in defense of his habitation against two or more persons who manifestly intend and endeavor in a riotous and tumultuous manner to enter the same for the purpose of assaulting or offering personal violence to some one dwelling or being therein, that he should act under the fears of a reasonable man that they intend to make a felonious assault upon some inmate of the habitation, but that he would be justified if he merely acted under the fears of a reasonable man that the purpose of the invaders was to offer personal violence not amounting to a felony to some one in the house. The instructions complained of would not be erroneous if applied only to the defense that the accused fired the fatal shot under the fears of a reasonable man that his own life was in jeopardy or that a serious personal injury, amounting to a felony, was about to be inflicted upon him. Relatively to the question of complete justification for the homicide upon the ground of mere self-defense alone, without regard to the defense of habitation, it was important to determine whether the accused acted under the fears of a reasonable man that a felony was about to be committed upon him by the deceased. But, relatively to the defense indicated in the stated exception to this instruction, it was not important to determine whether the accused acted under the fears of a reasonable man that the deceased and his companion were manifestly intending and endeavoring to enter his habitation for the purpose of making a felonious assault upon him or some one else therein; but if he acted under the fears of a reasonable man that their purpose was to make an assault upon, or to offer personal violence, not amounting to a felony, to some inmate of the house, he would be justified. *Hudgins v. State*, 2 Ga. 173, 182; *Smith v. State*, 106 Ga. 681, 32 S. E. 851, 71 Am. St. Rep. 286. The court should have made it clear to the jury that the instructions complained of applied only to the defense first above indicated, that is, that the homicide was committed in self-defense against a felonious assault upon the person of the accused, or under the fears of a reasonable man that such an assault was being made upon

him, and not to the defense that the homicide was committed in defense of habitation against persons manifestly intending and endeavoring, in a riotous and tumultuous manner, to enter the same for the purpose of assaulting or offering personal violence to the accused or some other person dwelling or being therein. As to the last-mentioned defense, the court should have instructed the jury that it was not necessary for the accused, in order to be justified, to have acted under the fears of a reasonable man that the assault or personal violence intended would, if perpetrated, amount to a felony, but that if he acted under the fears of a reasonable man that the purpose intended was to commit an assault upon, or to offer personal violence to, an inmate of the habitation, he would be justified.

12. Several grounds of the motion set forth excerpts from the charge, wherein the court was instructing the jury with reference to the subjects of murder, voluntary manslaughter, justifiable homicide in self-defense, and reasonable fear as a justification for a homicide, or as to some of these subjects, and except to the same, not upon the ground that they were not correct when applied to the particular subject or subjects embraced therein, but upon the ground that they either entirely deprived the accused of his defense that the homicide was committed in defense of his habitation against persons who manifestly endeavored, in a riotous and tumultuous manner, to enter the same for the purpose of assaulting or offering personal violence to some one therein, or had the effect of placing improper limitations or restrictions upon this defense. In our opinion none of these exceptions is well taken. In none of the instructions so complained of was the court dealing with the law applicable to homicide in defense of one's habitation. The court did, however, elsewhere in the charge, and very properly, we think, under the evidence in the case, undertake to deal with this defense of the accused, and no complaint is made that the court's instructions upon this subject were erroneous or were not full and explicit.

13. The court, after charging upon the subject of reasonable fear in the language of section 71 of the Penal Code of 1895, continued the instruction as follows: "In other words, it must be established that upon the occasion to which this evidence points * * * this defendant had an apprehension or had a fear, and had reason to fear, and that the reasons were such as to excite the fears of a reasonable man, not the fears of a coward, but the fears of a reasonably courageous man, that a felony was intended to be committed upon him, or a serious personal injury, and that this shooting was done with a view of defending himself against that danger, either real or apparent; that there was then impending danger; that it was necessary for him to kill to save his own life." The last

two clauses of the sentence last quoted are improper qualifications of the doctrine of reasonable fear as applied to the defense of justifiable homicide, and tended to destroy the effect of the instructions upon this subject which immediately preceded them. If it is shown that when the killing occurred the circumstances under which it occurred were sufficient to excite the fears of a reasonable man that his life was in imminent peril, or that an offense was about to be committed against him by the person killed amounting to a felony, and in striking the mortal blow he really acted under the influence of such fears and not in a spirit of revenge, the homicide is justifiable, whether it was in fact really necessary for him to kill in order to save his own life or not, or whether there was then really impending danger or not. Absolute necessity to kill is not the test by which to determine whether a homicide was justifiable, when the defense of justifiable homicide under the fears of a reasonable man is the question involved. The doctrine of absolute necessity has its proper place in the law of homicide, but that place is not found in the section of the Penal Code which deals with the subject of reasonable fear as a justification for a homicide. Section 73 of the Penal Code, which provides that, "if a person kill another in his defense, it must appear that the danger was so urgent and pressing at the time of the killing that, in order to save his own life, the killing of the other was absolutely necessary," this court has decided applies exclusively to cases of self-defense arising during the progress of a fight wherein both parties have been at fault. *Teasley v. State*, 104 Ga. 738, 30 S. E. 938; *Parks v. State*, 105 Ga. 242 (3), 31 S. E. 580; *Lowman v. State*, 109 Ga. 501 (3), 34 S. E. 1019; *Delegal v. State*, 109 Ga. 518 (3), 35 S. E. 105; *Pugh v. State*, 114 Ga. 16 (1), 39 S. E. 875. And it has been repeatedly held that the law as laid down in section 73 does not qualify or limit the law of justifiable homicide as laid down in sections 70 and 71, and that instructions dealing with the law contained in the last two mentioned sections, which are applicable when the homicide is committed in good faith to prevent the perpetration of any of the offenses mentioned in section 70, or under the fears of a reasonable man that such an offense will be committed, unless the person who is actually, or apparently, about to perpetrate it is killed, should not be confused with instructions as to the law embraced in section 73, wherein absolute necessity to kill is made the test of justifiable homicide. *Powell v. State*, 101 Ga. 9, 22-26, 29 S. E. 309, 65 Am. St. Rep. 277, and cases to this effect cited; *Teasley v. State*, supra; *Pugh v. State*, supra; *Warrick v. State*, 125 Ga. 133 (7), 53 S. E. 1027. In the case with which we are dealing, however, the error of the court was more deep seated than this; for, in no view

of the evidence, under the decisions first above cited, could this case fall within the class of cases to which section 73 of the Penal Code is applicable, and hence the question of justification arising from absolute necessity to kill in order to save one's own life was not involved in the case.

Judgment reversed. All the Justices concur.

EVANS, P. J., and ATKINSON, J., concur in the judgment and in the various propositions laid down in the opinion, except that contained in the ninth division. We think this evidence was inadmissible. A joint indictment against a witness for the accused and the accused for a distinct offense is not admissible to show the bias of the witness. The defendant's involuntary joinder in the indictment with the witness by the grand jury affords neither presumption nor inference of identity of interest or defense. By this evidence the credibility of the witness is not attacked by any of his own acts or conduct; but he is sought to be discredited by the ex parte action of the grand jury in returning a joint bill of indictment for a distinct offense against himself and the accused. If a defendant is to be presumed innocent until proved guilty, a fortiori, the standing, character, and credibility of a witness should not be allowed to be impugned by the introduction in evidence of an indictment containing a different charge, which he has never had the privilege of defending. Our views are in accord with the ruling in *City Bank of Macon v. Kent*, 57 Ga. 283 (12); and, though the point there decided may have been an obiter dictum, it is based in our opinion upon an impregnable basis.

(124 Ga. 477)

MARTIN v. COWAN.

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

1. EXECUTION (§ 194*)—CLAIM BY THIRD PERSON—EVIDENCE.

In a claim case, where the plaintiff in *fi. fa.* seeks to make out a *prima facie* case by showing possession in the defendant, it is incumbent on him to show such possession at the time of the rendition of the judgment, or at the time of the making of the levy, or at some time intermediate the judgment and the levy.

[Ed. Note.—For other cases, see *Execution*, Dec. Dig. § 194.*]

2. EXECUTION (§ 196*)—CLAIM OF THIRD PERSON—QUESTION FOR JURY.

In such a case, where the levying officer amended his entry of levy by adding thereto, after the words "defendant in *fi. fa.*," the words "being in possession of the property levied upon," and where the plaintiff in *fi. fa.* on the trial introduced also the testimony of witnesses which, as it appears in the record, is somewhat ambiguous, and renders it uncertain whether the defendant was in possession, either at the time of the rendition of the judgment, or at the time of the making of the levy, or between

those dates, the presiding judge correctly refused to dismiss the levy, but erred in directing a verdict in favor of the plaintiff. He should have submitted the case to the jury, to determine what was the fact in regard to such possession.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 196.*]

Error from Superior Court, Ben Hill County; U. V. Whipple, Judge.

Claim case between L. M. Martin and W. G. Cowan. From the judgment, Martin brings error. Reversed.

Eason & Bull, for plaintiff in error. Joseph B. Wall, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(134 Ga. 485)

SMITH v. SMITH et al.

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

EJECTMENT (§ 63*)—PLEADING—PETITION.

In an action of complaint for land and mesne profits, the petition, which alleged that the defendant was in possession, claiming title under the plaintiff's mortgagee, who had sold the land under the mortgage, and that the debt secured was the debt of the plaintiff's husband, and the sale void, was subject to demurrer; it not being alleged that the purchaser at the mortgage sale had notice at the time of the sale that the debt was that of the husband. To meet the demurrer it was not sufficient to allege that the mortgagee had notice, or that two others, one being the defendant, but neither alleged to be the purchaser at the mortgage sale, "likewise knew" all the facts stated in the petition.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 63.*]

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action by Josephine Smith against J. R. Smith and others. From an order sustaining a demurrer to the petition, plaintiff brings error. Affirmed.

Hendricks & Christian, for plaintiff in error. Brice & Knight, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(134 Ga. 478)

TAYLOR v. HARTSFIELD.

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

1. EXECUTION (§ 196*) — CLAIMS BY THIRD PERSONS—QUESTION FOR JURY—POSSESSION AT TIME OF LEVY.

Where, in a claim case, the plaintiff in fa. introduced in evidence the entry of levy, which contained a statement that the defendant in fa. was in possession of the land levied at the time of the levy, and also introduced parol evidence tending to show such possession, but later introduced other parol evidence tending to show that the defendant was not in

possession at the time of the levy, but that the claimant was then in possession, it was error for the presiding judge to direct a verdict finding the property subject. He should have submitted to the jury the question thus raised by this conflicting evidence as to possession.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 196.*]

2. EXECUTION (§ 194*) — CLAIMS OF THIRD PERSONS—TITLE IN CLAIMANT—SUFFICIENCY OF EVIDENCE.

In a claim case, if the plaintiff in execution makes out a prima facie case, and the claimant seeks to show title to the land levied on, it is not sufficient for that purpose to introduce a deed from a third person who is not shown to have had title, or to have been in possession at the time of the making of the deed.

(a) In the present case, the deed sought to be introduced was claimed to have been made by a corporation. The evidence failed to show that such corporation was in possession, but tended to show that its president, as an individual, held the land as his own.

(b) Objection having been made to such deed when it was introduced, and it having been admitted temporarily, but subject to a renewal of the motion, and the evidence, when the claimant closed, failing to show either title or possession in the corporation when the deed was made, its exclusion from evidence, on motion, was not erroneous.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 194.*]

3. EVIDENCE (§ 370*)—CORPORATIONS (§ 432*)—DEEDS OF CORPORATION—SEAL AS PRESUMPTION OF AUTHORITY—RECEPTION OF EVIDENCE.

When a deed purporting to have been made by a corporation, through its president, is offered in evidence, and objection is duly raised thereto, authority of the president to make such deed should be shown. If the deed has the seal of the corporation attached thereto, this will furnish presumptive evidence of such authority.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 370;* Corporations, Cent. Dig. § 1729; Dec. Dig. § 432.*]

Error from Superior Court, Mitchell County; Frank Park, Judge.

Action between Samantha Taylor and B. D. Hartsfield, administrator. From the judgment, Taylor brings error. Reversed.

H. C. Dasher, Jr., and Cox & Peacock, for plaintiff in error. Pope & Bennet, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(134 Ga. 518)

WALKER v. NORRIS.

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 78*)—DECISIONS APPEALABLE—JUDGMENT ON DEMURRER TO APPLICATION FOR QUO WARRANTO.

According to the ruling made in Western & Atlantic Railroad Co. v. State, 69 Ga. 524, which was followed in Sayer v. Harding, 118 Ga. 642, 45 S. E. 418, a judgment overruling a demurrer to an application for the writ of quo warranto is not a final disposition of the case,

from which a bill of exceptions can be taken directly to this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 465, 467; Dec. Dig. § 78.*]

2. APPEAL AND ERROR (§ 337*)—EXCEPTIONS, BILL OF (§ 30*)—DISMISSAL—PREMATURE BILL OF EXCEPTIONS—EXCEPTIONS PENDENTE LITE.

Under the rulings made in the cases above cited, the bill of exceptions in the present case was prematurely sued out, and therefore the writ of error must be dismissed; but, inasmuch as such rulings seem to constitute an exception to the general practice that a bill of exceptions will lie in a case "when the decision or judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the cause," leave is granted, on motion of counsel for the plaintiff in error, to have the official copy of the bill of exceptions, of file in the office of the clerk of the superior court, recorded there as an exception pendente lite.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1878; Dec. Dig. § 337; *Exceptions, Bill of, Dec. Dig. § 30.*]

Error from Superior Court, Johnson County; B. T. Rawlings, Judge.

Action between J. M. Walker and A. S. Norris. From the judgment, Walker brings error. Dismissed, with directions.

Hines & Jordan, for plaintiff in error. Wm. Faircloth and E. L. Stephens, for defendant in error.

PER CURIAM. Writ of error dismissed, with direction. All the Justices concur.

(124 Ga. 506)

BUCHMAN et al. v. INSURANCE CO. OF NORTH AMERICA.

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

INSURANCE (§ 668*)—ACTION ON POLICY—NONSUIT.

It appearing from the evidence introduced by the plaintiff, who sued upon a policy of fire insurance, that there had not been even a substantial compliance with the terms of the promissory warranty contained in the "iron safe clause," providing that "the assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory as provided for in first section of this clause, and during the continuance of this policy," and compliance by the assured with this part of the contract of insurance being one of the conditions upon which, by the express terms of the contract, the validity of the policy is made to depend, the court did not err in directing a nonsuit at the conclusion of the testimony offered by the plaintiff. *Sou. Fire Ins. Co. v. Knight*, 111 Ga. 622, 38 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1740; Dec. Dig. § 668.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Joseph Buchman and others against the Insurance Company of North America. Judgment of nonsuit, and plaintiffs bring error. Affirmed.

Tye, Peeples & Jordan, for plaintiffs in error. King, Spalding & Little, E. Marvin Underwood, and Smith, Hammond & Smith, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(124 Ga. 478)

JACKSON v. STATE.

(Supreme Court of Georgia. April 16, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—NAME OF PROSECUTING WITNESS.

It being in issue, under the evidence, as to whether there was a variance between the name by which the female alleged to have been assaulted was commonly known and the name set forth in the indictment, it was not error for the court to charge the jury touching this issue in the following language: "I charge you, if you find from the facts and circumstances of this case that the name set out in the indictment is the name by which the party was called, one that she recognized, and one by which she was known, it would be sufficient in law."

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 814.*]

2. STATEMENT OF OPINION.

The extract from the charge above quoted is not open to criticism upon the ground that it expresses or intimates an opinion upon any fact involved in the case.

3. CRIMINAL LAW (§ 770*)—INSTRUCTIONS—OBJECTIONS.

It is not a valid ground of criticism upon a charge correct and proper in itself that it fails to state some other rule or principle of law pertinent to the issues of the case.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 770.*]

4. SUFFICIENCY OF EVIDENCE.

There was sufficient evidence to support the verdict.

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Jim Jackson was convicted of crime, and brings error. Affirmed.

Saffold & Larsen, for plaintiff in error. Alfred Herrington, Sol. Gen., Hines & Jordan, and Jno. C. Hart, Atty. Gen., for the State.

BECK, J. The plaintiff in error, Jim Jackson, was charged with the offense of rape, alleged to have been committed upon one Neida Jackson. Upon the trial the jury returned a verdict of guilty, with a recommendation. A motion for a new trial was overruled, and defendant excepted.

In addition to the general grounds, complaining that the verdict was contrary to evidence and the law, and without evidence to support it, the motion for a new trial contained a special ground assigning error upon the following charge of the court: "I charge you, if you find from the facts and circumstances of this case that the name set out in the indictment is the name by which the party was called, one that she recognized, and

one by which she was known, it would be sufficient in law." As to the name of the female alleged to have been assaulted, she testified: "My name is Nedia Jackson. I go by the name of Nedia Jackson. That is the name I am known and go by—Nedia Jackson. That is the name I answer to. They call me Nedia Jackson, and I answer to it. I took the name of Nedia Jackson, because my mother married him [Jim Jackson]. They don't always call me Nedia Jackson. If anybody meets me, they just call me Nedia; but if they write anything, they call me Nedia Jackson. They address me as Miss Nedia Jackson. People calling me just say, 'Hello, Nedia.' That is the name I answer to. They call me Nedia; but my real name is Nedia Jeeter, and when people call me they always call me Nedia." While the spelling of the Christian name of the party upon whom the assault is alleged to have been made, as reported in the evidence, varies from the spelling of the name in the indictment, we have no doubt but that it is one and the same name with that stated in the indictment, and we think it is clearly a case of idem sonans, though various pronunciations might be given to it by different readers, and in fact there is no contention but that the Christian name of the party assaulted was correctly stated in the indictment. It is insisted, however, that her true name was Nedia Jeeter; but after the marriage of her mother to the accused she took the name of Nedia Jackson, and while she does not state in her testimony that she was universally or generally known by that name, the jury were authorized to find that she was so known, and the charge above quoted stated a correct rule for the guidance of the jury in determining whether there was a variance between the name as stated in the indictment and her real name, or that by which she was known. The criticism upon the charge, complaining that the court should have submitted to the jury the question as to whether the name stated in the indictment was the name "by which she was generally or commonly known," is without merit. The language of the charge itself is sufficiently comprehensive to indicate to the jury that they were to determine whether the name stated in the indictment is the one by which the party was commonly called and known. See, in this connection, *Johnson v. State*, 46 Ga. 289.

2. The extract from the charge above set forth is also criticised upon the ground that it did not leave the question of the identity of the person alleged to have been assaulted to the jury, and did not leave it for the jury to say whether the Nedia Jackson mentioned in the indictment was identical with the person testifying on the trial, but that the charge takes it for granted, thereby amounting to an expression of opinion upon the part of the court that she is one and the same person. We do not think that the charge contains

any expression or intimation of opinion by the court upon any fact in issue.

3. It is not a valid ground of complaint against a charge, correct in itself, that it fails to submit some other issue of fact to the jury, when it correctly submits to them the particular question with which it is dealing; and there is no complaint in the motion for a new trial that the court did not elsewhere in his charge properly submit to the jury the question of the identity of the witness with the person designated as Nedia Jackson in the indictment.

4. The evidence is sufficient to uphold the verdict, and we do not feel authorized to interfere with the discretion of the court below in refusing a new trial.

Judgment affirmed. All the Justices concur.

(134 Ga. 475)

BUCHANAN v. JAMES, Com'r, et al.

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 1½, * New, vol. 9, Key No. Series)—NATURE OF MOTION.

A motion for a new trial is a means of seeking to have a retrial or re-examination, in the same court, of an issue of fact, or of some part or portion thereof, after decision by a jury, report of a referee, or a decision by the court thereon. It is an application for a retrial of the facts of the case. 2 *Thomp. Trials*, § 2708; *Castellaw v. Blanchard*, 106 Ga. 97, 31 S. E. 801; 5 *Words & Phrases*, 4788 et seq.

2. JUDGMENT (§ 570*)—BAR—NONSUIT.

The grant of a nonsuit terminates the case, without a final passing upon the issues of fact by a jury, referee, or judge. It is a ruling by the judge that the plaintiff, under the evidence presented by him, has not made out such a case as to entitle him to have the jury pass upon the issues of fact. It is a ruling of law by the judge, not a determination of the issues of fact. Under the practice in this state, it does not preclude the plaintiff from bringing another action, and seeking to make out his case by the introduction of evidence on the trial thereof.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1028; Dec. Dig. § 570.*]

3. NEW TRIAL (§ 38*)—GROUNDS—GRANTING OF NONSUIT.

It follows, from the distinction which will appear from the two preceding headnotes, that where the presiding judge grants a nonsuit, and thus terminates the case before a verdict or decision upon the issues of fact, a motion for a new trial is not the proper mode of testing the correctness of such ruling. See *Hudson v. Georgia Pacific Ry. Co.*, 85 Ga. 203 (3), 11 S. E. 605; *Central Railroad Co. v. Folds*, 86 Ga. 42, 12 S. E. 216; *Swain v. Macon Fire Ins. Co.*, 102 Ga. 96, 103, 29 S. E. 147; *Southern Railway Co. v. James*, 114 Ga. 198, 39 S. E. 849; *City of Atlanta v. Miller*, 125 Ga. 495, 54 S. E. 538.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 56; Dec. Dig. § 38.*]

4. REVIEW ON WRIT OF ERROR.

There was no error in dismissing the motion for new trial.

Error from Superior Court, Early County; W. C. Worrill, Judge.

Action by Mrs. W. A. Buchanan against D. W. James, Commissioner, and others. Judgment of nonsuit, and plaintiff brings error. Affirmed.

Park & Collins and Pottle & Glessner, for plaintiff in error. R. H. Sheffield and Pope & Bennet, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(134 Ga. 476)

CITY OF DAWSON v. THORNTON.

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

1. QUESTION NOT NECESSARY TO DETERMINE.

The extent to which a municipality may constitutionally go in enacting ordinances in regard to a public weigher is a question which need not be determined in this case.

2. WEIGHTS AND MEASURES (§ 8*) — ORDINANCES—CONSTRUCTION.

An ordinance passed by the municipal authorities of the city of Dawson, after creating the office of public weigher, provided as follows: "It shall be the duty of said public weigher, in all cases of disagreement between seller and buyer, to weigh all cotton and other products sold by weight, when requested to do so, and give his certificate for the same." This provision did not undertake to compel all persons who bought or sold cotton or other produce to have the same weighed by the public weigher, or to prohibit warehousemen and cotton buyers from employing an agent or clerk to weigh cotton in cases not falling within the duty of the public weigher as above defined.

[Ed. Note.—For other cases, see *Weights and Measures*, Dec. Dig. § 8.*]

3. WEIGHTS AND MEASURES (§ 8*)—ORDINANCES—CONSTRUCTION.

While the penal portion of the ordinance employs some broad language, it must be construed in connection with its object, which was to prevent interference with the discharge of his duty by the public weigher. The ordinance provides for weighing by the public weigher only in cases of disagreement between seller and buyer, when he is requested to weigh. If the penal section were construed to impose a punishment on any clerk or other person for weighing cotton under any circumstances or in any capacity, without having been legally elected to the office of public weigher, it would seem that such provision would be invalid.

[Ed. Note.—For other cases, see *Weights and Measures*, Dec. Dig. § 8.*]

4. INJUNCTION PROPERLY GRANTED.

Under the pleadings and the evidence in the case, there was no abuse of discretion in granting the injunction.

Error from Superior Court, Terrill County; W. C. Worrill, Judge.

Action by H. O. Thornton against the City of Dawson. Judgment for plaintiff, and defendant brings error. Affirmed.

W. H. Gurr and H. A. Wilkinson, for plaintiff in error. J. A. Laing and M. C. Edwards, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

PINNEBAD v. PINNEBAD.

(134 Ga. 496)

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

1. DIVORCE (§ 27*)—GROUNDS—CRUEL TREATMENT BY WIFE—SUITS AGAINST HUSBAND.

That a wife brings suit against her husband and recovers judgment against him for a debt due to her, and that after separation she sues him for temporary alimony and obtains a judgment in such action, does not constitute cruel treatment, or furnish to the husband any basis for a suit for divorce.

[Ed. Note.—For other cases, see *Divorce*, Dec. Dig. § 27.*]

2. DIVORCE (§ 27*)—CRUEL TREATMENT—REFUSAL OF WIFE TO COHABIT.

Mere proof that a wife declined to cohabit with her husband will not authorize the grant of a divorce to him on the ground of cruel treatment.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 74, 77; Dec. Dig. § 27.*]

3. DIVORCE (§ 37*)—DESERTION—REFUSAL OF CONJUGAL RIGHTS.

Considering willful and persistent denial by a wife of the conjugal rights of her husband, without justification, and with the intention of casting him off as a husband completely and forever, as constituting desertion, although she continue to reside in the matrimonial domicile, under section 2426 of the Civil Code of 1896, such desertion must continue for three years in order to furnish a ground for a suit for divorce. *Whitfield v. Whitfield*, 89 Ga. 471, 15 S. E. 543.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 111, 128; Dec. Dig. § 37.*]

4. SUFFICIENCY OF EVIDENCE.

Under the rulings in *Ring v. Ring*, 118 Ga. 183, 44 S. E. 861, 62 L. R. A. 878, *Brown v. Brown*, 129 Ga. 247, 58 S. E. 825, and *Stoner v. Stoner* (April 18, 1910) 67 S. E. 1030, the evidence failed to show a case of cruel treatment which authorized the grant of a divorce on that ground; and the evidence of the plaintiff showed that there had been no desertion willfully and continuously persisted in for three years before the bringing of the suit. The verdict finding a total divorce for the plaintiff was therefore unauthorized by the evidence.

Error from Superior Court, Glynn County; T. A. Parker, Judge.

Action by Vincent Pinnebad against E. J. Pinnebad. Judgment for plaintiff, and defendant brings error. Reversed.

Ernest Dart, for plaintiff in error. Crovatt & Whitfield, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur, except ATKINSON, J., disqualified.

(134 Ga. 496)

KING & CLARK v. MONIAC TURPENTINE CO. et al.

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

LOGS AND LOGGING (§ 3*)—INJUNCTION (§ 48*)—GRANT OF TREES—TITLE ACQUIRED—TRESPASS.

The grant conveyed, "for a term of 10 years from January 9, 1907, all the pine, cypress, oak,

and other timber and trees, living or dead, standing or lying, of all sizes and dimensions, including stumps, roots, stock, and branches, whatsoever, thereon and thereof, for all uses and purposes, of any character and description, and to be removed and taken off within the time hereinafter stated, excepting therefrom the right and privilege of second party [King & Clark], or his assigns, to cut, box, or hack any living pine trees thereon for turpentine purposes in and upon that tract or body of land located," etc. *Held*, the exception did not exclude any of the trees from the operation of the grant, but restricted the grantees from cutting and boxing the pine trees for turpentine purposes. The grantees have such an interest in the pine trees during the stipulated period as will support an action to enjoin an insolvent trespasser from cutting and boxing the trees for turpentine use, and to recover such damages as the grantees may sustain from the trespass.

[Ed. Note.—For other cases, see *Logs and Logging*, Dec. Dig. § 3;* *Injunction*, Cent. Dig. § 101; Dec. Dig. § 48.*]

Error from Superior Court, Charlton County; T. A. Parker, Judge.

Action by King & Clark against the Moniac Turpentine Company and Henry Williams. Judgment for defendants, and plaintiffs bring error. Reversed.

King & Clark, copartners, brought suit against the Moniac Turpentine Company and Henry Williams to enjoin them from trespassing upon a certain tract of land, and to recover damages for the trespass already committed. The plaintiffs alleged that they were the owners of all the timber upon the described lots of land, which they had purchased for their own use and profit; that the same was necessary for the successful conduct of the sawmill, cross-tie, wood, timber, and lumber business in which they were engaged; that the acts of the defendants in turpentineing the trees were a continuing trespass, requiring of the plaintiffs a multiplicity of suits, but that the damages therefrom were incapable of being estimated with any degree of certainty; and that the defendants were insolvent and unable to respond in damages. The case came on for trial, and the plaintiffs proved title to the timber, the last muniment of which was a deed from the Charlton Land & Timber Company to the plaintiffs, conveying, "for a term of ten (10) years from January 9, 1907, all the pine, cypress, oak, and other timber and trees, living or dead, standing or lying, of all sizes and dimensions, including stumps, roots, stock, and branches, whatsoever, thereon and thereof, for all uses and purposes, of any character and description, and to be removed and taken off within the time hereinafter stated, excepting therefrom the right and privilege of second party, or his assigns, to cut, box, or hack any living pine trees thereon for turpentine purposes in and upon that tract or body of land located in the First land district of Charlton county, Georgia, and containing four thousand six hundred and thirty-nine (4,639)

acres, more or less, and described as follows," etc.

The plaintiffs submitted evidence that the defendants, without the consent and over the protest of plaintiffs, entered upon the land described in the petition, and cut, hacked, boxed, and worked the pine trees thereon suitable for turpentine purposes, and still over the objections of the plaintiffs continued to do so until the present time, and that the working of the trees, outside of the turpentine taken therefrom, has injured and damaged plaintiffs because of the trees being blown down and destroyed by such work, to the extent of at least \$500. At this juncture the plaintiffs offered an amendment, alleging that, "while they leased the timber in controversy from the Charlton Land & Timber Company for all purposes for the term specified of 10 years from January 9, 1907, except the turpentine privilege, and held possession of same for said purposes, such turpentine privilege is inconsistent with the enjoyment of said timber during term for said other purposes; that the boxing and working of said timber for turpentine purposes also tends to injure and damage said timber for such other purposes, by subjecting it to destruction by fire and storms, and renders the timber less valuable for such other purposes, including the manufacture of same into lumber and cross-ties; that plaintiffs, holding said timber under said Charlton Land & Timber Company for such other purposes, are in duty bound to protect same against the boxing and working same for turpentine purposes by defendants as trespassers, not only because of the injury and damage caused thereby to said timber for the purposes for which it was conveyed to them, but in protection of the freehold of their lessors, the said Charlton Land & Timber Company;

* * * that while they may not recover of and from defendants damages for the turpentine privilege in and to said timber, they are entitled to recover the amount of the damages claimed as injury to said timber for the purposes for which the same was leased and conveyed to them; and, as such injury and damage is irreparable, they are entitled to enjoin the same, which they pray may be done." They offered to support this amendment by proof. The court disallowed the amendment and granted a nonsuit on motion of the defendants, predicated upon the ground that inasmuch as plaintiffs, under the deed from the Charlton Land & Timber Company to them, had no right or title to cut, box, or hack the trees for turpentine purposes, they were not injured thereby, and could not recover under the pleadings and evidence, and were not entitled to a permanent injunction as prayed. Exception is taken to the disallowance of the amendment and the grant of a nonsuit.

J. L. Sweat and H. F. Dunwody, for plaintiffs in error. Wilson, Bennett & Lambdin, for defendants in error.

EVANS, P. J. (after stating the facts as above). The plaintiffs showed that their immediate grantor, the Charlton Land & Timber Company, was the owner of the freehold; and their contention is that they are the owners of all the timber granted in their lease by the Charlton Land & Timber Company, during the period of their lease, with the restriction that they should not use the same for turpentine purposes. The defendants, on the other hand, contend that, the turpentine privilege being expressly excepted from the grant, the plaintiffs had no such right or title as would enable them to maintain a suit to enjoin the defendants from working the timber for turpentine purposes. The correctness of the respective contentions of the parties depends upon a construction of the timber deed from the Charlton Land & Timber Company to King & Clark, an abstract of which appears in the statement of facts. A grant of timber to be cut and removed within a specified time passes title to the timber, subject to be defeated upon a failure to cut and remove it within the time stipulated in the grant. *Morgan v. Perkins*, 94 Ga. 353, 21 S. E. 574. The grant of the timber by the Charlton Land & Timber Company to the plaintiffs was as broad as is possible for words to make it. The grantors in that deed conveyed all the timber for all uses and purposes, "excepting therefrom the right and privilege of second party or his assigns to cut, box, or hack any living pine trees thereon for turpentine purposes." The exception does not operate upon the grant of the trees, but upon the use to which they may be put by the grantees or their assigns. The grant operates upon all the trees conveyed, and the exception does not undertake to except any tree upon the land. The grantees are given the right during the period of the lease to use the timber for any use, except that they may not turpentine it. They may cut the trees and manufacture them into cross-ties or lumber, but they are prohibited by their deed from turpentering the timber. The exception in the lease is more in the nature of a covenant not to put the timber to turpentine use than it is an exception of anything which was granted. A covenant by a lessee to plow the demised premises, except the warren, in due course of husbandry, was held to imply a covenant not to plow the warren. *St. Albans v. Ellis*, 16 East, 352. The grantees, therefore, had the right to use the timber as restricted by the deed. It was their timber, and the restriction that they were not to use it in a particular way gives no right to an insolvent trespasser to damage or destroy the timber by making use of it in a manner denied the plaintiffs by their grant.

It would make no difference to the defendants if the deed should be construed as reserving to the grantor the turpentine privileges in the timber, because it does not appear from the record that they are assignees or privies in estate with such grantor. So far as disclosed by the record, they are insolvent trespassers, without any claim of title to the land or the timber; and the existence of a right in some one else to do an act would be no justification of themselves to do the same act, which would have the effect to injure the timber of the plaintiffs by making it liable to be blown and destroyed by fire. The court erred in rejecting the proffered amendment, and also in granting a nonsuit.

Judgment reversed. All the Justices concur, except ATKINSON, J., disqualified.

(124 Ga. 518)

BASCH v. FRANKENSTEIN et al.

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

EQUITY (§ 71*)—STALE DEMAND.

The court committed no error in sustaining the demurrer and dismissing the equitable petition, on the ground that it undertook to set up a stale demand.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 204-211; Dec. Dig. § 71.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by S. R. Basch against M. I. Frankenstein and others. From an order sustaining a demurrer, plaintiff brings error. Affirmed.

The plaintiff in error filed an equitable petition for injunction, reformation of a deed, a decree that the plaintiff have and receive an undivided one-half interest in the land described in the petition, an accounting for rents, and other equitable relief. To the petition the defendants filed a demurrer on the following grounds: "(1) No cause for relief of any kind is set forth in the petition. (2) It appears by the allegations of the petition that petitioner is not entitled to the remedies sought for, or any of them. (3) The claim set up by petitioner is barred, and is also a stale demand, and it appears by the petition that petitioner has been guilty of such delay and laches as will prevent any recovery by petitioner." To the order of the court sustaining the demurrer the plaintiff excepted. The presiding judge, in his opinion appearing in the record, succinctly set forth all the material allegations of the petition, and gave his reasons for sustaining the demurrer. A copy of his opinion is as follows:

"The petitioner's grandfather, Elias Barnett, in 1872 gave to her and her sister, Julia Barnett, and to the survivor of them, the sum of \$2,000. They were minors at the

time, and the money was paid by the grandfather to their father, Wolfe Barnett, for the benefit of said minors, or the survivor of them. At some time, presumably in 1872, Wolfe Barnett invested the money in the purchase of an undivided one-half interest in a plantation in Bryan county, buying it for the use of the minors or the survivor, but for purposes of the said Wolfe Barnett and one Julius Levkoy, each knowing the interest of the minors in the purchase money, the deed was made to Levkoy, he holding the one half interest in the land in trust for petitioner, the other half being his own. On August 7, 1879, Levkoy conveyed an undivided half interest in the plantation to Leah Frankenstein, the mother of defendants; she fully knowing and understanding that such interest belonged to the petitioner (who was then the survivor of the minors), and the said Leah taking the same in trust, although the deed did not express or describe the trust. About the same time Levkoy transferred his half interest to Jane H. Ellis, who in turn conveyed to W. C. Jackson. Subsequent to this Wolfe Barnett purchased the Levkoy half interest from Jackson for Marcus I. Frankenstein; the deed being made to Leah Frankenstein on a consideration of \$2,000, who in turn conveyed it to Marcus I. Neither Levkoy nor his heirs have any claim to the property, nor have they claimed any since August 7, 1879. The defendants are adult heirs at law of Leah Frankenstein, and at all times had knowledge of the alleged trust; that is to say, that, whilst their mother was nominally the owner of said undivided half interest, [she] was really and in truth holding the same as trustee for the sole use and benefit of the petitioner, who on August 7, 1879, was, and has been since, the owner. Wolfe Barnett had great confidence in his sister Leah, and had the title put in her name because at the time he was in financial difficulties and feared the interposition of creditors, even if he appeared as trustee. He used his sister's name in various operations concerning the land, causing her to sign notes and do other things about the management of the property, and she never denied that she had no interest in the land, nor that she was holding the title for the benefit of petitioner. Leah Frankenstein died January 30, 1901, admitting up to the time of her death the interest of petitioner and her own want of interest in the land. Since her death the defendants as her heirs have claimed adversely to petitioner, asserting that they are the owners of the interest, and refusing to recognize the petitioner as owner. All the matters concerning the land were conducted by Wolfe Barnett, and he never told petitioner what her rights in the land were, nor did she know anything concerning the title thereof, and how it had been arranged and held, nor concerning her rights in the premises, until December 19, 1907, when she learned the facts

from Wolfe Barnett and immediately asserted her claim, filing this action, as a consequence, on May 9, 1908. The petitioner prays decree that Leah Frankenstein, in her lifetime, held the interest as the trustee, petitioner being the true owner, and that the deed from Levkoy be reformed, a division of the entire holding in kind or by sale, injunctive relief against waste, and an accounting for rents and profits.

"This is the case as presented by the petitioner. Between the deed to Levkoy and the filing of this action 36 years have intervened. When the petitioner became of age does not appear. But if when the money was handed her father by her grandfather she was only a day old, 15 years have elapsed since the attainment of her majority. Manifestly, a strong case must be presented in order to keep a cause in court which is burdened with all these years. There is no conspiracy charged; no fraud; no agreed effort to suppress information. Many people are declared to have known the true history of the transaction. The grandfather knew it; the father knew it; Levkoy knew it; the aunt knew it; the defendants knew it. For all that appears to the contrary, the other cestui que trust knew it. The sole person who during all these years did not know seems to have been the petitioner. There is no declared object of keeping the knowledge from her. The father's object appears to have been to keep the information from his creditors. He is not a defendant here; no fraud is imputed to him; no design to conceal; no present insolvency; no reason why, if he has violated a trust, he is not abundantly able to respond. Whilst it is stated that Leah Frankenstein was only the nominal owner, it only inferentially appears that she did not pay the consideration money named in the deed. For over seven years the defendants have been claiming the property adversely to petitioner. No facts are alleged to account for the failure of the petitioner to know, nor is any diligence on her part declared. She does state that 'all matters concerning said land have been conducted by the said Wolfe Barnett, and he never told this petitioner what her rights in the land were, nor did she know anything concerning the title thereof, and how it had been arranged and held, nor concerning her rights in the premises.' Non constat, but she knew of the gift of the money, and knowing that, it would seem unreasonable to assume that with a fact so extensively known by those who are not charged with fraud or even the effort to conceal, so far as petitioner was concerned, the slightest diligence would have disclosed years ago what was voluntarily told on December 19, 1907. On the contrary, taking, as I am bound to do, the strictest line of construction against the pleader, it would appear that no one so much as undertook to conceal the alleged truth. There is no claim

that Elias Barnett did not make it known, and it is distinctly averred that during her lifetime, from August 7, 1879, to January 30, 1901, a period of nearly 21 years, Leah Frankenstein 'admitted that she * * * had no interest in said land, but that your petitioner owned an undivided one-half interest therein.' There was about the transaction, save so far as the creditors of Barnett were concerned, apparently no secrecy. At all events, no facts are pleaded, as would seem requisite from the decisions, which explain why diligence on the part of the petitioner would not have disclosed the main fact long ago. This seems to have been a family affair, and to that extent the rule of law would allow some elasticity in the requirement of diligence. On the other hand, certainly one important witness, Leah Frankenstein, has died, and possibly others, and this tightens the rule again. I sustain the demurrer without going into the other very interesting subjects suggested by the arguments and the investigation. The initial step involved a parol trust concerning personality. The trust in land, whilst expressed so far as words can make it, is not in writing. Resultant or not, as it may have been at some stage, these particular defendants, save in so far as they may be affected by the attitude of their mother, have neither by writing nor words expressed any trust. They have denied it in asserting their own ownership. The responsible party, under these circumstances, seems to me to be Wolfe Barnett.

"Let an order be presented sustaining the demurrer."

Garrard & Meldrim and Osborne & Lawrence, for plaintiff in error. Adams & Adams, for defendants in error.

HOLDEN, J. (after stating the facts as above). We think the court committed no error in dismissing the petition on the demurrer thereto. The able opinion rendered by the presiding judge, Hon. Walter G. Charlton, hereinbefore copied, clearly and forcibly sets forth sound reasons why the plaintiff should not be permitted to maintain her action. As therein pointed out, it is not shown from the petition that the plaintiff has not at all times known that her grandfather gave the \$2,000 to her father for the benefit of herself and her sister. If she knew this in 1872, no excuse is offered why she did not from that time until the death of her aunt, Leah Frankenstein, in 1901, inquire what disposition was made of the money, and it would seem that if inquiry had been made the truth as to the investment of his money in 1879 would have been given her, as no fraudulent intent on the part of any of the parties is charged. The only statement the plaintiff makes about her age is that she was a minor in 1872. It is impossible to tell what time elapsed after

she became of age until she filed suit in 1908. The time which thus elapsed could not have been less than 15 years, and, as far as we know from the petition, may have been 36 years. While it does not appear when the plaintiff became of age, it does appear she had reached her majority when the mother of the defendants died on the 30th day of January, 1901, and defendants thereafter held the land adversely to the plaintiff for more than seven years before she filed suit. The laches of the plaintiff bars her of any right to the relief sought. Civ. Code, §§ 3939, 3775. And see, in this connection, *Baker v. Baker*, 134 Ga. —, 67 S. E. 541; *Reynolds v. Martin*, 116 Ga. 495, 502, 42 S. E. 796.

Judgment affirmed. All the Justices concur.

(134 Ga. 482)

GREEN et al. v. SCURRY et al.

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

1. TRIAL (§ 47*)—WITNESSES (§ 359*)—EXAMINATION—RECEPTION OF EVIDENCE—SHOWING PURPOSE OF ADMISSION.

On direct examination a witness was asked: "Did you have any information in the early part of the year 1902 to the effect that John Walker had escaped from the penitentiary?" On objection the court refused to allow the question to be answered. In an exception to this ruling it was not stated that the counsel informed the court what answer was expected, but it was stated that the counsel expected the answer "that he had." *Held*, the proper practice would have been for the counsel to have stated to the court the answer that he expected. *Cesar v. State*, 127 Ga. 710 (5), 57 S. E. 66. And the testimony elicited should have related to facts, rather than to mere "information" of the witness. *Atlanta Consolidated Street Railway Co. v. Bagwell*, 107 Ga. 158, 33 S. E. 191.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 118, 119; *Dec. Dig.* § 47; * *Witnesses*, Cent. Dig. §§ 1161, 1162; *Dec. Dig.* § 359.*]

2. APPEAL AND ERROR (§ 973*)—REVIEW—REFUSAL TO DIRECT VERDICT.

While a trial judge may, within the restrictions prescribed by Civ. Code 1895, § 5331, direct a verdict, this court will in no case reverse a trial court for refusing to do so. *Central of Georgia Ry. Co. v. Mote*, 131 Ga. 166, 62 S. E. 164.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3846; *Dec. Dig.* § 973.*]

3. DIRECTED VERDICT—SUFFICIENCY OF EVIDENCE.

Under the doctrines announced in the cases of *Wilson v. Allen*, 108 Ga. 275, 33 S. E. 975, and *Murchison v. Green*, 128 Ga. 339, 57 S. E. 709, 11 L. R. A. (N. S.) 702, the evidence was not of such character as authorized the judge to direct a verdict in favor of the applicant. For other cases, see note to *Smith v. Fuller* (Iowa) 16 L. R. A. (N. S.) 98.

Error from Superior Court, Mitchell County; Frank Park, Judge.

Petition by Eugenia Scurry for a year's support out of an estate, to which Aaron Scurry, guardian and next friend of Jamie Scurry, filed a caveat. Objections were sustained, and on appeal to the superior court there

was a directed verdict for applicant, and the caveator and J. L. Green, administrator, bring error. Reversed.

Eugenia Scurry filed a petition to the court of ordinary, alleging that James Scurry departed this life on December 21, 1906, leaving petitioner (his widow) and two minor children surviving him; and she prayed that a year's support, as allowed under the provisions of Civ. Code, § 3465, be set aside for them out of the estate of the deceased. After the return of the appraisers, Aaron Scurry, as guardian and next friend of Jamie Scurry, filed a caveat objecting to the allowance of the year's support, on the grounds: (a) That caveator's ward was the only heir at law of the deceased; (b) that the petitioner was never the lawful wife of the deceased, and that the minor child referred to in the petition was not the lawful daughter of the deceased; (c) that the amount set apart was excessive. On the hearing of the caveat the ordinary sustained the objections and refused the allowance prayed for by the applicants. The case was appealed to the superior court. On the trial in the latter court Eugenia Scurry testified that she was married to James Scurry in Mitchell county, in November, 1903, and that she had one child, about five years old, that was the child of James Scurry and herself. On cross-examination the witness further testified that her name originally was Eugenia Vick; that she was married to John Walker on January 31, 1897; that John Walker was convicted of murder in Mitchell superior court at the October term, 1901, and was sent to the penitentiary for life; that she heard, about a year after he was sent to the penitentiary, that he was killed while in the penitentiary, this information having been given to her by George Davis prior to the time she married James Scurry; that she did not make any further inquiries as to whether or not it was true that John Walker was so killed; and that James Scurry had by a former wife one lawful son, Jamie, the caveator's ward. The applicant introduced the petition for a year's support, together with the orders of the ordinary and the return of the appraisers setting apart certain property as a year's support, and then rested. The caveator moved that the court direct a verdict in his favor. The motion was overruled, and he excepted. A witness for the caveator testified that he knew John Walker, who had been working on his farm for about a year or two before he was sent to the penitentiary, and that about February, 1902, witness went to John Walker's brother's house one night, and thought he saw John Walker there. He would not be positive that it was John Walker, but to the best of his knowledge it was John Walker. Caveator introduced a certified copy of the "conviction and sentence" of John Walker, showing his conviction in the

superior court and sentence to the Georgia penitentiary, dated October 23, 1901; also a certified copy of the marriage license issued to John Walker and Eugenia Vick, with the certificate of the justice of the peace that he married them on January 31, 1897. While J. H. Baggs, a witness for the caveator, was on the stand, he was asked, on direct examination, "Did you have any information in the early part of the year 1902 to the effect that John Walker has escaped from the penitentiary?" counsel "expecting the answer that he had." Upon objection the court refused to allow the witness to answer. Upon the close of all of the evidence the judge, on motion, directed a verdict in favor of the applicant; and the caveator excepted to each of the rulings heretofore stated.

Davis & Merry, for plaintiffs in error. Spence & Bennet and Cox & Peacock, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(124 Ga. 511)

EPLAN v. WHEAT.

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

PLEDGES (§§ 21, 26*)—EVIDENCE (§ 317*)—NEW TRIAL (§ 162*)—RIGHTS OF PLEDGEE—ADMISSIBILITY OF EVIDENCE.

Where there is a valid pledge of property, the pledgee has a special property in the thing pledged for the purposes of the bailment. Civ. Code 1895, §§ 2956, 2960.

(a) Where property is thus bona fide pledged to secure a loan of \$125, and the pledgee afterwards returns it to the pledgor to sell for the former, taking from the pledgor at the time a receipt as follows: "Received of John B. Wheat [the pledgee] one (1) diamond ring in trust, which I agree to return on August 5, 1907, or pay one hundred twenty-five (\$125.00) in cash"—and subsequently to the date named in the receipt the pledgor refuses, after demand, to return the property named in the receipt, or to pay the amount therein stated, the pledgee may maintain an action of trover for such property against the pledgor, who has not sold the property, and who has it in his possession at the time of such demand. See *Henry v. State*, 110 Ga. 750, 36 S. E. 55, 78 Am. St. Rep. 137; *Citizens' Banking Co. v. Peacock*, 103 Ga. 171, 29 S. E. 752; *Denis on Contracts of Pledge*, § 127 et seq.; *Jones on Pledges and Collateral Securities* (2d Ed.) §§ 40, 43, 44, 45; 31 Cyc. 818, 819.

(b) Upon the trial of such case it was not error to refuse to permit the defendant to prove by the plaintiff's counsel what the latter "learned from the sheriff about the sheriff taking bond, giving up the bond, and accepting the ring from defendant, and later at the sheriff's request taking back the ring and making a new bond." Such testimony was at least subject to the objection of being hearsay.

(c) The verdict being for \$125 and interest, the court committed no error in refusing a new trial upon the plaintiff writing off the amount of interest; the evidence showing that the defendant admitted the article pledged and sued

for to be of the value of the principal sum found.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 64-66; Dec. Dig. §§ 21, 26.* Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.* New Trial, Cent. Dig. §§ 324-329; Dec. Dig. § 162.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between J. B. Wheat against Joseph Eplan. Judgment for plaintiff, and defendant brings error. Affirmed.

Morris Macks, for plaintiff in error. E. D. Thomas and Anderson, Felder, Rountree & Wilson, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(134 Ga. 485)

ALBRITTON v. TYGART.

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 273*) — COURTS (§ 117*)—PAROL EVIDENCE IMPEACHING RECORD—PREREQUISITES TO ADMISSION—SUFFICIENCY OF EXCEPTIONS.

On August 3, 1906, a creditor obtained an attachment against his debtor, returnable to the September term of court. At the trial, during an adjourned session of the September term, 1908, the defendant made an oral motion to dismiss the case, on the ground that the declaration in attachment was not filed at the first term, and moved to be allowed to introduce evidence to support the ground of the motion. The declaration on file purported to have been filed by the clerk at the first term. The plaintiff objected to the motion of the defendant, on the ground that the declaration showed upon its face and over the signature of the clerk that it had been filed at the first term, and before the defendant could attack the entry of the clerk it would be necessary to traverse it in writing and give notice thereof to the plaintiff or his counsel. The court overruled the objection, and, without requiring a written traverse of the clerk's entry, allowed the defendant to introduce evidence to impeach it. The plaintiff "excepted" and assigned the ruling "as error." After evidence was introduced by both parties, the judge granted an order dismissing the case. The plaintiff also excepted to this order, and assigned error on the ground that it was contrary to law and against the weight of the evidence. *Held:*

(a) The assignment of error upon the intermediate ruling, which allowed the introduction of evidence to impeach the entry of filing by the clerk, without a formal traverse, was sufficient, and it was not cause for dismissal of the bill of exceptions that the assignment of error upon the ruling ordering the dismissal of the case was not more specific. In this connection, see *Lyndon v. Georgia Railway & Elec. Co.*, 129 Ga. 353, 58 S. E. 1047.

(b) As the declaration on the files of the court contained an entry of filing purporting to be signed by the clerk, the entry was presumably true. Before extraneous evidence could be received to impeach it, the record should show a formal traverse in writing denying its truth. Civ. Code 1895, § 4968; *Maund v. Keating*, 65 Ga. 396; *Saffold v. Foster*, 74 Ga. 751.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1620-1630; Dec. Dig. § 273.* Courts, Dec. Dig. § 117.*]

2. COURTS (§ 486*)—TRANSFER OF CAUSES—GROUNDS.

The motion to dismiss the bill of exceptions, based on the ground "that the Court of Appeals has no authority to transfer the case to the Supreme Court," cannot prevail. The record discloses that in certifying the bill of exceptions the judge directed the clerk to transmit it and the record in the case to the Court of Appeals. An order was passed by the Court of Appeals, reciting that the case was one of which that court did not have jurisdiction, and directed the clerk to dismiss it from the files and to transmit the bill of exceptions to the Supreme Court, together with a copy of the order, which was done. It appears from an examination of the record that the Supreme Court has exclusive jurisdiction of the case.

(a) We are requested to review and overrule the cases of *Dawson v. State*, 130 Ga. 127, 60 S. E. 315, and *Mitchell v. Masury*, 132 Ga. 360, 64 S. E. 275, in so far as it is held that the Supreme Court will consider a bill of exceptions received by it in the manner indicated in the preceding note; but we decline to do so. The cases above mentioned have since been followed in the case of *Jones v. Williams*, 132 Ga. 782, 64 S. E. 1081, and *Bland v. Bird*, 134 Ga. —, 67 S. E. 427.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 486.*]

3. APPEAL AND ERROR (§ 653*)—BILL OF EXCEPTIONS—SUBSTITUTING CORRECTED BRIEF OF EVIDENCE.

The motion, made in the Supreme Court, "to amend the record," was an effort to vary the original bill of exceptions by substituting a "corrected brief of evidence," certified by the judge and consented to by counsel, to be considered in lieu of that contained in the original bill of exceptions. Several months had elapsed after the filing and service of the original bill of exceptions. The motion must be overruled, and the case decided according to the recitals in the bill of exceptions. In this connection, see *Jackson v. Georgia Southern & Florida Ry. Co.*, 132 Ga. 127, 63 S. E. 841.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 653.*]

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action by E. J. Albritton against R. C. Tygart. Judgment for defendant, and plaintiff brings error. Reversed.

J. W. Powell and W. G. Harrison, for plaintiff in error. Hendricks & Christian, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(134 Ga. 536)

DUNN v. ORR et al.

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1015*) — REVIEW — GRANT OF NEW TRIAL.

This being the first grant of a new trial, and the evidence not demanding the verdict, the judgment granting a new trial is affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3371; Dec. Dig. § 1015.*]

Error from Superior Court, Dawson County; J. J. Kimsey, Judge.

Action between S. A. Dunn and Jacob Orr and others. From an order granting a new trial, Dunn brings error. Affirmed.

O. J. Lilly, for plaintiff in error. Geo. K. Looper, A. W. Vandiviere, and R. H. Baker, for defendants in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(134 Ga. 481)

MARTIN v. DIX et al.
(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 5*)—
SALE OF LAND BY ADMINISTRATOR—SUBSE-
QUENT PROBATE OF WILL.

Where letters of administration have been granted by the court of ordinary having jurisdiction upon the estate of a decedent as in case of intestacy, and subsequently a will of the decedent is propounded and admitted to probate, this does not ipso facto render void a sale of land of the decedent by the administrator before the propounding of the will for probate, and under an order of the ordinary, duly granted, authorizing such sale. Patton's Appeal, 31 Pa. 465; Kittredge v. Folsom, 8 N. H. 98; Woerner's American Law of Administration (2d Ed.) §§ 266, 268.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 5.*]

2. EXECUTORS AND ADMINISTRATORS (§ 349*)—
SALE OF LAND—COLLATERAL ATTACK.

Such an order of sale could not be collaterally attacked in an action of ejectment brought by the legatee under the will, after its probate, by showing that the administrator knew of the existence of the will when he applied for appointment, and fraudulently concealed it, and obtained the appointment on the ground that there was an intestacy, and that the purchaser at the sale also had notice of the existence of the will. Fraud in the procurement of the order for sale as administrator, and notice on the part of the purchaser, may be available in proper proceedings to set aside such order and sale; but they cannot avail to destroy the judgment of the ordinary and the sale thereunder, upon a mere collateral attack in an ejectment suit by persons claiming as legatees. Davie v. McDaniel, 47 Ga. 195; Bailey v. Ross, 68 Ga. 735; Medlin & Sundy v. Downing Lumber Co., 128 Ga. 115, 57 S. E. 232.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 349.*]

3. EXECUTORS AND ADMINISTRATORS (§ 349*)—
SALE OF LAND—COLLATERAL ATTACK.

The rule above announced is emphasized in the present case, where the ordinary allowed the will to be probated and appointed as executor the person named therein as such (who was the same person that had previously been appointed as administrator), but denied a separate application for an order to revoke the former grant of administration.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 349.*]

EXECUTORS AND ADMINISTRATORS (§ 32*)—
APPOINTMENT—COLLATERAL ATTACK ON
DISCOVERING WILL.

The fact that the denial of the application for revocation referred to in the preceding head-note was carried to the superior court by appeal, and that the nominated executor and formerly appointed administrator died, would not

alter the rule above laid down. A judgment of a court of competent jurisdiction, which is not invalid on its face, cannot be collaterally attacked merely because the person in whose favor it was rendered had died or been dismissed from the office of administrator, which he held at the time of its grant. Whitley Grocery Co. v. Jones, 128 Ga. 791, 58 S. E. 623.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 32.*]

5. OTHER QUESTIONS NOT CONSIDERED.

As the principles above announced are controlling in the case, it is unnecessary to specifically deal with the several grounds of the motion for a new trial.

Error from Superior Court, Ben Hill County: W. V. Whipple, Judge.

Action between D. L. Martin and Willard Dix and others. From the judgment, Martin brings error. Reversed.

D. E. Griffin and Hal Lawson, for plaintiff in error. Haygood & Cutts, for defendants in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(124 Ga. 432)

MALLOY v. MALLOY et al.
(Supreme Court of Georgia. April 27, 1910.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD (§ 161*)—PROCEED-
INGS FOR DISCHARGE—APPEAL—JUDGMENT.

An application was made in the court of ordinary for letters of dismission to be issued to a guardian. A caveat was filed thereto, which, among other things, alleged irregularity and fraudulent conduct on the part of the guardian, and also that his original appointment was void, and prayed for a decree declaring it to be so, and that all returns, orders, and decrees of the court of ordinary obtained for and against the estate, and all the actings and doings of the guardian, be canceled and declared void and of no effect, including an order for the sale of realty which had been granted, and under which a sale had taken place, and for such other orders and decrees as might seem meet and proper. The ordinary overruled the caveat, and an appeal to the superior court was entered. When the case came on for trial, counsel for the caveators introduced in evidence the original application and proceedings in the court of ordinary under which the guardian was appointed, and thereupon moved for a decree declaring that the appointment of the guardian was void. It does not appear that any evidence had been introduced by the applicant for discharge, or that the introduction of evidence had closed. The presiding judge granted a decree declaring the appointment of the guardian void, but making no reference to any disposition of the application for discharge. He declined to submit the appeal to the jury or to dismiss it on motion. Held, that such a decree so entered was erroneous.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 161.*]

2. GUARDIAN AND WARD (§ 161*)—JURISDICTION—APPEAL FROM COURT OF ORDINARY.

A court of ordinary is not vested with the powers of a court of equity as to cancellation or other like equitable remedies; nor, on appeal from a decision of the court of ordinary in regard to granting letters dismisory to a guardian, has the superior court, as an appellate

court, broader powers in reference thereto than the court from which the appeal was taken.

[Ed. Note.—For other cases, see *Guardian and Ward*, Dec. Dig. § 161.*]

3. EXCEPTIONS, BILL OF (§ 56*)—CERTIFICATION.

After certifying that the recitals in the bill of exceptions as to rulings of the court and how they were made are true and correct, the presiding judge is not authorized afterward to make a certificate conflicting with that which he has already signed.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Dec. Dig. § 56.*]

4. EXCEPTIONS, BILL OF (§ 56*)—SUPPLEMENTAL CERTIFICATE OF EVIDENCE—CERTIFICATION.

Under the act of 1905 (Acts 1905, p. 84), if there is no brief of evidence on file in the trial court, and the evidence is sought to be brought up in the bill of exceptions, and any material evidence is omitted therefrom, within 20 days from the service of the bill of exceptions the judge may, on proper motion, make a supplemental certificate of the evidence so omitted, and such supplemental certificate, with the evidence so certified, shall be sent to this court and form a part of the bill of exceptions. But the original bill of exceptions, with the evidence included in it, being certified by the judge, the additional evidence must likewise be certified and verified by his signature.

The law does not authorize the presiding judge, where there is no brief of evidence on file, to declare that some evidence has been omitted from the bill of exceptions, describe it in general terms, and leave the clerk to find and identify evidence as that introduced, and send it to this court.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Dec. Dig. § 56.*]

5. APPEAL AND ERROR (§ 532*)—PROCEEDING FOR DISMISSION—APPEAL—RECORD.

Where application was made in the court of ordinary for letters of dismission to be granted to a guardian, and from his decision an appeal was taken to the superior court, this did not carry up the record of the original appointment of the guardian or make it a part of the record of the superior court. If, on the trial of the appeal of the case made by the petition for letters dismissory, the original record of the appointment in the ordinary's court was introduced in evidence, it did not ipso facto become a record of the superior court; nor did the clerk of that court have any authority to certify a copy of such record of the ordinary's court to this court, as a part of the record in the appeal case.

(a) If it is desired to have evidence introduced in the superior court, whether consisting of the record from another court or not, brought to this court, it should be done in the regular modes prescribed by law for bringing up evidence. It cannot be done by ordering the clerk of one court to certify a copy of a record belonging to another court, and to transmit it to this court.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 532.*]

Error from Superior Court, Decatur County. Frank Park, Judge.

Petition of R. T. Maloy, guardian of S. E. Maloy, for letters of dismission from the guardianship, E. N. Maloy and others filed a caveat to the discharge. The prayer of the caveat was denied, and, from a judgment of the Superior Court on appeal, petitioner brings error. Reversed.

R. T. Maloy filed in the court of ordinary a petition for letters of dismission from the guardianship of S. E. Maloy, alleging that he had fully executed his trust. Citation issued. Thereupon certain persons, who alleged that they were the heirs of S. E. Maloy, and that he died intestate, filed, apparently in the nature of a caveat or objection to the discharge of the guardian, a paper in the form of a petition. It alleged, in brief, as follows: Prior to the death of S. E. Maloy, upon the petition of R. T. Maloy, on November 1, 1904, the ordinary of Decatur county issued to eight named persons a commission, requiring them to inquire into the condition of S. E. Maloy; R. T. Maloy having made affidavit that he was an imbecile from old age and other causes, and incompetent to transact his business. On November 2d, five of the persons named in the commission and another returned a report to the effect that they had made such examination and found S. E. Maloy to be an imbecile from old age and other causes, and not of sound and disposing mind, and that he should have a guardian appointed. (The record shows that six of the eight commissioners made the return.) Thereupon the ordinary appointed R. T. Maloy guardian of the person and property of the alleged imbecile, and fixed his bond, and the appointee qualified. At the same term of court he made application for leave to sell real estate of the ward, which was granted at the next term. There is no record in the ordinary's office of an inventory or return of the estate of the ward, made by the guardian in 12 months after his appointment and qualification, as required by law. He took charge of certain real and personal property set out. By virtue of the order to sell the real estate, it was sold, and another person bid it in for R. T. Maloy, "guardian as aforesaid," for the sum of \$1,500, when they both knew the amount was not the value of the real estate. The sale was made by collusion to defraud the estate and the ward by the collection of a certain note payable to the person who bid in the property. While the ward was an imbecile and unable to make a contract, another person persuaded and induced him to sign the note, which was also signed by such other person. The guardian, the payee, and the other maker colluded together, and the payee sued on the note and obtained judgment. The guardian filed no defense, though he knew that the note was executed when S. E. Maloy was unable to make any valid contract. The guardian has made his return to the ordinary, pretending that he paid the money derived from the sale of the land in satisfaction of the execution issued on the judgment, thus expending the entire estate except a very small amount, and applying for final discharge from the guardianship and administration of the ward. The commission appointing eight persons to act as

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

commissioners to examine into the condition of an imbecile from old age and other causes was without authority of law and void. The act of six of such commissioners was unlawful, as no number less than twelve could act in such a case. The ordinary had no authority to appoint a guardian upon such a return. R. T. Maloy has taken charge of all the property stated in his petition, and has made no inventory and return as required by law. All of his actings and doings are void. The petitioners prayed that the appointment of the guardian be set aside and declared void; "that all his actings and doings be so decreed void;" that the sale and order authorizing the sale of the real estate be declared void and of no force and effect; "that all returns, orders, and decrees of the court of ordinary of Decatur county, obtained for and against the said estate of S. E. Maloy, and that all the actings and doings of R. T. Maloy, guardian, be and the same canceled and declared void and of no effect; and such other orders and decrees as may seem [meet] and proper, and will ever pray." Objections to the discharge were also separately filed, on the grounds that the applicant had not accounted by returns or otherwise for the disposition he had made of certain specified personal property, and that, although there was sufficient personal property and income from the estate to support the ward, he had made application to sell the real estate on the day of his appointment, and before making any inventory, so that the ordinary could pass upon the condition of the estate in allowing the guardian to sell a part of it; and that, "said order and application being fraudulently obtained, it should be set aside and declared void."

The ordinary passed an order denying the prayer of the caveat. The case was carried by appeal to the Superior Court. There the following judgment was entered: "This case coming on for trial, the same being an appeal from the ordinary's court, and after impaneling a jury in said cause, and by motion of counsel for the caveators, as set out in the caveat, and in the original appointment of said guardian, R. T. Maloy, the said appointment of said guardian is hereby decreed void and of no effect." Maloy, guardian, excepted. The bill of exceptions recited that: "Before striking a jury to try said appeal, after the call of said case for trial, the attorneys for the appellants moved the court orally for an order or decree voiding the original appointment of R. T. Maloy as guardian of S. E. Maloy, as defective on the grounds set out in the caveat to the dismissal, which motion, after argument had, and after the attorneys for the appellants had exhibited to the court the original proceedings in the ordinary's court under which the said R. T. Maloy was appointed guardian, and which was resisted by the attorney for the appellee, the court granted and entered upon the caveat his judgment decreeing said appointment as guardian void

and of no effect, and then and there refused to submit said appeal to trial by jury or dismiss same on motion, when requested by appellee's attorney." Exception was taken "to said judgment of the court and decree so rendered, and to the refusal of the court to permit said appeal to be tried by jury, or dismiss same on motion."

The bill of exceptions was certified on May 31, 1909. On June 15th counsel for the defendants in error apparently sought to have brought to this court, under the act of 1905 (Acts 1905, p. 84), the record of the appointment of a guardian in the court of ordinary, as evidence inadvertently omitted from the bill of exceptions. In the petition filed for that purpose, there were various allegations in regard to the history of the case, some of them in conflict with the recitals in the bill of exceptions previously certified. Among other things, it was stated that: "After a jury was stricken and impaneled to try said cause, these defendants, being the appellants from the ordinary's court, introduced in evidence, without objection, the following evidence: [Reciting the different parts of the record of the appointment of the guardian in the court of ordinary.] After the introduction of these original records of the ordinary's court and upon this evidence, the applicants [appellants?] made a motion to set aside the appointment of R. T. Maloy as guardian, upon the ground that the appointment was void." And the motion was sustained after argument. "Immediately after the court had rendered its judgment, the attorney for the guardian asked leave of the court to make a motion to dismiss the caveat and objections to the discharge of the administrator, to which motion the court replied that he was too late, that his judgment was made, but that the court would hear him and overrule his motion, which the court did." This petition did not set forth in full or in substance the evidence alleged to have been introduced, or have it attached and identified by the judge, but simply referred to it in general terms and asked to have it sent up. On this an order was passed which contained the following: "After examining the foregoing amended bill of exceptions and refreshing my memory as to what was tried and how tried, I hereby certify that this amended bill of exceptions is true, and in that part of the original bill that conflicts with this amended bill of exceptions, the original bill having been certified to inadvertently, I hereby certify that this amended bill is true against the original bill of exceptions, and specifies all the evidence and specifies all the record material to a clear understanding of errors complained of in said cause." The clerk was ordered to make out a complete copy of such parts of the record in said case as are specified "in this bill of exceptions," and certify them and cause them to be transmitted to the Supreme Court. The clerk thereupon transmitted to this court what purports to be

a copy of the record of the court of ordinary in reference to the appointment of the guardian, and certifies it as being the parts of the record in the present case specified in "the bill of exceptions," and required by the order of the presiding judge to be sent to the Supreme Court.

R. G. Hartsfield, for plaintiff in error. Ledford & Terrell, for defendants in error.

LUMPKIN, J. (after stating the facts as above). This case began in the court of ordinary with a petition for letters of dismission to be issued to a guardian. It terminated in the superior court with a decree that the appointment of the guardian was void and of no effect. This decree was rendered by the judge, on motion of counsel for the caveators, after the introduction in evidence by them of the record of the application and proceedings in the court of ordinary leading up to the appointment. The application and caveat involved several questions of fact; but the judge seems to have been of the opinion that, after this evidence was introduced, it was needless to go further. What became of the petition for letters of dismission, which brought the case into court, and which with the caveat was appealed to the superior court, does not distinctly appear. But we presume that the application to be dismissed from the guardianship was treated as absorbed into a decree that the appointment was void.

If the paper filed in the court of ordinary in opposition to the application for the dismissal of the guardian is to be considered as a caveat or legal objection to the discharge, as seems to have been done by the ordinary, it goes far beyond the range of opposition to the grant of the applicant's petition for dismission. If it is to be treated as also a petition seeking equitable relief, the court of ordinary had no jurisdiction to grant such relief, and the superior court, on appeal from the court of ordinary, had none. *Hufbauer v. Jackson*, 91 Ga. 298 (2), 18 S. E. 159; *Mulherin v. Kennedy*, 120 Ga. 1080 (6), 48 S. E. 437. In any event, the judge of the superior court could not, as soon as some evidence was introduced by caveators, terminate the case by a decree, rendered on motion, not disposing directly of the application for dismission of the guardian, by granting or denying it, or dismissing it, but simply adjudging that the appointment of the guardian was void. It is not clear exactly what was the procedure adopted. In the bill of exceptions it is recited that the case came on for trial in the superior court, and that "before striking the jury to try said appeal after the call of said case" the record of the appointment of the guardian was exhibited to the judge by counsel for the caveators, and that he then granted the decree on motion. The recitals in the judgment do not seem to be in complete accord with this. Some two weeks after this was certified, counsel for defendants in error sought to bring up this evidence, as having

been inadvertently omitted, under the act of 1905 (Acts 1905, p. 84), although the terms of the act were neither substantially nor literally followed, and the clerk was ordered to send up as record in the present case a copy of a record belonging in the court of ordinary, which had merely been introduced in evidence. In the petition which was presented to the judge for this purpose, and which he certified, were contained statements conflicting with those already certified in the bill of exceptions. The judge recognized this, and stated that, in the part of the original bill of exceptions which conflicted with this amended bill of exceptions, the latter was true "against the original bill of exceptions," which had been certified inadvertently.

Section 5528 of the Civil Code of 1895 provides that, when a bill of exceptions is presented, "the judge to whom such bill of exceptions is tendered shall, if needful, change the same so as to conform to the truth and make it contain all the evidence, and refer to all of the record, necessary to a clear understanding of the errors complained of." In section 5536 provision is made by which the defendant in error either in the main bill or cross-bill of exceptions can have additional portions of the record of the trial court transmitted to this court, and by which the court may itself direct additional parts of the record to be transmitted, if in their opinion it is necessary to have this done in order to fully and fairly adjudicate the questions at issue and the alleged errors. By section 5545 it is prescribed that, if the bill of exceptions is not true or does not contain all the necessary facts, the judge may return it to the party tendering it or his attorneys for correction, and, "if the judge sees proper, he may order notice to the opposite party of the fact and time of tendering the exceptions, and may hear evidence as to the truth thereof." Thus provision is made for ascertaining the correctness of a bill of exceptions before signing it. But after the bill of exceptions has been duly certified to be true, there is no provision of law for the presiding judge to certify that it is not correct in part or in whole. *Woolf v. State*, 104 Ga. 536, 30 S. E. 796. This is not a cross-bill of exceptions, complaining of other rulings, but is an effort by a certificate to change recitals in a duly certified bill of exceptions. In *Dyson v. Sou. Ry. Co.*, 113 Ga. 327, 38 S. E. 749, it was held that: "A bill of exceptions duly and regularly certified according to law will not be vitiated by an additional certificate following the one required by statute. In such a case the additional certificate may be ignored and treated as harmless surplusage." By the act of 1905 the judge was authorized to certify and have sent to this court additional evidence inadvertently omitted from the original bill of exceptions. But it did not authorize a certificate as to the rulings made by him, or how they were made, conflicting with what had already been certified.

It will readily be seen that if a party dissatisfied with a ruling of a trial court should present and have duly certified his bill of exceptions, stating the ruling made, the time when it was made, and the objections or questions which were raised and passed upon, and subsequently, on ex parte application of the other side, the judge should sign a certificate conflicting with the former one in whole or in part, the plaintiff in error might have his status materially altered without his knowledge, and when it was too late for him to obtain a further statement; and a reviewing court might be left in much uncertainty as to what was the question raised in the trial court, how it was made, and what was the exact ruling on it. We have thought it proper to say this much in regard to the practice in tendering and signing bills of exceptions. But in the case before us our ruling would be in effect the same, whether the recitals in the original bill of exceptions or those in the petition presented by counsel for defendants in error should be taken as correct.

Evidence may be brought to this court in either of two ways: (1) Where a brief of evidence has been filed. In order to file such a brief it must first have been approved by the judge. When in due time so approved and filed, it becomes a part of the record, and on exception it can be brought to this court as any other part of the record is brought up. (2) Where no brief of evidence has been approved and filed, and the evidence is not a part of the record of the case, it must be brought up in the bill of exceptions, under the certificate of the judge, or be exhibited thereto, duly identified by the signature of the judge. If the bill of exceptions omits material evidence, the act of 1905 (Acts 1905, p. 84) provides for a supplementary certificate by the judge certifying to the omitted evidence, which evidence and certificate identifying it are required to be sent up by the clerk, and become an amendment to the bill of exceptions. But the law contemplates that evidence must be identified and approved by the judge before it can come to this court; in the one instance by approving the brief, in the other by certifying the bill of exceptions, and identifying exhibits, if there be any, and, in case of a supplemental certificate under the act of 1905, by the judge's certifying to the additional evidence.

In no event does the law provide for the clerk to gather up evidence not contained in the brief of evidence or the bill of exceptions or supplemental petition, and not a part of the record in the case tried, and send it to this court. He has no right to substitute his certificate for that of the judge. Nor has the judge authority to direct him to do so. Civ. Code 1895, §§ 5528, 5529, 5537; Acts 1905, p. 84. The introducing in evidence of pleadings or exhibits to pleadings in the case on trial, which are parts of the record, or the bringing up of affidavits used in interlocutory hearings, is not now before us. In

the present case, it was sought to have the clerk of the superior court certify and send to this court a transcript of an original record in the court of ordinary, which had been introduced in evidence or exhibited to the presiding judge of the superior court. It was no part of the record in the superior court, and had not become a brief of the evidence, approved by the judge and filed there. The petition to have it sent to this court recites that the appellants introduced in evidence "the original application to appoint a guardian," and other original papers constituting the record of the proceedings for the appointment of the guardian in the court of ordinary. The record of the appointment of the guardian was no part of the record of his application for dismissal, and could not have been lawfully transmitted to the superior court on the appeal in the latter proceeding. The original record of the appointment belonged in the court of ordinary, and not in the superior court. The clerk of the superior court is not authorized to certify to this court a record from the court of ordinary. A clerk of one court cannot certify a record of another court, nor can the judge authorize him to do so merely because the record was used as evidence, but never became a record in the court where the trial was had. The record of the court of ordinary in the proceeding to appoint a guardian is not properly before this court, and cannot be considered by us.

Possibly, if from the whole evidence it appears, without conflict, that the appointment of the guardian was null and void, and there be no estoppel preventing the caveators from setting up that contention, the judge might dismiss the petition to discharge the guardian, on the ground that, if in law there was no guardian, a dismissal of a person as such is not proper; or perhaps a verdict denying the prayers for letters of dismissal might be directed; or the judge might be correctly charged on the subject, as might appear proper under the evidence. If anything is sought which requires a decree of cancellation or setting aside of something which is voidable but not void, this must be accomplished by proceeding in equity, or, in proper cases, by a regular motion to vacate in the court having jurisdiction. On these possibilities we make no decision, as they do not appear to have been clearly passed on in the trial court.

The applicant for letters of dismissal brought the case into court, and occupied the position of a plaintiff. It does not appear that he had introduced his evidence, or that counsel on either side had announced their evidence closed; so that the case was not ripe for final disposition by motion to dismiss, direction of a verdict, or submission of the case to a jury. But at some early stage of the trial the caveators, who occupied the position of defendants in the application for letters dismissory, introduced some

evidence and moved for a decree declaring that the original appointment was void, and this was granted. Error was also assigned on the ground that the court refused to submit the appeal to trial by jury, "or dismiss same on motion when requested by appellee's attorney."

We think this case should be returned for a trial on the petition for discharge and any legitimate objections to its grant, that the judgment should dispose of the case arising under such application, and that the entering of the decree by the judge on motion, upon the introduction of some evidence by the caveators, was erroneous.

Judgment reversed. All the Justices concur.

(134 Ga. 486)

FARMERS' BANK OF NASHVILLE v. JOHNSON, KING & CO.

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

1. BANKS AND BANKING (§ 138*)—PAYMENT OF CHECKS—DIRECTION ON CHECK.

Where a check was drawn on a bank located in another town than that in which the drawer resided, and immediately following the direction to the drawee bank, which was in the lower left-hand corner of the check, there were stamped, at the time when the check was drawn, the words, "Payable through [a named bank in another city of the same state] at current rate," this was a material part of the direction; and the drawee bank was not required to pay the check when not presented through the bank thus named, but directly by a third bank.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 138.*]

2. BILLS AND NOTES (§ 424*)—PROTEST ON CHECK—WHEN AUTHORIZED.

Under such circumstances, if the third bank, which held the check, presented it to the drawee bank, and the latter indorsed on it the statement that it would be paid when presented through the named bank, this did not authorize the bank holding the check to have it protested.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 424.*]

3. BILLS AND NOTES (§ 424*)—WRONGFUL PROTEST—LIABILITY.

For the holder of a check to unlawfully cause a protest of it to be made, and notice to be given to the drawer and indorsers, without proper presentation for payment, according to its terms, furnishes a cause of action to the drawer.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 424.*]

(Additional Syllabus by Editorial Staff.)

4. BILLS AND NOTES (§ 15*)—"CHECK."

A "check" is defined as a draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds for the payment at all events of a certain sum of money to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 15.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1109-1112; vol. 8, p. 7600.]

5. BANKS AND BANKING (§ 138*)—PAYMENT OF CHECKS—"PAYABLE."

The word "payable" is defined as that which may, can, or should be paid; suitable to be paid; that may be discharged or settled by delivery of value; matured; now due. A direction in a check to the drawee bank that it is payable through another named bank means that it is to be paid in that way.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 138.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5245, 5246.]

Error from Superior Court, Berrien County; W. V. Whipple, Judge.

Action by Johnson, King & Co. against the Farmers' Bank of Nashville. Judgment for plaintiff, and defendant brings error. Affirmed.

Johnson, King & Co., a corporation doing business in Macon, brought suit for damages against the Farmers' Bank of Nashville, Ga. The petition as amended alleged as follows: On December 30, 1905, the plaintiff issued a check of which the following is a copy: "Johnson, King & Company, \$62.00. No. 1044. Macon, Ga., Dec. 30th, 1905. Pay to the order of Hawley & Hoops, sixty-two and 47/100 \$62.47 dollars. Johnson, King & Co., by Jno. C. Holmes. V. P. & Gen. Mgr. To Bank of Nashville, Nashville, Ga. Payable through the Citizens' Bank of Valdosta, Valdosta, Ga., at current rate." On the same date the plaintiff issued three other checks drawn on the Bank of Nashville, similar in form to the one above, and differing only as to amount and the name of the payee. The words, "Payable through the Citizens' Bank of Valdosta, Valdosta, Ga., at current rate," were stamped on each check. The checks were presented to the Bank of Nashville, at Nashville, Ga., by the Farmers' Bank of Nashville, Ga.; three of them being presented on January 8, 1906, and one on January 8, 1906. Upon presentation the Bank of Nashville entered on the back of the checks, "Will pay when presented through the Citizens' Bank of Valdosta, Georgia." Thereupon the Farmers' Bank of Nashville caused the checks to be protested, each protest bearing the same date as the presentation for payment; and notice of dishonor was sent to certain indorsers and to the drawer. The Bank of Nashville never refused to pay the checks, but, through its officers, stated to the Farmers' Bank of Nashville that it objected to the manner in which the checks were presented, it being different from the terms expressed on their face, and that they would be honored when presented through the Citizens' Bank of Valdosta. At the time when the checks were drawn, and when presented to the Bank of Nashville by the Farmers' Bank of Nashville, the plaintiffs had a sufficient amount of money on deposit in the Citizens' Bank of Valdosta, subject to check for their payment. The plaintiff had au

arrangement with the Bank of Nashville by which all checks drawn on that bank would be paid if presented through the Citizens' Bank of Valdosta. The Farmers' Bank of Nashville willfully disregarded the terms of the checks, which were that they were "payable through the Citizens' Bank of Valdosta, Valdosta, Ga., at current rate," and, for the purpose of casting suspicion upon the credit of the plaintiff before the commercial world, protested the checks and thereby damaged the plaintiff. The protest was made for the purpose of causing the plaintiff to become offended with the Bank of Nashville, and of forcing it to become a depositor with the Farmers' Bank of Nashville and its associates. The defendant demurred to the petition. The demurrer was overruled, and the defendant excepted.

Bule & Knight, Hendricks & Christian, and E. P. S. Denmark, for plaintiff in error. W. A. Dodson and W. H. Griffin, for defendant in error.

LUMPKIN, J. (after stating the facts as above). A story is told of a distinguished writer on the subject of negotiable instruments, to the effect that, when he was asked what first suggested to him the idea of preparing such a work, he answered that he became interested in the question as to whether a demand was necessary in order to enforce by suit a promissory note or acceptance payable by its terms at a specified place, and that the extensive inquiry on this subject into which he was led suggested to him the utility of a new work on negotiable instruments. The story further proceeds that, when the inquirer asked him whether such a demand was necessary, he humorously replied that he had forgotten. Whether this is without foundation or not, it serves to indicate the wealth of inharmonious learning which has been lavished upon a question which, at first sight, would appear to be quite narrow. Much of the conflict in authorities has arisen over the question whether, in an action against the maker of a promissory note or the acceptor of a bill of exchange payable at a particular place, it was necessary to aver and prove a demand at such place. In England the authorities were divided on the subject of such acceptances. The Court of King's Bench held that where there was an acceptance payable at a specified place it was not necessary to allege or prove demand at that place, in a suit against the acceptor. The Court of Common Pleas, on the other hand, held that this made a qualified acceptance, and that presentment at the place stipulated must be averred and proved. In 1820 the case of *Rowe v. Young*, 2 Brod. & Bing. 165 (6 E. C. L. 83), came before the House of Lords. It was there decided that, where the acceptance named a place of payment, demand at such place must be averred and proved. In the following year

an act of Parliament was passed on the subject, declaring that an acceptance payable at a banker's or other specified place, without more, should be deemed a general acceptance; but if it were expressed to be payable at a banker's or other place "only, and not otherwise or elsewhere," it would be a qualified acceptance. This statute did not deal with promissory notes, and some of the decisions make a distinction as to them, where the place of payment was named in the body of them. In this country a contrary doctrine to that declared by the House of Lords was laid down by the Supreme Court of the United States in the case of *Wallace v. McConnell*, 13 Pet. 136, 10 L. Ed. 95. It was held in that case that in actions on promissory notes against the maker, or on bills of exchange against the acceptor, where the note or bill is made payable at a specified time and place, it is not necessary to aver in the declaration, or prove on the trial, that a demand for payment was made, in order to sustain the action; but, if the maker or acceptor was at the place at the time designated and was ready and offered to pay the money, it is matter of defense, to be pleaded and proved on his part. This decision has been generally followed in America, and the ruling has been adopted in this state. *Dougherty v. Western Bank of Georgia*, 13 Ga. 287. It was said by this court that the defendant may plead readiness to pay at the place stipulated, or damages sustained by him in consequence of the neglect or omission to make the demand, and, upon proof of his plea, the defendant shall be exonerated to the extent of the damages which he has sustained. It will be observed that the decisions above mentioned have reference to a case in which the acceptor of a bill of exchange or a maker of a promissory note is sued, not to questions involving the liability or release of indorsers or drawers of accepted bills.

In many respects a check is like an inland bill of exchange; but there are some differences. A check has been defined to be "a draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds for the payment at all events of a certain sum of money to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand." 2 Daniel on Negotiable Instruments (5th Ed.) § 1566. A check does not have to be accepted upon presentment, but paid, if good and if properly presented. One of the differences between a common check and an ordinary inland bill after its acceptance is in relation to the drawer. In the former, the drawer is the principal debtor, and the check purports to be made upon a fund deposited; in the latter, the acceptor is the principal debtor. The negligence of the holder of a check in not making due presentment, or as to giving the drawer notice of dishonor, does not absolutely discharge him from liability except to the extent to which he may have

suffered loss or injury by reason of such negligence.

These principles have been stated because citations have been made of cases which arose under them. They do not, however, fully cover the present case. Here the drawee of a check was a bank in a different place from where the check was drawn and the drawer resided. The direction to the drawee bank was at the left-hand lower corner of the check, and immediately under it were the words, "Payable through the Citizens' Bank of Valdosta, Valdosta, Ga., at current rate." The check was not forwarded through the Valdosta Bank, but came into the possession of a bank in Nashville, Ga., the place where the drawee bank was located, and was thus presented to it. Whether the check was deposited with such demanding bank, or sent to it for collection, or how it became the holder, is not stated. On presentment, the drawee bank indorsed on the back of the check these words, "Will pay when presented through the Citizens' Bank of Valdosta." Thereupon the check was protested for non-payment, and suit to recover damages was brought by the drawer against the collecting bank, which caused the protest to be made, on the ground that such protest was wrongful and was maliciously made.

Two questions are involved: (1) Whether the words, "Payable through the Citizens' Bank of Valdosta," etc., formed a part of the check, which the drawee bank was bound to regard, or which it had the right to disregard. (2) Whether this direction required payment through the Valdosta Bank, or whether it was merely permissive, so that payment could be demanded through that channel or directly from the drawee bank of Nashville. If the presentment to the drawee was required to be made through the Valdosta Bank, then the drawee had the right to decline payment except upon presentment in that manner; and if the bank holding the paper refused to recognize such reason for nonpayment on presentment by it, and caused the check to be protested, and notice to be given, this was unwarranted.

It was contended that the words, "Payable through the Citizens' Bank of Valdosta," etc., followed the signature, and formed no part of the check, but amounted merely to a memorandum, which the holder of the check did not have to regard. In England there is a well-known usage, which has now been made the subject of an act of Parliament, for the drawer or holder of a check to "cross" it with the name of a banker.

In 2 Daniel on Negotiable Instruments (5th Ed.) § 1585a, it is stated that the effect of this was, "before the statute which now exists, a direction of the drawee bank to pay the check to no one but a banker; or rather, according to the cases, with only a caution or warning to the drawees that care must be used, in paying it to any one else."

In 1 Morse on Banks & Banking (4th Ed.)

§ 245, it is said: "In this country the system of 'crossed checks,' strictly so called, is unknown. But of late the germ of a similar custom has begun to manifest itself. Occasionally checks have stamped or written upon them some form of words which is intended to secure their payment exclusively through the clearing house. No especial form has as yet been generally accepted, and the legal effect of none of those in use has ever been passed upon. It is safe to say, however, that there is no question but that the drawer could embody in his order a direction to his bank to pay only upon presentation of the instrument in the usual course through the clearing house, and that such a direction would be as valid and as binding upon the bank as a direction to pay only to the order of a particular person. If the check be payable to the order of A. B., it is probable that the privilege of including such instructions in his order, when indorsing over, might be accorded to him, certainly indorsements in this form are very frequent, and no bank would be safe in disregarding them. Supposing the direction to be properly given, the collecting and the paying bank must both respect it, and the English cases above mentioned would be precedent directly in force. It would amount to an express designation by the drawer, or the payee, of the manner alone in which payment is authorized to be demanded or made."

A check being in the nature of an order on a bank or banker to pay a certain sum purporting to be on deposit, there would seem to be no reason why the drawer could not direct the bank to pay only when presented through a specified channel or by a particular person or bank. The drawer is not compelled to make the check payable to bearer or order. Likewise, no sound reason is perceived why, in giving direction to the bank of deposit, he cannot make an addition to the mere order for payment. If the person to whom the check is delivered is not willing to accept it with such direction, he can reject it; but if he accepts it payable only through a particular bank, or through a particular banker, he cannot insist that the bank on which it is drawn must disregard this direction given to it by its depositor on the face of the paper. No ground has been suggested why such a direction by one to his banker, in ordering the latter to pay money, is illegal or unreasonable; the banks being in the same state and not far distant from each other. The case in hand does not present the question of whether the drawer of the check has been wholly or partially discharged by negligence or delay in presentation, but whether, in giving direction to his banker to pay the check, he can lawfully direct payment to be made through a certain medium, and whether the bank, when so instructed, is bound to disregard such direction at the demand of another collecting bank.

In *Nazro & Green v. Fuller*, 24 Wend. 374, it was held that an alteration of a promissory note by the payee thereof, so as to make it purport to be payable at a particular place, vitiates it in the hands of an indorsee, so that he cannot recover upon it in an action against the maker; and that, if it be doubtful whether it be an alteration of a note or a mere memorandum by the payee indicating where demand for payment should be made to charge him as indorser, the question, it seems, should be submitted to a jury.

In *Warrington v. Early*, 2 Ellis & Black. (75 E. C. L. 763), a promissory note was made payable six months after date, "with lawful interest." After it had been signed, without the assent of the maker, but with the assent of the holder, there was added, in the corner of the note, "Interest at six per cent. per annum." It was held that this addition materially altered the contract, and that the holder could not recover on the note against the maker.

As to alterations in written contracts in this state, see Civ. Code 1895, §§ 3702, 3703; *Gwin v. Anderson*, 91 Ga. 827, 18 S. E. 43; *Hotel Lanier v. Johnson*, 103 Ga. 604, 30 S. E. 558; *Pritchard v. Smith, Stewart & Co.*, 77 Ga. 463. See, also, *Woodworth v. Bank of America*, 19 Johns. 391, 10 Am. Dec. 239; *Polo Mfg. Co. v. Parr*, 8 Neb. 379, 1 N. W. 312, 30 Am. Rep. 830; *Farmers' Bank of Kentucky v. Ewing*, 78 Ky. 264, 39 Am. Rep. 231; *Wait v. Pomeroy*, 20 Mich. 425, 4 Am. Rep. 395; 1 Daniel on Negotiable Instruments (5th Ed.) §§ 149, 150, pp. 173, 174, and citations; 4 Am. & Eng. Enc. L. (2d Ed.) 137 (11), 140; *McCalla v. McCalla*, 48 Ga. 502; *Mayor and Council of Griffin v. City Bank of Macon*, 58 Ga. 534.

It is commonly stated that the contract must be collected "from the four corners" of the document, and no part of what appears there is to be excluded; and Mr. Daniel, in his work on Negotiable Instruments, has somewhat broadly declared that, as indorsements are made on the back of a negotiable instrument, it might be said that the purport of the instrument is to be collected from "the eight corners." 1 Dan. Neg. Inst. (5th Ed.) § 151, p. 175. A distinction is sometimes made between an entry upon a note or check at the time when it is made, and which is intended as a part of it, and a mere memorandum made by some person for convenience, and forming no part of the instrument. In the case before us the direction immediately follows the name of the drawee bank. From the allegations of the petition it appears to have been placed there when the check was drawn, as a part of the direction to the bank. It was a material part of such direction, and the drawee bank had the right to decline to disregard it.

It was argued that the statement that the check was "payable" through the Valdosta Bank did not indicate the exclusive method of collection, but gave to the holder an option to present it through that medium or through any other medium to the Nashville Bank. If a negotiable instrument is payable at one of two banks, it may be presented for payment to either. The word "payable" has been defined as follows: "That may, can, or should be paid; suitable to be paid; that may be discharged or settled by delivery of value; matured; now due." Webster's Dictionary. As commonly employed in commercial paper or contracts, in stating the time or manner of payment, the word "payable" does not give to the debtor an option or privilege of paying at such time or in such manner, but signifies that payment is to be thus made. If it should be stated in a note or bill of exchange that the amount mentioned was payable in 30 days, clearly the expression would mean that such amount was to be paid at that time, not merely that the debtor might then pay it. So if an obligation should be declared to be payable in gold coin of a certain fineness, it would mean that it was to be thus paid. And numerous illustrations might be given. A direction in a check to the drawee bank that it is "payable" through another named bank means that it is to be paid in that way. *City of Alma v. Guaranty Savings Bank*, 60 Fed. 203, 80 C. C. A. 564; *Cate v. Patterson*, 25 Mich. 191, 194; *Johnson v. Dooley*, 65 Ark. 71, 44 S. W. 1032, 40 L. R. A. 74; *Easton v. Hyde*, 13 Minn. 90 (Gil. 83); *Webster v. Cook*, 38 Cal. 423. Taken in connection with the direction from the drawer of the check to the drawee bank to pay a certain sum, the addition meant that the sum was to be paid through the Valdosta Bank.

It follows, from what has been said, that, under the allegations of the petition, the drawee bank had a right to decline to pay the checks until presented through the Valdosta Bank, and that, upon its entering upon the back of the check that it would pay when so presented, the collecting bank was not authorized to cause the check to be protested and notice to be given. It was therefore not erroneous for the trial judge to overrule the demurrer to the petition. We have not discussed the motive which it was alleged actuated the collecting bank in causing the protest to be made, as without it we hold that the petition set out a cause of action. *Atlanta National Bank v. Davis*, 96 Ga. 334, 23 S. E. 190, 51 Am. St. Rep. 139; *Hilton v. Jesup Banking Co.*, 128 Ga. 30, 57 S. E. 78, 11 L. R. A. (N. S.) 224; *State Mutual Life Association v. Baldwin*, 116 Ga. 855, 43 S. E. 262.

Judgment affirmed. All the Justices concur.

(134 Ga. 512)

McCULLOUGH BROS. et al. v. SAWTELL.
(Supreme Court of Georgia. May 11, 1910.)

(*Syllabus by the Court.*)

1. EVIDENCE (§ 271*)—SELF-SERVING DECLARATIONS.

Where two fruit dealers jointly contract with the owner of a cold storage plant for the storage of apples, in a suit by the former against the latter to recover damages occasioned to the apples by causing a lower temperature than provided in the contract, the testimony of an employé of the defendant that the defendant, in the presence of one of the plaintiffs, instructed him to obey and carry out the orders of this particular plaintiff as to the regulation of the temperature, is not open to objection that such amounted to a self-serving declaration.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1087; Dec. Dig. § 271.*]

2. EVIDENCE (§ 249*)—ADMISSIONS—JOINT CONTRACTORS.

Where two persons jointly sue to recover damages for an alleged breach of a contract between them and the defendant, the admissions of one of the plaintiffs affecting the terms of the contract are admissible against all.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 965; Dec. Dig. § 249.*]

3. TRIAL (§ 210*)—QUESTIONS FOR JURY—CREDIBILITY OF IMPEACHED WITNESS.

Where a witness is sought to be impeached by proof of contradictory statements alleged to have been previously made by the witness, which are relevant to his testimony and the case, it is not error to charge, in connection with the law relating to the impeachment of witnesses, the following: "If a witness swears willfully and knowingly falsely, his testimony ought to be disregarded entirely, unless corroborated by circumstances or other unimpeached evidence. It is for the jury to determine the credit to be given his testimony when impeached by contradictory statements out of court."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 490-494; Dec. Dig. § 210.*]

4. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—IRRELEVANT CHARGE.

An irrelevant instruction will not vitiate a verdict where it is reasonably clear that such instruction was not harmful to the losing party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by McCullough Bros. and others against T. R. Sawtell. Judgment for defendant, and plaintiffs bring error. Affirmed.

Westmoreland Bros., for plaintiffs in error. E. V. Carter, for defendant in error.

EVANS, P. J. McCullough Bros. and Hancock & Kolb sued T. R. Sawtell for damages for the breach of an alleged contract to furnish the plaintiffs with cold storage for a large quantity of apples which the plaintiffs owned in common. According to the petition, the plaintiffs contended that the defendant agreed to keep the temperature of the cold storage room not less than 30 nor more than 34 degrees Fahrenheit, and furnish the

labor and material and all things necessary for the cold storage at his expense. The defendant in his answer admitted that he contracted with the plaintiffs to store their apples, but denied the terms of the contract as alleged in the petition. He averred that under the agreement the defendant was to have no control over the temperature of the room; but that the plaintiffs should inspect same daily, and that the defendant's servants were under the direction and control of the plaintiffs at all times for the purpose of regulating the temperature of the room. The apples stored by the plaintiffs were frozen because of the temperature's falling below 30 degrees, and damages were claimed for the loss thus occasioned. The evidence was voluminous on both sides, and sharply conflicting. The trial eventuated in a verdict for the defendant, and the plaintiffs filed their motion for a new trial, complaining of the ruling of the court as to the admission of certain evidence and of certain instructions to the jury, the motion was denied, and the plaintiffs excepted.

1, 2. The court allowed one employé of the defendant to testify: "I heard a conversation between Mr. Sawtell and Mr. Hancock with reference to the temperature of the room after some of the apples had been put in the storage room in the latter part of September, 1905. Mr. Sawtell told Mr. Hancock that he would not have anything to do with it; that I would act under Mr. Hancock's directions, and I would carry it as near as I could. If he said carry it down, I was to carry it down, and if he wanted it up, I was to let it go up. That conversation occurred right in the building within 15 or 20 feet of the storage room. Mr. Sawtell said that to Mr. Hancock. Mr. Hancock said then, 'That is all right, and me and Roberts [the witness] can make that all right. We can get along all right.'" Another employé was permitted to testify: "I never received any instructions from Mr. Sawtell in reference to those apples, only to obey and carry out Mr. Hancock's orders about the temperature. Yes, sir; Mr. Hancock was present when I was so instructed. Yes, sir; Mr. Sawtell gave me those instructions in the presence of Mr. Hancock, in reference to those apples and the room in which they were stored." Another employé testified: "The only thing I know about the storing of apples at that plant by McCullough Bros. and Hancock & Kolb during the winter of 1905 and 1906, they had an amount of apples stored there, and Mr. Hancock, that gentleman there [indicating plaintiff], gave me instructions about the temperature. He told me a few times how he wanted the temperature carried, what degree to carry the temperature in the room. Yes, sir; he did request me to run it to a certain degree. He told me on one

occasion, I think. He came out there on one Sunday. I was down in the engine room working on the dynamo, and he came down there, and he said he had been down in the room, and he told me what the temperature was. If I am not mistaken, he said it was 32 or about 33, and I said something about it, that I probably thought that was about low enough for fruit; and he said no, it wouldn't hurt at that, but it wouldn't hurt to run it to 26 or 27, but not to keep it there too long; he said for a short period. Yes, sir; Mr. Hancock said that to me. That was some time along about the 15th or 18th of December, 1905. Yes, sir; that was while those apples were stored in that plant." It is contended that this evidence was inadmissible, because the statement of the defendant in the presence of one of the plaintiffs as to the regulation of the temperature is but a self-serving declaration made subsequently to the contract; that the various occurrences do not amount to admissions, and, even if they do amount to admissions, they only bound Mr. Hancock, the plaintiff alleged to have made the admissions; and that the court erred in not restricting the scope of this evidence, if admissible, as affecting the party who made them. None of these objections are meritorious. "Where the parties to a suit, either as plaintiffs or defendants, set up in a joint suit a joint claim, resting on one and the same contract, with an issue applying to them jointly, the declarations or admissions of one are evidence against his coplaintiff or codefendant." *Southern Life Ins. Co. v. Wilkinson*, 53 Ga. 545.

3. Testimony was offered that a witness had previously made contradictory statements relevant to his testimony and to the case on trial. The court instructed the jury as to the credibility and impeachment of witnesses, and, among other things, said: "A witness may be impeached by contradictory statements previously made by him as to matters relevant to his testimony in the case. Before contradictory statements can be proven against him, his mind shall be called with as much certainty as possible to the time, place, and circumstances attending the former statement. When a witness is successfully contradicted as to a material matter, his credit as to other matters is for the jury; but, if a witness swear willfully and knowingly falsely, his testimony should be disregarded entirely unless corroborated by circumstances or other unimpeached evidence. It is for the jury to determine the credit to be given his testimony when impeached by contradictory statements out of court." The criticism upon this charge is that there was no evidence that any witness had sworn willfully

and knowingly falsely. The Code provides how a witness may be impeached, and one of the modes of impeachment is by proof of contradictory statements previously made by the witness as to matters relevant to his testimony and to the case. The Code further provides that: "When a witness is successfully contradicted as to a material matter, his credit as to other matters is for the jury. But if a witness swear willfully and knowingly falsely, his testimony ought to be disregarded entirely unless corroborated by circumstances, or other unimpeached evidence. It is for the jury to determine the credit to be given his testimony when impeached for general bad character or for contradictory statements out of court." Civ. Code 1895, § 5295. This section of the Code underwent analysis in *Powell v. State*, 101 Ga. 19, 29 S. E. 309, 65 Am. St. Rep. 277, and it is unnecessary to reproduce or paraphrase that analysis. The effect of the charge was an instruction that, if the witness had been successfully impeached, his testimony should be disregarded by the jury. Successful impeachment of a witness may afford an inference that the impeached witness may have knowingly delivered false testimony; and, according to the reasoning in the *Powell* Case, the charge complained of was not erroneous for the reason assigned.

4. The court charged: "If the defendant contracted to furnish space and cold storage for the apples of the plaintiffs, and under that contract made no restriction of his liability, then he was bound to exercise all ordinary care in furnishing a reasonably good storage room, and furnishing the proper refrigeration. The assignment of error is that the suit is upon a contract, and that the charge is irrelevant to any issue made by the pleadings. We agree that the charge complained of was irrelevant. Both parties insisted that there was a parol contract, but they differed as to the essential terms of the contract. The defendant's liability depended upon the plaintiffs establishing by evidence the contract alleged in their pleadings; he was sued upon an express contract, and was not sought to be held bound either upon an implied contract or in tort. However, from a careful reading of the voluminous evidence, the jury could not have been misled by this inapplicable instruction. The evidence submitted by the plaintiffs tended to show the existence of the contract pleaded in their petition, while that of the defendant tended to establish the contract averred in his plea. The issues were so sharply drawn that it is clear that the jury were not misled by the instruction complained of.

Judgment affirmed. All the Justices concur.

(134 Ga. 500)

ATHENS MUT. INS. CO. v. R. H. LEDFORD & SON.

(Supreme Court of Georgia. May 11, 1910.)

*(Syllabus by the Court.)***1. INSURANCE (§ 378*)—KNOWLEDGE OF AGENT IMPUTABLE TO INSURER.**

Knowledge by one employed as a solicitor of fire insurance, who delivered the policy of insurance to the insured and received the premiums, of material facts relative to the state of the title and the use to which the property was put at the time of the issuance of the policy, is imputable to the company; and knowledge of the state of the title to the property, although it appears that the interest of the insured was other than "unconditional and sole ownership," will estop the company from setting up a defense based upon a provision in the policy that it should be void if the interest of the insured be "other than unconditional and sole ownership."

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 968; Dec. Dig. § 378.*]

2. TRIAL (§ 296*)—INSTRUCTIONS—ERRORS CURED BY OTHER INSTRUCTIONS.

Even if the charge of the court complained of, laying down certain rules whereby the agency of an alleged agent of an insurance company might be tested, was not the correct rule under the facts in the case, yet, where the judge in his charge, in submitting to the jury the question as to whether certain material alterations in the policy sued on were made by one authorized to make them, instructed the jury that the person whose agency, relatively to any authority to make such alterations, was challenged, was without authority to make them, and that the policy was not binding upon the company unless they were made by a named individual who was admittedly the agent of the company and had the authority to make such alterations, or by direction of the latter, the company was not harmed by the charge complained of.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 296.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by R. H. Ledford & Son against the Athens Mutual Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. H. Ledford & Son brought suit against the plaintiff in error upon a policy of fire insurance, attaching a copy of the policy to their petition. The company in its answer admitted having issued a policy to R. H. Ledford individually, similar to the one sued on, except that in the policy so issued it was stated that Ledford was the owner of the premises described therein; whereas, petitioners alleged that they merely held a bond for title to the property. The company pleaded that it had never issued any policy to R. H. Ledford & Son, and that, if the words "& Son" now appear in the policy after the name of R. H. Ledford, they were inserted after the policy was issued and by some one not authorized by the company to make such alterations. The company also contended that in the policy which it issued it was stat-

ed that the building was occupied by Ledford for feed, for hitching, and for storing vehicles; whereas, in fact it was occupied as a livery stable and a barber shop and by a dealer in soft drinks. The company further defended upon the ground that the policy contained a provision that it should be void if the interest of the insured "be other than unconditional and sole ownership," or "if the subject of the insurance be a building on ground not owned by the insured in fee simple."

Upon the trial R. H. Ledford testified that one Morgan solicited him to take out insurance on the building in question, that he told Morgan he did not own the property, but that he and his son held a bond for title, and that Morgan stated that would make no difference, and he would have the policy issued. Ledford told him to have it issued in favor of R. H. Ledford & Son. When Morgan afterwards brought the policy, it was in favor of R. H. Ledford, who refused to pay for same, stating that his son had an equal interest in the property with him, and instructed that the policy be changed so as to read in favor of R. H. Ledford & Son. Morgan took the policy, and in two or three days returned with it with the change so made, and Morgan said the words "& Son" were inserted with indelible pencil in Atlanta. Ledford took the policy and paid Morgan the premium. Ledford further testified that, when Morgan was writing out the policy, there was a barber shop and cold drink stand in the building, and a blacksmith shop, and that Morgan saw them. Ledford had no dealings with any one except Morgan. The secretary of the defendant company testified that Morgan was not the company's agent, that he had no connection with the company, that N. O. Williams was the company's agent in Atlanta, and that he was authorized to issue such policies. Williams acknowledged that he himself was the company's agent in Atlanta, that he issued the policy in its original form as alleged, and that Morgan was a solicitor of insurance for him. He testified that when he signed and sent out the policy it did not contain the words "& Son"; that he did not authorize any one to make that addition, and did not know it had been made, and had never made any report of such change to the company; that the words "& Son" looked like Morgan's handwriting. In rebuttal the plaintiffs introduced evidence to the effect that Williams had acknowledged, after the fire occurred, that the change in the policy by the insertion of the words "& Son" was made by Morgan at the direction of Williams. The jury found for the plaintiffs, and the company excepted to the refusal of a new trial.

T. S. Mell and Tye, Peeples, Bryan & Jordan, for plaintiff in error. Howard & Bolding and Westmoreland Bros., for defendant in error.

BECK, J. (after stating the facts as above).

1. The policy sued on contained certain clauses providing that it should be void if the interest of the insured "be other than unconditional and sole ownership," or "if the subject of the insurance be a building on ground not owned by the insured in fee simple," and that in any matter relating to the insurance "no person, unless duly authorized in writing, shall be deemed the agent of this company." And it was further provided in the policy that no officer, agent, or other representative of the company should have power to waive any provision or condition of the policy, except such as by its terms might be the subject of agreement indorsed thereon or added thereto, unless such waiver were in writing attached to the policy. Under the evidence in the case, the insured, who were in possession of the property insured, held the same under a bond for title at the time of the issuance of the policy, but did not have such ownership as that required by the terms of the policy; and the defendant company insists that by reason of the provisions in the policy quoted above the policy was void. The evidence in the case further shows that one Morgan solicited the insurance on the building in question, and that he was informed by Ledford that the insured did not own the property, only through a bond. "I [Ledford] had a bond and would not own it until it was paid for, and the payment would not be due until the latter part of 1909. I told him I didn't have any deed for the property at all, and that I paid partial payments. I told him I didn't have deeds for it, and he said it would make no difference. I agreed to take the insurance for R. H. Ledford & Son. He was to issue the policy. He did not bring it with him then; he brought it back. When he brought it back, I was to pay the premium. When he brought it back, I told him it was just marked R. H. Ledford, and I told him I would not pay the premium until it was made to R. H. Ledford & Son; that my son had as much interest in it as I had. He took it and kept it for two or three days, and brought it back with R. H. Ledford & Son added to it. He said it was done with an indelible pencil in Atlanta. When he brought the policy with the '& Son' added to it, I paid him for the policy." The uncontradicted evidence in the case is that Morgan was a solicitor of insurance, employed by the company or its agent, and in the course of his employment he delivered the policy in question and received the premium; though the evidence raises an issue as to whether the words "& Son" were in the policy when it was taken from the office of the company's agent in Atlanta, and as to whether these words were subsequently inserted. Under the ruling in the case of *Springfield Fire Insurance Co. v. Price*, 132 Ga. 687, 64 S. E. 1074, knowledge by Morgan that the insured did not own the building and the land upon which it was situated was notice to the company, and the

latter will not be heard, in defending an action on the policy, to set up the noncompliance by the insured with the condition in the policy in reference to ownership of the property. In the case cited it was said, dealing with a defense in every way similar to the defense now under consideration, based upon provisions in the policy practically identical with those quoted from this policy: "The insurance company defends its refusal to pay the amount of damages done to the property, because the buildings were upon ground not owned by the insured. In *Johnson v. Aetna Insurance Co.*, 123 Ga. 404, 51 S. E. 339, 107 Am. St. Rep. 92, it was held that: 'Where a policy of fire insurance contained a stipulation that it should be void "if the subject of insurance be a building on ground not owned by the insured in fee simple," but at the time the application for insurance was made the company, through its agent, knew that the applicant did not own the land on which the building sought to be insured was situated, it will not be heard, in defense to an action on the policy, to set up the noncompliance of the plaintiff with this condition of the contract.' Restrictions inserted in the contract upon the power of the agent to waive any condition, unless done in a particular manner, do not apply to those conditions which relate to the inception of the contract, where it appears that the agent has delivered it, and received the premiums, with full knowledge of the actual situation. *Wood v. American Fire Ins. Co.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733; *Mechanics' Insurance Co. v. Mutual Bldg. Ass'n*, 98 Ga. 262, 25 S. E. 457; *Johnson v. Aetna Ins. Co.*, supra; 3 *Cooley's Briefs on Ins.* 2651."

Under the doctrine above laid down, the jury having found adversely to the company upon the issues raised as to the knowledge of the company, through its soliciting agent, of the state of the title to the property insured, that part of the defense of the company based upon want of title in the insured was met and overcome. And the same is true of the defense based upon the contention that the property was put to other uses than those set forth in the application for insurance.

2. But the insurance company contends further that, if Morgan was such an agent of the company as made his knowledge of the state of the title and the use to which the property was put at the time of the application and issuance of the policy, he was not such an agent as had authority to make a change of the persons to whom it was payable; and that, as the policy when it left the office of the company's agent was payable, in case of loss, to R. H. Ledford, the insertion of the words "& Son" after the name of R. H. Ledford, whereby the policy was made payable to the firm of R. H. Ledford & Son, was unauthorized, even if made by Morgan, and vitiated the contract of in-

surance; and that it was error for the court to charge the jury, touching the question of agency, in the language of section 2054 of the Civil Code, as follows: "Any person who solicits in behalf of any insurance company, or agent of the same, incorporated by the laws of this or any other state or foreign government, or who takes or transmits, other than for himself, any application for insurance or any policy of insurance to or from such company, or agent of the same, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect any risk at any time, or receive or collect or transmit any premiums of insurance, or make or forward any diagram of any building or buildings, or do or perform any other act or thing in the making or consummating of any contract of insurance for or with any insurance company, other than for himself, or who shall examine into or adjust or aid in adjusting any loss for or in behalf of any such company, whether any of such acts shall be done at the instance or request or by the employment of such insurance company, or of, or by, any broker or other person, shall be held to be the agent of the company for which the act is done or the risk is taken." It is insisted by the plaintiff in error that this charge was error, because, "as between the insurer and insured, in determining the liability of the insurer to the insured as to who is to be deemed agent of the insurer so as to bind the insurer by knowledge of such agent, or by the act of such agent, said charge is not applicable." As to whether this contention of counsel for plaintiff in error is sound or not, it is unnecessary to decide here; for, even if the charge quoted is an incorrect statement of the rule for determining the question of agency between the insured and the company, when we consider other portions of the charge, the defendant was not harmed by this part of the court's instructions to the jury. As we have observed above, in a limited sense—that is, in so far as to make knowledge by Morgan, of material facts relative to the ownership of the property and the uses for which it was employed at the date of the policy, notice to the company—the latter was the company's agent; but, when we come to consider the question of whether the change in the name of the policy holder was made by a duly authorized agent or not, we find that the court below did not submit that question as one which could be answered in the affirmative in case the change had been made by Morgan; and he was an agent of the company, under the definition of agency contained in the above extract from the charge. In submitting this last question to the jury, the court required them to apply a stricter and more specific test, and one of which it would

seem the plaintiff in error can scarcely complain; for, in submitting the question as to whether the words "& Son" were rightfully inserted after the name of R. H. Ledford in the policy, the court employed this language: "If Morgan was the solicitor of the agent of the company, and he took from the agent of the company a policy of fire insurance, with direction or authority to deliver it, and if he tendered it to the insured, and it was rejected, then he could not, without the consent of the company, acting by its proper officer or its agent, be authorized to make a material alteration in it; and, if he made such alteration without authority, then it would void the policy, and the plaintiff could not recover. If Morgan returned the policy to Williams, the agent, and Williams by himself changed it, or Morgan by direction of the agent changed it, and the policy so changed was retendered to the insured and accepted by him, then the policy would be binding on the company." The only change or alteration in the policy to which this charge could have had reference was to the insertion of the words "& Son" after the name of R. H. Ledford, and this charge made the validity of the policy, so far as that validity was attacked upon the grounds of an alteration in the name of the insured is concerned, turn upon the question as to whether or not that alteration in the policy was made by Williams himself, who was unquestionably the agent of the company, or by Morgan at the direction of Williams; and under the evidence in the case the jury were authorized to find that the alteration, by the addition of the words "& Son" in the policy, was at the direction of Williams.

3. The rulings made above are controlling in the case; and, while certain other parts of the charge are excepted to, they relate to such immaterial questions that their inaptness cannot be treated as harmful, requiring the grant of a new trial.

Judgment affirmed. All the Justices concur.

(124 Ga. 517)

DELKIN v. McDUFFIE

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

1. TRUSTS (§ 99*)—CONSTRUCTIVE TRUSTS—ENFORCEMENT.

A., having an equity of redemption in two tracts of land, agreed with B. that the latter should pay the amount claimed by the holder of the title and take a deed to both tracts, the title to one of which should be retained by B. in consideration of the money expended by him, and the other tract should be conveyed by him to A. The contract was performed to the extent of B.'s paying the amount due to redeem the land and taking from the creditor of A. a deed to both tracts. B. refused to comply with his agreement to convey one of the tracts to A. Held, that the title to the tract agreed by B. to be conveyed to A. was affected with a trust

in favor of A., which equity will enforce by proper decree. *Horne v. Mullis*, 119 Ga. 534, 46 S. E. 663.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 150; Dec. Dig. § 99.*]

2. TRUSTS (§ 365*)—CONSTRUCTIVE TRUSTS—ENFORCEMENT—LACHES—CONFIDENTIAL RELATIONS.

Where the plaintiff and defendant in an action like that described in the preceding note sustain the relation of nephew and uncle, and it is alleged that the nephew reposed confidence in the uncle, who wielded great influence over him, and the nephew made the contract with his uncle because of his trust in him, and there is no change in the character of the possession of the land, or in the relation of the parties with respect thereto, a failure of the nephew to sue the uncle until five years had elapsed is not such laches as will bar his equitable remedy.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 572; Dec. Dig. § 365.*]

3. APPEARANCE (§ 19*)—JURISDICTION—ACQUIREMENT—PLEADING TO MERITS BY NON-RESIDENT.

By pleading to the merits of an action in a court having jurisdiction of the subject-matter, a nonresident defendant submits himself to the jurisdiction of the court.

[Ed. Note.—For other cases, see *Appearance*, Cent. Dig. §§ 79-90; Dec. Dig. § 19.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between A. L. Delkin and W. B. McDuffie. From the judgment, Delkin brings error. Affirmed.

R. B. Blackburn and Westmoreland Bros., for plaintiff in error. Moore & Pomeroy, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(124 Ga. 523)

SMITH et al. v. INGRAM.

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

TRESPASS (§ 52*)—CUTTING AND REMOVAL OF TIMBER—DAMAGES.

No error of law is alleged, and the verdict is supported by the evidence.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 137, 138; Dec. Dig. § 52.*]

Error from Superior Court, Houston County; W. H. Felton, Judge.

Action by R. E. Smith and others against A. E. Ingram. Verdict for plaintiffs for less than the amount claimed, and they bring error. Affirmed.

R. N. Holtzclaw, for plaintiffs in error. H. A. Mathews, for defendant in error.

EVANS, P. J. The plaintiffs and defendant were adjoining landowners, and the agents of the latter crossed over her line and cut 107 pine trees on the plaintiffs' land and manufactured them into lumber. The plaintiffs alleged that the trespass was willful, and sued for the value of the tim-

ber as converted into lumber. It was shown on the trial that the 107 trees were worth 35 to 40 cents per tree, that they produced between 40,000 and 50,000 feet of lumber, which was worth \$1 per hundred feet. The jury returned a verdict for \$42.80, and the plaintiffs moved for a new trial, which was refused, and they except.

The contention of the plaintiffs is that the evidence demanded a larger verdict. "Where plaintiff recovers for timber cut and carried away, the measure of damages is: (1) Where defendant is a willful trespasser, the full value of the property at the time and place of demand or suit brought, without deduction for his labor or expense. (2) Where a defendant is an unintentional or innocent trespasser, or innocent vendee from such trespasser, the value at the time of conversion less the value he or his vendor added to the property." Civ. Code 1895, § 8918. The court instructed the jury accordingly. Under the evidence the jury were not bound to find that the trespass was willful. They were authorized to find that the trespass was unintentional, and that the plaintiffs were not entitled to recover the accretion of value to the trees produced by their manufacture into lumber. The value of the timber at the time of the conversion was from 35 to 40 cents per tree, and the verdict is for the equivalent of 107 trees at 40 cents per tree.

As no error of law is complained of, the judgment refusing a new trial will not be disturbed.

Judgment affirmed. All the Justices concur.

(124 Ga. 524)

READ v. GOULD.

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

LICENSES (§ 50*)—OPTION TO TERMINATE—EXERCISE BY LICENSOR—LIABILITIES.

The petition stated a cause of action, and should not have been dismissed upon general demurrer.

[Ed. Note.—For other cases, see *Licenses*, Dec. Dig. § 50.*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by Mary Read against E. W. Gould. From an order sustaining a general demurrer to the petition, plaintiff brings error. Reversed.

Mrs. Mary Read brought suit against E. W. Gould, and alleged that he was indebted to her in the sum of \$400. She averred that on or about June 6, 1904, she sold to him certain lands, and that as part of the consideration for the sale he agreed to allow her hunting, fishing, and pasturage privileges on the lands, or, in default thereof, to pay her \$400 in addition to the price already paid for

the land. The agreement referred to was embodied in a writing dated June 6, 1904, signed by the defendant, in which it was stipulated that, in consideration of the sale of the lands, describing them, Mary J. Read should have the right to pasture upon said lands during her life for not exceeding 20 head of cattle and 60 head of hogs, and that if the defendant, his heirs or assigns, should at any time choose to do so, he should have the right to terminate the agreement as to pasture and hunting privileges, upon the payment to plaintiff of the sum of \$400 in addition to the purchase price of said lands. The petition contains the further averments that on or about February 4, 1908, the defendant sold the lands to Mrs. Ophelia Phillips; that the deed conveying the lands to Mrs. Phillips conveyed in express terms the right to pasture and hunting on said lands; that, since the sale of the lands by the defendant to Mrs. Phillips, petitioner has attempted to exercise the right of pasture and hunting thereon, and has been denied the right by Mrs. Phillips; and that by reason of the foregoing facts the defendant has elected to terminate the rights of petitioner as to pasture, etc.; and petitioner prays judgment in the sum of \$400. A general demurrer to the petition was sustained, and the petitioner excepted.

R. S. Wimberly, for plaintiff in error. L. D. Moore, for defendant in error.

BECK, J. (after stating the facts as above). The deed from petitioner to defendant, conveying the lands in question, is not set forth in full or in substance in the petition, nor is it exhibited. The sale of the lands by petitioner to defendant is alleged to have been made on or about the 6th day of June, 1904. The date of the agreement is June 6, 1904; and it is impossible for this court to determine, from the meager averments of the petition, whether the written agreement signed by the defendant, touching the rights of pasture, etc., was executed prior to the deed, and merged in the deed executed subsequently, or whether the written agreement was executed subsequently to the deed conveying the lands in fee simple, without reservation or exception. But, construing the petition and the agreement executed by the defendant in the light of the meager averments of the petition, and the language of the agreement itself, reciting that the granting of the right to pasture upon the lands and the privilege of hunting and fishing thereon was a part of the consideration for the sale of the lands, in the absence of special demurrer calling for a more specific statement of the terms of the conveyance of the lands to the defendant, and as to the relative time of the execution of that conveyance and the instrument in writing, re-

ferred to as an agreement in the petition, we take it that the two papers were executed simultaneously, and are to be construed as parts of one and the same transaction, and do so construe them, though the facts of the case as they may appear upon the trial may require an entirely different construction. Thus construing the written agreement signed by the defendant, we think the petition was good as against a general demurrer.

Considered as a whole, the defendant undertook to pay to the plaintiff the sum of \$400 whenever he should "terminate this agreement" relative to the rights and privileges of the petitioner as to pasture and hunting upon said lands; and when he sold the lands to a third person, and expressly conveyed the rights of pasture and hunting, generally and without limitation, he will not be heard to say that he has not brought about the contingency upon the happening of which the \$400 was to become due to petitioner. Petitioner has herself, by filing this suit, elected to treat her rights and privileges of pasture and hunting upon the lands as terminated and extinguished; and we are of the opinion that the amount of \$400, which the defendant obligated himself to pay upon the termination of the rights and privileges referred to, is due, and that plaintiff is entitled to a judgment therefor, unless other facts not appearing upon the face of the petition, affecting or destroying the validity of the binding effect of the agreement signed by the defendant, should appear upon the trial.

Judgment reversed. All the Justices concur.

(134 Ga. 527)

SOUTHERN RY. CO. v. PLANTERS' FERTILIZER CO.

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 128*)—JUDGMENT—EQUITABLE RELIEF—INJUNCTION.

The defendant in a case pending in a justice's court, who had filed a meritorious defense, was not present at the court when, at a regular term thereof, the case was called for trial and judgment rendered in favor of the plaintiff. This omission to attend the court was because of an agreement with the plaintiff that the case should be continued to a subsequent term, and that the plaintiff should inform the court of the agreement, which he neglected to do. The defendant did not learn that the judgment had been rendered until the term of the court to which the case was agreed to be continued. He then filed an equitable petition, praying that the judgment be set aside and its enforcement enjoined until the final hearing. *Held*, that the court erred in refusing the injunction.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 403; Dec. Dig. § 128.*]

Error from Superior Court, Hall County; J. J. Kinsey, Judge.

Action by the Southern Railway Company

against the Planters' Fertilizer Company. Judgment for defendant, and plaintiff brings error. Reversed.

John J. Strickland, Ed. Quillian, and C. R. Faulkner, for plaintiff in error. B. P. Gailard, Jr., for defendant in error.

EVANS, P. J. The Planters' Fertilizer Company sued the Southern Railway Company in a justice's court to recover for an alleged overcharge of freight and for loss of goods. The defendant filed a plea under oath, setting up a meritorious defense. By agreement between the president of the plaintiff corporation and the attorney of the defendant the case was continued to the May term of the court, and again was continued by agreement between the parties to the June term. Prior to the June term the president of the plaintiff corporation and the attorney of the railroad company orally agreed to continue the case until the July term, and that the president of the company should notify the court of the agreement, which he neglected and failed to do. Relying upon the agreement to continue the case and the promise of the president of the plaintiff company to communicate it to the court, the railroad company did not appear by counsel or otherwise at the June term, and judgment was entered against it for the full sum sued for. The defendant was not aware of the failure of the president of the plaintiff company to communicate the terms of their agreement to the court, nor of the judgment which was rendered at the June term, until he appeared at the July term, pursuant to the terms of his agreement, ready to try the case. The railway company filed its petition to set aside the judgment and enjoin further proceedings in the justice's court until the final hearing. The court refused the injunction, and the railway company excepted.

The railway company had filed its defense to the fertilizer company's action at the return term of the case. The court had previously continued the case for two terms by consent of the parties, and the railway company's attorney could reasonably act on the assumption that the last agreement would have been respected by the court, if the court had been informed of it. At all events, good faith would have required the president of the fertilizer company to have apprised the court of the agreement to continue. The defendant was shut off from a hearing on its plea, not because of any ruling of the court respecting the agreement to continue, but because the fertilizer company's president neglected to inform the court of it. The fertilizer company should not be permitted to take advantage of its adversary's omission, based on reliance upon the oral promise of its president. 23 Cyc. 920. The latter's fail-

ure to acquaint the court of the agreement according to his promise, and allowing a judgment to be rendered, in the absence of any representation on the part of the defendant, amounts to the perpetration of a fraud in the procurement of the judgment. The Code declares that equity will set aside a judgment of a court having jurisdiction, where the person was prevented from making his defense by fraud or accident, or the act of the adverse party unmixd with fraud or negligence on his part. Civ. Code, § 8988. It was certainly not negligence for the railroad company to act upon a convention with the adverse party stipulating for a continuance of the case, and a promise by the adverse party to notify the court of the convention. As the plaintiff, under the undisputed evidence submitted on the hearing, was entitled to have the judgment set aside, the court should have enjoined any further proceeding in the justice's court until the final hearing. Judgment reversed. All the Justices concur.

(134 Ga. 523)

LAMONT v. LAMONT.

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

DIVORCE (§ 62*)—JURISDICTION—DOMICILE OF WIFE.

Where the domicile of a husband and wife was in a foreign country, and she, on account of his habitual intoxication and cruel treatment of her, separated from him and came to Chatham county, in this state, with the intention of making her permanent residence there and of living in a bona fide state of permanent separation from him, but, after so living in such county for several years, she returned to the country of her husband's residence and resumed her marital relations with him, the separate domicile which she may have acquired in Georgia was lost. Consequently, when she subsequently, for like causes, again separated from her husband, and, leaving him in such foreign country, returned to Chatham county, in this state, with the intention of living there in a bona fide state of permanent separation from him, she could not lawfully institute in that county a suit for divorce until the expiration of the period of 12 months from the date when she returned to the same and again acquired a separate domicile therein. Civ. Code 1893, § 2431.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 200-220; Dec. Dig. § 62.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Bill by Maud Lamont against Peter Lamont. Judgment for plaintiff, and defendant brings error. Affirmed.

Oliver & Oliver, for plaintiff in error. W. C. Hartridge, Sol. Gen., for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(124 Ga. 538)

REID v. FAIN.

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 49*)—ACTION ON LEASE—OFFENSES.

A provision in a lease that, "in the event that a retail liquor license cannot be secured by said second party for this store, this lease will be void," is a defeasance, and in an action against the tenant for a breach of the lease contract it will not be required of the plaintiff in his petition to negative the defeasance of the contract; but, if the defendant relies on the defeasance as an avoidance of his contract, he must plead and prove his defense.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 49.*]

2. TRIAL (§ 170*)—DIRECTING VERDICT.

Where a defendant in open court admits that the plaintiff is entitled to recover a specific amount of the damages laid in the petition unless he sustains his plea of avoidance of any recovery, and the evidence submitted fails to sustain such plea, it is not error to direct a verdict for the amount so admitted.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 392; Dec. Dig. § 170.*]

3. APPEAL AND ERROR (§ 1056*)—REVIEW—HARMLESS ERROR.

The exclusion of evidence which cannot change the result of the trial is not sufficient ground to grant a new trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4187; Dec. Dig. § 1056.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Mercer Fain against M. W. Reid. Judgment for plaintiff, and defendant brings error. Affirmed.

The action was by Mercer Fain, as assignee of the landlord, W. Jones, against M. W. Reid, tenant, to recover damages on account of breach of contract and abandonment of the premises by the tenant. From the petition it appears that on March 8, 1906, M. W. Reid entered into a written contract with W. Jones for the lease of a certain storehouse for the term of five years, commencing April 1, 1906, for which premises Reid agreed to pay Jones \$150 per month in advance. The lease contained this stipulation: "In the event that a retail liquor license cannot be procured by said second party [tenant] for this storeroom, this lease will be void." The tenant also stipulated in the lease not to sublet the premises or any part thereof without the written consent of the landlord. On May 14, 1906, Jones transferred in writing to petitioner all his right, title, and interest in and to the lease, and directed the lessee, Reid, to pay to petitioner or his order the accruing rentals. Reid acquiesced in the transfer, ratified the same, and treated the assignee as landlord, and paid to him the monthly rentals accruing under the lease up until September 1, 1907, since which time Reid refused to pay to petitioner the monthly rentals as they accrued under the contract, and refuses to comply further with the terms

and covenants of the lease, and has wholly abandoned the leased premises. On account of the breach of the contract and abandonment of the premises, petitioner claims damages in the sum of \$6,450. There was also an allegation and prayer to recover attorney's fees. The lease contract and its assignment were attached to the petition. The plaintiff demurred on the grounds: (1) That the attached contract shows upon its face that it is not assignable. (2) That plaintiff is not entitled to recover attorney's fees, as the statutory notice to claim attorney's fees is not alleged to have been given to the defendant. (3) Because the petition omits to allege that a retail liquor license could be procured by the defendant; and, before the plaintiff can recover, he must allege and prove that this defendant could procure a retail liquor license for the operation of a retail liquor business in the storeroom covered by the lease. (4) Inasmuch as by act approved August 6, 1907, the sale of spirituous and intoxicating liquors was prohibited after January 1, 1906, the plaintiff in no event could recover for any part of the term covered by the lease subsequent to January 1, 1908. (5) The suit was filed on November 9, 1907, and rent for the month of December, 1907, could not be recovered in this action. The court sustained grounds 2 and 4 of the demurrer, and overruled grounds 1, 3, and 5. Both sides excepted *pendente lite*. In his answer the defendant denied that he acquiesced in the transfers of the lease or treated the plaintiff as landlord and recognized him as such. He admitted his refusal to pay rents for any time after September 1, 1907. He further answered that on October 1, 1906, he assigned his lease to H. J. Fite, who transferred his lease in June, 1907, to A. S. Crumpton, and that W. Jones, the landlord, accepted the several assignees as tenants instead of the defendants; also, that he was unable to procure a license for the operation of a retail liquor business in the storeroom for the term beginning September 1, 1907; that by reason of his failure to procure such license the lease contract by its terms became void; and that the defendant did not occupy the leased premises any time subsequent to September 1, 1907. Both sides submitted evidence, and the court directed a verdict in favor of the plaintiff for the sum of \$659.50. The defendant moved for a new trial, which was refused. He assigned error upon this ruling, and upon his *pendente lite* exceptions.

J. D. Kilpatrick, for plaintiff in error. H. W. Dent and W. R. Hammond, for defendant in error.

EVANS, P. J. (after stating the facts as above). 1. It was not necessary for the plaintiff to allege that the defendant was able to procure a retail liquor license for the conduct of a retail liquor business in the rented

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

storeroom. The verbiage of the contract demonstrates, and the occupation by the tenant of the storeroom for several months before abandoning his lease illustrates, that the clause in the lease relating to the procurement of a retail liquor license by the defendant was not intended as a condition precedent, but as a condition subsequent or defeasance, which would terminate the lease. The contractual obligation of the tenant to secure a retail liquor license implies a reasonable effort in good faith to get such a license. The lease is not to be defeated by his non-action, or colorable attempt in that direction. The lease became operative from the time it purported to go into effect, and the tenant had a present interest in the same; but the lease was subject to shorter termination if the tenant after performing an act should fail to accomplish a particular result. The rule of pleading is that "when the interest or estate passes presently and vests in the grantee and is to be defeated by matter *ex post facto*, or condition subsequent to the condition to be performed in the affirmative or negative, or to be performed by the defendant or any other, then the plaintiff may count generally without showing any performance; this shall be pleaded by him who is to take advantage of it." 5 Bacon's Abr. Tit. Pleading, 337; *Murphy v. Lawrence*, 2 Ga. 257.

2. Where a lessee repudiates his lease and abandons the rented premises, the lessor may sue for a breach of the contract before the expiration of the term, and the damages are to be measured by the difference between the rent stipulated in the lease and the actual rental value of the balance of the term. *Minn. Baseball Co. v. City Bank*, 74 Minn. 98, 76 N. W. 1024. In his ruling on the demurrer the court held that the enactment of the prohibition law interdicting the sale of spirituous and intoxicating liquor in the state after January 1, 1908, restricted and limited the term of the lease to that time. No crossbill of exceptions was sued out by the plaintiff, and this ruling of the court is *res adjudicata* as to that point. The court directed a verdict for the plaintiff for \$659.50, the stipulated rent for the months intervening September 1, 1907, and January 1, 1908, with interest thereon. The defendant admitted in open court that the plaintiff was entitled to recover this sum, unless he sustained by a preponderance of evidence his plea of avoidance of the contract. Taking all the evidence submitted on this subject, the only verdict which could properly be rendered was that directed by the court.

3. The defendant offered in evidence certain written assignments of the lease, viz.: One by him to Fite, dated October 1, 1906; one by Fite to Crumpton, dated June 7, 1907; and an indorsement by the original landlord, Jones, consenting to these transfers, dated

June 7, 1907. These writings were rejected from evidence, and error is assigned on their exclusion. The defendant has no just cause of complaint for the exclusion of this evidence. The ordinance of the city of Atlanta required of each applicant for a liquor license to submit proof that he is the true owner of the premises, or holds in his own name and right a lease on the building wherein he proposes to conduct the liquor business before any license shall be granted. The defendant's application for license was made after his assignment of his lease. By his own voluntary act in assigning his lease, he put it out of his power to comply with the municipal regulation for obtaining a license in his own name. It is true that the ordinance was passed intervening the defendant's transfer to Fite and his application for a license. But the rejected evidence shows that the landlord assented to the transfer after the passage of the ordinance and before the defendant's application for a license was refused by the council.

Judgment affirmed. All the Justices concur.

(194 Ga. 537)

BRACEWELL v. SOUTHERN RY. CO.
(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

1. RAILROADS (§ 33*) — ACTION AGAINST — VENUE.

Where a railroad company incorporated in another state operates a line of railroad in this state, and a cause of action arises by reason of a tort here committed, section 2334 of the Civil Code, providing that "all railroad companies shall be sued in the county in which the cause of action originated," etc., applies to a suit brought on account of such a tort.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 71; Dec. Dig. § 33.*]

2. ACTION AGAINST RAILROAD—VENUE.

As to the point decided in the previous headnote, this court declines to reverse the decisions in the cases of *Mitchell v. Southern Railway Company*, 118 Ga. 845, 45 S. E. 703, *Hazlehurst v. Seaboard Air Line Railway*, 118 Ga. 858, 45 S. E. 703, and *Cockley v. Southern Railway Company*, 120 Ga. 960, 48 S. E. 372.

Case Certified from Court of Appeals.

Action by H. A. Bracewell against the Southern Railway Company. Judgment for defendant, and plaintiff brought error to the Court of Appeals, which set five settled questions to the Supreme Court. Questions answered.

Guerry, Hall & Roberts and H. L. Grice, for plaintiff in error. Harris & Harris, for defendant in error.

LUMPKIN, J. The Court of Appeals certified to this court the following question: "Does section 2334 of the Civil Code relate to suits against nonresidents or foreign corporations? (In connection herewith it is to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

be noted that counsel for plaintiff in error asks leave to review and question the correctness of *Mitchell v. Southern Ry. Co.*, 118 Ga. 845 [45 S. E. 703]; *Coakley v. Southern Ry. Co.*, 120 Ga. 960 [48 S. E. 372]; *Hazlehurst v. Seaboard Air Line Ry.*, 118 Ga. 858 [45 S. E. 703]."

In *Mitchell v. Southern Ry. Co.*, 118 Ga. 845, 45 S. E. 703, it was held that "Civ. Code, § 2334, fixing the venue of suits against railroad companies, applies to foreign as well as domestic corporations." In *Hazlehurst v. Seaboard Air Line Ry.*, 118 Ga. 858, 45 S. E. 703, it was held that: "For any cause of action arising in this state foreign railroad companies are subject to suit by attachment or in personam, but the trial in every such case must be in the county designated by Civ. Code, § 2334." In *Coakley v. Southern Ry. Co.*, 120 Ga. 960, 48 S. E. 372, it was held that: "An action for personal injuries against a railroad company, foreign or domestic, * * * must be brought in the county in which the cause of action originated, if such company have an agent in that county; and a judgment rendered in any other county is utterly void. Civ. Code, § 2334." Each of these decisions was concurred in by all of the justices. It is evident, therefore, that, unless these decisions are reviewed and reversed, they furnish an answer to the question propounded by the Court of Appeals as to suits against nonresident or foreign corporations for injuries committed by them in this state. In *Reeves v. Southern Ry. Co.*, 121 Ga. 561, 49 S. E. 674, 70 L. R. A. 513, it was held that a foreign corporation doing business in this state, and having agents located therein for this purpose, may be sued and served in the same manner as domestic corporations upon a transitory cause of action, though originating without the state. If suit may be thus brought on account of a cause of action originating in another state, and not in any county in this state, it follows that as to such a case the provision contained in section 2334 of the Civil Code, that all railroad companies "shall be sued in the county in which the cause of action originated," cannot apply.

The real question raised is whether this court will reverse the ruling in the three cases first mentioned. The suit was brought in Bibb county for a tort alleged to have been committed by the agent of the Southern Railway Company, a Virginia corporation, in Pulaski county; the defendant operating a line of railroad and having an agent in each county. Counsel for plaintiff in error urged that, in the light of the history of the legislation which has now become codified and embodied in section 2334 of the Civil Code, the decisions first above cited were erroneous, and should be reversed. The same counsel who presented this argument before us was also counsel for plaintiff in error in the *Mitchell* Case, and it would seem that he then urged the same historical argument. Mr. Jus-

tice Turner, in delivering the opinion, said, at pages 847, 848, of 118 Ga., page 704 of 45 S. E.: "We have read the interesting history which counsel for plaintiff in error gives of this section of the Code and the ingenious argument which he bases on that history; but we think that this section declares the policy of the state as to suits against all railroad companies, foreign as well as domestic." It was said that the court saw no reason why the General Assembly could not regulate the venue of such suits, and that, if there was any reason why it should be provided that suits against domestic railroads for injuries should be brought in the county in which the cause of action originated, the same reason would seem to apply to all railroads doing business in the state. It was added: "Whatever significance may attach to the reason of the law, the plain words of the statute embrace all railroads. We do not feel at liberty to make an exception where the General Assembly has made none." It will thus appear that the history of the legislation on the subject and the argument to be derived therefrom were considered by this court in deciding the *Mitchell* Case, and that the conclusion reached was not the result of accident or oversight, but of the fact that the court could not concur in the argument made by counsel or the result at which he arrived. It is true that the members composing the court are now mostly different from those who presided when that decision was made. It is also true that, if even a court of last resort determines that it has made a clear and palpable error, it will correct such ruling. But the doctrine of stare decisis is an important one. It affects the stability and the certainty of the decisions of the court. A decision concurred in by the entire bench after argument and careful consideration, and followed in other cases, will not readily be overturned, unless clearly erroneous. Especially is this true where it has stood for a number of years (in this case for nearly seven years) unquestioned, and where the Legislature, with knowledge of the rulings thus made on the subject of venue, have not deemed it proper to make any change in that regard. Even if the original ruling were somewhat doubtful, which we do not mean to assert, this court would be inclined to be conservative in regard to overturning it in such a case. The very purpose of making decisions is to solve questions of doubt. The *Mitchell* Case has been followed not only in the other cases above mentioned, but also in *Southern Railway Co. v. Grizzle*, 124 Ga. 735, 739, 53 S. E. 244, 110 Am. St. Rep. 191. In that case an action for damages was brought against the railway company and its engineer running the trolleys which caused the injury. The suit was brought in Gwinnett county. The railway company filed a petition to have the case removed to the United States court, alleging that the engineer was merely a nominal party, joined for the purpose of preventing a re-

moval of the case; that there was a separable controversy between the plaintiff and the company; that the plaintiff was a resident and citizen of Georgia, and the railway company was a corporation under the laws of Virginia, a resident and citizen of that state, and a nonresident of the state of Georgia. This court sustained a refusal to pass an order removing the case to the United States court. In doing so it was held that a foreign railroad company operating in this state and an engineer in its employment might be jointly sued in the county in which the cause of action originated, even though the residence of the engineer were in another county in this state. Again, in *Harvey v. Thompson*, 128 Ga. 147, 154, 57 S. E. 104, 107 (9 L. R. A. [N. S.] 765, 119 Am. St. Rep. 373), Mr. Justice Cobb said: "A foreign railroad company operating a line of railroad in this state and having agents and a place of doing business within the state, upon whom, under the general laws of the state, process may be served, is a resident of this state, subject to suit under the same rules and regulations where other residents may be sued"—citing the Cases of *Reeves and Grizzle*. In *Southern Railway Co. v. Brock*, 115 Ga. 721, 42 S. E. 95, section 2334 of the Code was treated as applying to the same company now involved. See, also, *Ball v. Mabry*, 91 Ga. 781, 18 S. E. 64; *Atlantic Coast Line R. Co. v. Du Pont*, 122 Ga. 251, 50 S. E. 108; *Tatum v. Seaboard Air Line Ry. Co.*, 128 Ga. 813, 58 S. E. 465; *Brooke v. Louisville & Nashville R. Co.*, 3 Ga. App. 492, 60 S. E. 218.

Under what has been said, we do not deem it necessary to enter at length into a discussion of the common law on the subject of venue, or various acts of the Legislature and decisions of this court. But it may be profitable to mention some facts in relation to the origin of the section of the Code under consideration. In *Davis v. Central Railroad, etc., Co.*, 17 Ga. 323, it was held that the act of the 20th of February, 1854, "to define the liabilities of the several railroad companies of this state for injury to or destruction of live stock, killed or injured," etc., was not in violation of the Constitution of the state or that of the United States. On page 333 *Benning, J.*, said: "It is clear that what shall be the place of residence of a corporation is a question over which the Legislature has power"—referring to the residence for the purpose of venue. That decision was rendered in 1855. By the act of March 5, 1856 (Acts 1855-56, p. 154), it was declared that: "The several railroad companies of this state shall be liable to be sued in any county in which the cause of action originated, by any one whose person or property has been injured by them, their officers, agents, or employes, in or by the running of their cars or engines," etc. In *Southwestern R. Co. v. Paulk*, 24 Ga. 356 (decided in 1858), it was held that in a suit for damages for

the killing of a person by a railroad the action should be brought in the county where the principal office of the corporation was kept, and that the provision of the act of 1856 in regard to an action for a homicide was prospective in character. By the act of December 13, 1859 (Acts 1859, p. 48), which soon followed the decision just cited, it was declared that no suit against a railroad company in this state should thereafter be dismissed for want of jurisdiction of the court in the county in which the suit might be pending or thereafter brought, if the road of the company was located in or ran through such county, and if the cause of action arose, or the contract was made or to be performed, in the county where the suit was instituted. When the original Code (1861), which took effect on January 1, 1863, was compiled, the provision in regard to the venue of suits against railroad companies was embodied in section 3317. As there contained, it was stated that: "All railroad companies shall be liable to be sued in any county in which the cause of action originated," etc. Here the expression "all railroad companies" took the place of "the several railroad companies of this state" in the act of 1856. That Code was adopted by act of the Legislature. In the Code of 1868 this provision was included in section 3329. Here again the expression, "all railroad companies," was used. It has been declared that the Code superseded all previous legislation inconsistent with it, and this was said in dealing with another section of the act of 1856 and its repeal by a later act. *Georgia Railroad & Banking Co. v. Oaks*, 52 Ga. 410, 414. The provision as to venue was contained in section 3329 of the Code of 1868, where the words "all railroad companies" were again used. This Code was recognized by the Constitution of 1868. Code 1873, § 5145. The same expression was repeated in the Codes of 1873, 1882, and 1895, the last of which was formally adopted by the Legislature. In 1869 the Legislature amended section 3329 of the Code of 1868 so "as to embrace all causes of action against railroad companies." Acts 1869, p. 14. In the same year an act was passed to repeal the third section of the act of 1856. Acts 1869, p. 157. This was the act dealt with in the case of *Georgia Railroad, etc., Co. v. Oaks*, supra. On December 20, 1892, an amendment was made to section 3406 of the Code of 1882, which contained the provision under consideration, by striking out the words "liable to be" and the word "any," and adding a clause to the section. Acts 1892, p. 59. Though the Legislature were dealing with a section of the Code which then declared that "all railroad companies shall be liable to be sued," etc., and were making the provision mandatory instead of permissive, they not only did not alter the words beginning the section so as to confine them to domestic railroads, but declared that

the section, when amended, should read thus: "All railroad companies shall be sued in the county in which the cause of action originated," etc. This was not merely a recognition of the broad language of the section, but a re-enactment of it. As incorporated in the Code of 1895, which was adopted by the Legislature, the section now reads as follows: "All railroad companies shall be sued in the county in which the cause of action originated, by any one whose person or property has been injured by such railroad company, its officers, agents, or employes, for the purpose of recovering damages for such injuries; and also on all contracts made or to be performed in the county where suit is brought; any judgment rendered in any other county than the one in which the cause so originated shall be utterly void. But if the cause of action arises in a county where the railroad company liable to suit has no agent, then suit may be brought in the county of the residence of such company." That section was again amended by the act of December 21, 1898 (Acts 1898, p. 50). The amendment provided for the venue of a suit to set aside and annul an unlawful acquisition of the line of a competing railroad company incorporated under the laws of this state. In dealing with this question, the act amended specifically named "a railroad company incorporated under the laws of this state," but made no change in the language with which the section began.

The argument was made that in the original act of 1856 the language employed was "the several railroad companies of this state"; that this referred only to domestic railroad companies; that the language employed in the Code was merely an abbreviation of that in the act, and was not intended to change its meaning so as to include foreign railroad corporations; and that the original meaning continued through the various Codes. From what has been said above, it will appear that the Legislature, both in adopting several of the Codes and in amending the section and re-enacting it as amended, employed the broad language, "all railroad companies." The language of Benning, J., in *Davis v. Gen. R., etc., Co.*, 17 Ga. 323, in discussing the act of 1854, may be appropriately quoted. He said: "The principle of this state is that in certain suits against the railroads the venue of the suit shall be the venue of the wrongful act. This principle is certainly not a novel one. It is the principle of the common law. It is a principle sanctioned and affirmed by a statute as old as the time of Richard II. It is a principle which lies at the foundation of the doctrine of venue, as practiced in England up to this day. The principle rests upon the maxim that, 'Vicini vicinorum facta præsumuntur scire'—a maxim that makes the

suit seek the witnesses, rather than the witnesses seek the suit."

It was urged that the decision in *Hazlehurst v. Seaboard Air Line Railway*, supra, was inconsistent with itself, in that by treating a foreign railroad as a resident it would cease to be liable to attachment. But, while the Legislature may fix the venue of a suit against a foreign corporation, this does not make it for all purposes a domestic company, or prevent the Legislature from giving the right of attachment against it. It was further urged that the decision in *Coakley v. Southern Railway Co.*, supra, was inconsistent with the law and with other decisions; and that, if service could be had by a second original, it would seem that there was no good reason why the original process would not lie in the same county against the same person. If the Legislature has power to fix the venue, and has done so, and if the company has no agent in the county where the cause of action originated, but has one in another county, on the subject of service, in addition to the *Coakley* Case, see *Mitchell v. Southwestern Railroad*, 75 Ga. 398; *Devereux v. Atlanta Railway & Power Co.*, 111 Ga. 855, 36 S. E. 939; *New York, etc., R. Co. v. Estill*, 147 U. S. 591, 608, 609, 13 Sup. Ct. 444, 37 L. Ed. 292.

We have carefully considered the argument of counsel for plaintiff in error. But we do not think that the decisions which we have been requested to review should be overruled on the point under consideration. All the Justices concur.

(134 Ga. 531)

LEWIS v. STATE.

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

1. VOLUNTARY MANSLAUGHTER.

Under the evidence, there was no error in not charging on the subject of voluntary manslaughter.

2. CRIMINAL LAW (§§ 941, 942*)—NEW TRIAL —NEWLY DISCOVERED EVIDENCE.

The newly discovered evidence was at best merely impeaching or cumulative in character. [Ed. Note.—For other cases, see *Criminal Law, Cent. Dig. §§ 2328-2332*; *Dec. Dig. §§ 941, 942.**]

3. SUFFICIENCY OF EVIDENCE.

The verdict was authorized by the evidence.

Error from Superior Court, Crisp County; U. V. Whipple, Judge.

Arthur Lewis was convicted of murder, and brings error. Affirmed.

J. T. Hill and J. W. Dennard, for plaintiff in error. W. F. George, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(134 Ga. 529)

FITZPATRICK v. E. L. ALFORD & CO.
(Supreme Court of Georgia. May 11, 1910.)

(*Syllabus by the Court.*)

1. APPEAL AND ERROR (§ 637*)—DEFECTS IN BILL OF EXCEPTIONS—DISMISSAL.

All necessary parties, either in person or by counsel, acknowledged service of the bill of exceptions before it was filed in the court below. The bill of exceptions contains enough to enable this court to ascertain the questions desired to be decided, and the motion to dismiss must be overruled. *Gregory v. Daniel*, 93 Ga. 705, 20 S. E. 656; Civ. Code 1895, § 5569.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2784; Dec. Dig. § 637.*]

2. EXECUTORS AND ADMINISTRATORS (§ 411*)—JUDGMENT (§ 576*)—ESTOPPEL—INTERLOCUTORY ORDER.

A creditor of an intestate, claiming to be secured by bill of sale to certain property for advances, filed an equitable proceeding against the administrator and certain other creditors, alleged to be asserting claims, some on cotton and some on mules, seeking to have the status determined, and the rights of all parties decreed. One of the defendants, alleged to have a claim to cotton as a purchaser, demurred to the petition, on the ground of misjoinder of defendants and causes of action. Before a determination of the demurrer, an order was granted directing a sale of the mules by the administrator. Later the demurrer was sustained, and the demurrant dismissed from the case. After this a decree was taken between parties remaining in the litigation. Still later, but before distribution, the administrator filed a petition in the nature of a bill to marshal the assets of the estate, alleged to be insolvent, making creditors of the decedent parties, including those claiming under the former decree, and the same person who had been alleged to be a purchaser of cotton, but had been dismissed from the former suit; he being now made a party on account of a general judgment, held by him as surviving partner of a firm, against the decedent. Injunction was prayed. On the hearing the court refused the injunction against the complainants in the former proceeding, directed the administrator to pay over the fund raised from the sale of a mule to them in accordance with the decree, and enjoined proceedings against the other funds. The surviving partner last named excepted. *Held*, that such interlocutory order was erroneous, in excepting from the injunction the complainants in the former proceeding and directing the funds to be paid to them on account of the decree.

(a) The entry of a nunc pro tunc order in the first litigation, some months after the demurrer of the alleged purchaser of cotton had been sustained and he had been dismissed from the litigation, and after the entry of the decree in the case, in which order certain recitals were made as to an intimation of the court in regard to the demurrer filed, and statements by the demurrant as to having no claim in regard to the mules, said order not appearing to have been entered after notice, could not in the present case affect the status of the demurrant by way of estoppel on account of such recitals.

(b) The evidence did not show an estoppel on the plaintiff in error as to the general judgment held by him as surviving partner.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1620-1623; Dec. Dig. § 411.* *Judgment*, Cent. Dig. §§ 1003-1006; Dec. Dig. § 576.*]

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Action by E. L. Alford & Co. against H. H.

Fitzpatrick, survivor, and others From the judgment, Fitzpatrick brings error. Reversed.

E. W. Butler, for plaintiff in error. Samuel H. Sibley, M. C. Few, Percy Middlebrooks, F. C. Foster, Sr., and W. C. Thompson, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(134 Ga. 536)

LANSDALL et al. v. KING, Tax Collector, et al.

(Supreme Court of Georgia. May 11, 1910.)

(*Syllabus by the Court.*)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 24*)—CREATION OF DISTRICTS—STATUTORY PROVISIONS.

The act of August 23, 1905 (Acts 1905, p. 425), as amended by the act of August 21, 1906 (Acts 1906, p. 61), declares that within 30 days after the passage of the act, or as soon thereafter as practicable, it shall be the duty of the county board of education of each county in Georgia to lay off the county into school districts, and directs the manner in which the lines shall be defined. It then provides that, "within ninety days after the board of education has laid off the county as required in section 1, the said board of education shall order the citizens of the several school districts to hold an election for the purpose of electing three trustees for each district in the county. It further provides for the ordering by the ordinary of an election in any school district in a county not levying a local tax for educational purposes, upon petition of one-fourth of the qualified voters. It then declares that, "in those districts which levy a local tax for educational purposes, the board of trustees shall make all rules and regulations to govern the schools of the districts," and that the secretary of the board of trustees of the district, with the aid of the county school commissioner of the county, shall make a digest, and a levy of the local school tax shall be based thereon. *Held*, that under the provisions of this act the county board of education is required to lay off the county into school districts, and, "after the board of education has laid off the county as required," the school trustees are to be elected for each district in the county. There is no authority of law for a board of education of a county to disregard these positive requirements, and to merely arbitrarily lay off a school district in one part of a county, leaving the balance of the county undivided. A school district thus sought to be created is not lawful, and the authorities cannot proceed to have an election therein to determine the question of levying a local tax for school purposes.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 42; Dec. Dig. § 24.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 24*)—CREATION OF DISTRICTS—STATUTORY PROVISIONS.

The county board of education of Columbia county, on May 7, 1907, adopted the following resolution: "After discussing at length the school district situation, motion was carried that each white school in the county be regarded as the center of the various school districts. The school districts thus regarded shall comply with the requirements of section 1 of the McMichael act, as amended 1906.

Whenever the white citizens of any school district want to supplement the said school funds by levying a special school tax, the boundaries of said district or districts shall be definitely fixed by the county surveyor under the direction of the county board of education. It was ordered that the Harlem school district be surveyed by the county surveyor and plat made." Under this resolution a district was laid off under the name of the "Harlem school district." At other times two other school districts were laid off. But the county was never divided into school districts, and a large part of it remained undivided, including long and irregularly shaped strips of territory intervening between the districts thus laid off. *Held*, that this was neither a literal nor a substantial compliance with the law; that the Harlem district, thus established, was not a lawful school district; and an election within such district for the determination of the question of imposing a local tax therein was illegal.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 42; Dec. Dig. § 24.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 111*)—ILLEGAL CREATION—INJUNCTION OF TAX ELECTION.

Upon due and proper application by citizens and taxpayers of the district in which it was sought to levy a local school tax by virtue of an election held as indicated in the preceding headnotes, an injunction should have been granted.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 265–268; Dec. Dig. § 111.*]

4. CASE DISTINGUISHED.

The petition was brought by the petitioners, on behalf of themselves and other citizens and taxpayers similarly situated. The pleadings and evidence differentiated it from the case of *Irvin v. Gregory*, 86 Ga. 605, 13 S. E. 120. See *Jordan v. Franklin*, 131 Ga. 487, 62 S. E. 673.

Error from Superior Court, Columbia County; H. C. Hammond, Judge.

Action by William Lansdell and others against F. P. King, Tax Collector, and others. Judgment for defendants, and plaintiffs bring error. Reversed.

John T. West, for plaintiffs in error. Lamar & Callaway, for defendants in error.

LUMPKIN, J. Judgment reversed. All the Justices concur.

(134 Ga. 532)

WHITE et al. v. CITY OF ATLANTA et al. (Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

1. STATUTES (§ 8½*)—ENACTMENT—LOCAL BILLS—ADVERTISEMENT.

The question of preliminary advertisement of a local bill is for determination by the General Assembly before its passage. *Burge v. Mangum*, 134 Ga. —, 67 S. E. 857.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 6; Dec. Dig. § 8½.*]

2. STATUTES (§ 90*)—SPECIAL LEGISLATION—INCORPORATION OF CITIES—AMENDMENT.

The law embodied in Pol. Code 1895, § 683 et seq., is not such a general law in regard to the incorporation of cities as to render it un-

constitutional for the Legislature, which had previously chartered a city, to amend such charter so as to extend the corporate limits. *Benning v. Smith*, 108 Ga. 259, 33 S. E. 823.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 99; Dec. Dig. § 90.*]

3. STATUTES (§§ 120, 141*)—SUBJECTS AND TITLES.

The act of August 14, 1909 (Acts 1909, p. 534), providing for the extension of the municipal limits of Atlanta, is not unconstitutional on the ground that it contains matter not covered by the caption, or because it does not set out or describe the act to be amended. *Town of Poulan v. Atlantic Coast Line R. Co.*, 123 Ga. 605, 51 S. E. 657; *Mayor, etc., of Macon v. Hughes*, 110 Ga. 795, 36 S. E. 247.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 168–172, 209; Dec. Dig. §§ 120, 141.*]

4. STATUTES (§ 107*)—SUBJECTS AND TITLES.

Such act is not unconstitutional as a whole, or as to the extension of the municipal limits, on the ground that it contains more than one subject-matter. *Smith v. Mayor and Council of Macon*, 129 Ga. 227, 58 S. E. 713; *Mayor and Council of Americus v. Perry*, 114 Ga. 871, 40 S. E. 1004, 57 L. R. A. 230; *Stapleton v. Perry*, 117 Ga. 561, 48 S. E. 996.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 126; Dec. Dig. § 107.*]

5. MUNICIPAL CORPORATIONS (§ 34*)—EXTENSION OF TERRITORY—POWER OF LEGISLATURE.

While the Legislature may provide for an election to determine whether unincorporated territory contiguous to a municipal corporation shall be annexed thereto and the corporate limits extended so as to include such territory, they are not obliged to do so, but may extend the limits without the consent of those residing or owning property in the added territory. *Toney v. Macon*, 119 Ga. 83, 46 S. E. 80.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 98–101; Dec. Dig. § 34.*]

6. MUNICIPAL CORPORATIONS (§ 36*)—ANNEXATION OF TERRITORY—LIABILITY FOR TAXATION.

Where the Legislature amends the charter of a municipality so as to extend its corporate limits and include therein contiguous territory previously unincorporated, all the inhabitants and their property within the limits so fixed are subject to taxation to raise municipal revenue for all legitimate purposes, without respect to the time when some of the liabilities arose.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 109; Dec. Dig. § 36.*]

7. MUNICIPAL CORPORATIONS (§ 36*)—ANNEXATION—LIABILITY FOR DEBTS.

Under such circumstances, unless otherwise provided by law, debts of the corporation contracted before the limits were extended are chargeable upon the city as enlarged by the territory added, as well as upon that included in the boundaries before they were extended.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 107; Dec. Dig. § 36.*]

8. CONSTITUTIONAL LAW (§ 190*)—MUNICIPAL CORPORATIONS (§ 859*)—ANNEXATION—LIABILITY FOR INDEBTEDNESS—STATUTES—RETROACTIVE EFFECT.

Such a provision in the act extending the limits is not unconstitutional on the ground that it is retroactive or retrospective as to the municipal indebtedness already incurred (Civ. Code 1895, § 5730); nor on the ground that this

would amount to binding the new inhabitants by a previously incurred debt without their having voted to incur it (Civ. Code 1895, § 5893).

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 531-533; Dec. Dig. § 190;* Municipal Corporations, Cent. Dig. §§ 1841; Dec. Dig. § 859.*]

9. MUNICIPAL CORPORATIONS (§ 36*)—ANNEXATION DEBTS. AND ASSETS OF ANNEXED TERRITORY.

The charters of Oakland City and Battle Hill were repealed by separate acts (Acts 1909, p. 1201; Acts 1908, p. 407), and they were taken into the extended limits of the city of Atlanta. It is denied in the answer that there was any bonded indebtedness of those municipalities, or that the city of Atlanta assumed any such; and it was alleged that there was only a comparatively small amount of outstanding liabilities on the part of Oakland city, to counterbalance which there was a greater amount of municipal assets. *Held*, that in becoming incorporated as a part of the city of Atlanta, in the absence of any contrary provision, such public assets and liabilities both passed to that city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 106, 107; Dec. Dig. § 36.*]

10. MUNICIPAL CORPORATIONS (§§ 859, 868, 870, 957*)—VALIDITY OF STATUTE—ANNEXATION TO CITY—AID TO CORPORATION—PROVISION FOR PAYMENT OF DEBTS.

The act of 1909 is not unconstitutional on the ground that it seeks to loan the credit of Atlanta to Oakland City (Civ. Code 1895, § 5891), or that it causes the incurring of a new debt without a vote (Civ. Code 1895, §§ 5893, 5897), or that it will cause a tax in the city of Atlanta to pay the debt of Oakland City.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1814, 1817, 1842, 2015-2022; Dec. Dig. §§ 859, 868, 870, 957.*]

11. MUNICIPAL CORPORATIONS (§ 957*)—VALIDITY OF STATUTE—ANNEXATION TO CITY—TAXATION.

The act above mentioned is not unconstitutional on the ground that the inhabitants of the added territory will be taxed for the support of the public schools of Atlanta, as to the establishment of which they had no vote.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2015-2022; Dec. Dig. § 957.*]

12. CONSTITUTIONAL LAW (§ 46*)—CONSTITUTIONALITY OF STATUTE—NECESSITY OF DETERMINATION.

If there be some special provisions of the act of 1909 which are unconstitutional, they are not such integral parts of it as to render the whole invalid. Nor is it necessary to pass upon them until some person affected by them shall seek appropriate relief in regard thereto. They furnished no ground to declare the extension of the limits of the city of Atlanta illegal for the reasons urged against it in the present suit, or to authorize an injunction against the inclusion of the territory where the plaintiffs reside or hold property.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43-45; Dec. Dig. § 46.*]

13. STATUTES (§ 64*)—VALIDITY OF STATUTE—PARTIAL INVALIDITY.

If there be an inaccuracy in stating the corporate name of a railroad company whose right of way forms for a short distance one boundary of the extended limits, but which is so named as to be readily recognized and located, as averred in the sworn statements of the answer, this

furnishes no ground for declaring the entire act void or for granting an injunction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 61; Dec. Dig. § 64.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by H. M. White and others against the city of Atlanta and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Robt. L. Rodgers and J. D. Kilpatrick, for plaintiffs in error. Jas. L. Mason and W. D. Ellis, Jr., for defendants in error.

LUMPKIN, J. By the act of August 14, 1909 (Acts 1909, p. 534), the corporate limits of the city of Atlanta were extended. Some of the residents and taxpayers of the territory which had previously been outside of the corporate limits, and which by the act was included therein, filed an equitable petition to enjoin the city and its officers from putting the act into effect so as to include such new territory. The injunction was denied. Numerous grounds of objection were raised. Most of them are controlled by decisions of this court heretofore rendered, and require no discussion beyond the rulings made in the headnotes.

It was contended that the act was unconstitutional on the ground that it contained matter different from and not included in its title. Civ. Code 1895, § 5771. An inspection of the act shows that its caption covers four pages and a fraction of printed matter, referring to the amendment of the city charter by extending the corporate limits, the extending of jurisdiction over the new territory, the redistricting of the city so as to include the additional territory in the different wards, the authorizing of the making of such changes, and the passing of such ordinances as might be necessary or advisable in readjusting the city limits as extended (which are described at length), and terminating with the cabalistic words "and for other purposes." The body of the act covers somewhat more than seven pages. So that it will appear that the caption not only covers the act legally, but to a considerable extent is sufficient to cover it physically, applied by the rule of square measure. If subject to criticism at all, it would be rather for plethora than minimization.

The Legislature has the power to extend the corporate limits of a city. In doing so they may provide for the holding of an election to determine whether or not the extension shall be made, but they are not compelled to do so. Beyond the publication required by the constitution to be made before the introduction or passage of a local act, there is no requirement for giving notice or obtaining the consent of persons residing in the unincorporated territory which is to be added to the city. When included within the

city by legislative enactment, they take the advantages of being residents or taxpayers of the municipality, and they become subject to the corresponding proportionate burden, in the absence of lawful provision to the contrary. Receiving such benefits as may arise to residents of a city in connection with police protection, lighting, water, sewers, or the like, there is no injustice in requiring that they should share with other residents or taxpayers of the city in proportionately carrying the municipal burdens. Nor is it in violation of the constitutional provisions against the incurring of debts by counties or municipalities except by an election held for that purpose that the new residents become an integral part of the municipality, and as such may be subject to taxation to assist in paying debts already incurred. By way of illustration, suppose a system of waterworks had been established by means of the issuance of bonds, and residents of the added district were allowed, as the pipes could be extended, to make water connections therefrom to their property, certainly they ought not to be allowed to receive the benefits of the established system without assisting in the discharge of the burden entailed by it. To endeavor to keep separate accounts for different portions of a city might create great confusion. While to a certain extent the Legislature may make distinctive provisions legitimate in connection with adding the new territory to the city, an effort to make permanent discriminatory provisions as to different parts of a municipality would be more likely to raise constitutional questions than to allay them. We need not discuss the extent to which the Legislature may go in that direction. What we now hold is that the inhabitants in the newly added territory have not raised any valid constitutional objection to the act on the ground that the new inhabitants of the city and their property will be proportionately subject to taxation to meet the liabilities already existing. *Cash v. Town of Douglasville*, 94 Ga. 557, 20 S. E. 438; *Toney v. Mayor and Council of Macon*, 119 Ga. 83, 46 S. E. 80; 1 Dill. Mun. Corp. (4th Ed.) § 185; *Wade v. City of Richmond*, 18 Grat. (Va.) 583; *Washburn v. City of Oshkosh*, 60 Wis. 453, 19 N. W. 364; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; 28 Cyc. 184, 220 (G), 221, 222.

The repeal of the charters of Battle Hill and Oakland City, which corporations were situated just outside the limits of Atlanta, and including those places in the extended limits of the last-named city, furnished no ground for objection on the part of residents of certain other territory which was also included in the extended limits. Nor did it render the act unconstitutional that Oakland City had certain public property and owed a small amount of floating indebtedness, and that the Legislature provided that these

should be taken over by the City of Atlanta as enlarged. *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 25 L. Ed. 699.

That there are some unusual features in the act of 1909 must be conceded. Several of its provisions are vigorously attacked by the plaintiffs in the present case, such as the making of a legislative provision in regard to a single police officer in Oakland City, and exempting him from certain requirements applicable generally to the police force of Atlanta, of which he becomes a part; a provision restricting the jurisdiction of justices of the peace in the newly acquired territory by a rule different from that applicable under the general law to justices within the original limits; and certain provisions in regard to the election of aldermen and councilmen. The time for holding the election has long passed, and this is not a proceeding either to prevent the election or to test it. We do not deem it necessary to pass upon the validity of these points raised by the plaintiffs. If any of the provisions of the act complained of are invalid or unconstitutional, they do not form such an essential part of the entire act as to render it all void. If any one or more of them should be held invalid, they could be eliminated, and the act still left to stand as a whole. They furnish no reason for declaring the entire act void and granting an injunction, so that the plaintiffs may remain outside the city.

None of the other grounds of attack were such as to require a holding that the judge erred in refusing the injunction sought.

Judgment affirmed. All the Justices concur.

(67 W. Va. 417)

McGLAMERY et al. v. JACKSON.

(Supreme Court of Appeals of West Virginia.
May 3, 1910.)

(Syllabus by the Court.)

1. ACTION ON THE CASE (§ 4*)—DECLARATION.

Lack of an ad damnum clause in a declaration in trespass on the case is an omission of matter of substance and cannot be disregarded on a demurrer to the declaration.

[Ed. Note.—For other cases, see *Action on the Case*, Cent. Dig. § 42; Dec. Dig. § 4.*]

2. PLEADING (§ 433*)—AIDED BY VERDICT.

When a demurrer has been interposed for such a defect, it is neither waived nor cured by the verdict.

[Ed. Note.—For other cases, see *Pleading*, Dec. Dig. § 433.*]

3. WASTE (§ 12*)—WHEN ACTION MAINTAINABLE—RIGHTS OF REMAINDERMAN.

Trespass on the case in the nature of an action for waste may be maintained by a reversioner, vested with the remainder in fee simple, against the life tenant, for injury done to the estate in remainder by the cutting of timber on the land.

[Ed. Note.—For other cases, see *Waste*, Cent. Dig. § 21; Dec. Dig. § 12.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. DEEDS (§ 133*)—CONSTRUCTION—NATURE OF ESTATE.

A deed by which the grantor, reserving to himself a life estate in the land, grants and conveys, to his granddaughters, for and in consideration of natural love and affection and \$5 in money, "the remainder in fee simple after the life estate therein" of himself, vests a present estate in remainder in the grantees.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 368; Dec. Dig. § 133.*]

Error to Circuit Court, Greenbrier County.

Action by Cora McGlamery and others against James W. Jackson. Judgment for plaintiffs, and defendant brings error. Reversed and remanded.

Henry Gilmer, for plaintiff in error.
Charles S. Dice, for defendants in error.

POFFENBARGER, J. In an action of trespass on the case for timber cut and removed from certain land, Cora McGlamery and Josie Winifred McGlamery, claiming estates in remainder in the land, recovered a judgment for \$637, against James W. Jackson, the life tenant, in the circuit court of Greenbrier county. As the declaration contains no ad damnum clause, its sufficiency was challenged by demurrer, and, the demurrer having been overruled, there was a motion in arrest of judgment, because of the defect in the declaration, which motion was likewise overruled.

Propriety of the remedy is not denied; but, if it were, that question has been settled. An action of trespass on the case in the nature of an action for waste is available to the reversioner against the life tenant. *Rogers v. Boom & Driving Co.*, 41 W. Va. 593, 23 S. E. 919, 26 S. E. 1008; *Moses v. Old Dominion Co.*, 75 Va. 95.

If there had been no demurrer to the declaration, the verdict would have cured the defect, or, to be more accurate, the defect would be harmless because the declaration could be amended by the writ, which is treated as a part of the record for purposes of amendment. *Stevens v. White*, 2 Wash. (Va.) 203; *Palmer v. Mill*, 3 Hen. & M. (Va.) 502; *Hook v. Turnbull*, 6 Call (Va.) 85. As the declaration is susceptible of amendment by the record, it is plausibly insisted that the defect is not prejudicial; but this reasoning carries on its face an admission of the materiality of the omitted matter. If the ad damnum clause were mere matter of form and not of substance, no amendment would be necessary. The omission thereof could be ignored on a demurrer. As an amendment is necessary, in order to make the declaration sustain the judgment, it necessarily follows that the allegation, when in, is one of substance. Therefore it is not dispensed with by section 20 of chapter 125 of the Code of 1900, saying the court shall not regard, on demurrer, any defect or imperfection in the declaration, unless there be omitted something so essential to the action that judgment

according to law and the very right of the cause cannot be given. Injury and damage constitute the very gist or gravamen of an action of trespass on the case, just as the promise constitutes the basis of an action of assumpsit. The claim of damages may perform a very important function. It apprises the defendant of the amount of the claim. If it be but a hundred dollars, he may not wish to defend; but, if it be a thousand dollars, he may desire to do so. Whatever the reason may be for its materiality, no decision of this court or the Virginia court goes so far as to authorize omission of the ad damnum clause. On the contrary, its materiality is admitted and confessed in the assertion that the effect of its omission can be cured by amendment. Moreover, none of them say it can be disregarded on demurrer. If there had been no demurrer, the defect would be cured by section 3 of chapter 134, saying no judgment shall be reversed for any defect, imperfection, or omission which might have been taken advantage of on a demurrer but was not so taken advantage of.

In *Craighill v. Page*, 2 Hen. & M. (Va.) 446, 457, Judge Tucker said: "It is not necessary to lay damages in the declaration in an action of debt." This may be true, inasmuch as the declaration in debt demands a certain sum of money, and the gist of the action is nonpayment thereof. For this reason, it may be distinguished from trespass on the case and others sounding in damages, wherefore the decision is not a precedent for the omission in one of this class. *Allison v. Bank*, 6 Rand. (Va.) 204, relied upon here, was also an action of debt. In 5 Ency. Pl. & Pr. p. 707, a number of decisions are cited for the proposition that the declaration can always be amended as to the damages by the writ, and that therefore the defect is unavailing in an appellate court; but an examination of these decisions shows that none of them were actions of trespass on the case. Some were actions of assumpsit and treated very much like actions of debt. *Farley's Adm'r v. Nelse*, 4 Ala. 185; *Proctor v. Crozier*, 6 B. Mon. (Ky.) 268. One was an action of debt. *McWhorter v. Standifer*, 2 Port. (Ala.) 519. Others approve and justify the allowance of amendment by the trial court before judgment, in respect to such defect. *Eaton v. Case*, 17 R. I. 429, 22 Atl. 943; *Merrill v. Curtis*, 57 Me. 152; *Burleigh & Co. v. Merrill*, 49 N. H. 35. In some of these cases, there was no demurrer, and the defect was declared to have been cured by the statute of jeofails. Like our own decisions, all of these assert the materiality of the allegation of damages, by declaring the necessity of an amendment to supply the omission thereof, or waiver by failure to demur on account thereof. In those instances in which demurrers have been interposed, the ad damnum clause has been held to be matter of substance. *Brownson v. Wallace*, 4

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Blatchf. 465, Fed. Cas. No. 2042; Deveau v. Skidmore, 47 Conn. 19; Sedberry v. Verplank (Tex. Civ. App.) 31 S. W. 242; Goodall v. Harrison, 2 Mo. 153; May v. Bank, 9 Ind. 235; Webb v. Thompson, 23 Ind. 431.

That the amendment can be made by the record, when a demurrer has been interposed and erroneously overruled, as easily as when the objection was not so made, constitutes a strong argument against reversal for such omission, it must be admitted; but there has been no waiver of the defect, nor has the amendment been made. The defendant was entitled to a sufficient declaration before proceeding to trial, and could have compelled dismissal of the action for lack thereof, on refusal to amend. He did everything in his power to avail himself of this right and it was denied to him. In view of this, we do not see how he can be precluded from insisting upon it here. The motion in arrest of judgment should have been sustained.

As the case may come up for trial on an amended declaration, it becomes necessary to pass upon another objection, namely, that the plaintiffs, having no right to possession of the land, since they take in remainder after a life estate, under the deed conferring their title, cannot recover damages for timber cut from the land. A remainderman can recover damages for injury done to his estate. *Jordan v. City of Benwood*, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859.

It is also urged that the deed does not vest any present estate in the plaintiffs. The defendant is the grantor therein. For and in consideration of natural love and affection and \$5 in hand paid, he conveyed the land to the plaintiffs, his granddaughters, subject to a life estate reserved to himself. The granting clause is as follows: "The party of the first part does by these presents grant and convey unto the said party of the second part the following real estate, viz.: The remainder in fee simple after the life estate therein of the said James W. Jackson, which he hereby expressly reserves, in one hundred and thirty acres of land, a portion of said James W. Jackson's home place." After the description of the premises, a clause was inserted by which the grantor covenanted for good title and right to convey and against incumbrances, and warranted the title generally. The deed was acknowledged and admitted to record. The contention that it does not vest any present estate in the grantees, but is in fact a testamentary paper, intended to have no effect and to pass no title until after the death of the grantor, cannot be sustained, in view of what is said in *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. 986, of a deed containing a clause purporting to limit the effect thereof until after the death of the grantor. Here an estate is granted by words, purporting to make it take effect at once, and

unattended by any inconsistent clause or terms. The intent to pass an estate in present is clear beyond the shadow of doubt.

For the reasons stated, the judgment will be reversed, the verdict set aside, the demurrer sustained, and the case remanded, with leave to the plaintiffs to amend their declaration.

(87 W. Va. 448)

THACKER COAL & COKE CO. v. NORFOLK & W. RY. CO.

(Supreme Court of Appeals of West Virginia.
May 3, 1910.)

(Syllabus by the Court.)

1. COMMERCE (§ 89*)—INTERSTATE COMMERCE — SCHEDULE OF RATES — JURISDICTION OF STATE COURT.

A court of equity of this state has no jurisdiction to enjoin a railroad company engaged in interstate transportation from filing with the Interstate Commerce Commission a schedule of its rates for transportation of coal from a point in this state to a point in another state, on the ground that such rates are unreasonable, unfair, and discriminatory.

[Ed. Note.—For other cases, see *Commerce*, Dec. Dig. § 89.*]

2. COMMERCE (§ 85*)—INTERSTATE COMMERCE — POWER OF INTERSTATE COMMERCE COMMISSION.

It is the exclusive power of the Interstate Commerce Commission, in the first instance, to pass on the fairness and reasonableness of rates contained in the schedule of rates fixed by an interstate carrier on articles transported in interstate commerce.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 138; Dec. Dig. § 85.*]

Appeal from Circuit Court, Mingo County.

Bill by the Thacker Coal & Coke Company against the Norfolk & Western Railway Company. Decree for defendant, and plaintiff appeals. Affirmed.

Vinson & Thompson, for appellant. Holt & Duncan, Joseph I. Doran, and Theodore W. Reath, for appellee.

BRANNON, J. The Thacker Coal & Coke Company brought a suit in equity in the circuit court of Mingo county against the Norfolk & Western Railway Company to enjoin the railroad company from filing with the Interstate Commerce Commission a schedule of rate charges for transportation of coal from the mines of the coal company, in the state of West Virginia, to points on the lakes in the state of Ohio and other states, which schedule increased the rates over those existing; the railroad company alleging that lower rates were accorded to other railroad carriers carrying coal from Pennsylvania and Ohio in competition with West Virginia coal, and that the rates proposed by such schedule were discriminatory, unjust, and unreasonable, and would entail irreparable injury and probable ruin upon the Thacker Coal Company. Upon its bill a temporary injunction

was granted, and, this injunction having been dissolved, the Thacker Coal Company appeals.

The case is one purely of interstate commerce. Its solution rests upon that act of Congress known as the "Interstate commerce act." U. S. Comp. St. 1901, vol. 3, p. 3153. We must follow federal decision upon this act. We know that the great subject of interstate commerce has been committed to the power, the vast power, of Congress by that provision of the national Constitution declaring that "the Congress shall have power * * * to regulate commerce with foreign nations and among the several states." Under this grant of power was passed the interstate commerce act, touching, controlling, and regulating, to large extent, and in material respects, commerce passing state lines. A leading feature of that act, one controlling this case, is that it establishes a commission of weighty jurisdiction over interstate commerce, a jurisdiction to supervise, regulate, we may say dictate, interstate commerce, called in the act the "Interstate Commerce Commission," and it gives carriers engaged in such commerce right to fix rates in the first instance, and requires them to do so, and to print schedules of such rates, and file the schedules with the Interstate Commerce Commission, and requires the carrier to conform to the rates fixed in such schedule under severe penalties for over or discriminative charge. The act, in section 13, gives any one complaining of anything done or omitted by a carrier to his injury in contravention of the act, right to file a complaint with the commission stating the wrong, and provides for notice to the carrier and a full hearing of the complaint, and section 15 provides that if upon such hearing the commission shall be of opinion that the rates demanded or collected, or any act, regulation, or practice by the carrier touching such rates, are unjust, unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of the act, the commission shall determine what will be the just or reasonable rates to be thereafter observed, and what regulation or practice in respect to transportation is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier shall cease and desist from such violation. U. S. Comp. St. Supp. 1907, § 15, amended page 900. Supp. 1909, p. 1158. As stated, section 13 of the original interstate commerce act gives a party injured right to complain to the commission, and section 14 gives power to investigate and make order in the premises, and section 16 as amended in 1887 gives power to the commission to render judgment that the carrier pay the party injured damages, and in case of nonpayment the party may file a bill in the United States Circuit Court to enforce the order or judgment of the commission. U. S. Comp. St. 1901, p. 8165, Supp. 1907, p. 902. Section 12 gives

the commission latitudinous authority to inquire into the business of carriers, and keep itself informed of their conduct, and demand information of the carriers, and commands it to enforce all the provisions of the act, and it is given authority itself to institute legal proceedings and call upon district attorneys to prosecute proceedings, under the direction of the Attorney General, for the enforcement of the act and for punishment for its violation.

In this statement of some of the provisions of this voluminous act, we see that Congress has assumed jurisdiction over interstate commerce; that it has made regulations as to it, particularly as to the matter in hand, rates of transportation; that it has created a tribunal for testing the character and fairness of such rates, with wide powers to judge them, and with power to modify them so as to conform to right and reasonableness. We see that there is nothing more distinctly committed to the jurisdiction of this tribunal than the matter of rates—the schedule of rates. This schedule must go at once to this commission, the only authority to deal with it, at least in the first instance, if the act is obeyed; a tribunal created by Congress under its exclusive power over interstate commerce, and given a subject-matter for its action. Yet a state court is asked to grant a perpetual injunction to debar a great interstate railroad from fixing rates and filing them with the commission. A state court is asked to say that this schedule shall never reach that commission. It does seem to me that the very statement of the proposition is its own refutation. But we are not without authority to support this position. I consider that a decision of the United States Supreme Court, in principle, does so. *Texas & Pacific Ry. Co. v. Abilene Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553. The Abilene Company sued the railroad company for charges claimed to be unreasonable and unjust rates, though they did not exceed the rates specified in a schedule filed with the Interstate Commerce Commission. It was held that such schedule was final until changed by the commission. This was so because it rested with the commission to say, and the schedule was the rule until its action deprived the schedule of force. The court held that: "The interstate commerce act was intended to afford an effective and comprehensive means of redressing wrongs resulting from unjust discriminations and undue preference, and to that end placed upon carriers the duty of publishing schedules of reasonable and uniform rates; and, consistently with the provisions of that law, a shipper cannot maintain an action at common law in a state court for excessive and unreasonable freight rates exacted on interstate shipments where the rates charged were those which had been duly fixed by the carrier according to the act and had not been found to be unreasonable by the Interstate Commerce

Commission." This court followed the Abilene Case in *Robinson v. B. & O. R. Co.*, 64 W. Va. 406, 63 S. E. 823. Its principle decides this case.

As will be suggested to the mind at once, and as pointed out in those cases, if such action could be maintained, then a jury and state court would hold one rate to be proper, and the commission another. Which shall prevail? If the state court's rate, then of what force the act of Congress and the judgment of the commission under it? The federal power, in a matter which nobody will deny to be within its constitutional jurisdiction, would be nullified. One state one rate, another another, the federal tribunal another, and confusion worse confounded! Just the same may be said in our case. If we stop that schedule on its way, and thus prevent any action on it by the commission, do we not nullify the act of Congress and render the jurisdiction of the commission abortive? In *Central Stock Yard Co. v. L. & N. R. Co.* (C. C.) 112 Fed. 823, it is held that a complaining shipper must go to the commission for relief, as the remedy given by the act through it is exclusive. So in *American Union Coal Co. v. Pa. R. Co.* (C. C.) 159 Fed. 278, and *Great Northern Co. v. KallsPELL*, 165 Fed. 25, 91 C. C. A. 63. Counsel refer to *KallsPELL L. Co. v. Great Northern (C. C.)* 157 Fed. 845. That was not a suit to enjoin the filing of a schedule, but against enforcement of one filed pending a decision by the commission. The cases *Kiser v. Central R. Co.* (C. C.) 158 Fed. 193, and *Macon v. Atlantic R. R.* (C. C.) 163 Fed. 738, cannot be regarded, as they were Circuit Court decisions, and contrary to the decision in the same circuit in the Circuit Court of Appeals in *Atlantic Coast Line v. Macon Co.*, 166 Fed. 206, 92 C. C. A. 114, above. In *Jewett v. Chicago Co.* (C. C.) 156 Fed. 160, it is held that no injunction lies, as a court cannot pass on a rate in advance of action of the commission. This denies our right to pass on the rates involved in this case.

Counsel for the coal company say that the Abilene Case does not apply in this case; their theory being that that case was to recover damages for unfair rates imposed under established rates; that is, to recover for charges as unfair, though rates had been established by a schedule on file with the commission, and had not yet been condemned by it; whereas, this suit is to prevent the filing of a schedule of unfair rates, to arrest these rates on their way, and thus prevent their establishment. But such injunction would be for the state court to fix rates by condemning them as unjust; that would be for the state court to exercise a jurisdiction not vested in it, to pass on rates; that would be to deny the national tribunal its functions under the interstate commerce act. Judge McCormick, in delivering the opinion in *Atlantic, etc., Co. v. Macon Grocery Co.* (In Circuit Court of Appeals) 166 Fed. 217, 92 C. C. A. 114, thought

that there would be less reason, if possible, for entertaining an injunction than an action to recover back charges. So I think, and for the reason that action to recover back is not to prevent establishment of rates, not stopping the commission from action; whereas, an injunction would forestall all action by the commission, and deprive the public and carrier of the benefit of the schedule. It would be a tedious, protracted litigation, a barrier to urgent commerce. But we are not without authority for the particular question of this case, that no injunction lies to arrest a carrier from filing its rate schedule with the commission. The case just mentioned is one wherein the Circuit Court of Appeals held that shippers cannot maintain a suit in equity to prevent the filing or enforcement of a schedule of rates. The case of *Columbus Iron & Steel Co. v. Kanawha & Michigan Co.* (C. C.) 171 Fed. 713, is a case in which the Circuit Court of the United States for the Southern District of West Virginia denied a shipper an injunction to prevent a railroad company from filing with the commission its schedule of rates, on the principle that it must first go before that commission for its action. I shall only refer to the able and laborious opinion filed in that case by Judge Keller as a strong support for the position which we hold. Judge Keller's decree was affirmed by the Circuit Court of Appeals of the Fourth Circuit, February 14, 1910.¹ An advance opinion written by Judge Pritchard is before me in which he approves strongly the following conclusion enunciated in Judge Keller's opinion: "I conclude, therefore, that a proper construction of the act of February 4, 1887, forbids the exercise of jurisdiction in a case like the present, because it is inconsistent with the purposes of that act as expressed therein, and as construed and expounded by the Supreme Court of the United States in the leading cases of *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426 [27 Sup. Ct. 350, 51 L. Ed. 553]; *Southern Ry. Co. v. Tift*, 206 U. S. 428 [27 Sup. Ct. 709, 51 L. Ed. 1124]." And Judge Pritchard says: "This is a clear and concise statement of the question to be determined. In other words, is the relief sought by the appellant compatible with the act to regulate commerce? Does the interstate commerce act, as it now stands, contemplate that the Interstate Commerce Commission shall have, primarily, exclusive jurisdiction over matters pertaining to fixing rates and determining as to whether the rates filed by the railroads are fair and just? From an examination of the interstate commerce act it is apparent that the carrier alone can initiate the proposed rate. A rate thus proposed, after having been filed in the office of the Interstate Commerce Commission for the term of 30 days, becomes effective, and at that time the Interstate Commerce Commission assumes complete jurisdiction over the subject-matter. It has been repeatedly held that the fixing of rates is a legislative and not a ju-

¹ 173 Fed. 261.

dicial function, and, in this instance, Congress has provided that the carrier shall, in the first instance, establish the rate. In the case of *Southern Pacific Co. v. Colorado Fuel & Iron Co.*, 101 Fed. 779, 42 C. C. A. 12, the Circuit Court of Appeals for the Eighth Circuit passed upon this question. The fourth section of the syllabus in that case reads as follows: "It is not within the legitimate province of a court of equity, in a controversy between interstate carriers and shippers, to interpose and fix a maximum freight rate, either upon an independent consideration of what is a reasonable charge or by relation to some other rate then or theretofore in force, and thereupon enjoin the carrier from demanding more than the rate so established, inasmuch as such an order effectually deprives an interstate carrier of the right to fix its rates in the first instance, and to change the same, which power, as it seems, is conceded to the carrier by the interstate commerce act." The judge then made an extensive extract from the case of *B. & O. R. Co. v. United States ex rel. Pitcairn* (decided by the Supreme Court January 10, 1910) 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. —, as supporting the decisions.

The Circuit Court of Appeals on the same date in two other cases held the same. *Houston Coal & Coke Co. v. N. & W. Ry. Co.*, 178 Fed. 266, and *Powhatan Coal & Coke Co. v. N. & W. Ry. Co.*, 178 Fed. 266. I here refer to *B. & O. R. Co. v. U. S. ex rel. Pitcairn Coal Co.* (decided by the Supreme Court of the United States January 10, 1910) supra, holding the same doctrine. Great reliance is placed by counsel for the coal company upon the case of *Southern Ry. Co. v. Tift*, 206 U. S. 428, 27 Sup. Ct. 706, 51 L. Ed. 1124. We find in its syllabus that, "Although an action at law for damages to recover unreasonable railroad rates which have been exacted in accordance with the schedule of rates as filed is forbidden by the interstate commerce act (*Texas & Pacific Ry. Co. v. Abilene Cotton Co.*, 204 U. S. 426 [27 Sup. Ct. 350, 51 L. Ed. 553]), the Circuit Court may entertain jurisdiction of a bill in equity to restrain the filing or enforcement of a schedule of unreasonable rates or a change to unjust or unreasonable rates." The question presented in this case was not before the court, and the matter contained in that syllabus was not decided, and the proposition is erroneous. The opinion said, after referring to the *Abilene Case*: "We are not required to say, however, because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed is forbidden by the interstate commerce act, a suit in equity is also forbidden to prevent a filing or enforcement of unreasonable rates or a change to unjust or unreasonable rates." That was no express decision that an injunction would lie to prevent the filing of

the schedule. It was not necessary to decide it in the case. It will be seen in Judge Keller's opinion in the *Columbus Coal Company Case*, supra, that he regards this *Tift Case* as supporting the proposition that an injunction will not lie to arrest the filing of a schedule with the commission. I so regard the *Tift Case* when properly construed. The force attributed to the *Tift Case* cannot be sustained in view of the comment upon it by the United States Supreme Court in *B. & O. Co. v. U. S. ex rel. Pitcairn* (January 10, 1910) supra; the opinion saying: "Nor is there anything in the contention that the decision in *Southern R. Co. v. Tift*, 206 U. S. 428 [27 Sup. Ct. 706, 51 L. Ed. 1124], qualifies the ruling in the *Abilene Case*, and is an authority supporting the right to resort to the courts in advance of the action by the commission for relief against unreasonable rates or unjust discriminatory practices which, from their nature, primarily require action by the commission." I would also refer to the case of *Interstate Commerce Commission v. Ill. Central R. Co.* (decided by the United States Supreme Court January 10, 1910) 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. —, as supporting our position. It is useless to prolong this opinion by further reference to these cases, as they are accessible to all.

Brief of counsel relies upon the claim of unlawful combination between the Norfolk & Western Company and other railroads as contrary to the Sherman anti-trust law; but we do not think that that act will sustain this injunction bill. It seems that a person injured by a conspiracy contrary to that act may recover damages; but he cannot have an injunction, as that is a remedy to be used only by the government. *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870. This principle will be sustained by *Southern Ind. Express Co. v. U. S. Express Co.* (C. C.) 88 Fed. 659, affirmed by the Circuit Court of Appeals, 92 Fed. 1022, 35 C. C. A. 172. See, also, *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 86 Fed. 407, 30 C. C. A. 142, and *Greer, Mills & Co. v. Stoller* (C. C.) 77 Fed. 1.

Decree affirmed.

(67 W. Va. 485)

RYAN et al. v. NUCE et al.

(Supreme Court of Appeals of West Virginia.
May 10, 1910.)

(Syllabus by the Court.)

1. EVIDENCE (§ 441*)—PAROL EVIDENCE—CONTRACTING WRITTEN CONTRACT.

A contract when reduced to writing becomes the repository of the common intentions of the parties, all prior or contemporaneous negotiations becoming merged therein, and it can not be contradicted by extrinsic evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1719, 2030; Dec. Dig. § 441.*]

2. CANCELLATION OF INSTRUMENTS (§ 37*)—PLEADING—OFFER TO RESTORE BENEFITS.

A bill to cancel a contract for fraud in its procurement should as a general rule allege plaintiff's willingness and ability to do so, and tender to defendants all property and rights derived under the contract.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 73; Dec. Dig. § 37.*]

3. CANCELLATION OF INSTRUMENTS (§ 37*)—FRAUDULENT REPRESENTATIONS—PLEADING.

As a general rule a bill to cancel a contract for fraud in its procurement should specifically allege the facts constituting the fraud; and where false representations are relied on such representations must not only be averred, but it must also be alleged that they were in fact false, were relied on by plaintiff and that plaintiff did not know the falsity thereof, and was injured thereby.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 73; Dec. Dig. § 37.*]

4. EQUITY (§ 362*)—AMENDMENT TO BILL—DISMISSAL.

Where a good case for relief is shown by the evidence but the facts are not sufficiently pleaded in the bill, the court should not dismiss the bill without first giving plaintiff an opportunity to amend.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 759; Dec. Dig. § 362.*]

Appeal from Circuit Court, Monongalia County.

Bill by Ross F. Ryan and others against David C. Nuce and others. Decree for defendants, and plaintiffs appeal. Reversed and remanded.

Lazelle & Stewart and M. E. Gorman, for appellants. C. C. Rose, for appellees.

MILLER, J. Ross F. and Rebecca Ryan, by their bill seek cancellation and annulment of a contract, made December 7, 1906, with David C. Nuce, whereby, in consideration of one hundred and fifty dollars, evidenced by their three notes, each for fifty dollars, made payable to Nuce's wife, in four, eight and twelve months respectively, with interest, Nuce undertook to grant to plaintiffs "the sole and exclusive right to sell 'Lotts Steam Washer' in Monongalia county, W. Va., during the life of the patent and all improvements thereon, and to purchase same at the regular wholesale price of \$5.00, \$6.00 and \$8.00 each from the Chicago Hardware Foundry Company, North Chicago, Illinois." The bill also prays that plaintiffs have judgment for the amount of their notes mentioned in the contract, and a note for \$12.00 given Nuce by Ryan, growing out of the same transaction, on which latter note the bill alleges suit was then pending against Ryan before a justice, and that said suit be enjoined.

The ground of relief is that defendant, David C. Nuce, by fraud and fraudulent representations induced and procured plaintiffs to enter into said contract, and to execute said notes. The particular acts of fraud relied on, but we think not sufficiently pleaded, are,

first, that before and at the time of entering into said contract, Nuce, to induce plaintiffs to enter into said contract, falsely and fraudulently represented to them that he owned the right to sell said washers in Preston county, and agreed to give plaintiffs the right to sell in a certain part of that county also, but that after plaintiffs had sold some machines there and ordered them shipped from Chicago, to fill these orders, they learned by letter, alleged to be exhibited with the bill, but not found in the record, that Nuce did not own the right to sell said washers in Preston county, and that such right was owned by other parties; second, that as a further inducement to plaintiffs to enter into said contract said Nuce also falsely and fraudulently represented to them that he had procured four certain contracts in writing with other persons for the sale and purchase of said washers, which he exhibited, and agreed to and did turn over to plaintiffs, and which he falsely and fraudulently represented were as good as the money, and that all that was necessary for them to do was to deliver the washers and receive the money; but they allege that on presentation of said contracts to the parties whose names were signed thereto, three of them, Anderson, Brushel and Mundell pronounced them forgeries, and each refused to take the washers; third, that as another inducement to enter into said contract said Nuce gave plaintiffs the names of twelve prospective buyers, representing to them that he had talked to all, and to all of them washers could be sold, but they charge that a part of said prospective purchasers when seen by them represented that they had not seen Nuce, nor talked to him on the subject; that to one of them, Otto Sigwart, Nuce, after the contract with plaintiffs, had sold a machine and himself had collected the money therefor.

With respect to said \$12.00 note it is alleged that plaintiff Ross F. Ryan was induced to execute said note to said David C. Nuce by the false representation of said Nuce, shortly after ordering twelve machines, that said hardware company required an advance of one dollar on each machine, which said Nuce loaned to plaintiff and took his note therefor.

Defendants did not demur to, but answered the bill. The answer we think substantially denies all the material allegations of the bill, except that allegation respecting the four contracts in writing for machines turned over to plaintiff, and if the facts in relation thereto were well pleaded in the bill we think plaintiffs on the evidence would be entitled to relief.

While the bill charges that these four contracts were turned over to plaintiffs to induce them to enter into said contract, and that the persons whose names were signed thereto, denied signing the same, the bill does not distinctly allege that these persons did not in fact sign said contracts, or that

the alleged representations of the defendant Nuce were false, or that plaintiffs were at the time of entering into said contract ignorant of the facts, and relied on the false representations of said Nuce. The same general criticism will apply to other allegations of the bill relied on, one of which, however, that relating to the right to sell machines in Preston county, we do not think presents good ground for the relief. The right to sell in Preston county is not covered by the contract. Nuce denies that he sold or proposed to sell that county or any part of it. Plaintiffs admit the subject was discussed prior to the execution of the contract, and that he knew it was not covered by contract before he signed it. The contract having been afterwards reduced to writing became the repository of the common intentions, and all prior or contemporaneous negotiations become merged into it, and it can not now be contradicted by extrinsic evidence. *Home Gas Co. v. Window Glass Co.*, 63 W. Va. 286, 61 S. E. 329; Page on Cont. § 1189.

A question presented by the evidence, but not specifically covered by the pleadings, is whether defendant Nuce did not undertake to sell plaintiff what he had no right to sell him, namely, the exclusive right to sell in Monongalia county "during the life of the patent, and all improvements thereon." He exhibits with his answer his contract with the patentee and manufacturer. As we now see it his contract was a mere agency, authorizes him to sell and to appoint sub-agents, and on whose sales he was to have a commission. This contract by its terms, however, if certain conditions therein were broken, was terminable at the end of a year. Where then did Nuce get his right to sell plaintiffs the exclusive right to sell during the life of the patent and all improvements thereon? We do not decide the question but in view of the disposition we shall make of the case we suggest it in furtherance of the ends of justice, and to avoid unnecessary litigation.

The bill is also defective we think in failing to tender to defendant Nuce all the property and benefits derived under the contract, particularly pay for the washer and wringer previously purchased, the contract for which was surrendered to them at the time the contract they ask to have cancelled was made. The evidence of Ryan shows that he is willing on cancellation of his contract and notes to make proper restitution to defendant, but the bill does not allege this as we think it should. *Hogg's Eq. Prin.* § 60; *Worthington v. Collins*, 39 W. Va. 406, 19 S. E. 527; *Christian v. Vance*, 41 W. Va. 754, 24 S. E. 596; *Engeman v. Taylor*, 46 W. Va. 669, 713, 33 S. E. 922.

Generally a bill to cancel or rescind a written contract on the ground of fraud in its procurement must specifically allege the facts constituting the fraud. And the authorities

hold that where false representations are relied on such representations must not only be averred, but it must also be averred that they were in fact false, were relied on by plaintiff and that plaintiff did not know of the falsity of the false representation, and was injured thereby. 1 *Hogg, Eq. Proc.* § 115; *Burley v. Weller*, 14 W. Va. 264, 273. The bill in this case plainly does not come up to these requirements.

We take it from the saving in favor of plaintiffs in the decree appealed from, the court below dismissed the bill on the theory that there was adequate remedy at law, and that equity did not have jurisdiction to grant relief. If so we think the court was in error. Cancellation of instruments because of fraud is a specific ground of equitable jurisdiction. *Hogg's Eq. Pr.* § 48, and many cases cited. In *Nease v. Insurance Co.*, 32 W. Va. 283, 9 S. E. 234, Judge Snyder says: "The well settled general rule, that equity has no jurisdiction, where there is a plain and adequate remedy at law, does not of itself afford a sufficient test of the jurisdiction. * * * It is safe to say however, that, where it is doubtful, whether or not there is an adequate and complete remedy at law, a court of equity will take jurisdiction." *Hogg's Eq. Pr.* § 3. To deny equity jurisdiction because of remedy at law the legal remedy must not be partial, but must be adequate, and as complete and efficacious as that given by equity. *Corney v. Barnes*, 56 W. Va. 581, 49 S. E. 423. We do not think plaintiffs' remedy at law as adequate and complete as in equity. Besides the contract there are their notes outstanding, which the evidence we think shows are simply in the bank for collection, and if still owned or under the control of defendants should along with the contract be surrendered and cancelled. A court of equity, all parties being before it, may in one suit dispose of all matters involved and put an end to litigation.

The bill being defective, however, in the particulars indicated, but the evidence showing good grounds for relief, should the court have dismissed the bill? We think not, without giving plaintiffs an opportunity to amend their bill so as to present by pleadings the case as proven. For such error we may reverse the decree, remand the cause, and give the plaintiffs leave to amend their bill. *Blue v. Campbell*, 57 W. Va. 34, 49 S. E. 909; *Lamb v. Laughlin*, 25 W. Va. 300; *Doonan v. Glynn*, 26 W. Va. 225, 228; *Gilchrist v. Oil Co.*, 21 W. Va. 115, 45 Am. Rep. 555; *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26; *Rigg v. Parsons*, 29 W. Va. 522, 2 S. E. 81.

Being of opinion that a case calling for relief is shown in the evidence we will reverse the decree below and remand the cause, giving leave to plaintiffs to amend, if they desire to do so.

(87 W. Va. 517)

STATE v. BARKLEY.(Supreme Court of Appeals of West Virginia.
May 10, 1910.)**INTOXICATING LIQUORS (§ 146*) — ILLEGAL SALE—NONRESIDENTS—SOLICITING ORDERS.**
For syllabus, see *State v. Miller*, 66 W. Va. 436, 66 S. E. 522.[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 146.*]

Error to Circuit Court, Jackson County.

W. H. Barkley was indicted for an illegal sale of liquor. From an acquittal, the State brings error. Reversed and remanded.

Wm. G. Conley, Atty. Gen., and D. E. Matthews, for the State.

BRANNON, J. In the circuit court of Jackson county seven indictments were found against W. H. Barkley for selling intoxicating liquors and soliciting and receiving orders for sale of such liquors. A jury was waived and all the cases submitted to the court upon facts agreed between the parties, and the court acquitted the defendant and rendered one judgment in all the cases finding the defendant not guilty and discharging him from the indictments. The facts agreed show that Barkley sold no liquor in Jackson county, but that in September, 1905, he did solicit and receive orders from seven persons in that county for the sale to each of one gallon of liquor; he acting only as solicitor or agent for the Old Cannery Company, a company engaged in selling liquor in the city of Cincinnati, Ohio, and that the orders were sent to the Cannery Company, and that the liquors were to be and were shipped from Cincinnati to the purchasing parties in Jackson county. No license appears.

The cases are controlled and governed by the case of *State v. Miller*, 66 W. Va. 436, 66 S. E. 522. We reverse the said judgment of the circuit court, and find upon the facts agreed that the defendant is guilty as charged in the indictments. We cannot here render final judgment, because we do not consider that this court should fix the punishment to be imposed upon the defendant, and therefore we remand the cases, and each of them, to the circuit court of Jackson county, with direction to that court to fix the punishment therefor in each of the cases, and render judgment in favor of the state.

(87 W. Va. 480)

BARKER et al. v. STEPHENSON et al.(Supreme Court of Appeals of West Virginia.
May 10, 1910.)

(Syllabus by the Court.)

1. EXCEPTIONS, BILL OF (§ 39*)—SIGNING—TIME.

The occurrence of a regular or special term of a circuit court within the thirty days after

adjournment of the last preceding term does not cut off the time given the court, by section 9, c. 131, Code 1906, to make up and sign bills of exception.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. §§ 54-56; Dec. Dig. § 39.*]
2. EXCEPTIONS, BILL OF (§ 39*)—SIGNING—TIME.

The thirty days after adjournment of the term given the court by said section 9, c. 131, Code 1906, to make up and sign bills of exception means thirty days after adjournment of the term at which final judgment is pronounced.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. §§ 54-56; Dec. Dig. § 39.*]**3. APPEAL AND ERROR (§ 78*)—FINAL ORDER—MOTION TO SET ASIDE VERDICT—"FINAL JUDGMENT."**A judgment or order overruling a motion to set aside a verdict for defendant, and refusing plaintiff a new trial, is not such final judgment. The judgment to be final, in such a case, must be a judgment *nil capiat*.[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 477; Dec. Dig. § 78.*]For other definitions, see *Words and Phrases*, vol. 3, pp. 2774-2798; vol. 8, p. 7663.]**4. TROVER AND CONVERSION (§ 66*) — EVIDENCE—DIRECTING VERDICT.**

A case in which the trial court erred in excluding plaintiff's evidence and directing a verdict for defendant.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 288-294; Dec. Dig. § 66.*]

Error to Circuit Court of Kanawha County.

Action by J. Q. Barker and others, partners, as the Kanawha Hardwood Company, against Samuel Stephenson and others. Judgment for defendants, and plaintiffs bring error. Reversed.

S. B. Avis, J. W. Kennedy, and Morgan Owen, for plaintiffs in error. Chilton, McCorkle & Chilton, for defendants in error.

MILLER, J. Plaintiffs, as Kanawha Hardwood Company, sued defendants in trover and conversion for the value of about 250,000 feet of lumber, which, they allege, while they were in the actual possession thereof and in the act of branding and inspecting the same, defendants with force and arms and without their consent and against their protest seized, carried away and converted to their own use, damaging them in the sum of \$15,000.

On the trial, concluded March 17, 1906, defendants offering no evidence, the court below, on motion of defendants excluded the plaintiffs' evidence and directed a verdict for defendants. Plaintiffs excepted, and moved the court to set aside said verdict and grant them a new trial, which motion was overruled, they again excepted. No judgment, however, was pronounced on the verdict until the September term following, when on October 6, 1906, plaintiffs moved the court to arrest the judgment. This motion being overruled, they again excepted, and final judgment was then pronounced that plaintiffs take nothing by their action, and that defendants go hence without day and recover their costs. Plain-

tiffs again excepted, and were given thirty days from the rising of the court within which to prepare and have signed proper bills of exception.

A term of court having been begun according to law before the thirty days expired, the bills of exception were not signed and made a part of the record in vacation, but the record shows that by an order entitled in the cause, entered December 12, 1906, in term, plaintiffs tendered their bills of exception numbered one and two, which were signed, sealed and certified, and properly identified and ordered to be made parts of the record.

Defendants interpose two objections here to a consideration of the case upon its merits. First, that judgment of March 17, 1906, directing a verdict, and overruling plaintiffs' motion to set aside that verdict and grant them a new trial, was a final judgment, and that no bills of exception having been taken or signed during that term, or within thirty days after the adjournment thereof, the court was without jurisdiction thereafter to certify the evidence, and make the same a part of the record. Second, that if wrong in their first contention, the statute, section 9, c. 131, Code 1906, giving the court in vacation, within thirty days after adjournment of the term, authority to make up and sign bills of exception and certify the same, is exclusive, and that a special or a regular term occurring within thirty days after such adjournment cuts off the time given by statute and precludes the court at a succeeding special or regular term from any action on such bills of exception.

The first proposition is specifically negatived by numerous decisions of this court: *Damron v. Ferguson*, 32 W. Va. 33, 9 S. E. 39; *Hannah v. Bank*, 53 W. Va. 82, 44 S. E. 152; *Bank v. Bee*, 60 W. Va. 386, 55 S. E. 380; *De Armit v. Town of Whitmer*, 63 W. Va. 300, 60 S. E. 136; *Kirk v. Camden Interstate Ry. Co.*, 66 S. E. 683. The judgment of March 17, 1906, was not final. It contained no judgment of *nisi* capiat; therefore no writ of error would lie thereto. *Kirk v. Camden Interstate Ry. Co.*, *supra*, citing *Riley v. Jarvis*, 43 W. Va. 44, 26 S. E. 366; *Parsons v. Snider*, 42 W. Va. 517, 26 S. E. 285; *Buehler v. Chevront*, 15 W. Va. 479. The statute (section 1, c. 135, Code 1906) gives no right to a writ of error in cases like this except to a final judgment. The ninth clause thereof does give a writ of error to a judgment granting a new trial, but none is given from a judgment or order overruling a motion for a new trial. Until there has been a final judgment or decree, from which an appeal or writ of error will lie, the whole matter of controversy remains in the breast of the court. *Wickes v. B. & O. R. R. Co.*, 14 W. Va. 157, 105, citing 1 Rob. (Old) Pract. 638, and 3 Tho. Co. Lit. 323. Until such final judgment a complete

trial has not been had. Section 2, c. 159, Code 1906, provides that "a person indicted for felony shall be personally present during the trial therefor." In *State v. Stevenson*, 64 W. Va. 392, 399, 62 S. E. 688, following *State v. Parsons*, 39 W. Va. 464, 19 S. E. 876, we held this meant from arraignment to judgment inclusive.

But it is argued on the authority of *Crowe v. Corporation of Charles Town*, 62 W. Va. 91, 57 S. E. 330, and *Jordan v. Jordan*, 48 W. Va. 600, 37 S. E. 556, that the trial was had at the term at which the order of March 17, 1906, was entered, and that according to these decisions the court was without jurisdiction, except during that term or within thirty days after its adjournment, to make up and sign bills of exception. The first point of the syllabus of *Crowe v. Charles Town* does say: "Bills of exceptions are required to be signed at the term at which the trial is had, or within thirty days after the adjournment thereof, and after the expiration of such time, there is no jurisdiction to sign such bills." But *Jordan v. Jordan*, as do many previous decisions, decides that bills of exception may be signed, either during the term at which final judgment is rendered or within thirty days after its close. *State v. Strayer*, 58 W. Va. 676, 52 S. E. 862; *Wetly v. Campbell*, 37 W. Va. 797, 802, 17 S. E. 312; *State v. McGlumphy*, 37 W. Va. 806, 17 S. E. 315; *Griffith v. Corrothers*, 42 W. Va. 59, 24 S. E. 569. The case of *Crowe v. Charles Town* does not mean to depart from the prior decisions. Manifestly it was intended simply to reaffirm the rule of the previous decisions. "At the term at which the trial is had" according to *Jordan v. Jordan*, and the other decisions, means at the term at which final judgment was rendered.

The second proposition has been fully negatived by two decisions at the present term, not yet officially reported, namely, *Layne v. C. & O. Ry. Co.*, 67 S. E. 1103, and *Jacobs v. Williams*, 67 S. E. 1113. Point one of the syllabus of the first case holds: "Bills of exception may be signed, certified and made a part of the record of a trial, at any time within thirty days after the adjournment of the term at which the judgment in the action was rendered, either in vacation or in a special or regular subsequent term of the court, occurring within said period of thirty days." Point four of the syllabus of the latter case is as follows: "Intervention of a special term in the thirty day period, allowed for taking bills of exception after adjournment, does not shorten said period nor deprive the court or judge of power to allow such bills. Within said period, they may be allowed either in court or in vacation." We must dispose of the case, therefore, on its merits.

Did the court err in excluding the plaintiffs' evidence and directing a verdict for defendants? The lumber in controversy, or

that which it represents, was manufactured by defendants from timber taken from a tract of land originally containing something over ten thousand acres. This tract was in 1868, by decree of the federal court, partitioned among the owners, five thousand acres thereof falling to those under whom defendants claim, and a triangular piece containing, exclusive of claims of prior occupants, about 1320 acres, and designated on the plat and in the record as the "Cole and Chapman" tract, going to Maria Byrne, under whom plaintiffs claim. The controversy here does not seem to involve title, but the true location of the original dividing line between the Byrne, or Cole and Chapman 1320 acres, and the five thousand acres, designated on the plat of surveyor Mathews, who made the survey in the partition suit, as the line "F. L. D." Mathews was a witness for plaintiffs on the trial and was examined and cross-examined with reference to the true location of this line as reported to the court in said partition suit. He proved what seems to be conceded, that his report called for eight dogwoods at the corner at "F"; "thence north 33° west 575 poles crossing same branch of Coal Fork to a white oak and black oak in a line of the Banks survey at D." Mathews swears positively that the eight dogwoods found on the ground by Johnson, one of plaintiffs' vendors, from the information furnished by him, and afterwards shown to him, are the identical dogwoods called for in his report in the partition suit, and are located on the ground at the point claimed by plaintiffs as the corner at "F." Other witnesses, including Johnson himself, corroborate Mathews on this material fact. It is conceded that if this line is where plaintiffs claim it, this lumber, or that which it represents, was the product of timber belonging to them or to Burdett Brothers and Johnson, their immediate vendors. Evidence was brought out on cross-examination of plaintiffs' witnesses tending to show that plaintiffs, or their immediate vendors, had recognized another line, substantially the line claimed by defendants as the true dividing line between the five thousand acre tract and the Cole and Chapman 1,320 acre tract, but it is explained by them that this was merely a trial line run when they were trying to find the correct line.

The timber from which the lumber in controversy was manufactured is the same as that involved in the chancery cause of *Stephenson & Coon v. Burdett*, and others, decided here in October, 1904, and reported in 56 W. Va. 109, 48 S. E. 846, 10 L. R. A. (N. S.) 748. In that case jurisdiction in equity to determine the matters in controversy was denied and injunctions obtained by both parties were dissolved, and the bill and answer on which the injunction had been awarded were dismissed and relief denied. Pending that suit in the court below, two orders in evidence in this case, were made therein in

June, 1902, the last being a consent order in modification of the first. By the first order the plaintiffs therein, *Stephenson & Coon*, on their motion and upon a bond of \$20,000, with security, and conditioned as prescribed, were authorized to proceed with the manufacture and sale of the timber and lumber covered by the temporary injunction theretofore awarded upon the answer of *Burdett Brothers and Johnson*, and instead of paying the proceeds thereof to the parties designated in a prior agreement as trustees, to pay the same into the hands of the general receiver of the court. The second order provided that the "plaintiffs shall leave on the mill yard of A. W. Moses, manufactured and in condition for market and properly" assorted, stacked and sticked, 250,000 feet of lumber coming off the territory in dispute as between plaintiffs and defendants *Burdetts and Johnson*, or to be substituted for lumber coming off said disputed territory by lumber from elsewhere said 250,000 feet of lumber to be of like kinds, grades, and of equal market value in the average, as that taken from said disputed territory, said 250,000 feet to be left and to be and remain on said mill yard subject to the defendant's said injunction, and to the future order of the court; but nothing either in the said order entered on the ——— day of June, 1902, as aforesaid, or in this order, shall be construed as deciding or affecting in any wise, any question or rights as between plaintiffs and defendants *Burdetts and Johnson*, or of any of the parties to this suit, on the merits of the case; any violation of the terms of this order on the part of plaintiffs shall be taken and construed as a violation of said defendants *Burdetts and Johnson* injunction heretofore awarded against the plaintiffs in this cause." It was clearly contemplated by the parties to this agreement that their rights would be adjudicated in that cause. But the court denying jurisdiction in equity to do so, and the bill being dismissed the parties were thereby left to their legal rights.

The plaintiffs in the present action claim right and title to the lumber in controversy derived immediately from *Burdett Brothers and Johnson* by contract in writing dated October 28, 1901; also by a verbal contract, the exact date of which is not shown, but confessedly after the 250,000 feet had been cut and stacked on the mill yard, and before the decision of said chancery suit by this court. By the original or written contract in evidence *Burdett Bros. & Johnson*, after reciting their purchase from *Cole and Chapman*, of a certain boundary of timber on Coal Fork branch of Cabin Creek, and that they were desirous of selling the product of said timber, of the kinds and grades thereafter mentioned to the plaintiffs, thereby, in consideration of one dollar and other valuable considerations thereafter mentioned, sold and agreed to deliver to

them on board cars Kanawha Railway Company, the poplar, red and white oak, basswood, ash and yellow lin of the grades and at the prices therein named, and not necessary to recite herein. This contract further provided that the prices named were subject to a discount of two per cent for cash, when loaded on cars by order of the purchasers, but that should they desire said lumber to remain on stick longer than should be necessary for it to dry, then the value of such lumber was to be estimated in car lots of each grade and thickness and payment made, subject, however, to final measurement and grade when loaded on cars at the time of shipment, said lumber to be cut to their order as to length and thickness, and should the sellers desire it the contract provided that they should have the privilege of disposing of their cull oak and poplar for local building purposes.

The oral contract, as testified by Barker, who signed the written contract on behalf of plaintiffs, covered the 250,000 feet of lumber on the mill yard. He says plaintiffs were thereby to take the lumber, accept it on the yard, and that while there engaged in grading, measuring and branding it, and after they had been thus engaged with their inspector from Thursday to some day in the following week, defendants, Stephenson and Coon, with their men went upon the mill yard and seized the lumber. Barker seems to admit, however, that neither their written contract nor their oral contract covered all the lumber to be taken off the land, but only certain grades specified in the written contract. On the other hand J. F. Burdett, one of the vendors, and a witness for plaintiffs, states that there was no modification of the written contract by the oral, except that plaintiffs were to take and accept the lumber on the mill yard in place of delivering it on the cars, and he explains that the written contract covered or was intended to cover all the lumber that was to be manufactured from the land, to be paid for according to the prices stipulated for the different grades.

No deeds showing title to the land or the various boundary lines thereof were offered in evidence. Plaintiffs apparently relied on the common source of title, their written and alleged oral contract for the timber and lumber, shown in evidence, and the evidence introduced by them on the true location of the division line between the two tracts of land, and upon this evidence rested their case. The question is did they make out a prima facie case, one entitling them to have the case submitted to the jury?

The position of defendants' counsel on this question is, first, that by their written executory contract with Burdett Brothers and Johnson, plaintiffs did not buy the timber in place, but the lumber to be manufactured and delivered by the sellers on cars at the railway, and by which they acquired no legal title to the lumber on the mill yard

on which they could maintain this action. The oral contract they say was simply to bolster up plaintiffs' case, and besides, that according to the evidence of Barker this contract changed the written contract, and that at most the oral contract according to his evidence was conditioned on the 250,000 feet of lumber being decreed to Burdett Brothers and Johnson, and that as the court did not in the chancery suit so decree the condition failed, and that their title to the lumber, by the very terms of the contract, failed also; that Burdett Brothers and Johnson might have sued but plaintiffs could not do so.

In each of these positions we think counsel are in error. It is true plaintiffs did not buy timber, but lumber to be delivered. The contract did provide, however, that if plaintiffs should desire the lumber to remain on stick longer than should be necessary for it to dry, the value thereof should be estimated and paid for subject to subsequent inspection on delivery. But this is not important. The parties were competent to waive delivery on cars at the railroad, and accept delivery on the mill yard. Their evidence uncontradicted is that they did by their oral contract do so, and had actually taken possession of the lumber, and were engaged in inspecting, measuring and branding it, and had been so engaged for several days when defendants seized it. J. F. Burdett says plaintiffs not only accepted the lumber on the mill yard, but that by the oral contract they agreed to take the mill culls not covered by the written contract, and that there was no other modification of the written contract, except that they were to pay all expenses of delivering the lumber on board cars. He does not say what prices were to be paid for mill culls. One difficulty in the way has been the want of satisfactory evidence of the amount of the different grades of lumber called for in the original contract upon which the jury, by reference to the prices stipulated in the original contract, might have arrived at the proper verdict. We have concluded, however, that the jury might from the evidence reasonably have found some damages, and that the lack of more certain evidence did not warrant the court on this ground in directing a verdict for defendants.

We see little force in the argument that the oral contract was conditioned on a decree in favor of Burdett Brothers and Johnson. The parties to the contract evidently contemplated that their rights would be finally adjudicated in the chancery suit. The new conditions created by the two decrees therein called for a modification of the first contract, which they undertook to cover by their oral contract. Plaintiffs' rights under both contracts so far as the lumber to be stored on the mill yard by defendants was concerned necessarily depended on the right of their vendors to the lumber, which it was

assumed would be finally adjudicated in the pending suit. Failing to obtain an adjudication of their rights in that suit the parties to these contracts have attempted to adjust the respective legal rights thereunder to the conditions in which they were left by the result of the previous litigation. Burdett Bros. and Johnson affirm that plaintiffs are entitled under their contracts to the lumber in controversy, or at least to such rights there to as but for the contracts they would have had. With what consistency then can defendants deny plaintiffs the right which they practically concede Burdett Brothers and Johnson would have. With this right we do not see that the question of possession, much discussed by plaintiffs' counsel in their brief, is important.

The record shows but the one side of the case, and we express no opinion on the merits, but we are clearly of opinion that on the evidence submitted plaintiffs were entitled to have the case go to the jury, and that the court below erred in directing a verdict for defendants. We need not burden the opinion by citation of decisions previously decided by this court prescribing the rule in such cases. The judgment will therefore be reversed and plaintiffs granted a new trial.

(87 W. Va. 499)

LUDWICK v. JOHNSON et al.

(Supreme Court of Appeals of West Virginia.
May 10, 1910.)

(Syllabus by the Court.)

1. TRUSTS (§ 81*)—RESULTING TRUSTS—PROOF TO ESTABLISH.

In the case of a conveyance of land to a wife, a parol trust therein in favor of her husband may be established by proof that the latter paid the purchase money in pursuance of an oral agreement between them, antedating or contemporaneous with the conveyance, that he should do so and that the wife should take the legal title in trust for him.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 115-118; Dec. Dig. § 81.*]

2. TRUSTS (§ 81*)—CONVEYANCE TO WIFE—PRESUMPTION OF GIFT—RESULTING TRUSTS.

Prima facie, such a conveyance is a gift from the husband to the wife; but the presumption of donation, arising from mere payment of the purchase money by the husband, is rebuttable.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 116; Dec. Dig. § 81.*]

Appeal from Circuit Court, Barbour County.

Bill by Jacob M. Ludwick against John W. Johnson and others. Decree for complainant, and certain defendants appeal. Affirmed.

C. M. Murphy, W. R. D. Dent, and Dent & Dent, for appellants. J. Hop Woods, for appellee.

POFFENBARGER, J. The nature and object of this suit are fully disclosed by the

opinion in Johnson v. Ludwick, 58 W. Va. 484, 52 S. E. 489. After the cause was remanded, an amended bill, substantially the same in its allegations as the original bill, was filed. To this the defendants demurred, and, their demurrers having been overruled, filed an answer. Depositions were taken and filed, and, on the hearing, a decree was pronounced, granting to the plaintiff the relief prayed for in his bill. It was adjudged, ordered, and decreed that the full equitable title to the tract of land in question was in the plaintiff, and the defendants were required, within 10 days from the adjournment of the term of the court at which the decree was pronounced, to convey and release to the plaintiff, by an apt and proper deed, their interest in the land, which is here construed to be the legal title inherited from plaintiff's deceased wife, and it was further ordered that, on their failure to do so, such deed should be executed by a commissioner who was appointed by the decree for the purpose. From this decree, the defendants have appealed.

As the sufficiency of the original bill, differing in no substantial respect from the amended bill, was declared by this court on the former appeal, and the evidence, adduced in support of its allegations, adheres to the theory of the bill, no separate discussion of the demurrer is necessary. What is to be said of the sufficiency of the evidence and the nature of the case made by it will fully suffice.

The evidence consists almost wholly of proof of oral declarations on the part of the wife, the grantee in the deed, that, though the deed was to be taken in her name, because, in that way, the land could be purchased for \$100 less money, she was wholly unable to pay the purchase money, that the same was to be paid by her husband, the plaintiff, and that she was to convey the land to him later, and proof of her inability, and his ability, to pay it, and actual payment thereof by him. Many of these declarations were made before the deed was executed, while others of subsequent date recognize and admit the trust and express intention to execute it. The circumstances disclosed by the evidence indicate that the husband did, in fact, pay the purchase money. The purchase price was \$250, of which \$200 was paid on the delivery of the deed. Of this cash payment, \$150 was borrowed of Isaac Martin on a note, executed to him by the plaintiff and his wife. The wife of Isaac Martin testifies that the plaintiff paid the note, her husband giving him receipts for the payments and indorsing the same on the note. A paper is filed in the record which purports to show copies of these receipts, indicating payment by the plaintiff. A witness testifies positively to the admis-

sion by one of the grantors of his receipt from the plaintiff of a steer and other property in part payment of the note, held for the remaining \$50 of the purchase money, and another witness to the payment by the plaintiff of a balance due on that note. In view of some controversy as to the relative financial ability of the husband and wife to make payment, their assessments for purposes of taxation are put into the record and disclose pronounced superiority of the husband in this respect.

There is some contradiction between his testimony, and that of some of the defendants, respecting alleged admissions on his part, as well as his ability to pay for the land and the impecuniousness of the wife at the time it was bought. A letter from him to one of the defendants, in which he proposed to purchase their interests, is also put in evidence; but he insists his proposition was an offer to compromise and get rid of their claims, and the letter bears some evidence of that on its face. In one place he says: "If I can buy you out, and if I can't it will be something else." The letter is by no means a disclaimer of title. Witnesses for the defendants say the plaintiff had nothing at the time of his marriage, and that the wife had, in addition to her household goods, some horses, cattle, and sheep; but others say she had no stock or other property of any substantial value. One of the defendants, a sister of the deceased wife, testifies that she told her she would not convey the land to her husband; but her evidence cannot be considered, since she is a party to the suit, interested in the event thereof, and the subject-matter is a personal communication with a deceased person under whom she claims.

As the declarations of the deceased wife, put in evidence, are plain, clear, and unequivocal, certain as to the beneficiary of the trust, the consideration upon which it is founded and the subject-matter, and consistent with the surroundings and circumstances disclosed, and the evidence preponderates in favor of the plaintiff, we are unable to see that the trial court erred in its finding upon the issue of fact.

The remaining and important inquiry, therefore, is whether the statute of frauds excludes the claim thus set up, and this question seems to be foreclosed by our decisions. *Johnson v. Ludwick*, 58 W. Va. 464, 52 S. E. 489; *Currence v. Ward*, 43 W. Va. 367, 370, 371, 27 S. E. 329; *Troll v. Carter*, 15 W. Va. 567. Taking these cases in their inverse order, they hold as follows: "But if a party obtains a deed without any consideration upon a parol agreement that he will hold the land in trust for third parties, such a trust so proven will be enforced in a court of equity, as to permit a party to hold the

land so obtained for his own use would be to permit the grantee to commit a fraud." *Troll v. Carter*. "Where one buys land under executory agreement, and afterwards, before legal title passed, verbally agrees that if another will pay the purchase money he shall have the land, and that other does so, the trust is enforceable in equity." *Currence v. Ward*. "But where land is purchased and paid for by the husband, and the conveyance taken in the name of the wife, pursuant to an understanding and agreement between them at the time of the purchase and conveyance, that the land is to be held by the wife for the benefit of the husband, this creates an express trust which will be enforced in favor of the husband." *Johnson v. Ludwick*. The doctrine of these cases seems to be sustained by the text and cases cited in 28 A. & E. Ency. Law, 872.

A purchase by the husband in the name of the wife would be regarded, on the face of the transaction, as a gift to the wife; but this is only a rebuttable presumption, which can be overthrown by evidence to the contrary. *Johnson v. Ludwick*, cited. Here the evidence is amply sufficient, in our opinion, to accomplish this result.

For the reasons stated, the decree will be affirmed.

(87 W. Va. 525)

CAMDEN CLAY CO. v. TOWN OF NEW MARTINSVILLE.

(Supreme Court of Appeals of West Virginia.
May 10, 1910.)

(Syllabus by the Court.)

**1. PLEADING (§ 222*)—OVERRULING DEMUR-
RER—LEAVE TO REPLY.**

When a demurrer to a plea is overruled, the plaintiff cannot reply in point of fact unless he withdraws the demurrer; but leave to withdraw the demurrer will be conceded as of course and answer in point of fact then allowed. [Ed. Note.—For other cases, see Pleading, Cent. Dig. § 570; Dec. Dig. § 222.*]

**2. PLEADING (§ 412*)—DEMURRER—DEMURRER
TO PLEA—WITHDRAWAL—REPLY.**

Though a demurrer to a plea is not formally withdrawn after it is overruled, the defendant will be held to a recognition of its implied withdrawal if he permits an issue of fact to be joined by replication to the plea without objection on his part.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1394; Dec. Dig. § 412.*]

**3. MUNICIPAL CORPORATIONS (§ 863*) — EX-
PENDITURE OF CURRENT REVENUES—"CON-
TRACT DEBTS."**

A town may expend its current revenues and accrued funds, and may make contracts to that end. To do so is not to "contract debts" within the meaning of the constitutional inhibition.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 863.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1520, 1521.]

4. MUNICIPAL CORPORATIONS (§ 864*)—CONTRACTS—VALIDITY.

If the contracts and engagements of a municipal corporation do not overreach the dependable current resources for which provision exists at the time the contracts and engagements are assumed, no lawful objections to them can be interposed, however great the indebtedness of the municipality may be.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1828; Dec. Dig. § 864.*]

5. MUNICIPAL CORPORATIONS (§ 1035*)—IN-VALIDITY—EXCESS OF INDEBTEDNESS.

A party to assert successfully the invalidity of a contract made by a municipal corporation, on the ground that it has assumed an indebtedness beyond that which it could legally assume by the contract, must establish by clear evidence all facts necessary to show the alleged invalidity.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 1035.*]

Error from Circuit Court, Wetzel County.

Action by the Camden Clay Company against the Town of New Martinsville. Judgment for plaintiff, and defendant brings error. Affirmed.

Thos. P. Jacobs and Hall & Hall, for plaintiff in error. H. P. Camden, Dan B. Leonard, Rankin Wiley, and Thomas H. Cornett, for defendant in error.

ROBINSON, P. The Town of New Martinsville, a municipal corporation, on June 11, 1902, entered into a contract with C. Skidmore for the paving of particularly named streets. For doing the work in the manner specified, Skidmore was to receive stated prices for the curbing, excess excavating, and brick paving necessary to complete the contract. The work was to be completed by November first, of that year. Payments were to be made to Skidmore every thirty days, upon estimates of eighty per cent. of the work completed. Final payment was to be made at the completion of all the work and its acceptance. Just here it may be observed that the contract was to be performed and the work paid for during the current municipal fiscal year of 1902 within which it was made. The contract does not relate to future years, nor does it pretend to bind future levies for its payment.

Skidmore completed the work. The municipal authorities accepted it. They accounted with him and fixed the amount to which he was entitled. Then Skidmore assigned to the Camden Clay Company the amount remaining due to him from the town. Many payments were made by the town to this assignee. But later a balance of \$10,000 remained unpaid, and the town refused to make further payment. This suit followed. The town in defense claimed that the work had not been done according to the contract, and that, in any event, the debt was an illegal and invalid one because the legal limit to which the municipality could incur indebt-

edness was exceeded in the making of the obligation. From a judgment for \$11,700, upon the verdict of a jury, this writ of error was obtained.

Though many exceptions were presented in the original assignments of error, the brief of counsel for the town relies upon but two points. The neglected assignments, however, have been considered by us. Finding them not well taken, we overrule them. This written opinion may well be devoted to the two points raised in the brief.

Two special pleas were interposed by the defendant town. One of the pleas alleged a breach of the contract by Skidmore and averred that defendant was damaged by that breach to the amount claimed by plaintiff. The other plea denied the validity of the contract upon the averment that the town undertook to incur an indebtedness payable out of revenues for years other than the one as to which the contract was made. Plaintiff demurred to each plea, but the court overruled the demurrers. Then plaintiff replied generally to each plea. Issues were thus joined, without objection on the part of defendant. Now, defendant insists that when plaintiff failed in the demurrers to the pleas the issues presented by the pleas were thereby finally settled against plaintiff. In other words, it is submitted that plaintiff could not reply to the pleas after the demurrers thereto were overruled unless the demurrers were withdrawn. True it is that at the common law the plaintiff could give one answer, either of law or of fact, but no more, to each plea. 4 Minor's Inst. (3d Ed.) 1167. This common law rule is changed by our statute only in one particular. More than one answer in point of fact to a special plea is now allowed—more than one replication. But this common law rule which applies to the plaintiff has not been altered further in his behalf, as a similar rule of pleading in relation to the defendant has been changed. The defendant may demur and also plead fact. He "may plead as many several matters, whether of law or fact, as he shall think necessary," except in a single instance named in the statute. The plaintiff, however, has not been given such privilege. He must still answer the defendant's plea by demurrer, or answer it in point of fact by replication. He cannot demur and reply. He must choose one course or the other. If he chooses the latter course, then, to any special plea, he "may plead as many special replications as he may deem necessary." Code 1906, c. 125, § 20. But the inconvenience in being compelled to choose between a demurrer or a replication may be evaded by the plaintiff. If a demurrer to a plea be overruled, leave to withdraw the demurrer will be conceded as of course and an answer in point of fact then allowed. 4 Minor's Inst. (3d Ed.) 1167. In the case at hand, plaintiff did not expressly withdraw

the demurrers upon which it failed, but it was permitted to reply in point of fact without protest or objection on the part of defendant. In substance and practical import, this course was a withdrawal of the demurrers. Defendant must be held to a recognition of the implied withdrawal of the demurrers, since no objection on its part was made to the replications. Defendant recognized the demurrers as withdrawn when it acquiesced in the filing of the replications. Applicable here are words of the Virginia court: "In this case, although the record does not show that the demurrer was withdrawn, the court and parties must have so considered it, otherwise the replication could not have been filed and a trial had upon the issue of fact raised by it. The demurrer having been treated in the trial court as waived or withdrawn, it must be so considered here." *Railway Co. v. Bank*, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

The court instructed the jury that the evidence was insufficient to justify a finding that the contract was an illegal and invalid one. This instruction was a proper one in the premises. Defendant did not prove that at the time the town entered into the contract it thereby assumed an indebtedness which, with other liabilities then existing or assumed, overreached the dependable resources of the municipality for the current year. Were resources provided at the time the contract was made, sufficient according to reasonable expectation, to meet all existing liabilities of the town for the current year including the indebtedness under the contract? If so, the contract was not illegally made. Defendant failed to prove that such provision was not made. Evidence clearly establishing the fact that no such provision existed was primarily essential to an overthrow of the contract for illegality on the ground alleged. The contract and the indebtedness which it represents are presumed to be legal. *Armstrong v. County Court*, 41 W. Va. 602, 24 S. E. 993. It is presumed that all steps necessary to the legality of the contract were taken. It is presumed that legal provision was made for the payment of the indebtedness when the same was assumed. That presumption prevails and sustains the legality of the contract until the presumption is clearly overthrown by evidence. It was not overthrown in this case. The burden was on the town to prove the illegality of the contract by clear and defined evidence—so to prove that the provided resources of the town were exceeded by the indebtedness under the contract at the time it was made. That the dependable resources may have been overreached during the current year is not enough. If this contract did not overreach them, no part of it is invalid, though liabilities assumed after its execution may have overreached those resources. The constitutional provision does not inhibit the making

of current engagements which may be met with moneys on hand and the current revenues provided at the time the engagements are made. A town may expend the current revenues and accrued funds and may make contracts to that end. To do so is not to contract debts within the meaning of the constitutional inhibition. *Davis v. County Court*, 38 W. Va. 104, 18 S. E. 373. Principles which we approve have been enunciated in the following language: "If a city has money on hand, or provides at the time a present means of raising it otherwise than by loan, it may contract for expenditures without restriction, as there is no constitutional limitation on municipal expenditure, provided the city pays as it goes. What is prohibited is the incurring of debt. If a contract made by a city pertains to its ordinary expenses, and is, together with other like expenses, within the limits of its current revenues and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute the incurring of indebtedness within the meaning of a constitutional provision limiting the power of municipalities to contract debts. If means are adopted which in good faith, according to reasonable expectation, will produce a sufficient fund to pay, a contract entered into on the faith of them should not be held unlawful on account of an unintentional miscalculation, or an accidental and unexpected failure to produce the full result." *Addyston Pipe & Steel Co. v. City of Corry*, 197 Pa. 41, 46 Atl. 1035, 80 Am. St. Rep. 812. The evidence in this case does not disclose that these legal principles were violated in the making of the contract which is the basis of this action.

The only issue of fact submitted for the determination of the jury related to the alleged breach of the contract by Skidmore—to his failure to do the work contemplated by it in the manner stipulated. That issue the jury, on conflicting facts and circumstances, determined in favor of plaintiff. Their finding is warranted by the evidence. Nothing appears by which we can overthrow it.

The record plainly calls for an affirmance of the judgment. It will be so ordered.

(57 W. Va. 518)

DUNBAR et al. v. DUNBAR et al.

(Supreme Court of Appeals of West Virginia.
May 10, 1910.)

(Syllabus by the Court.)

1. EQUITY (§ 452*)—BILL OF REVIEW—LIMITATIONS.

The limitation for a bill of review from a decree made before chapter 40, Acts 1900, took effect, reducing the limitation to one year, is three years.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 452.*]

2. VENDOR AND PURCHASER (§ 279*)—VENDOR'S LIEN—ENFORCEMENT—PARTIES.

In a suit in equity to enforce a lien for purchase money reserved in a conveyance of land, persons not parties to the conveyance, between whom and its parties there is no equity, and who claim title adversary to that of the parties to such conveyance, cannot be made parties to such suit, and their rights cannot be adjudicated against them in it.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 778-882; Dec. Dig. § 279.*]

Appeal from Circuit Court, Raleigh County.

Bill by H. A. Dunbar and others against W. S. Dunbar and others. Decree for defendants, and plaintiffs appeal. Reversed and remanded.

Sanders & Crockett, J. W. McCreery, and File & File, for appellants. Price, Smith, Spilman & Clay and W. L. Ashby, for appellees.

BRANNON, J. W. S. Dunbar and wife conveyed to D. S. Courtney, E. T. Crawford, and W. L. Ashby, (1) all the right, title, and interest formerly belonging to John Cook and Mary A. Cook in lands of which Lemuel Jarrell, Sr., died seised, which interest was purchased by W. S. Dunbar at a sale under a decree; and (2) all the right, title, and interest of said Dunbar and wife in the land of Lemuel Jarrell, deceased. This deed contained a covenant of general warranty and a covenant for further assurance, and reserved a lien for deferred purchase money. Lemuel Jarrell died seised of 10 tracts of land in Raleigh county. W. S. Dunbar brought a chancery suit to enforce against the realty conveyed by him by that deed to Courtney, Crawford, and Ashby the lien for purchase money reserved in the deed. Courtney, Crawford, and Ashby defended the suit by an answer setting up that by various conveyances from other parties they had become owners of all of the shares or interests in the various tracts of land of which Lemuel Jarrell died seised, and that afterwards W. S. Dunbar claimed that said purchasers had not acquired all such interests, and that he still owned the Cook interest, and that, in order to get rid of this claim of W. S. Dunbar, they purchased of him the said Cook interest and all the interests of Dunbar in said Jarrell land. And said answer further states, in effect, that two interests had been conveyed by heirs of Jarrell to H. A. Dunbar, and that, the deeds being defective, those two heirs had made second conveyances of those interests to W. S. Dunbar, thus making conflicting claims to those interests between H. A. Dunbar and W. S. Dunbar. The answer further stated that H. A. Dunbar had conveyed to Michael Lilly and Isabella Lilly a boundary of 250 acres of said land and to William H. Jarrell by one deed 16½ acres and by another deed 62 acres. The answer further alleged

that H. A. Dunbar was in possession of, and claiming, some 700 acres or 800 acres of the Jarrell land. How claiming is not stated. The answer further stated that Michael Lilly and C. N. Dunbar had entered on the land books in their names 18 acres and 104 poles of said land, and that C. N. Dunbar had entered on the land books 11 acres and 5 poles, such entries importing a claim of title, but how the answer does not certify. The answer further stated that by deed Stephen Williams had conveyed to Henry A. Williams 60 to 70 acres of the land, and had fenced a portion of it and was in possession thereof, and that W. H. Jarrell was claiming another part of the land containing about 80 acres, and that C. P. Stover somehow claimed 30 acres of the said land, and alleged further that said adverse claimants were in possession. After this answer was filed, W. S. Dunbar filed an amended bill making such adverse claimants, H. A. Dunbar, Michael S. Lilly, Isabella Lilly, W. H. Jarrell, C. N. Dunbar, Henry A. Williams, Stephen Williams, Jack Williams, Daniel Williams, and C. P. Stover, party defendants, and assailing their titles and claims as bad, and asking that their rights be adjudicated, and that their deeds be canceled and set aside as a cloud upon the titles of the land, and that they be required to surrender possession to Courtney, Crawford, and Ashby. These adverse claimants, the said new parties, did not appear, and the amended bill was taken for confessed against them. They did not answer the answer of Courtney, Crawford, and Ashby. Courtney, Crawford, and Ashby answered the amended bill, asserting their own title to be good and alleging that the title or right or claim of H. A. Dunbar and other adverse claimants above named were bad, and added that Jack Williams and Daniel Williams and Henry A. Williams were also asserting title to a portion of the land; and this answer alleged that their titles were worthless, and asked that the rights of all such claimants be adjudicated, and, if found valid, that there might be a reduction of the purchase money. A decree was made of sweeping character declaring that the title of Courtney, Crawford, and Ashby to all the said 10 tracts of land of which Lemuel Jarrell died seised was superior and paramount to any claim or title of said adverse claimants H. A. Dunbar, Michael and Isabella Lilly, William H. Jarrell, C. N. Dunbar, and C. P. Stover, and setting aside the deeds from H. A. Dunbar to W. H. Jarrell and the deed from H. A. Dunbar to Michael S. Lilly and Isabella Lilly, and awarding Courtney, Crawford, and Ashby a writ of possession against such claimants, and decreeing that Courtney, Crawford, and Ashby pay W. S. Dunbar the purchase money for which the lien was reserved in the deed from W. S. Dunbar to said purchasers, and subjecting the land to sale therefor.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Afterwards H. A. Dunbar, Michael S. Lilly, Isabella Lilly, and W. H. Jarrell filed a bill of review, assigning errors of law in the said decree, and praying that the same be reversed. Courtney, Crawford, and Ashby entered a demurrer to the said bill of review, and a decree was pronounced sustaining said demurrer and dismissing the bill of review, from which decree H. A. Dunbar, Michael S. Lilly, Isabella Lilly, and W. H. Jarrell appeal.

The first point presented for our consideration is that the demurrer to the bill of review was well taken because it was filed more than two years after the decree, which decree was rendered December 22, 1905, and that the bill of review is barred by limitation. This contention is rested on the theory that though the Code until chapter 40, Acts 1909, reducing the limitation for a bill of review from three to one year, allowed a period of three years, yet that three-year limitation was reduced to two by the act changing the limitation upon an appeal from five to two years, the argument being that the statute reducing the limitation for an appeal to two years by implication changed the limit of a bill of review from three to two years; in other words, though the section of the Code allowing three years for a bill of review was not expressly repealed, yet it was so impliedly repealed, and no bill of review could be entertained, even before the act of 1909, after two years. To sustain this view we would have to overthrow *Dunfee v. Childs*, 45 W. Va. 157, 30 S. E. 102, holding that, notwithstanding the period of an appeal was two years, a bill of review could be entertained within three years. We are asked to reconsider and overthrow that case. We decline to reconsider that subject, not only on the principle of stare decisis, but also because there can now be but few cases in which the matter can be material, as time will soon bar bills of review to decrees anterior to the act of 1909, fixing the limit for bills of review at one year. The matter then is of little importance, except in this case and perhaps a few others. Besides, said chapter 40 gives three years as to decrees prior to its passage.

Coming to the merits of the case, we find that the original cause was a suit brought by W. S. Dunbar against Courtney, Crawford, and Ashby purely and only to enforce the lien for purchase money reserved in the deed from Dunbar to Courtney, Crawford, and Ashby. We find that parties claiming adverse titles to much of the land mentioned above are brought into this suit and their rights adjudicated, and their titles annulled, and their deeds canceled, and title to all the land declared to be in Courtney, Crawford, and Ashby paramount to the claim of other codefendants. A plain error consists in the fact that, in a suit between grantor and grantee having for its sole and only purpose the enforcement of a lien for pur-

chase money reserved in a deed for land, parties who are strangers to the transaction between grantor and grantee, strangers having no connection therewith, having adverse titles and claims, are brought into a suit upon a matter entirely foreign to their rights and claims, and their rights and claims adjudicated and destroyed. That deed made a contract between W. S. Dunbar and his grantees. The rights between them emanate from that deed only, a matter with which the adverse claimants have no connection, as that contract or transaction is confined to the parties to that deed. This right to bring in these strangers is predicated upon *Heavner v. Morgan*, 30 W. Va. 335, 4 S. E. 406, 8 Am. St. Rep. 55, asserting the right in such a suit to bring in such strangers and settle their rights; but that case has been pointedly overruled by *Miller v. Morrison*, 47 W. Va. 684, 35 S. E. 905. I shall not repeat the argumentation there found, but will simply say that the authorities there cited do negative the right of the parties in a suit for the enforcement of purchase money to bring in and pass upon the adverse rights of strangers. I will add the strong case of *Peters v. Bowman*, 98 U. S. 56, 25 L. Ed. 91, holding that such a trial of adverse title is foreign to a suit to enforce a vendor's lien reserved, because there is no equity between the adverse claimant and the parties to the deed. Indeed, equity has no jurisdiction to try adverse title, unless there be an equity between the plaintiff and the party claiming adversely to him. *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 910; *Johnston v. Jarret*, 14 W. Va. 235. If this is not so, then the right and title of these strangers would be settled in equity, and they deprived of a jury trial, and this cannot be. *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216; *Davis v. Settle*, 43 W. Va. 19, 26 S. E. 557. This is the general rule in equity; but in this case it is more especially applicable because only the rights between Dunbar and his grantees are involved, their contractual rights, and the rights of the stranger parties are entirely foreign to the matter of this suit and to the rights arising between Dunbar, the grantor, and Courtney, Crawford, and Ashby, his grantees under the deed between them.

The decree is erroneous for the additional reason that this bill was to enforce a lien only against certain interests in the land, not all the interests; but the decree gives Courtney, Crawford, and Ashby title to the entire 10 tracts of the Jarrell land. How could that be done in a suit to enforce a lien only against certain interests therein? The decree goes far beyond the scope of the suit.

I have considered the case as if the deed from W. S. Dunbar to Courtney, Crawford, and Ashby conveyed only the interest of Mary A. Cook in the Jarrell land. Under the indefinite pleadings, it is difficult to say whether this is so or not. In some re-

spects they justify that position and the parties in some respects so regard the deed; but the deed conveys not only that interest, but any other interest of Dunbar by a second item. It may be that this second clause in the deed was put in to shut out any further claim by Dunbar, not as intending to convey any more than the Cook interest, but as precautionary against any further claim by Dunbar to the prejudice of his grantees in the Jarrell land. If we regard the deed as conveying only the Cook interest, with what show of reason could the decree pass on other interests when the suit was only to sell one interest for its purchase money? How could the decree give title not only as against Dunbar, but other parties to the whole land and all interests therein? But if we regard the deed as conveying not only that Cook interest, but other interests, we can say that those other interests are not specified, and that the import of the pleadings is not that the sale covered all the interests in the land, but only some of them. Then there could not be a decree conferring title to all upon Courtney, Crawford, and Ashby in a suit to sell for purchase money for part only, and give title to all the land to the destruction of any right which those adversary parties might have.

Counsel for the appellant make the point that Courtney, Crawford, and Ashby could not set up against Dunbar any defense of defective title to defeat the claim for purchase money, because the deed conveyed only the right, title, and interest of Dunbar, and though it contained a general warranty and a covenant for further assurance that warranty does not operate at all because only right, title, and interest were conveyed, not the land itself; citing *Hull v. Hull*, 35 W. Va. 156, 13 S. E. 49, 29 Am. St. Rep. 800, and *Reynolds v. Shaver*, 59 Ark. 299, 27 S. W. 78, 43 Am. St. Rep. 36, and *Wynn v. Harman*, 5 Grat. (Va.) 158, 164, and *Kent v. Watson*, 22 W. Va. 462, and *Harrick v. Patrick*, 119 U. S. 158, 7 Sup. Ct. 147, 30 L. Ed. 396. And a covenant for further assurance applies to no other estate than that conveyed in the deed already made. *Uhl v. Railroad*, 51 W. Va. 107, 41 S. E. 340. Counsel say that as, for this reason, these purchasers could not defend for bad title, it follows that they could not bring in these adverse claimants and their titles. There is some force in that argument; but it strikes me that that is a matter between Dunbar and his grantees. Dunbar might say that he did not guarantee title; but we are not passing on the rights between Dunbar and his grantees, and it occurs to me that that matter is one arising only between them. What have these strangers to do with that?

It is hardly necessary to say that the decree cannot be vindicated on the theory that the answer of Courtney, Crawford, and Ash-

by is to be regarded as a cross-bill against H. A. Dunbar and other adverse new parties. If, as we have shown, Dunbar could not bring into this suit the rights of strangers claiming adverse title, for like reason a cross-bill answer could not do so. Another reason is that the suit is only for purchase money, not involving in the slightest degree the rights of those adverse claimants, and a cross-bill must relate to a matter properly involved in the suit. *Hogg's Eq. Proceed.* § 191; *Hansford v. C. & O. Coal Co.*, 22 W. Va. 70, 75; *Peters v. Case*, 62 W. Va. 33, 57 S. E. 733, 13 L. R. A. (N. S.) 408.

It might occur to the mind that as H. A. Dunbar and other adverse claimants suffered the amended bill, alleging badness of their title, to be taken for confessed, they cannot complain; but there is no force in this, because taking everything to be true as appeared in the pleadings, still there could be no decree against these hostile claimants. Their rights were foreign to the matter legally involved in the suit. Chapter 134 of the Code allows a person injured by error of law by a decree by default to reverse it on motion, as he could do by appeal but for that chapter. A bill which does not entitle the plaintiff to any relief in law on its facts against the party, though taken for confessed, does not call for relief and it is reversible error to adjudicate it.

For these reasons, we reverse the decree pronounced upon the bill of review on the 22d day of December, 1908, and we overrule the demurrer to that bill of review; and we reverse so much of the decree in the main cause of W. S. Dunbar against D. G. Courtney and others pronounced on the 22d day of December, 1905, as declared that the title of D. G. Courtney, E. T. Crawford, and W. L. Ashby to the lands described in the record is superior and paramount to any claim or title thereto of H. A. Dunbar, Michael S. Lilly, and Isabella Lilly, his wife, and William H. Jarrell, and annuls the deed from Henry A. Dunbar and wife to W. H. Jarrell, dated January 7, 1904, recorded in the county clerk's office of Raleigh county in Deed Book No. 28, p. 150, and the deed from Henry A. Dunbar and wife to Michael S. Lilly and Isabella Lilly, his wife, dated February 3, 1908, recorded in said office in Deed Book No. 28, p. 184, and that clause of said decree awarding to said Courtney, Crawford, and Ashby a writ of possession against H. A. Dunbar, Michael S. Lilly, Isabella Lilly, and William H. Jarrell, and we dismiss the case as to H. A. Dunbar, Michael S. Lilly, Isabella Lilly, and William H. Jarrell without prejudice to the rights of any of the parties in any other suit in which they may be involved.

And this cause is remanded to the said circuit court for further proper proceedings.

(87 W. Va. 508)

**ASHLAND COAL & COKE CO. v. HULL
COAL & COKE CORPORATION.**(Supreme Court of Appeals of West Virginia.
May 10, 1910.)*(Syllabus by the Court.)***1. CONTRACTS (§ 278*)—WAIVER OF BREACH—
ACCEPTANCE OF PART PERFORMANCE.**

Although a condition precedent in a contract must be fully performed, in order to bind the opposite party to performance of his reciprocal obligation, acceptance of performance of only a substantial part thereof precludes reliance upon the breach as matter justifying repudiation or discharge of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1207; Dec. Dig. § 278.*]

**2. CONTRACTS (§ 227*)—WAIVER OF BREACH—
ACCEPTANCE OF PART PERFORMANCE.**

Partial interruption, for a time, of a continuous duty, imposed by a contract, amounting to a breach of a condition precedent, is unavailing as ground of repudiation, if such partial performance has been accepted until the period of interruption has ceased.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1039; Dec. Dig. § 227.*]

**3. CONTRACTS (§ 227*)—WAIVER OF BREACH—
ACCEPTANCE OF PART PERFORMANCE.**

Under such circumstances, waiver of the breach, to the extent aforesaid, follows as matter of law, and is not a mere question of intent for jury determination.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1039; Dec. Dig. § 227.*]

**4. CONTRACTS (§ 271*)—SUSPENSION OF PER-
FORMANCE—ELECTION BETWEEN CANCELLA-
TION AND ACCEPTANCE.**

A clause in a contract between a coke producing company and its sales agent, providing that, for certain specified causes, deliveries thereunder may be suspended or partially suspended, or, at the option of the party not in default, may be immediately canceled, during the period of such interruption, by immediate notice to that effect, contemplates partial performance, under such circumstances, in the absence of cancellation, and imposes upon the party not in default the duty of election between cancellation and acceptance of partial performance, on the happening of the contingency or as soon thereafter as may be practicable.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1190; Dec. Dig. § 271.*]

**5. CONTRACTS (§ 270*)—SUSPENSION OF PER-
FORMANCE—ELECTION BETWEEN CANCELLA-
TION AND ACCEPTANCE.**

Such clause does not authorize cancellation for all time, but only during the period of interruption.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 270.*]

**6. CONTRACTS (§§ 303, 312*)—BREACH—RIGHTS
OF OTHER PARTY.**

Failure of full performance, due to causes other than those specified in such clause, amounts to a breach, but, if the opposite party induced or caused such breach by its own default, it can take no advantage of it.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. §§ 303, 312.*]

**7. SET-OFF AND COUNTERCLAIM (§ 35*) —
CLAIM FOR UNLIQUIDATED DAMAGES.**

A claim for unliquidated damages is not available as a set-off.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 58-64; Dec. Dig. § 35.*]

**8. SET-OFF AND COUNTERCLAIM (§ 35*) —
CLAIM FOR UNLIQUIDATED DAMAGES.**

Such a claim may be proved in reduction or bar of the plaintiff's demand, if it grows out of the contract on which the plaintiff sues, but no recovery over in favor of the defendant can be had thereon.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 58-64; Dec. Dig. § 35.*]

*(Additional Syllabus by Editorial Staff.)***9. TRIAL (§ 192*) — INSTRUCTIONS — ASSUMP-
TION OF ADMITTED FACT.**

The assumption of an admitted fact in an instruction is permissible.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.*]

**10. SET-OFF AND COUNTERCLAIM (§ 1*)—DEFTI-
NITION—"DEBT."**

A set-off is a "debt" due defendant from plaintiff.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1864-1886; vol. 8, p. 7628.]

Error to Circuit Court, McDowell County.

Action by the Ashland Coal & Coke Company against the Hull Coal & Coke Corporation. Judgment for plaintiff and defendant brings error. Reversed and remanded.

A. W. Reynolds and Lucien H. Cocke, for plaintiff in error. Anderson, Strother & Hughes, for defendant in error.

POFFENBARGER, J. The refusal of certain instructions, asked for by the defendant, and the giving of an instruction, prepared and given by the court, in lieu of those requested, constitute the grounds of complaint on this writ of error.

The Ashland Coal & Coke Company sued the Hull Coal & Coke Corporation, in assumpsit, for about \$2,800, the price of coke sold to the latter in the months of June and July, 1906. The defendant claimed, by way of set-off, \$1,362.34, as commission on certain other coal, and, by way of recoupment, \$2,575.37, both of which cross-claims grew out of an alleged breach of contract on the part of the plaintiff. The jury disallowed both, and rendered a verdict for the full amount of the claim of the plaintiff.

The contract involved was made about the 1st of February, 1906, and is evidenced by two letters, one written by Frank A. Hill, president of the Hull Coal & Coke Corporation, dated February 3, 1906, proposing, on behalf of said corporation, to act as sales agent for the coke manufactured by the Ashland Coal & Coke Company from February 1, 1906, until October 1, 1906, and to take and dispose of the entire output of said company's plant on a commission of 8 per cent. on the selling price of the coke on board the cars at the ovens, guaranteed to be not less than \$1.85 per ton of 2,000 pounds, and to guarantee all accounts and remit in cash on the 25th of each month for all coke passing over the scales during the previous month;

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and the other, dated March 5, 1906, accepting said proposal. Said first letter contained the following additional provision: "Our usual strike, accident and transportation clause which reads as follows to mutually govern: 'In case of strike, accident, deficient transportation or other cause, unavoidably causing stoppage or partial stoppage of the work of the manufacturer of this coke, or of its shipment, or in case of accidents unavoidably causing stoppage or partial stoppage of the works of the buyer, deliveries herein contracted for may be suspended or partially suspended, as the case may be, or, at the option of the party not in default, may be immediately canceled during the continuance of such interruption by immediate notice to that effect given to the other party.'" Whether technically the defendant was a sales agent or a purchaser of the coke is an immaterial question, since it does not deny its liability for the price of the coke sued for. Its answer to the demand of the plaintiff is a claim of recoupment, founded upon the alleged breach of the contract.

In the months of February, March, and April, 1906, the contract was observed and complied with by both parties; but, in May of that year, the defendant was unable to handle the entire output of the plaintiff's plant. This disability continued through the month of June. As to whether it was able to take all the coke contracted for in July is a controverted matter, and constitutes the crucial question in the case. About May 1st the defendant lost a large contract with the Algoma Steel Company at Sault Ste. Marie. Some time after that, an accident happened to the plant of another customer at Roanoke, Va. These adversities seem not to have been reported to the plaintiff at once, but the requisitions for coke from its plant fell off greatly, with the result that many of its ovens had to be put out and its force of laborers greatly reduced. However, it continued to deliver such quantities of coke as the defendant called for, and never ceased to do so until about July 24th. In February the defendant took 190 cars, in March 261, in April 218, in May 60, and in June 104. The plaintiff had, at its two plants, Ashland and Monitor, 410 ovens, of which the largest number in operation at any time was 260. These were reduced from time to time until the number in blast fell to 64. This is said to have been attended by a loss of from \$5,000 to \$10,000 a month. No notice of any intention to cancel or repudiate the contract was given, however, and the plaintiff continued to take the benefit of it, as has been stated. It was advised of the embarrassment under which the agent company was laboring. On May 7th, it addressed an inquiry to the agent company as to why it was not receiving orders for its output of coke, saying "we are burning only 175 ovens at present, but you are furnishing us with orders for only 50." This letter was replied to on May 10th, and the loss of the Algoma

contract reported, with the additional information that another company had defeated the Hull Corporation by cutting the price 10 to 15 cents, and representing superiority of their coke. The following further statement in this connection was made: "It is not hard for them to convince the Soo people of this fact, as when we made claim for our coke being of as high quality as the other people they showed us continuous analyses of coke from two of our plants which we had been shipping them there, the ash for days ran as high as 15 per cent. This has temporarily reduced our coke shipment. We, however, expect to close a business tomorrow of equal volume to that which we have lost, and, should we be successful in this, we will at once advise you, and it will not be necessary to put out any more ovens; in fact it would almost be necessary to put in some additional ovens to obtain the output." On June 13, 1906, the Hull Corporation reported the accident to the Roanoke furnace, and then said: "Our sales for shipment after July 1st, as of to-day, would indicate an output from your oven of five to seven cars daily unless we should be able to increase our sales between now and July 1st. This, of course, we expect to do. Until July 1st, the indications are that we will have to live from hand to mouth and the tonnage we can take from will be very uncertain." They also sent the result of an analysis of coke shipped in April, made by the Algoma Steel Company people, showing 17.17% ash, an amount considerably in excess of that allowed in Standard Pocahontas coke which the plaintiff had agreed to furnish. The record discloses no intimation of intention on the part of the plaintiff to cancel or repudiate the contract on account of the breach thereof by the defendant, after the receipt of this information, until July 25th. As we have stated, it furnished 104 cars in June, and from July 1st until July 24th, when it ceased to make deliveries, it furnished 61 cars, but there is evidence tending to show more were demanded of it in July.

In the meantime, without the knowledge of the Hull Corporation, the plaintiff entered into negotiations with the Norton Iron Works, of Ashland, Ky., through an agent, for the sale of its coke to that company, which culminated in a contract for the entire output of the plant, bearing date June 20, 1906, but it is admitted that it was not actually signed until August 1, 1906. W. A. Phillips, president of the Ashland Coal & Coke Company, said in his testimony: "I think the contract had been entered into on July 20th, but had not been signed until Aug. 1st. The mistake was made in placing June instead of July, the earlier date." Said company, on July 25, 1906, formally notified the defendant that it had sold the product of its ovens to the Norton Iron Works and could not ship any more to the Hull Corporation. Thereafter it ceased to do so and sold all of its coke to the Norton Iron Works. It is on the coke so sold

that the defendant claims a commission of 8 per cent.

As to the situation of the defendant and its relation to the plaintiff from July 1st until July 25th, there is conflict in the testimony. The former claims that, relying upon the silence and acquiescence of the latter, with full notice to the plaintiff of the circumstances, causing embarrassment, and its intention to relieve the situation by securing new contracts, it did secure them, and was in a condition on or before July 25th to take the entire output of the plaintiff's ovens, and, from July 1st until July 25th, made requisitions upon it covering the entire output of the plant, and gave shipping directions for all of the cars the latter reported as having been received and loaded. It continued, through the months of July, August, and September, to send in its written requisitions, which were ignored. The plaintiff says these requisitions were not made in good faith, but simply to bolster up a claim. It denies that the defendant had any customers for the coke, and says these requisitions named nobody as consignees, wherefore no shipments could be made under them. Some of its agents say in their testimony they repeatedly called up Mr. French, the agent of the defendant, and asked him for shipping directions which he was unable to give. On the other hand, Mr. French testifies to the number of cars for which he gave consignments from June 22d to June 30th, and closes by saying: "On June 30th we consigned three cars that were loaded by the Ashland Coal & Coke Company on the 27th of June, which, according to the records furnished us by the Ashland Coal & Coke Company were the last unconsigned cars on their yards." He then stated facts tending to show, and claimed, that all the coke loaded in June had been removed on July 2d except seven cars, and said they were consigned. He then stated what occurred in July, and said the Ashland Company reported 19 loaded cars on their tracks on July 10th, but they had been tagged for shipment, and were allowed to stand there by the railroad people, and that on July 12th they reported the receipt of 10 empties and the loading of 4, leaving on hand 6 empties and 9 loaded cars. He then said: "After that date they were evidently shipping to other parties and did not give us this information, though we were demanding that our orders be filled." In his testimony in chief, he said that, on discovering that his orders were not being filled, he went to the office of the Ashland Company, and demanded of Mr. Phillips, their manager, Mr. O'Neal, their superintendent, and Mr. Babb, their bookkeeper, the filling of his orders. He further says he gave them information that his company needed coke, and asked them to increase their shipments, and says he urged them to prepare to increase their output. He says that, in the effort to obtain coke from them, he visited their plant on July 7th, 11th, and 13th, and

made a vigorous protest against their shipping to other parties, adding, "I found out they had quite a number of cars billed to other parties than ourselves, and I demanded that they destroy the tags on the cars consigned to other parties than ourselves, and to tag the cars in conformity with our requisitions."

After the introduction of all the evidence, the defendant asked the court to instruct the jury (1) that the letter of July 25, 1906, was an effort to cancel the contract, and that, in so doing, the plaintiff broke its contract, if the jury should believe that, on that date and prior thereto, the parties had been executing the contract, and at that time the defendant was tendering and ready and willing and able to tender orders for coke sufficient to cover the output of the ovens; (2) that, if the jury should find for the defendant, they could assess in its favor such damages as would compensate it for losses resulting from the breach of the contract by the plaintiff, whether such losses consisted of advanced prices, paid for coke by the defendant, to fill its contracts, made on account of coke the plaintiff was to furnish, or loss of commission on coke sold by the plaintiff to other parties than the defendant; (3) that, if the jury believed the defendant had failed to comply with its contract prior to June 13, 1906, and that the plaintiff was informed of this fact on or about that date, and that said failure would continue until July 1st, and, after that date, the defendant would be able to take from five to seven cars per day, and the plaintiff accepted such information, and continued thereafter to take the benefit of the contract, and led the defendant to believe the promise of its letter was satisfactory, such acts constituted a waiver on the part of the plaintiff, and that if they believed the defendant was ready, willing, and able to furnish orders during the month of July and thereafter for five to seven cars per day, and the plaintiff was informed of that fact, the action of the plaintiff on July 25th constituted a breach of the contract; (4) that the defendant was entitled to a commission of 8 per cent. on the coke sold to the Norton Iron Works and persons other than the defendant or its consignees, during the time covered by the contract, February 1, 1906, to October 1, 1906, if the jury believed such sales had been made by the plaintiff, and the defendant had made contracts for the sale of said coke and was demanding delivery thereof by the plaintiff on its orders and consignments; (5) that, if the jury believed the defendant, before notice from the plaintiff of its intention to cease to make deliveries of coke under the contract, the defendant was demanding delivery thereof, and, under the belief that the plaintiff would continue to observe its contract, had made contracts for the sale of the coke to be delivered to it by the plaintiff, and, by reason of the breach of the contract on the part of the plaintiff, the defendant had

been compelled to buy coke from other parties to enable it to comply with its own contracts, made as aforesaid, at a price greater than it received for the same, the plaintiff was liable to the defendant for the difference between the prices it paid and the prices received for such coke, and the defendant entitled to offset such damages against the account sued on; (6) and "that if they believe from the evidence in this case that the defendant did not furnish to the plaintiff sufficient orders to cover all the coke manufactured by it, or which it was able and desired to manufacture during the months of May, June, and the early part of July, 1906, and further believe from the evidence that on the 25th day of July, when the plaintiff informed the defendant of its intention to cease delivery of the coke under the contract sued on in this case, the defendant had secured contracts for and was demanding the delivery of all the coke that the plaintiff was then making, and was able and desired to make between that date and the first day of October, 1906, then the failure of the defendant during the months of May, June, and the early part of July, 1906, to furnish sufficient orders to the plaintiff for its coke as aforesaid, did not give the plaintiff the right to cancel and refuse to comply with the said contract on and after the 25th day of July, 1906."

The court refused all of these instructions and gave one, prepared by itself, embodying, in a general way, practically all that is included in those rejected, and covering nearly two pages of the printed record. It is not separated into paragraphs nor even sentences, and is very much involved. We will not undertake to analyze it fully. It suffices to point out one fatal defect in it, and to show which of the instructions, requested by the defendant, should have been given.

In lieu of the defendant's sixth instruction, above quoted, the court inserted this in its instruction: "And that such breach was not waived by the plaintiff." The difference between the two instructions on the subject of waiver is manifest. The one requested by the defendant sets forth hypothetically the facts and tells the jury that, if they find they are established, the plaintiff has waived the breach, committed by the defendant, and cannot rely upon it as matter of defense to the claim of recoupment. Sometimes a waiver is a mere matter of intention, a fact to be ascertained by the jury; but it is not always so. It is often a mixed question of law and fact, and, when it is, the court, if asked to do so, should submit only the questions of fact to the jury, and declare the law thereon itself. The instruction on this question, prepared by the court, submits to the jury both the law and the facts. The one asked for by the defendant would have submitted the questions of fact only, and it should have been given, if it embodies in the hypothetical statement all of the elements necessary to

constitute a waiver. Reading it in the light of the evidence, we think it does. That the plaintiff continued to take the benefit of the contract, as far as the defendant was able to perform it, through the months of May and June and up into the month of July, is an uncontroverted fact. In its bill of particulars and the testimony of its witnesses, the plaintiff claims from the defendant the purchase money of coal delivered as late as July 23d, and possibly July 24th. This instruction does not affirmatively and positively state this salient and vital fact in the case, but it is therein embraced by implication in two places. It says this: "And further believe from the evidence that on the 25th day of July, when the plaintiff informed the defendant of its intention to cease deliveries of coke"—which carries the necessary implication that deliveries had continued up until that time. The like implication is found in this clause: "Then the failure of the defendant during the months of May, June, and the early part of July, 1906, to furnish sufficient orders to the plaintiff for its coke as aforesaid." The assumption of an admitted fact in an instruction is always permissible. Indeed, it would be wrong to submit it to the jury as a matter in controversy. *Blashf. on Instruct.* § 36, citing numerous decisions. If it could be said this material fact has been omitted from the instruction, no possible injury or prejudice could flow from the omission, so far as we are able to see. Both parties say it is true. The plaintiff's claim is founded upon it as true, and the defendant admits it. Can it be supposed, for an instant, that the jury could overlook it or that it could escape their attention? However this may be, it has not been omitted. Though informal and only impliedly expressed, it is included in the instruction as a concession.

If the plaintiff had desired to do so, no doubt it could have suspended the contract on the failure of the defendant, for the reasons disclosed by it, to take the product of the plant. The contract contemplated it by giving to the party not in default the alternative right of cancellation, during the continuance of an interruption, by immediate notice to that effect, but that would have been mere suspension, during the period of the interruption, founded upon a cause, specified in the contract. This clause, therefore, cannot be construed as precluding right of repudiation for a breach of the contract, a failure to take the product of the plant, not justified by such cause. But as the instructions we are now considering assume or concede, for their purposes, the nonexistence of such cause, this phase of the case turns on the ability of the defendant to take the output of the plant, when the plaintiff gave notice of renunciation or repudiation. Hence the construction of the strike clause will be deferred for the present. It seems clear that the plaintiff, after having taken the benefit of the contract to the extent of the ability

of the defendant to perform it, with full knowledge of the nonperformance and the conditions relied upon by way of excuse therefor, could not, after the breach on the part of the defendant had ceased to exist, repudiate or cancel the contract on the ground of such past breach. Full performance by the defendant, or partial performance, justified by the cause specified, may have been originally a condition precedent, or the fulfillment of a dependent or concurrent promise or undertaking, but, if that be true, failure on the part of the plaintiff to avail itself of the breach or nonperformance thereof reduced it to a mere warranty, and rendered it no longer available as justification for nonperformance of the reciprocal obligation. "A condition precedent may change its character in the course of performance of the contract; and a breach that would effect a discharge, if treated as such at once by the promisee, ceases to be such, if he goes on with the contract and takes a benefit under it. Accordingly, if, after breach of a condition precedent, the promisee continues to accept performance, the condition loses its effect as such, and becomes a warranty in the sense that it can be used only as a means of recovering damages." Hammond on Contracts, p. 923; Clarke on Con. p. 466; Page on Con. §§ 1494-1506; 9 Cyc. 646; 7 A. & E. Enc. Law, 152. This principle is well stated in Wiley v. Athol, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342, in the following terms: "But although conditions precedent must be performed, and a partial performance is not sufficient, yet when a contract has been performed in a substantial part, and the other party has voluntarily accepted and received the benefit of the part performance, knowing that the contract was not being fully performed, the latter may thereby be precluded from relying upon the performance of the residue as a condition precedent to his liability to pay for what he has received, and may be compelled to rely upon his claim for damages in respect of the defective performance." To the same effect see Lyon v. Bertram, 20 How. 149, 15 L. Ed. 847; Withers v. Green, 9 How. 213, 13 L. Ed. 109; Thornton v. Wynn, 12 Wheat. 183, 6 L. Ed. 595; Perley v. Balch, 23 Pick. (Mass.) 283, 34 Am. Dec. 56; Burnett v. Stanton, 2 Ala. 183; Kase v. John, 10 Watts (Pa.) 107, 36 Am. Dec. 148; Kenworthy v. Stevens, 132 Mass. 123. The principle was applied under conditions similar to those presented here in Mill Dam Foundry v. Hovey, 21 Pick. (Mass.) 417, in which it is said and held: "That although an interruption of the mill power might be construed to be the breach of a condition precedent, which would authorize the defendant to break off from the performance of his contract, yet if he continued in the performance until the power was re-established, this would amount to a waiver, and he would no longer be excused from further performance; although, if he had suffered loss by

the delay in furnishing the power, he would have a remedy by an action for damages."

Under this principle, waiver follows as matter of law, if the facts conditionally assumed in the instruction are true. Hence, the refusal of said instruction and failure to give a proper one on the subject-matter thereof constitute error to the prejudice of the defendant, for which the judgment will have to be reversed and a new trial allowed.

The same principle sustains defendant's instructions Nos. 1 and 5. All the others were properly refused. Nos. 2 and 4 are bad for lack of a limitation on the amount of the damages claimed by way of recoupment. Neither of these claims is a set-off. A set-off is a debt due the defendant from the plaintiff. Case Mfg. Co. v. Sweeny, 47 W. Va. 638, 35 S. E. 853; Clark's Cove Guano Co. v. Appling, 38 W. Va. 470, 10 S. E. 809; Harrison v. Wortham, 8 Leigh (Va.) 296; Robertson v. Hogshhead, 3 Leigh (Va.) 667; Christian v. Miller, 3 Leigh (Va.) 78, 23 Am. Dec. 251. Unliquidated damages cannot be the subject of a set-off. The loss of commission by reason of plaintiff's alleged breach of the contract is a claim of that kind. The commissions were not earned. The defendant did not sell the plaintiff's coke to the Norton Iron Works, on account of which the commissions are claimed. Therefore, the claim is for unliquidated damages, arising out of an alleged wrongful prevention of gain or profit the defendant would have earned, if it had been permitted to make the sales. Such damages, like those embodied in the other claim, constitute mere matter of defense, going to reduce or bar recovery, but affording no basis for a verdict or judgment over in favor of the defendant. Gas Co. v. Healy, 33 W. Va. 102, 106, 10 S. E. 56; Baltimore, etc., Co. v. Bitner, 15 W. Va. 455, 464, 36 Am. Rep. 820; Baltimore, etc., Co. v. Jameson, 13 W. Va. 833, 838, 31 Am. Rep. 775.

Instruction No. 3 embodies defendant's interpretation of the suspension or strike clause, and claims the benefit thereof under a state of facts hypothetically submitted to the jury. For the purpose of testing the correctness of this instruction and settling the principles of the case for the new trial, it becomes necessary to construe this clause. We think it gives right to the party not in default, in the case of an accident of any of the kinds therein mentioned, not to cancel the contract wholly and for all time, but only during the period of the interruption. This accords with the letter of the clause. It says immediate notice of cancellation shall be given, if such party desires to cancel. This negatives the right to cancel by notice at any time such party may see fit to do so, within the period of interruption. The desire to cancel must be communicated immediately on the happening of the interruption or as soon as may be practicable thereafter. The party having such right must elect at the beginning of the period whether he will cancel or take partial per-

formance. Then the clause says the contract may be canceled during the period of interruption, which excludes the idea of a cancellation for all time. Partial performance, however, is not optional with either party. It is justified only by the causes specified. Partial performance not justified in that way is a breach of the contract. When there is justifiable partial performance, it does not alter the contract nor confer any right of alteration. All of this is within the contract. It is provided for by it. Just what considerations induced the insertion of this provision in the contract, we do not know, but it is easy to perceive some upon which it may have been founded. Partial performance on the part of one company might, under certain circumstances, become very embarrassing to the other. The producing company might find the closing of its plant decidedly more economical than partial operation during the period of interruption; or it might have an opportunity to dispose of its entire product to some person other than the agent, during such period, but no chance to dispose of a portion of it while bound to deliver the other part to the agent. Similar considerations might make this right of suspension highly valuable to the agent company. Every word, phrase, and clause in a contract must have some force and effect, and there is a presumption that the parties inserted them for reasons sufficient and satisfactory to themselves, whether the court is able to see them or not.

Instruction No. 3 adopts the erroneous view that the letter of June 13, 1906, indicating probability of capacity to take no more than five to seven cars per day after July 1st, and failure of the plaintiff to reply thereto or indicate, in any way, its dissatisfaction with the prospect, amounted to a modification of the contract, and relieved the defendant of its obligation to take more than that quantity of coke after July 1st. When that letter was written, the defendant was operating under the suspension clause, without any notice of a desire on the part of the plaintiff to suspend the contract during the period of interruption. It was bound to exert itself to overcome the difficulties causing the interruption and put itself in a situation, as soon as possible, to take the entire output of the plaintiff's plant. Its partial performance was justified only during the period of its inability to render full performance, and if it was able to take all the coke that the plaintiff could produce after the first of July, or, by the exercise of reasonable diligence, could have been able to do so, but was not, it was bound to take it in the one instance, and its refusal to take it, in the other, amounted to a breach of the contract. Therefore we think this instruction was properly refused.

In conformity with our interpretation of this clause, we are of the opinion that the loss of the Algoma Steel Company contract

was not one of the causes of interruption specified as justifying partial performance, if such loss resulted from underbidding by a competing company, and failure on the part of the defendant to take all of the plaintiff's coke, due to such loss, constituted a breach of the contract, justifying renunciation thereof by the plaintiff. But, if the loss of that contract was due to bad quality of coke, produced by the plaintiff, it would be estopped to set up the loss of that contract as justification for repudiation. A party to a contract is not discharged by a breach, occasioned by its own failure of duty. Again, if failure resulted from loss of said contract by underbidding only, the plaintiff waived the breach by continuing to take the benefit of the contract, after notice, provided the defendant was ready to take the entire output of the plant, when the plaintiff attempted to renounce the contract. On the other hand, we think the accident to the Roanoke Furnace Company, causing partial failure of performance on the part of the defendant, was one of the causes specified in the contract. That clause says "accidents unavoidably causing stoppage or partial stoppage of the works of the buyer" may suspend or partially suspend deliveries, in the absence of notice to completely suspend during the period of interruption, given by the party not in default. The Hull Coal & Coke Corporation was not the buyer within the meaning of the contract. It was designated therein as agent to sell the coke to other persons, and guarantee and collect from them the purchase money. Plainly, its customers were the persons referred to as buyers.

Our conclusion is that the court erred in refusing defendant's instructions Nos. 1, 5, and 6, and in giving its own charge to the jury, from which it follows that the judgment must be reversed, the verdict set aside, and the case remanded for a new trial.

(34 S. C. 60)

STATE v. HENDRIX.

(Supreme Court of South Carolina. May 14, 1910.)

1. CRIMINAL LAW (§ 1059*)—APPEAL—EXCEPTIONS—SUFFICIENCY.

An exception to a charge, which merely quotes the charge without assigning any specific error, is too general for consideration on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2671; Dec. Dig. § 1059.*]

2. CRIMINAL LAW (§ 824*)—INSTRUCTIONS—REQUESTS—NECESSITY.

Where an indictment contained a count for burglary and a count for larceny growing out of the same transaction, a charge authorizing a general verdict of guilty or not guilty, without specifying the offense, was not erroneous, in the absence of a requested charge requiring the verdict to specify the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2003; Dec. Dig. § 824.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Index.

3. CRIMINAL LAW (§ 1059*)—APPEAL—EXCEPTIONS—SUFFICIENCY.

An exception that the court erred in not charging the law applicable to the issues as required by Const. art. 5, § 26, requiring judges to declare the law, is too general for consideration on appeal, because it fails to specify in what particular there was error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2671; Dec. Dig. § 1059.*]

4. CRIMINAL LAW (§ 824*)—INSTRUCTIONS—REQUESTS—NECESSITY.

Where the court substantially charged the law applicable to the case, if accused desired a further charge, he must prepare requests to that effect.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1996; Dec. Dig. § 824.*]

Appeal from General Sessions Circuit Court of Barnwell County; Geo. W. Gage, Judge.

Frank Hendrix was convicted of crime, and he appeals. Dismissed.

The following are the exceptions:

"(1) Because his honor erred in charging the jury as follows: 'And then there is a second count, which charges him with stealing a gun worth \$7. That is only petit larceny, and the penalty for that is only 30 days' imprisonment. You have heard the testimony, gentlemen, if you are satisfied that he broke into the house and stole, say so, and if you think the punishment too severe, you may recommend him to the mercy of the court. You may write one of two verdicts: 'GUILTY,' or 'GUILTY with recommendation,' or, of course, 'Not guilty,' and sign your name as foreman to the verdict.'

"(2) That the circuit judge erred in charging the jury that they might write one of two verdicts—that is, 'GUILTY,' or 'GUILTY with recommendation,' or, of course, 'Not guilty'—in that under such charge the jury was misled into failing to specify the specific offense on which they found the defendant guilty. Such verdict being responsive to both counts in the indictment, and the court having failed to instruct the jury that they might acquit the defendant on the first count and convict him on the second count alone, they were misled into finding a general verdict of guilt, even if they found from the facts that the defendant was guilty of the second count only.

"(3) Because the judge erred in not charging the law applicable to the issues raised by the second count in the indictment, in that, the jury could convict or acquit the defendant on the said second count, thereby ignoring the said second count in the indictment, all of which deprives the defendant of having his issues in his said case fully passed upon by the jury and court, which were prejudicial to his case, for the reason, had the jury acquitted on the first count and convicted on the second count, the punishment and fine would have been very much lighter, only 30 days or \$100 at the greatest.

"(4) Because the judge erred in not charging the law applicable to the issues in the in-

dictment, as required by the Constitution of 1895 (article 5, § 26), which provides: 'Judges shall not charge juries in respect to matters of fact, but shall declare the law.' All of which, it is respectfully submitted, he failed to do in this case, as is shown by reference to his said charge."

A. H. Ninestein, for appellant. James F. Byrnes, Sol., for the State.

GARY, A. J. The defendant was convicted under an indictment containing two separate counts—one for burglary and the other for larceny—growing out of the same transaction. The verdict of the jury was simply "GUILTY." The defendant was sentenced to imprisonment for a term of five years, on the public works of Barnwell county, and he appealed from said sentence.

The first exception is too general for consideration, as it merely quotes from the charge of his honor the presiding judge, without assigning any specific error. The second exception is as follows: "That the circuit judge erred in charging the jury that they might write one of two verdicts—that is, 'GUILTY,' or 'GUILTY with recommendation,' or, of course, 'Not guilty'—in that under such charge the jury was misled into failing to specify the specific offense on which they found the defendant guilty. Such verdict being responsive to both counts in the indictment, and the court having failed to instruct the jury that they might acquit the defendant on the first count, and convict him on the second count alone, they were misled into finding a general verdict of guilt, even if they found from the facts that the defendant was guilty of the second count only." In the case of *State v. Smith*, 57 S. C. 489, 35 S. E. 727, the defendant was tried under an indictment charging him, in separate counts, with two offenses growing out of the same act. The jury rendered a general verdict of guilt. He appealed from the sentence on exceptions, two of which were as follows: "(16) Because his honor erred in not instructing the jury that they could convict under one count, and acquit under the other. (17) Because his honor erred in not, at least, instructing the jury to pass upon each count separately." In disposing of the said exceptions, the court thus ruled: "There was no request that the jury should be instructed, as it is claimed they should have been, in exceptions 16 and 17, and hence the omission to so instruct the jury cannot properly be regarded as reversible error." This exception and the third, which raises practically the same question, are therefore overruled.

The fourth exception is as follows: "Because the judge erred in not charging the law applicable to the issues in the indictment, as required by the Constitution of 1895 (article 5, § 26), which provides: 'Judges shall not charge juries in respect to matters of fact,

but shall declare the law.' All of which, it is respectfully submitted, he failed to do in this case, as is shown by reference to his said charge." This exception is too general for consideration, as it fails to specify in what particular there was error. We may say, however, that his honor the presiding judge substantially charged the law applicable to the case; and, if the appellant desired a further charge, it was incumbent on him to prepare requests to that effect. *State v. Adams*, 68 S. C. 421, 47 S. E. 876; *Jennings v. Mfg. Co.*, 72 S. C. 411, 52 S. E. 113; *Williams v. Railway*, 76 S. C. 1, 56 S. E. 652; *State v. Thompson*, 76 S. C. 116, 56 S. E. 789; *Snipes v. Railway*, 76 S. C. 208, 56 S. E. 959; *Morris v. Ass'n*, 78 S. C. 398, 59 S. E. 27; *State v. Chastain*, 87 S. E. 6. This exception is overruled.

It is the judgment of this court that the appeal be dismissed.

(86 S. C. 73)

SIMMONS v. OKEETEE CLUB et al.

(Supreme Court of South Carolina. May 14, 1910.)

PRINCIPAL AND AGENT (§ 123*) — ACTIONS AGAINST PRINCIPAL—EVIDENCE AS TO AUTHORITY OF AGENT.

In an action against a principal and its agent for damages caused by the agent's shooting plaintiff, evidence held insufficient to show that the agent in shooting plaintiff was acting within the apparent scope of his authority.

[Ed. Note.—For other cases, see *Principal and Agent*, Dec. Dig. § 123.*]

Appeal from Common Pleas Circuit Court of Beaufort County; R. Withers Memminger, Judge.

Action by Frank Simmons against the Okeetee Club and W. D. Thomas. Judgment for defendants, and plaintiff appeals. Affirmed.

W. N. Heyward and Jervey & Cohen, for appellant. C. J. Colcock and Smythe, Lee & Frost, for respondents.

GARY, A. J. This is an action for punitive damages alleged to have been sustained by the plaintiff. The allegations of the complaint, material to the questions presented by the exceptions, are as follows: "That the defendant W. D. Thomas is an agent and servant of the defendant Okeetee Club, and as such is charged with the care and protection of the property of the said Okeetee Club, within the state of South Carolina. That on or about the 24th day of October, 1906, the defendant Okeetee Club, through its servants and agents, wantonly, willfully, and maliciously entered upon the lands of the plaintiff at or near Hardeeville, in said state, and erected thereon a fence, which said fence connected with a fence, the property of the said Okeetee Club, east and west of the land of the plaintiff. That thereupon, and on or about the 1st day of March, 1907, plaintiff,

because of threats against him made by the defendant W. D. Thomas and other persons as agents and servants of the Okeetee Club, was compelled to leave the tract of land before mentioned, and seek personal safety by leaving said property in the possession of a tenant. That thereupon the said Okeetee Club wantonly, willfully, and maliciously entered upon the said property, built a wire fence thereon, and otherwise attempted to exercise thereon acts of ownership. That being advised that this act of ownership might endanger his title to said tract of land, the plaintiff cut down and removed the fence, and otherwise asserted his right of possession; whereupon the defendant W. D. Thomas, as agent for the Okeetee Club as aforesaid, and in discharge of his duty to said Okeetee Club, and acting within the scope thereof, again threatened the plaintiff, saying that if he again cut and removed the before-mentioned fence, he (the plaintiff) would be killed. That thereupon the said fence was rebuilt by the said defendant, its servants and agents, and true it is that on the 3d day of April, 1907, it was removed again by the plaintiff, whereupon the said W. D. Thomas, as agent of the Okeetee Club, as aforesaid, in pursuance of his threat aforesaid, in discharge of his duty to said Okeetee Club, and acting within the scope thereof, on the said day and year, sought the plaintiff, and wantonly, willfully, and maliciously did shoot and wound him. That the plaintiff was twice shot by the defendant W. D. Thomas, as agent aforesaid, the plaintiff being unarmed, and was severely wounded in the head and body." At the close of the plaintiff's testimony, the defendant Okeetee Club made a motion for a nonsuit, on the following ground: "Because the testimony fails to connect the Okeetee Club, with the injury to the plaintiff, so as to make the Okeetee Club responsible therefor; in fact, the testimony fails to show that the injury to the plaintiff was due to the Okeetee Club, or to the acts of any of its agents or employes when acting within the scope of their authority." There was testimony to the effect that the fence was erected on lands belonging to the plaintiff; that the defendant Thomas granted permission to the Okeetee Club to put a fence over his line, connecting the two fences of the club; that the duly authorized servants of the club built the fence for its benefit; that the defendant Thomas was the agent of the club, and duly authorized to protect the property of the club, including the fence in question.

We proceed to consider whether there was any testimony tending to show that the shooting of the plaintiff by Thomas was within the apparent scope of his authority to protect the fence. The undisputed testimony showed that at the time of the shooting the fence had been cut by the plaintiff, who had re-

sumed work on the railroad, about 1,600 feet from where the fence stood; and of course he was not then attempting to injure the fence. The act of destroying the fence was then completely executed. If the testimony had shown that the shooting took place while the work of destruction was in fieri, the nonsuit would have been improper. But we fail to see what relation the shooting had to the protection of the property, as it could not be successfully contended that it would prevent the plaintiff in future from cutting the fence. Under such circumstances the court cannot hold that there was testimony tending to show that the shooting was within the implied authority of the agent.

Judgment affirmed.

(96 S. C. 69)

POLLARD v. FOUNTAIN INN OIL CO.

(Supreme Court of South Carolina. May 14, 1910.)

1. MASTER AND SERVANT (§ 286*)—INJURY TO SERVANT — NEGLIGENCE — QUESTION FOR JURY.

A manufacturer maintained a projecting set screw in a revolving shaft between a pulley and a post, in a space of about 11 inches. On the other side of the pulley there was a clear space of from three to four feet which was free from any danger. An employé attempted to work in the space between the pulley and the post, and was caught by the set screw and killed. The appliance was used by manufacturers of ordinary prudence and foresight. *Held*, that the manufacturer was not, as a matter of law, guilty of negligence in failing to furnish a reasonably safe place for his employes in which to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 219*)—INJURY TO SERVANT — ASSUMPTION OF RISK — OBVIOUS DANGERS.

The risk of going between the pulley and the post was incidental to the employment, and was plainly obvious to one of ordinary observation, and was assumed by decedent, who had been employed for two or three years, and who voluntarily selected a place of danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

Appeal from Common Pleas Circuit Court of Greenville County; S. W. G. Shipp, Judge.

Action by Mollie E. Pollard, as administratrix of Charles Pollard, deceased, against the Fountain Inn Oil Company. From an order of nonsuit, plaintiff appeals. Affirmed.

Cothran, Dean & Cothran, for appellant. Haynsworth, Patterson & Blythe, for respondent.

GARY, A. J. This is an appeal from an order of nonsuit. The facts are thus stated in the argument of the appellant's attorneys: "At the time of the accident, January 17, 1908, Charles Pollard, a young man 22 years old, was employed by the defendant to at-

tend to the tinters and cotton gins, in the defendant's oilmill and ginnery. On the morning of that day, he was directed to operate the gins, and when he started at this work he discovered that the lacing of the belt to one of the gins, which connected the pulley of the gin with a pulley attached to the shafting on the ground floor, directly underneath the gin, had been removed to supply a broken lacing upon a belt in the oilmill. This belt had to be repaired before the gin could be operated. At this time the belt was hanging loose on the gin pulley; one end lying on the floor of the ginnery and the other end on the ground floor beneath, near the pulley which was attached to the shafting which supplied the power. Two holes had been cut in the ginnery floor, directly under the pulley on the gin, through which the belt was intended to pass, and through one of these holes the belt then was. To get the two ends of the belting together for the purpose of lacing it, as the end lying on the ground underneath could not be reached and pulled up through the hole by one standing on the ginnery floor, which he did by means of a set of steps near the middle of the building, the landing place of which was within a few feet of the pulley on the ground floor, and the way thereto free and unobstructed, Pollard approached the belt, as it was hanging through the hole in the floor above, in the most direct route, and on the side of the shafting upon which it was hanging. He called to one of his friends to push the other end of the belt through the other hole in the floor, that he might catch it, draw it underneath the shafting, relace it, and adjust it to the pulley. A post to which the shafting was attached was about 11 inches from the pulley, and in this space the belt was hanging. Between the pulley and the post, in this 11-inch space, there was a 'collar' screwed to the shafting by two 'set screws,' the heads of which projected above half an inch. The shafting was revolving at the time, which made the projecting set screws practically invisible. As Pollard reached over the shafting to catch the loose end of the belt hanging on the opposite side, his clothing was caught by the set screws so projecting, and his body beaten to death against the upright and overhead timbers."

At the close of the plaintiff's testimony the defendant made a motion for a nonsuit, which was granted for the reasons therein set out. Subsequently plaintiff's attorneys made a motion to set aside the order of nonsuit. After hearing argument, his honor the circuit judge was satisfied that the nonsuit should remain, and assigned the following reasons for his ruling: "The plaintiff's testimony showed that the collar with projecting set screw such as defendant used was an appliance almost universally used in ginneries. One of the witnesses had known of one

or two instances where ginners had employed collars with set screws let down into them, but he stated that these were the exceptions. There was no evidence tending to show that this kind of an appliance would not be used by a master of ordinary prudence and foresight. The very reverse was shown. In addition, plaintiff's testimony showed that the collar and set screw in question were at a point where it was impossible for the human body to pass. It was located between the pulley and a large post, to which the shafting was attached, in a space of about 11 inches. On the other side of the pulley there was a clear space of from three to four feet that was free from any danger, and where the work could have been as well done. Here, then, was a case where the deceased had two ways of doing the work in hand. One of them involved danger of contact with the set screw; the other was free from danger. He chose the dangerous way, and assumed the risk involved. Furthermore, the evidence showed that the deceased was in charge of the ginnery; that the engineer was subject to his directions and control. It was in his power, therefore, to have stopped the machinery if he had deemed it necessary for his safety to do so. If, being free to stop the machinery, he elected to do the work while it was running, he must be taken to have assumed the risk. It is certain that the defendant had given him no directions to do the work while the machinery was running. The deceased had been at work in this ginnery for some two or three years, and for about one month had been in charge of the ginning establishment. He must be taken to have been aware of the presence of the collar and set screw, located as they were in a well-lighted room. On the whole, I conclude as follows: That there was no evidence of negligence on the part of the defendant operating as a proximate cause of the death of the deceased; that the risk was one ordinarily incident to the employment in which the deceased was engaged; that the risk was plain and obvious to a man of ordinary observation, and was assumed by the deceased; that having a perfectly safe way to do the work, he voluntarily selected a method involving danger to himself, and thereby assumed the risk."

For the reasons assigned by his honor the circuit judge, the order of nonsuit is affirmed.

(36 S. C. 65)

STATE v. RUCKER.

(Supreme Court of South Carolina. May 14, 1910.)

1. CRIMINAL LAW (§ 695*)—EVIDENCE—COMPETENCY—WHEN DETERMINED.

The competency of evidence must be determined by the state of facts existing when the objection is interposed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 695.*]

2. CRIMINAL LAW (§ 408*)—EVIDENCE—ADMISSIONS—ATTEMPT TO COMPROMISE.

The evidence of an attempt to compromise in a criminal case is competent; it being for the jury to decide whether the effort indicated a consciousness of guilt, or merely fear or anxiety to avoid the risk of a miscarriage of justice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 785; Dec. Dig. § 408.*]

3. BASTARDS (§ 16*)—SUPPORT OF CHILD—DEPOSIT OF MONEY BY FATHER—PUBLIC POLICY—DUTY OF FATHER.

It is not against public policy for the father of a bastard child to deposit money with an officer of the law for its maintenance, as there is a natural and moral duty resting upon him to support his illegitimate offspring.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. § 22; Dec. Dig. § 16.*]

4. CRIMINAL LAW (§ 408*)—EVIDENCE OF COMPROMISE—COMPETENCY.

In a prosecution for bastardy, evidence as to whether accused deposited money with the clerk of the court for the purpose of compromising the case was competent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 785; Dec. Dig. § 408.*]

5. CRIMINAL LAW (§ 695*)—OBJECTIONS TO EVIDENCE.

Where accused's attorney in objecting to evidence simply said "We object," the objection was too general.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1634; Dec. Dig. § 695.*]

6. BASTARDS (§ 64*)—EVIDENCE—SUFFICIENCY.

In a prosecution for bastardy, it is not necessary to a conviction that the evidence show beyond a reasonable doubt that the reputed bastard child is likely to become a burden to the county.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. § 174; Dec. Dig. § 64.*]

Appeal from General Sessions Circuit Court of Calhoun County; R. C. Watts, Judge.

W. B. Rucker was convicted of bastardy, and he appeals. Appeal dismissed.

J. M. Walker, for appellant. P. T. Hildebrand, Sol., for the State.

GARY, A. J. This is an appeal from the sentence imposed upon the defendant for bastardy.

The first exception is as follows: "That the presiding judge was in error in allowing the witness J. A. Wolfe, clerk of the court, to testify, over objection by the defense, to the fact of money having been deposited with him by the defendant for the alleged purpose of compromising the case; the error being that an offer of compromise in a case of this kind cannot be used as evidence of guilt." At the time his honor the presiding judge made the ruling which gave rise to this exception, the solicitor had merely asked the question: "Did he ever deposit any money in your office, in this bastardy case?" The defendant's attorney then made the objection that an offer of compromise was inadmissible, for the purpose of showing the guilt of the prisoner, although no testimony relative to a compromise had been offered. Whereupon his honor the presiding judge rul-

ed that the declaration of a defendant is competent. If the question was competent, the objection should not have been made to it, but to inadmissible testimony thereby elicited. The question of competency must be determined by the state of facts existing when the objection is interposed. The evidence of an attempt to compromise in a criminal case is competent; it being for the jury to decide whether the effort indicated a consciousness of guilt, or merely fear or anxiety to avoid the risk of a miscarriage of justice. *State v. Wideman*, 68 S. C. 119, 46 S. E. 769. It is not against public policy for the father of a bastard child to deposit money with an officer of the law for its maintenance, as there is a natural and moral duty resting upon him to support his illegitimate offspring. *Com. of Poor v. Gilbert*, 2 Strob. 152. The question was competent, as its tendency was to develop such a state of facts, and the exception is overruled.

The second exception is as follows: "That the presiding judge was in error in allowing the witness Wolfe to testify as to the contents of a certain alleged agreement or contract, and in admitting it in evidence; such paper not having been signed by the defendant, nor any one authorized to sign for him, nor as a matter of fact by any one." When the paper was offered for the purpose of being introduced in evidence, the defendant's attorney simply said, "We object." The objection was too general, and this exception is also overruled.

The third exception is disposed of by what has already been said.

The fourth exception is as follows: "That the presiding judge was in error in failing and neglecting to charge the jury that, before they could find a verdict of guilty, the evidence must show beyond reasonable doubt that the reputed bastard child is likely to become a burden to the county." The cases of *State v. McDonald*, 2 McCord, 299, and *State v. Crawford*, 10 Rich. Law, 361, show that this exception cannot be sustained.

The fifth exception was abandoned.
Appeal dismissed.

(36 S. C. 62)

CITY OF COLUMBIA v. SPIGENER.

Supreme Court of South Carolina. May 11, 1910.)

APPEAL AND ERROR (§ 1169*)—REVIEW.

Where a mandamus proceeding was decided in the circuit court, and on appeal on the theory that no issue of fact was involved, but on rehearing it appeared that the pleadings raised important issues of fact, and that the cause could not be decided until a finding on the facts after hearing evidence, the judgment will be reversed, and the cause remanded for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4531; Dec. Dig. § 1169.*]

On rehearing. Former opinion withdrawn, and case remanded.

For former opinion, see 67 S. E. 552.

PER CURIAM. In this proceeding for mandamus the circuit judge in his decree ordering the mandamus to issue said, "It was admitted on both sides at the hearing that the pleadings herein raised no issue of fact"; and the case was decided by the circuit court and heard in this court on the pleadings without the taking of evidence. One of the exceptions of the defendant is directed to this finding of the circuit court. This court heard the cause, and has filed a decree reversing the judgment of the circuit court, and a petition has been filed for a rehearing. Upon a careful reconsideration and review of the entire case, we have reached the conclusion that the pleadings raise important issues of fact, and that the cause cannot be justly decided until there has been a finding of the facts after hearing evidence.

It is therefore adjudged that the decree of this court be withdrawn from the files, and that this order be substituted therefor, that the judgment of the circuit court be reversed, and the cause be remanded to that court for a new trial on the evidence to be taken in such manner as the circuit court may direct.

(123 N. C. 651)

DALE et al. v. GAITHER LUMBER CO.
et al.

(Supreme Court of North Carolina. May 25, 1910.)

FRAUDS, STATUTE OF (§ 16*)—PROMISE TO PAY DEBT OF ANOTHER—ORIGINAL PROMISE.

Where defendant employed a person to cut, saw, and stack timber, and such person hired plaintiff to do the logging, an agreement by defendant to withhold from such person the amount he owed plaintiff and pay it to plaintiff was not within the statute of frauds (Revisal 1905, § 974) as a promise to pay the debt of another and void because not in writing; defendant having a direct pecuniary interest in the work to be performed by plaintiff and having received the benefit of it.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 22; Dec. Dig. § 16.*]

Appeal from Superior Court, Burke County; Justice, Judge.

Action by A. N. Dale and others against the Gaither Lumber Company and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

There was evidence tending to show that one L. L. Wood had contracted in writing with defendant company to "cut, saw, log and stack in a workmanlike manner" for defendant company the timber growing on a tract of land of 888 acres, and was engaged in the performance of said contract; that the plaintiff had agreed with L. L. Wood to do the logging for this job at \$3 per 1,000 feet; that plaintiff went to work under this agree-

ment, and after a short time, not receiving any money, and not being satisfied with the arrangements for his pay, he saw the manager of defendant company and told him that plaintiff was to have \$3 per 1,000 for doing the logging, and that he wanted the company to hold back that amount for plaintiff out of money to be earned by Wood under his contract; that the manager agreed to do this, and, under and by reason of this agreement, plaintiff went back to work and did logging to the amount of \$400 and over, for which he had not been paid; that this arrangement and agreement as to holding back the \$3 per 1,000 was made with the knowledge and assent of Wood; that after this agreement on the part of the manager a large amount of the lumber was cut and turned over to the company by Wood, the amount thereafter earned by Wood under the contract being near \$2,000; and that plaintiff had applied to the company for his money, and it had failed and refused to pay the amount or any part of it, claiming that they had paid Wood in full, and that he was indebted to them several hundred dollars on an old debt, etc. Defendant's evidence tended to show that they had the written contract with Wood to do the work, and they did not know plaintiff in the transaction; that the first they knew of plaintiff making any claim against the company was when he presented an order from Wood for the company for \$416; that they had paid Wood something over \$2,000, all they owed him for work done under the contract, and he was indebted to the company for more than \$200 on an old debt. There was also evidence of some payments by Wood to Dale on the amount due him for logging. It appeared that R. A. Gaither was secretary and treasurer, having power as general manager to bind the company.

On the issue as to the liability of the defendant company, the court charged the jury as follows: "The court charges you: (a) That if you find from the evidence that R. A. Gaither, who is admitted to be the secretary and treasurer of the Gaither Lumber Company, agreed with plaintiff, A. N. Dale, that he would hold back \$3 per 1,000 feet out of the money due or to become due L. L. Wood for sawing for said company, and that he would pay the same to said plaintiff for cutting and logging done by him for said Wood, and if you find from the evidence was induced thereby to go on with the logging, then the defendant the Gaither Lumber Company would be liable to pay plaintiff at that rate for all timber cut and logged by plaintiff for said Wood after the time such agreement was made, and you will therefore allow plaintiff \$3 per 1,000 feet for whatever amount of timber you find was so cut and logged, in your answer to the second issue, (b)"

There was verdict against the company for \$398.90. Judgment on the verdict, and defendant excepted and appealed, assigning

for error chiefly that the demand of plaintiff against defendant company was avoided under the statute of frauds (Revisal 1905, § 974), requiring agreements to answer for the debt, default, or miscarriage of another to be in writing, and that all oral evidence tending to support the claim should have been excluded.

Avery & Ervin, for appellants. John M. Mull and J. T. Perkins, for appellees.

HOKE, J. We are of opinion that the case has been correctly tried, and the charge of his honor is in accord with the better considered precedents.

In *Emerson v. Slater*, 63 U. S. 28-43 (16 L. Ed. 360), a decision on this section of the statute of frauds, the court said: "But whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." This position has been sustained and applied in other cases of the same court, notably in *Davis v. Patrick*, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826, in which it was held: "In determining whether an alleged promise is or is not a promise to answer for the debt of another, the following rules may be applied: (1) If the promisor is a stranger to the transaction, without interest in it, the obligations of the statute are to be strictly upheld; (2) but if he has a personal, immediate, and pecuniary interest in a transaction in which a third party is the original obligor, the courts will give effect to the promise. The real character of a promise does not depend altogether upon form of expression, but largely upon the situation of the parties, and upon whether they understood it to be a collateral or direct promise."

This rule has prevailed in many well-considered cases in other courts construing this section of the statute, as in *Crawford v. Edison*, 45 Ohio St. 239, 13 N. E. 80; *Prout & Robertson v. Webb*, 87 Ala. 593, 6 South. 190; *Commissioners v. Heating Co.*, 128 Ind. 247, 27 N. E. 612, 12 L. R. A. 502—and the same general principle has been recognized and approved with us, as in *Deaver v. Deaver*, 137 N. C. 241, 49 S. E. 113; *Voorhees v. Porter*, 134 N. C. 591-605, 47 S. E. 31, 65 L. R. A. 736; *Whitehurst v. Hyman*, 90 N. C. 487; *Mason v. Wilson*, 84 N. C. 51, 37 Am. Rep. 612; *Threadgill v. McLendon*, 76 N. C. 74. A doctrine resting upon the same basic principle appears in several of these cases from our own court to the effect that where a debtor places a fund, money, or property in the hands of a third person, who agrees to pay the debt out of the fund, the said agreement is not within the statute.

The position is stated in *Mason v. Wilson*, *supra*, as follows: "A parol promise to pay the debt of another out of property placed by the debtor in the hands of the promisor, who converts the same into money, is not within the statute of frauds. It is an original and independent promise founded upon a new consideration." And in either class of cases the promise on the part of the third person is held to be a binding obligation, whether the original debtor continues liable or not; this by reason of the new consideration moving between the parties.

Referring to this question in *Whitehurst v. Hyman*, *supra*, *Merrimon, J.*, said: "It is settled by many judicial decisions in construing this statute, and others substantially like it, that where there is some new and original consideration of benefit or harm moving between the party to whom the debt to be paid is due, and the party making the promise to pay the same, such case is not within the statute; as where a promise to pay an existing debt is made in consideration of property placed by the debtor in the hands of the party promising, or where the party to whom the promise is made relinquishes a levy on the goods of the debtor for the benefit of the promisor, or where the party promising has a personal interest, benefit, or advantage of his own to be subserved, without regard to the interests or advantage of the original debtor; as, for example, if a creditor has a lien on certain property of his debtor to the amount of his debt, and a third person who has an interest in the same property promises the creditor to pay the debt in consideration of the creditor's relinquishing his lien. Such promises are not within the statute, because they are not made 'to answer the debt, default, or miscarriage of another person.' It may be the performance of the promise will have the effect of discharging the original debtor; but such discharge was not the inducement to, or the consideration to, support the promise. The moving, controlling purpose of the promisor in such cases is his own advantage, not that of the debtor. It not unfrequently happens that in a great variety of business circumstances it becomes important in a valuable sense to third parties to discharge the debt of a debtor, or relieve his property from liability to the creditor for the benefit of such third parties, without regard to the benefit, ease, or advantage of the debtor. The advantage to the third party, the promisor, is a sufficient valuable consideration to support a contract separate from, and independent of, the debt to be discharged."

And to like effect, delivering the opinion in *Voorhees v. Porter*, *supra*, Associate Justice Walker said: "But we think the case of *Mason v. Wilson*, 84 N. C. 51, 37 Am. St. Rep. 612, is directly in point. The doctrine there stated is that if a third person promises the debtor to pay his antecedent debts in con-

sideration of property placed in the hands of the promisor by the debtor for the purpose, which is afterwards converted into money, the creditors may recover on the promise or for money had and received, 'for although,' says the court, 'the promise is in words to pay the debt of another, and the performance of it discharges that debt, still the consideration was not for the benefit or ease of the original debtor, but for a purpose entirely collateral, so as to create an original and distinct cause of action,' and it is immaterial, as is further said by the court, whether the liability of the original debtor is continued or not; the promise being an independent and original one founded upon a new consideration and binding upon the promisor. In our case, though the property was not received for the purpose of being converted into money in order to pay the debt out of the proceeds, the promise to purchase it at a fixed price and to pay the amount of that price to the creditors of the vendor amounts to the same thing, and brings our case within the principle of the third class mentioned in *Mason v. Wilson* (which authorizes the creditor to sue directly), namely, 'when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the original contracting parties.' In such a case the creditors may sue the promisor, whether his debtor remains liable to him or not."

In the case before us, the defendant company had a direct pecuniary interest in the work to be performed by plaintiff, and received the benefit of it, and its obligation comes clearly within the first principle as it appears in *Emerson v. Slater*, *supra*, and we see no reason why the promise of defendant does not come also within the second principle referred to. The company's agreement was, in effect, to see the claim paid out of the amount to be earned under the contract by L. L. Wood, the original debtor. This was entered into with the sanction and approval of Wood, and, as this amount was earned by Wood, it would seem to become a fund applicable by the agreement to plaintiff's debt, and affording the consideration to support the company's promise as a new and original obligation.

There is no error in the rule laid down by the court which gives defendant any just ground of complaint, and the judgment in plaintiff's favor is affirmed.

No error.

(153 N. C. 648)

McCALL v. TOXAWAY TANNING CO.

(Supreme Court of North Carolina. May 25, 1910.)

RELEASE (§ 17*)—VALIDITY—MISREPRESENTATION.

Where plaintiff was injured by defendant's negligence, and while still suffering, was sent

for by the general manager of defendant and induced to sign a release by false representations of the manager that it was a receipt to enable the manager to obtain insurance arising by reason of the injury, and that it had no bearing on his claim for damages, and such representations were made under circumstances calculated to mislead plaintiff, and did mislead him, the release is invalid.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 32; Dec. Dig. § 17.*]

Appeal from Superior Court, Transylvania County; Joseph S. Adams, Judge.

Action by J. B. McCall against the Toxaway Tanning Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The plaintiff alleged, and offered evidence tending to show, that he had suffered physical injury caused by negligence of defendant company. Defendant denied negligence, and pleaded a release of all claim for damages, signed by plaintiff, and offered evidence tending to support the defense. Plaintiff replied, alleging that this release was obtained by false and fraudulent statements as to its contents on the part of one J. S. Silverstein, vice president and general manager of defendant company, and alleged, further, that at the time he signed the release he was in such a condition of bodily suffering and mental anxiety that he was not able to understand or comprehend the meaning or effect of same, and offered evidence tending to show the false representations, etc. On the sixth issue, that as to obtaining the release by fraud, the court, among other things, charged the jury as follows: "Before you can find the sixth issue 'Yes,' you must be satisfied by a preponderance of evidence that at the time it was signed the plaintiff did not understand what he was signing, and that he was misled by fraudulent misrepresentations of defendant, and that he was in such a condition from ignorance or mental and physical suffering that he was at the time incapable with reasonable care and caution to understand the contents of the paper. If, however, you are satisfied by the greater weight of the evidence that the defendant, through its agent, Silverstein, represented to plaintiff that plaintiff was merely releasing an insurance company, and was not releasing the defendant company, and that the plaintiff was in such a condition of suffering from the effects of his wounds that he could not comprehend the meaning of the writing, then you should find this issue, 'Yes.'" The jury rendered a verdict that plaintiff was wrongfully injured by defendant's negligence and damaged thereby \$150; that plaintiff had released the claim, and said release was not procured by fraud. Judgment for defendant, and plaintiff excepted and appealed.

Geo. A. Shuford and Brown Shepherd, for appellant. Welch Galloway, for appellee.

HOKE, J. (after stating the facts as above). In the case of *Gray v. James*, 151 N. C. 80, 65 S. E. 644, the last expression of the court on the question directly presented, the judge delivering the opinion said: "It is true that in an action of this character the false statements must be such that they are reasonably relied upon by the complaining party. It is also true that when an adult of sound mind and memory, and who can read and write, signs or accepts a formal written contract, he is ordinarily bound by its terms. *Floars v. Ins. Co.*, 144 N. C., 232 [56 S. E. 915]. In such case it is very generally held that a man should not be allowed to close his mind to facts readily observable and invoke the aid of courts to upset solemn instruments and disturb and disarrange adjustments so evidenced, when the injury complained of is largely attributable to his own negligent inattention. Older cases have gone very far in upholding defenses resting upon this general principle, and, as pointed out in *May v. Loomis*, 140 N. C. 357-358 [52 S. E. 728], some of them have been since disapproved, and are no longer regarded as authoritative; and the more recent decisions on the facts presented here, are to the effect that the mere signing or acceptance of a deed by one who can read and write shall not necessarily conclude as to its execution or its contents, when there is evidence tending to show positive fraud, and that the injured party was deceived and thrown off his guard by false statements designedly made at the time, and reasonably relied upon by him. Some of these decisions, here and elsewhere, directly hold that false assurances and statements of the other party may of themselves be sufficient to carry the issue to the jury when there has been nothing to arrest attention or arouse suspicion concerning them"—citing *Walsh v. Hall*, 68 N. C. 233; *Hill v. Brower*, 76 N. C. 124; *May v. Loomis*, 140 N. C. 350, 52 S. E. 728; *Griffin v. Lumber Co.*, 140 N. C. 514, 53 S. E. 307, 6 L. R. A. (N. S.) 463. This, we think, correctly states the doctrine relevant to the inquiry, and its proper application to the case requires that the plaintiff be awarded a new trial.

There was evidence on the part of plaintiff tending to show that plaintiff had been injured by defendant's negligence, and while he was still suffering pain and anxiety from his hurt he was sent for by J. S. Silverstein, vice president and general manager of defendant company, and was induced to sign the release in question by false and fraudulent representations on the part of said Silverstein, to the effect that the release in question was a receipt to enable Silverstein to obtain an amount of insurance arising by reason of the injury, and that same had no bearing on his claim for damages. If such representations were made under circumstances calculated to mislead plaintiff, and did mislead him, the effect upon the doctrine referred to would be to

avoid the release, whether plaintiff at the time had mental capacity to understand its purport or not. The charge of his honor, therefore, contained error to plaintiff's prejudice in imposing on plaintiff more exacting conditions than the law requires. The jury were told, in effect, that in order to avoid the release it was incumbent on plaintiff to establish both actual fraud and mental incapacity.

For the error indicated, there will be a new trial on all the issues, and it is so ordered.

New trial.

(152 N. C. 688)

MCCORMICK v. WILLIAMS.

(Supreme Court of North Carolina. May 25, 1910.)

1. PRINCIPAL AND AGENT (§ 22*)—EXISTENCE OF RELATION—ACTS AND DECLARATIONS OF AGENT.

An agency cannot be established by the acts or declarations of the alleged agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. § 22.*]

2. EVIDENCE (§ 258*) — DECLARATIONS OF AGENT—ADMISSIBILITY.

The existence of an agency must be established at least prima facie before the acts and declarations of the agent are competent against the alleged principal.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1006, 1007; Dec. Dig. § 258.*]

3. MORTGAGES (§§ 365, 370*)—SALES UNDER TRUST DEEDS—FAILURE OF PURCHASER TO COMPLY WITH BID—LIABILITY.

Where the purchaser at a valid sale under a trust deed refused to comply with his bid, the trustee could sue for the amount of the bid and recover the same with costs, or resell for the benefit of the purchaser and recover the loss sustained.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1089, 1101, 1101½; Dec. Dig. §§ 365, 370.*]

4. MORTGAGES (§ 365*)—SALES UNDER TRUST DEEDS—FAILURE OF PURCHASER TO COMPLY WITH BID—LIABILITY.

Where a purchaser at a valid sale under a deed of trust refused to comply with his bid, and the trustee resold the property in accordance with the deed and with notice to the purchaser, the trustee could recover from the purchaser the difference between the amount of the purchaser's bid and the market value of the property considering the price it brought on the resale, provided the resale was made fairly.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1089; Dec. Dig. § 365.*]

Appeal from Superior Court, Robeson County; Lyon, Judge.

Action by J. G. McCormick, trustee, against S. B. Williams. From a judgment for plaintiff, defendant appeals. Affirmed.

McNeill & McNeill and Shaw & Johnson, for appellant. McLean & McLean, for appellee.

WALKER, J. This action was brought by the plaintiff for the recovery of the sum of \$585; it being the difference between the

amount bid by the defendant at a sale made by the plaintiff, as trustee, of certain property conveyed to him by deed of trust, and the amount bid at a second sale of the same property, which was made necessary by the failure of the defendant to comply with his bid which was made at the first sale. It appears in the case that H. D. Williams executed several deeds of trust to the plaintiff to secure certain debts therein described, each of which said deeds contained a power of sale, to be exercised by the trustee in case of default in the payment of the debts. The trustee, in accordance with the terms of the deed of trust, and after default in the payment of the debts, sold the property at public auction after due advertisement, and the defendant, S. B. Williams, purchased, at the sale, a sawmill plant for the sum of \$785, to be paid in cash. After demand made upon him for a compliance with his bid and the payment of the purchase money, and the refusal to comply, the plaintiff, as trustee, resold the sawmill plant, when it was purchased by T. R. Toler, at the price of \$200. The defendant claimed that he had been released from his bid by the Akers Lumber Company, the owner of the notes secured by the deed of trust. It is not contended that he was released otherwise than by J. T. Burrus, who, defendant alleges, was acting, at the time, as agent of the lumber company; but we find no evidence in the case to establish the agency of Burrus. It is well settled by the authorities that an agency cannot be established by the acts or declarations of the person who is alleged to be agent. The agency must first be shown, at least prima facie, by other evidence, before the acts and declarations of the agent become competent evidence against the alleged principal. Jackson v. Tel. Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738; Francis v. Edwards, 77 N. C. 271; Daniel v. Railroad, 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455.

In this case, the court charged the jury to disregard all the testimony as to any conversation or agreement between the defendant and J. T. Burrus, upon the ground, of course, that there was no evidence which tended to show that Burrus was authorized to act for the Akers Lumber Company, and to release the defendant from the obligation which he had incurred by bidding for and buying the property at the first sale. We can see no error in this instruction, as there was no evidence introduced by the defendant to sustain his allegation that Burrus had the authority to release the defendant, even if what was said by him in his conversation with the defendant could have the effect in law of discharging the defendant of his obligation as purchaser at the sale.

As to the damages, when the defendant failed or refused to comply with his bid and

pay the amount thereof to the trustee, the sale being a valid one under the deed of trust, the latter could have sued the defendant for the full amount of the bid and recovered the same with costs. He elected, though, to resell the property for the benefit of the defendant, and it is not disputed that the sale was properly made in accordance with the terms of the deed of trust, and that defendant had notice of the sale. The court charged the jury upon the issue as to damages that they might allow the plaintiff the difference between the amount bid at the first sale and the market value of the property, as they might ascertain it to be, considering the price it brought at the second sale, if the jury should find that the second sale was made fairly and in accordance with the requirements of the deed of trust. This charge seems to be in accordance with what was said by this court in the case of *Register Company v. Hill*, 136 N. C. 276, 48 S. E. 637. The verdict was for an amount much less than the sum which the defendant had bid at the first sale, and which could have been recovered by the plaintiff, as we have already said, if he had elected to sue for the same upon tendering the property to the defendant, if the facts and circumstances of the case required such a tender.

We have examined the record carefully, and have concluded that the case was fairly and correctly tried in the court below, and that consequently there was no error in the rulings and judgment of the court.

No error.

(152 N. C. 945)

STATE v. TWEED et al.

(Supreme Court of North Carolina. May 25, 1910.)

1. HOMICIDE (§ 157*)—PROSECUTION—SUFFICIENCY OF EVIDENCE.

Testimony as to a previous quarrel between accused and decedent shortly before the killing was admissible to show ill feeling between the parties.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 288; Dec. Dig. § 157.*]

2. CRIMINAL LAW (§ 823*)—APPEAL—INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTIONS.

Any error in defining "murder in the second degree" as the felonious killing of a human being could not have misled the jury, where the court subsequently defined it as the felonious killing of a human being by one of sound memory and discretion with malice aforethought, which might be either express or implied, and such charge was afterwards repeated.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1994; Dec. Dig. § 823.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4641, 4642; vol. 8, p. 7727.]

Appeal from Superior Court, Buncombe County; J. S. Adams, Judge.

M. H. Tweed and another were convicted of murder in the second degree, and the defendant named appeals. Affirmed.

Moore & Rollins, Gedger & McElroy, and Craig, Martin & Thomason, for appellant. The Attorney General, Geo. L. Jones, and Frank Carter, for the State.

PER CURIAM. The typewritten record in this case embraces 174 pages, and there are 23 exceptions, all of which have been examined. There is only one exception to the admissibility of evidence, and that relates to the admission of testimony in regard to the previous quarrel on Saturday night between Major Tweed and Arthur Franklin. This was clearly competent to show bad blood between the parties. The remaining exceptions (except those purely formal and those relating to the service of case on appeal) appertain to the charge of the court, which is set out in full in the record. We are of opinion that the charge is full and correct, and follows carefully the well-settled decisions of this court. A discussion of them again is unnecessary in an opinion. It is true his honor defined murder in the second degree as the felonious killing of a human being in the first of his charge, but immediately thereafter he defined it correctly as follows: "Murder in the second degree is the felonious killing of a human being in the peace of the state, by a person of sound memory and discretion, with malice aforethought, and this malice may be either express or implied." This was repeated again in the charge. We do not think it possible that the jury could have been misled.

There is abundant evidence to justify the verdict of the jury, and we find no error of sufficient importance to warrant us in ordering another trial.

No error.

(152 N. C. 681)

SECURITY LIFE & ANNUITY CO. v. FORREST et al.

(Supreme Court of North Carolina. May 25, 1910.)

1. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action involving the validity of life insurance policies contested by the insurance company on the ground that the insured in his written application falsely represented the condition of his health, the company on the trial proceeded upon the theory that the sons of assured carried out a common plan to defraud the insurance company by obtaining a number of policies upon the life of their father. On cross-examination of a witness for the beneficiary, the witness being one of the sons, evidence was brought out in support of this theory. Held, that there was no prejudicial error in allowing the witness on redirect examination to be asked if any of the policies issued under plaintiff's theory had been paid, in view of the latitude allowed the insurance company in the development of its theory.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.*]

2. TRIAL (§ 267*)—INSTRUCTIONS—FORM.

It is not error to give a requested instruction in substance, although not in the language requested.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668-672, 674; Dec. Dig. § 267.*]

Appeal from Superior Court, Pamlico County; Council, Judge.

Action by the Security Life & Annuity Company against Josephus Forrest and others. Judgment for defendants, and plaintiff appeals. Affirmed.

The action was begun in the superior court of Guilford county July 27, 1908. The defendant moved to remove the action for trial to Craven county. Pending the motion, J. Barrom Forrest died, and his wife, having qualified as executrix, was made party defendant. The order of removal was made to Pamlico county. The plaintiff alleged in its complaint that it had issued, on August 23, 1907, two policies of \$1,500 and \$1,000 upon the life of J. Barrom Forrest, the beneficiary named in each being Josephus Forrest, his son; that the policies were issued upon written applications; that the representations made therein as to his condition of health were false; that he had chronic bowel trouble; that the statement that he had not consulted a physician in five years was also false; that these representations were material and were relied on, and plaintiff had no information that the representations and statements were not true; that it had tendered in June or July, 1908, the premiums paid and demanded a return of the policies, which tender and demand had been refused; that defendants had tendered the second annual premiums, but plaintiff had declined to accept them. The plaintiff prayed judgment that the policies be surrendered for cancellation. The defendant denied the allegations of the false representations and statements as to the health of J. Barrom Forrest, the assured. After the death of the assured, the beneficiary, Josephus Forrest, instituted action against the plaintiff in Craven county to recover upon the policies. The Annuity Company made a motion to remove to Pamlico county, which motion was allowed, and the two actions were, by consent, consolidated and tried as one action; the Security Life & Annuity Company being plaintiff, and the Forrests being defendants. The issues submitted by the judge and the answers of the jury are as follows:

"(1) Did Barrom Forrest in his application make material representations and warranties that were untrue as alleged? Ans. No.

"(2) Did the representations as made induce the plaintiff to issue to Barrom Forrest the insurance policies referred to in the pleadings? Ans. No.

"(3) Has the defendant, Josephus Forrest, complied with the terms and conditions of the policy for \$1,500, being No. 9,338? Ans. Yes.

"(4) Has the defendant, Josephus Forrest, complied with the terms and conditions of the policy for \$1,000, being No. 9,339? Ans. Yes.

"(5) What amount, if any, is the defendant Josephus Forrest, entitled to recover on the policy for \$1,500, being No. 9,338? Ans. \$1,500, with interest from September 19, 1908.

"(6) What amount, if any, is the defendant, Josephus Forrest, entitled to recover on the policy for \$1,000, being No. 9,339? Ans. \$1,000, with interest from September 19, 1908."

There was judgment upon the verdict for the defendant, Josephus Forrest, and the plaintiff appealed.

Simmons, Ward & Allen and A. L. Brooks, for appellant. D. L. Ward, Stedman & Cooke, C. L. Abernethy, and H. L. Gibbs, for appellees.

MANNING, J. We have carefully examined the record and the brief and authorities cited therein by the learned counsel of the plaintiff, and we do not discover that his honor committed, in the rulings excepted to, any error which entitles the plaintiff to a new trial. As determined by the pleadings, the principal controverted fact was presented by the first issue—the truth of the representations and statements by the assured as to the condition of his health. His honor instructed the jury that, if they should find from the evidence that these representations and statements were untrue, then they would answer the first issue, "Yes"; and, if untrue, they were material, and they should answer the second issue, "Yes." Upon the condition of the health of the assured, there was much evidence offered by the plaintiff tending to support its contentions, and by the defendants in contradiction and in support of the truth of the representations in the applications for the insurance. The assured was examined three times within 30 days by Dr. Duguld, the local medical examiner of plaintiff, and certificate of the examinations for plaintiff made upon blanks furnished by it. This physician had known assured for two years, was his family physician, and lived near him. He certified that he had made careful examination and in his opinion he was a first-class risk. This statement was confirmed by the physician as a witness at the trial. The theory upon which the plaintiff developed its case at the trial was that the sons of the assured, appreciating his bad health, and that his life would not be long prolonged, obtained policies of insurance upon the life of their father for many thousand dollars, and this was done in carrying out a common plan and scheme to defraud the insurance companies, among them the plaintiff. The plaintiff, on cross-examination of a witness for defendant, one of his brothers, elicited testimony which supported this theory, by examining the witness specifically as to the

several policies upon his father's life, the beneficiaries named, the companies issuing them, etc. Upon redirect examination, in rebuttal of plaintiff's theory of a common fraudulent scheme or plan to defraud the insurance companies, "by overloading (to quote the language of plaintiff's counsel) a decrepit father, sick with a fatal malady, with life insurance policies," the defendant was permitted to ask the witness if any of the insurance policies so issued under plaintiff's theory had been paid. The plaintiffs objected to this testimony, and excepted to its admission. While the theory upon which plaintiff was proceeding was of doubtful relevancy to the issue, the sole inquiry being as to the truth or falsity of the statements, and it being immaterial whether they were fraudulent or not, and while such evidence would be ordinarily incompetent as obnoxious to the maxim, "Res inter alios acta," we are not convinced that its admission, under the circumstances of this case, was erroneous; at most, if error, it was harmless error, in view of the latitude allowed plaintiff in the development of its theory. In *Miller v. Miller*, 89 N. C. 209, this court said: "Great latitude is sometimes allowed by the court in the trial of issues by the jury, and it must be largely left to it to see that the parties have equal latitude and advantage, as was the case here. *Green. Ev. § 48; Steph. Dig. Law of Ev. 36 et seq.*"

Under the theory advanced by plaintiff, each policy issued during the year 1907 upon the life of the assured was a link in a chain of a fraudulent scheme, entered into by the defendant, Josephus Forrest, and his brothers. We are not convinced that it was error, of which plaintiff can justly be heard to complain, when his honor permitted the defendant to controvert this theory of the plaintiff. The record shows that subsequently during the trial the plaintiff examined other witnesses as to the several policies, and probed much into the details, showing other companies had and were contesting payment of their policies. The plaintiff excepted to certain parts of his honor's charge, and to his refusal to give certain special instructions. We have carefully examined the charge as given, and the refused instructions, and we do not think plaintiff's exceptions can be sustained. In the charge to the jury, his honor followed the decision of this court in *Alexander v. Insurance Co.*, 150 N. C. 536, 64 S. E. 432, placing the right of the plaintiff to avoid the policies upon the ground of the falsity of the representations and statements in the applications for insurance, irrespective of any fraudulent purpose or lack of honest intent. The other exceptions are covered in large measure by the decision of this court in *Perry v. Insurance Co.*, 150 N. C. 143, 63 S. E. 679, where it is said: "If there has been an actual delivery of the policy, nothing else appearing, the production of it at the

trial presents a prima facie case for the plaintiff. *Kendrick v. Insurance Co.*, 124 N. C. 315 [32 S. E. 723, 70 Am. St. Rep. 592]; *Grier v. Insurance Co.*, 132 N. C. 542 [44 S. E. 28]; *Rayburn v. Casualty Co.*, 138 N. C. 379 [50 S. E. 762, 107 Am. St. Rep. 548]; *Waters v. Annuity Co.*, 144 N. C. 663 [57 S. E. 437, 13 L. R. A. (N. S.) 805]." In the present case, the plaintiff alleged that it issued and delivered the policies and received the first annual premiums, and that it declined to receive the second annual premiums tendered by defendant. Some of the prayers requested by plaintiff, while not given in the very language requested, were substantially given, and, when this is done, it is not error. The plaintiff, after full investigation before action begun, selected its own grounds upon which it sought to avoid the policies issued by it, and, having so selected, without requesting an amendment of its pleadings either before or at the trial, it cannot be unjust to require it to adhere to them. In our opinion, no error was committed at the trial which entitles plaintiff to a new trial, and the judgment is affirmed.

No error.

(152 N. C. 636)

WHITE-BLAKESLEE MFG. CO. v.
RHODES.

(Supreme Court of North Carolina. May 25, 1910.)

REPLEVIN (§ 125*)—FAILURE OF PLAINTIFF TO PROSECUTE—JUDGMENT ON BOND.

Plaintiff in claim and delivery having failed to comply with the express provision of its bond, to appear and prosecute the action, defendant is entitled to judgment, according to the condition of the bond, for a return of the property, and, in case return cannot be had, for recovery of damages assessed by the jury. [Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 503, 504; Dec. Dig. § 125.*]

Appeal from Superior Court, Buncombe County; J. S. Adams, Judge.

Action by the White-Blakeslee Manufacturing Company against E. J. Rhodes. From the judgment, plaintiff's surety appeals. Affirmed.

S. G. Bernard, for appellant. Frank Carter and Geo. A. Shuford for respondent.

WALKER, J. This action was brought by the plaintiff for the recovery of certain machinery described in the complaint. The plaintiff caused to be instituted proceedings in claim delivery, and gave an undertaking with the usual condition in the sum of \$1,000 for the prosecution of the action by the plaintiff, in the superior court of said county, against the defendant, for wrongfully seizing and detaining the said property, and for the return of the property to the defendant or for the payment of damages for the detention and deterioration of the property, if return there-

of cannot be had, in case the plaintiff should fail to prosecute the action without success. It is stated in the case that the plaintiff filed a complaint, but failed to appear and prosecute the action when the same was called for trial, and judgment of nonsuit was thereupon entered against the plaintiff after he had been called and failed to answer. The court thereupon submitted an issue to the jury as to the damages the defendant had sustained by reason of the seizure and detention of the property, and the jury assessed the damages at \$500, with interest from April 5, 1905. The court further adjudged that the property seized by the sheriff and delivered to the plaintiff be returned to the defendant, and if, upon execution issued, it cannot be seized thereunder and returned as required by the order of the court, that the defendant recover of the plaintiff and its surety, the American Bonding Company, the sum of \$1,000, which was the penalty of the plaintiff's bond, to be discharged upon the payment of the sum of \$500 with interest thereon; that being the amount of damages assessed by the jury. The court further ordered execution to issue for the enforcement of its judgment. The American Bonding Company alone appealed from the judgment of the court. A motion was made in this court to dismiss the appeal, as the bonding company was not a party to the suit and, under the facts and circumstances as they appear in the record, had no right to appeal from the judgment of the court. No question was raised as to the costs which were adjudged to be paid by the plaintiff and its surety.

The case of *Manix v. Howard*, 82 N. C. 125, settles the question presented in the case against the contention of the appellant, and it is only necessary for us to refer to what is therein said by Justice Dillard for the court, which is as follows: "It is settled that, whenever a party is deprived of the possession of property by the process of the law in proceedings adjudged void, an order for restitution will be made as a part of the judgment. *Perry v. Tupper*, 70 N. C. 538; *Dulin v. Howard*, 66 N. C. 433. Upon the same reason, if a plaintiff, in the action of claim and delivery, in which action both parties are actors, procured property to be taken out of the hands of the defendant and put into his possession, and then dismiss his action, it ought to be a part of the judgment to put the parties in statu quo. Such a course of proceeding seems to be necessary; otherwise the plaintiff, under color of legal process, will perpetrate a fraud on the law and be allowed to keep property, the title to which was prima facie in the defendant, from whom it was taken at the beginning of the suit. In all cases where issue is joined on pleadings filed, the defendant on the trial may have a verdict on the right, and fixing

the value; or, if plaintiff neglect or refuse to come to trial of the issue joined, the defendant may have judgment as of nonsuit for the property, with an assessment of value on a writ of inquiry, followed by a judgment in either case in the alternative; that is to say, for the property, if to be had, and, if not, then for the value. And it is equally necessary in all cases, whether issue be joined or not, in prevention of fraud, to provide, on plaintiff's motion to dismiss or discontinue, for a like judgment in the alternative."

The case of *Phipps v. Wilson*, 125 N. C. 106, 34 S. E. 227, upon which the appellant relied in this court, presented a very different state of facts from those we find in the record now before us. In that case, the court rendered judgment upon a counterclaim pleaded by the defendant, without any inquiry into the lawfulness of the seizure by the plaintiff of the defendant's property. The pleadings or proceedings in that case, as will appear by reference thereto, presented this issue, and the court decided that it should have been determined in favor of the defendant before he was entitled to a judgment upon his counterclaim. That is not our case, for here the plaintiff has failed to comply with the express condition of its bond, and failed to appear and prosecute its action as it was required to do. The defendant did not ask for any judgment on the counterclaim he had pleaded in the case, but merely for judgment according to the condition of the plaintiff's bond; that is, for a return of the property unlawfully seized by the plaintiff, and, in case such return could not be had under the process of the court, then the recovery of the damages assessed by the jury.

In any view of the case, there was no error in the judgment of the court below, even if the bonding company had the right to appeal therefrom.

No error.

(125 N. C. 645)

GARRISON v. VERMONT MILLS.

Appeal of CONE EXPORT & COMMISSION CO.

(Supreme Court of North Carolina. May 25, 1910.)

1. FACTORS (§ 47*)—LIEN.

A factor has no lien upon the goods of the principal unless he holds possession of the goods, and hence a factor acquired no lien on the product of a mill under a contract whereby the factor was to have exclusive sale of its products at a stipulated commission and was to advance 75 per cent. of the net cash value of the goods on hand stored in mill and under which the factor advanced money.

[Ed. Note.—For other cases, see *Factors*, Cent. Dig. § 66; Dec. Dig. § 47.*]

2. FACTORS (§ 47*)—LIEN.

The act of the mills company in marking the goods and invoicing them to the factor gave

it no lien, since an invoice does not transfer the title.

[Ed. Note.—For other cases, see *Factors*, Cent. Dig. § 66; Dec. Dig. § 47.*]

3. FACTORS (§ 47*)—DEED—"TAKING POSSESSION."

The act of the factor's agent, who visited the mill with the mill president and superintendent and took an inventory of all the cloth on the looms and in the basement and warehouse and stated that he took possession of it as the property of the factor and appointed the superintendent as its agent to take charge of the cloth, where the president did not give his consent to the taking of the cloth, which remained in its former position, and the superintendent had no authority to transfer possession thereof to a stranger, did not amount to a "taking possession" of the cloth by the factor so as to give it a lien.

[Ed. Note.—For other cases, see *Factors*, Cent. Dig. § 67; Dec. Dig. § 47.*]

Manning and Hoke, JJ., dissenting.

Appeal from Superior Court, Gaston County; Webb, Judge.

Action by D. A. Garrison against the Vermont Mills, in which the Cone Export & Commission Company intervened. From the judgment, intervener appeals. Affirmed.

King & Kimball and J. H. Pon, for appellant. Burwell & Cansler and O. F. Mason, for appellee.

CLARK, C. J. On January 25, 1907, L. L. Jenkins, the appellee, was appointed receiver of the Vermont Mills in Gaston county and took possession of all its property and effects. Among the effects so taken possession of by the receiver were a number of bales of cloth. Some of these bales were in the warehouse of the company and some in the basement. The appellant, the Cone Export & Commission Company, on February 26, 1907, having made claim to said bales of cloth, entered into an agreement with the receiver by which said bales were sold and the proceeds were to be held to abide the decision of the court whether they should be paid to the receiver for distribution according to law among the creditors of said company or should be paid over to the appellant.

The facts found by the referee, and approved by the court, are: That on March 15, 1906, the Vermont Mills made a contract with the Cone Export & Commission Company, whereby the latter was to have exclusive sale of the products of the mill, at a stipulated commission, and would advance 75 per cent. of the net cash value of the goods on hand stored in mill. That the goods thus advanced upon were to be billed to the Cone Company and stored in a separate warehouse and insured by the mill for the benefit of the claimant. The claimant agreed to guarantee the payment of the amount for which the goods were sold by it. The mills reserved the right to sell at its own store and to fill any contracts then in force. On January 15, 1907, one Vaught, agent of the claimant, vis-

ited the mills in the company of its president and the superintendent (Coble), and took an inventory of all the cloth on the looms and also that in the basement and in the warehouse, and thereupon stated that he took possession of all the cloth as the property of the said Cone Export & Commission Company, and appointed said Coble as its agent of the claimant to take charge of all the cloth. At that time, the Vermont Mills were indebted to the Cone Export & Commission Company in an amount in excess of the value of said cloth, and was also largely indebted to other creditors and insolvent. The judge finds as a fact that the said president of the Vermont Mills did not give his consent to the taking of the goods by Vaught, though he was present. The cloth remained in its then position till the receiver took charge on January 26th, as above stated.

The claim of the appellant, the Cone Export & Commission Company, is that, by virtue of its contract and the action of the said Vaught on January 15th, it is entitled to the proceeds of the sale of these goods.

The Cone Export & Commission Company acquired no lien by virtue of its contract of March 15, 1906, for that was purely an executory contract that goods should be shipped to said company for sale on commission. It acquired none by virtue of its advances, for there was no lien given or recorded. Nor did the fact that the Vermont Mills had marked the goods and invoiced them to the appellant have that effect, for an invoice does not transfer the title. *Dows v. Bank*, 91 U. S. 630, 23 L. Ed. 214; *Sturm v. Boker*, 150 U. S. 328, 14 Sup. Ct. 99, 37 L. Ed. 1093; 23 Cyc. 351.

A factor has no lien upon the goods of the principal unless he holds possession of the goods. "Possession, actual or constructive, is an essential element in the factor's lien." 19 Cyc. 160, and numerous cases there cited. The appellant's claim depends, therefore, upon whether the action of Vaught on January 15, 1907, amounted to a taking possession of said goods. We do not think that it can be so held. He appeared on the premises of the debtor, took an inventory of the cloth, whether in the looms or baled up and lying in the basement and in the warehouse. Possession was not surrendered by the company, nor by any one authorized to act for it. The court finds that the president of the company, who was present, did not assent to Vaught taking possession. He did not obtain possession with the consent of the company nor without it, for he had no process of any court. He contented himself with directing the superintendent to take possession of the goods and hold them as agent of the Cone Company. There was no physical change in the status of the goods. The superintendent had no authority to transfer the possession of the goods which he held as a servant for the com-

pany to a stranger. The president so testifies without contradiction, and we know it to be so as a matter of law. The superintendent is not an officer of the company, but merely an employé. The servant could not assent to transfer the goods he held for the master to another. Vaught thereafter exercised no dominion over the goods nor took any actual possession. They remained just as they lay, none the worse and none the better for the declaration of Vaught, and, unmoved by anything he said or did, they remained untouched until the receiver, by the authority of the court, took possession of them as the property of the company, which had not till then voluntarily or by order of any court lost possession of them.

When the receiver took possession of them, he did not take them from Vaught, but as the property of the company and lying in its mill. There being no lien upon them, the judge properly held that the claimant had no priority over the proceeds in the distribution of the proceeds by the receiver.

Affirmed.

MAINNING, J. (dissenting). I regret at all times not to be in agreement with the majority of this court, in cases submitted for our decision; but I am constrained to dissent from the conclusion reached in the disposition of this appeal. In section 155, vol. 1, Pomeroy's Equity Jurisprudence, the learned author says: "It is well established that where a court takes possession of the property of a party, and appoints a receiver to administer the trust for the benefit of all interested parties, the court receives such property impressed with all existing rights and equities, and the relative rank of claims and standing of liens remains unaffected by the receivership. Every legal and equitable lien upon the property is preserved with the power of enforcing it. The receivership does not destroy any liens that may have been acquired before the appointment." Applying this principle, stated with such admirable clearness, I think the contract between the Vermont Mills and the Cone Export & Commission Company created in the latter, upon making the advances to the former, as stipulated in paragraph 5, a right in equity against the mills, which was completed by the delivery of the baled goods, the subject of this action. It is admitted that the mills suspended manufacturing before the acts were done which, in my opinion, constituted a delivery to the commission company, under the contract and before the appointment of the receiver. During this period, advances to an amount more than double the value of the particular goods having been made theretofore, an agent of the commission company visited the Vermont Mills, and in the presence of its president, of the man who was by him thought to be its secretary and had been up to three days prior thereto, and of its superintendent, made invoices of the bales of

manufactured goods, by numbers and marks which he had placed thereon for the commission company, and in the presence of the president, the plaintiff, Garrison, and of Durham, the supposed secretary, and without objection or protest from either, requested Coble, the superintendent, to take charge of them as agent of the commission company, and he assented to do so. There was no removal of the goods, nor, in view of the above, do we think removal necessary to complete delivery. The mills were shut down and suspended. They did not again resume manufacturing, and there was no commingling of these goods with others. There was no word of objection or protest by the officers of the mills to what was said and done. It is true there was no positive assent. The officers saw; they heard; they were witnesses; but they stood mute.

It is admitted in the opinion of the court that the equitable lien of the commission company would have been complete by delivery, and this principle is well established. So the decisive question is: Did the acts narrated constitute a delivery? I cannot think that a change of physical location, in view of the actual occurrences, was required to complete the equitable lien of the commission company. It was acting strictly within its rights under the contract; the taking possession of the goods was not tortious, but under and by virtue of its contract; and the delivery by the mills was in accordance with its obligation under the contract. If a corporation makes a valid agreement to sell a horse for \$150, and the other party subsequently pays the price to the treasurer of the corporation, I cannot think the law requires a meeting of its board of directors to authorize the delivery of the horse, or that the taking possession of the horse by the purchaser in the presence of the president and without objection an unlawful or tortious act. Nor can I see that it is material that the absolute title does not pass by the delivery, but that the delivery is for the purpose of sale and an application of the proceeds to the payment of advances made on them. My conclusion is supported by the following cases and authorities: Kollock v. Jackson, 5 Ga. 153; Campbell v. Penn, 7 La. Ann. 371; Hamilton v. Campbell, 9 La. Ann. 531; Jackson v. Rutherford, 73 Ala. 155; Hauselt v. Harrison, 105 U. S. 401, 26 L. Ed. 1075; Gregory v. Morris, 96 U. S. 619, 24 L. Ed. 740; Yeatman v. Savings Institution, 95 U. S. 764, 24 L. Ed. 589; Walker v. Brown, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865. In this last case, the court quotes with approval section 1235, 3 Pomeroy, Equity Jurisprudence, where this doctrine is stated: "The doctrine may be stated in its most general form that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or

other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands, not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers or incumbrancers with notice. * * * The ultimate grounds and motives of this doctrine are explained in the preceding section, but the doctrine itself is clearly an application of the maxim, 'Equity regards as done that which ought to be done.' I do not think that the principle settled in *Brem v. Lockhart*, 93 N. C. 191, and the numerous decisions of the court since approving it, is contravened, for the reason that the court, in the present case, through its officer, is administering the assets of the defendant corporation "in trust for the benefit of all its creditors, impressed with the existing rights and equities and the relative rank of claims and standing of liens remains unaffected." Nor is the doctrine declared in *Duke v. Markham*, 105 N. C. 131, 10 S. E. 1017, 18 Am. St. Rep. 889, and since then repeatedly approved, contravened; that doctrine being that the power given by a corporation to execute a mortgage on, or make other conveyance of, corporate property, can only be given at a corporate meeting duly held.

In this present case, it is not questioned that the contract between the Vermont Mills and the commission company received proper corporate authorization. I am, therefore, of the opinion that the commission company was entitled to the proceeds of the sale of the manufactured goods, upon the facts found, and that his honor should have so adjudged.

HOKE, J., concurs in the dissenting opinion.

(152 N. C. 617)

SMITH v. TOWN OF HENDERSONVILLE.

(Supreme Court of North Carolina. May 25, 1910.)

1. MUNICIPAL CORPORATIONS (§ 288*)—CONSTRUCTION OF SIDEWALKS—STREETS.

Under Hendersonville Town Charter, §§ 5, 6, 9 (Priv. Laws 1901, c. 97), authorizing the grading of streets, providing that the lot owners may be required to pave the sidewalks under specified circumstances, and authorizing the submission to the voters of the question of paving the streets, the board of commissioners of the town may, on the voters at an election, ordered on a petition praying for a general scheme of street and sidewalk improvement, voting for the issuance of bonds for such purposes, use the proceeds for the grading of sidewalks and of streets, as distinguished from sidewalks, and for the payment of compensation to engineers employed to establish the grades of streets and sidewalks, as well as to pay for the paving of sidewalks.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 288.*]

2. MUNICIPAL CORPORATIONS (§ 321*)—IMPROVEMENT OF STREETS—JUDICIAL CONTROL.

The matter of grading streets rests exclusively in the discretion of the governing authorities of the city, and their decision will not be controlled by the courts.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 837; Dec. Dig. § 321.*]

Appeal from Superior Court, Hendersor County; Council, Judge.

Controversy without action by Walker A. Smith against the Town of Hendersonville. From a judgment for defendant, plaintiff appeals. Affirmed.

This was a controversy without action heard by Council, J., on April 27, 1910, at the superior court of Henderson county. The agreed facts are thus stated:

(1) That the General Assembly of North Carolina, session of 1901, passed an act (see chapter 97 of the Private Laws of 1901) entitled "An act to amend the charter of the town of Hendersonville," which act forms a part of the charter of the town of Hendersonville, reference to which is hereby made. That sections 5, 6, and 9 of said act form a general scheme for the paving of the streets and sidewalks of the said town.

(2) That on or about the 1st day of September, 1900, the people of the said town decided to lay cement sidewalks, under and by virtue of the said charter, and, through their commissioners, duly elected and qualified, they called an election to vote upon the question of the issuance of bonds for the said purpose, which call for election is hereto attached, marked "Exhibit A," and prayed to be taken as a part of this petition. That the election was carried, and \$20,000 worth of the said bonds were duly issued and sold, and the money therefrom has been placed in the treasury of said town. A copy of the said bonds is hereto attached, marked "Exhibit B," and prayed to be taken as a part of this petition.

(3) That after the sale of the said bonds and the receipt of the said money, the commissioners of the town of Hendersonville passed an order as to how said moneys should be spent in said work, and how said work should be prosecuted, which order of the board is hereto annexed and marked "Exhibit C," and prayed to be taken as a part of this petition.

(4) That the commissioners of the town of Hendersonville, as outlined in their said order, have proceeded to hire engineers to lay out and establish the grades on said streets and sidewalks, and have employed a contractor to grade the same and lay said cement sidewalks. That, acting under the orders of the said board and their employment by the said board, the said engineers and contractor are now at work on what is known as Academy street in said town. That the town of Hendersonville is a moun-

tain town, having many hills inside of said town, and in many places great excavations are called for by the engineers' survey, with fills on either side, which excavations and fills will cost much money to complete.

(5) That the said board of commissioners propose to pay: (1) The grading of the sidewalks out of said funds; (2) the grading of the streets, as distinguished from the sidewalks, out of said funds derived from said bond sale; (3) to pay the said engineers out of the funds derived from said bond sale for the establishment of the grades of the sidewalks; (4) to pay the said engineers out of the funds derived from said bond sale for the establishment of the grades of said streets as distinguished from said sidewalks.

(6) That a great controversy has arisen in the said town, among the lawyers and citizens, as to whether, under the said charter and call for election, etc., the commissioners have the power to do such grading, employ such engineers, to pay for the grading of the sidewalks and streets, and said engineers, as aforesaid, out of the money derived from the said bond sale.

(7) That the plaintiff, Walker A. Smith, who is a resident and taxpayer of the town of Hendersonville, contends that, under the plain terms of the charter, the call for said election, and the plain letter of the law, the said commissioners have no power: (1) To pay for the grading of the sidewalks out of said money; (2) to pay for the grading of the streets between the sidewalks out of said money; (3) to pay the engineers out of said money to establish the grade of said sidewalks; (4) to pay the engineers out of said money to establish the grade of the streets, as distinguished from the sidewalks—all of which aforesaid things the town claims it can lawfully do. And he further contends that under the plain letter and meaning of the law, as set forth in said charter and statutes amendatory thereof, and the said call of election, the money derived from the sale of these bonds can only be spent for actual cement and the work of laying it down.

Upon the above facts agreed, his honor rendered the following judgment: "This case coming on to be heard before his honor, W. B. Council, Judge, at chambers, and being heard, by consent, the court is of the opinion, and so adjudges: First. That the board of commissioners of the town of Hendersonville had and now have a legal right to pay for grading the streets (as distinguished from sidewalks) in the town of Hendersonville, from the funds now in hand derived from the sale of \$20,000 bonds issued January 1, 1910, in accordance with and by authority of an election held in said town the 28th day of September, A. D. 1908. Second. That the board of commissioners of said town had and now have a legal right to pay for grading the sidewalks in said town from said fund. Third. That the board of commissioners of said town had and now have a legal right to

employ and pay competent engineers to ascertain the proper grades of said streets in said town. Fourth. That the board of commissioners of said town had and now have a legal right to employ and pay competent engineers to ascertain the proper grades of said streets in said town. Fifth. That the plaintiff pay the costs of this action, to be taxed by the clerk." From which judgment plaintiff appealed to this court.

Charles F. Toms, for appellant. Michael Schenck, for appellee.

MANNING, J. In *Commissioners v. Webb*, 148 N. C. 120, 61 S. E. 670, a case involving the interpretation of the same sections of the charter of the town of Hendersonville as the present case (chapter 97, Priv. Laws 1901), this court said: "The term 'streets' may, and frequently does, include both sidewalks and driveways, and, while there are many decisions which, under certain facts and conditions, distinguish and separate the two, we are clearly of opinion that in an undertaking of this magnitude, involving an expenditure of \$18,000 in paving sidewalks, both the purpose of the law and its correct interpretation require that the term 'streets' in this connection should include sidewalks, bringing the proposition within the provisions of section 9 of the charter, requiring that a vote of the people should be taken." In *Hester v. Traction Co.*, 138 N. C. 288, 50 S. E. 711, 1 L. R. A. (N. S.) 981, it is said: "The rights, powers, and liability of the municipality extend equally to the sidewalk as to the roadway, for both are parts of the street. *Tate v. Greensboro*, 114 N. C. 392 [19 S. E. 767, 24 L. R. A. 671]; 2 *Smith, Mun. Corp.* § 1304; *Elliott, Roads & Streets*, § 20." The petition upon which the election was ordered, the bonds sold, and the proceeds received for expenditure, particularly desired the board of commissioners of Hendersonville "to adopt a general scheme of street and sidewalk improvement for the town." In adopting such a general scheme in limine, it is assuredly the part of a wise administration to engage the services of a competent, experienced, and skillful engineer. It would be unwise and unsightly to have the sidewalks graded to an established grade and then paved with cement, and to leave the driveways or roadways of the streets in their natural condition and with their natural configuration undisturbed. It is left to the sound judgment and discretion of the board of commissioners, aided by the advice of a competent engineer, to determine how much grading any particular street shall receive, and how much its natural configuration shall be varied. It has been repeatedly held by this court, as well as other courts, that such matters are legislative and rest exclusively in the discretion of the governing authorities of the municipalities, and its decisions cannot be interfered with, or controlled by, the courts. *Meares v. Wilmington*.

§1 N. C. 73, 49 Am. Dec. 412, and the numerous cases cited in Annotated Edition. Under sections 5, 6, and 9 of the town charter, it was permissible to adopt a general scheme of improvements of its streets and sidewalks, as requested in the petition, and approved at the election by the voters of the town, and proceed to carry it out.

We therefore discover no error in the judgment appealed from, and it is affirmed.

(152 N. C. 641)

UNDERWOOD v. TOWN OF ASHEBORO.
(Supreme Court of North Carolina. May 25, 1910.)

1. MUNICIPAL CORPORATIONS (§ 867*)—INDEBTEDNESS—ISSUANCE OF BOND—"NECESSARY EXPENSE."

The protection of a town from fire and disease by providing water and sewerage is a "necessary expense," within the meaning of Const. art. 7, § 7, and Revisal 1905, § 2974, providing that no municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein, and, therefore, a vote of the people is not required to render bonds issued to provide waterworks and a sewerage system valid, in the absence of statutory restrictions enacted under Const. art. 8, § 4, making it the duty of the Legislature to restrict the power of cities to tax, borrow money, contract debts, or loan their credit.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1841; Dec. Dig. § 867.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4715, 4716.]

2. MUNICIPAL CORPORATIONS (§ 864*)—LIMITATION ON POWER TO CONTRACT INDEBTEDNESS.

Revisal 1905, § 2977, making it unlawful for any city to contract a debt, pledge its faith, or loan its credit for the support or maintenance of internal improvements or for any special purpose whatsoever to an extent exceeding in the aggregate 10 per cent. of the assessed valuation of the real and personal property in the city, does not apply to an indebtedness for necessary expenses.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1828-1835; Dec. Dig. § 864.*]

3. MUNICIPAL CORPORATIONS (§ 1000*)—RESTRAINING ISSUANCE OF BONDS—BURDEN OF PROOF.

In proceedings to enjoin the issuing of bonds by a town board of commissioners for waterworks and a sewerage system on the ground that the interest on them could not be paid without exceeding the statutory limitations on the town as to the levy of taxes, the burden is on plaintiff to show that, after deducting rentals and profits of the water system, the levy necessary to pay the balance would be in excess of the town's authority.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 1000.*]

Appeal from Superior Court, Randolph County; Biggs, Judge.

Action by W. A. Underwood against the Town of Asheboro. Judgment for defendant, and plaintiff appeals. Affirmed.

On February 10, 1910, the board of commissioners of the town of Asheboro passed a resolution, without submitting the same to a vote of the people, to issue \$50,000 in bonds of the town, due 30 years after date and bearing 5 per cent. interest, for the purpose of providing a system of waterworks and sewerage for said town. The plaintiff, a taxpayer of said town, brought this action to restrain the issuing of said bonds. The court decided that the purpose contemplated by the resolution was a necessary expense, and there being no limitation in the charter or by any statute, general or special, upon the power of the town to contract for necessary expenses, adjudged that the town commissioners had authority to incur said indebtedness and issue bonds therefor and denied the injunction. Plaintiff appealed.

R. C. Kelly and H. M. Robins, for appellant. J. A. Spence, for appellee.

CLARK, C. J. Upon the facts agreed, which the judge found to be true, it appears that the population of the town of Asheboro is about 2,000; that the assessed value of the real and personal property in the town is \$752,767, and there are 312 taxable polls; that the bonded indebtedness already existing is \$15,000; that by virtue of special elections authorized by the General Assembly the town levies 50 cents on the \$100 of property and \$1.50 on the poll for graded school purposes and 25 cents on the \$100 and 75 cents on the poll for general, street, and other purposes. It is further agreed and found as facts by the judge that the present source of water supply for the inhabitants of the town is surface wells, and water from four of these have been analyzed, and all four were found to be infected with typhoid germs; that the town has no provision for protection from fire; that the town is lighted by electric lights, but it has only about 100 yards of paved streets; that the cost of putting in the proposed water and sewerage system will be between \$40,000 and \$60,000.

The protection of the town from fire and disease is of the first importance, and his honor properly adjudged that this provision for water and sewerage was a necessary expense. By the terms of Const. art. 7, § 7, and Revisal 1905, § 2974, a vote of the people is not required before incurring an indebtedness and issuing bonds for "necessary expenses," in the absence of statutory restriction. Const. art. 8, § 4.

The existing indebtedness is \$15,000, and the assessed valuation of property, real and personal, in the town is \$752,767. The proposed issue of \$50,000 bonds would therefore not violate the 10 per cent. restriction in Revisal 1905, § 2977, if it applied to indebtedness for necessary expenses, which it does not. Wharton v. Greensboro, 146 N. C. 356, 59 S. E. 1043.

The limitation in Revisal 1905, § 2924, of a levy of more than 50 cents on the \$100 and \$1.50 on the poll applies to "municipal purposes," i. e., for ordinary purposes of city or town government. The limitation in Revisal 1905, § 5110, that the town shall not levy to exceed \$1 on the \$100, has this proviso, "except by special authority from the General Assembly." Though the town already levies 75 cents on the \$100, so much thereof (50 cents) as is levied for special purposes (school, etc.) under elections authorized by special statutes, is to be deducted from the 75 cents, which leaves ample margin between the 25 cents now levied for general purposes and the \$1 limitation in Revisal 1905, § 5110, for a levy to pay the interest on these bonds, though that would not be necessary to the validity of the bonds. *Commissioners v. McDonald*, 148 N. C. 125, 61 S. E. 643. Besides, it does not appear that, after deducting rentals and profits of the water system, the levy to pay interest on these bonds would probably swell the total levy, for other than special purposes (which are authorized by special statute) beyond the limitation in either Revisal 1905, § 2924, or section 5110. The burden to show this was on the plaintiff asking an injunction.

Towns in Randolph county are exempted from the very commendable provision in Laws 1907, c. 935, and Pell's Revisal 1908, § 2924, which restricts the total municipal poll tax in all cases to \$2. The excessive poll tax levied in many towns, before the passage of this act, was a great hardship on the poorer classes.

The judgment refusing the injunction is affirmed.

(152 N. C. 822)

STATE v. BALDWIN.

(Supreme Court of North Carolina. May 17, 1910.)

1. HOMICIDE (§ 11*)—MURDER—ELEMENTS—MALICE.

Under Revisal 1905, § 3631, providing that a murder which shall be perpetrated by means of poison, etc., or by any other kind of willful, deliberate, and premeditated killing, shall be deemed "murder in the first degree," and that all other kinds of murder shall be deemed murder in the second degree, malice is always an essential ingredient of murder.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 15, 16; Dec. Dig. § 11.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4637-4641; vol. 8, p. 7727.]

2. HOMICIDE (§ 13*)—MURDER—MALICE.

Under Revisal 1905, § 3631, defining murder, while malice in the popular sense of hatred or ill will is not always required, it may be said to exist whenever there has been an unlawful or intentional homicide, without excuse or mitigating circumstances.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 15-18; Dec. Dig. § 13.*]

3. HOMICIDE (§ 31*)—"MANSLAUGHTER"—DEFINITION.

"Manslaughter" is the unlawful killing of another without malice, and under certain conditions this crime may be established, though the killing has been both unlawful and intentional.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 52; Dec. Dig. § 31.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4338-4342; vol. 8, p. 7715.]

4. HOMICIDE (§ 39*)—MALICE—PRESUMPTIONS.

Though there may have been previous ill feeling between the parties, yet if they afterwards meet accidentally, and a fight ensues in which one of them is killed, it will not be judged that they were moved by the old grudge, unless it so appear from the circumstances of the affair.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 39.*]

5. HOMICIDE (§ 231*)—MURDER—MALICE—SUFFICIENCY OF EVIDENCE.

In a trial for murder, evidence held insufficient to show malice.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 231.*]

6. HOMICIDE (§ 307*)—INSTRUCTIONS—MANSLAUGHTER.

In a trial for murder, where the evidence repelled the idea of malice, it was the court's duty to instruct on manslaughter only.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 307.*]

7. CRIMINAL LAW (§ 1141*)—APPEAL—PRESUMPTIONS.

On appeal in a criminal case, the ruling of the trial court is presumed to be correct.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3014; Dec. Dig. § 1141.*]

Appeal from Superior Court, Watauga County; Council, Judge.

William Baldwin was convicted of murder, and appeals. New trial.

There was evidence on the part of the state, tending to show that on July 6, 1909, the prisoner shot and killed J. W. Miller, deceased, who was at the time the town marshal of Blowing Rock, N. C.; that prisoner was going out of town towards Linville, when the deceased, who was 50 steps behind, called to prisoner, overtook him, and, claiming to have a warrant for prisoner, arrested him and started him back towards town; that he shoved the prisoner twice to hurry him along, and the second time the prisoner pulled loose, and, turning, shot and killed deceased; that deceased had no valid warrant at the time, and was armed with a billy and pistol, and himself fired once, and one or two of the cartridges in his pistol showed that they had been snapped on.

Henry Coffey, an eyewitness, testified for the state, in part, as follows: "Live at Blowing Rock. I was present at the time the prisoner shot and killed Miller, the deceased. The shooting occurred near shop in Blowing Rock. I walked with the deceased to shop just before the shooting. The place where the shooting occurred is beyond the shop a little. When Miller and I were going

towards the shop we saw the prisoner come out of the shop and walk off; went in road toward Linville. At this time Baldwin was about 50 yards from Miller and I. Miller then hollowed, and said 'Hold, Mr. Baldwin, I have got a warrant for you.' Mr. Baldwin continued to walk on; did not look back; Miller walked on after him and overtook him in a few steps. When Miller overtook Baldwin he pulled out a paper. (Here defendant excepts.) Mr. Baldwin then said: 'Go off and let me alone; I have started to leave here.' Then Mr. Miller pulled out his 'billy' like he would use it if Baldwin resisted; then Mr. Miller put his hand on Baldwin or give him a little shove and started toward Blowing Rock. While they were walking along Baldwin reached his hand to his left bosom, and then seemed to drop it to his side. Mr. Miller about this time kinder give him a little shove, and told Baldwin to walk along a little faster. About this time Baldwin got away from Miller some five or six feet and made a little circle, moving to the front of Miller, then presented a pistol on Miller and snapped it at him. At the time Baldwin drew his pistol and snapped it, Miller seemed to be trying to put his paper away and drew his pistol. Mr. Baldwin drew his pistol first; Miller drew his a second after well as I could tell. When Baldwin snapped his pistol at Miller, Miller was then drawing his pistol. Immediately after the pistol snapped Baldwin then shot. (Indicates time by slapping hands.) After first shot Baldwin continued in rapid succession to shoot until he fired four shots. After the four shots by Baldwin I then heard the report of another pistol; it sounded louder, and was a few seconds after the four shots I first heard that Baldwin fired. Miller fired the last shot; had pistol in his right hand, but put up his left hand to his right and shot. He only shot once; did not hit Baldwin. When Miller fired at Baldwin, then Baldwin caught Miller by the coat sleeve and began to beat Miller over the head with the pistol. (Pistol is shown witness, and he says it looks like the Baldwin pistol—it is the same pistol.) Baldwin struck Miller some four to five licks over the head. The guard on the pistol is bent. The Baldwin pistol is a S. & W. double action, rapid fire, caliber 32. When Baldwin was beating Miller over the head with the pistol, Miller hollowed, 'Help me boys,' and I said, 'Come on, boys, and let's stop this.' Mr. Robbins then came out in the yard, then turned and went back. I went on and took hold of Baldwin's pistol and took it from him and put it in my pocket. I took hold of Baldwin's arm, and then Mr. Johnson took hold of Miller and led him off. Baldwin was taken in charge by the officers. I went to Miller and helped to carry him home. Saw Dr. Parleir with Miller. This shooting occurred at Blowing Rock, N. C., the 6th July, and some time after 4 p. m., in daylight. The pistol Baldwin used, a six-

shooter, and five shells shot out and one snapped on. When Miller first got up to Baldwin he just kinder put up his hand and touched Baldwin and said, 'I have a warrant for you,' and took out a paper. Miller never struck Baldwin before Baldwin began firing." Cross-examined: "I had seer Baldwin that day at Blowing Rock prior to the shooting. Next saw Baldwin when he came out of the shop. I just struck up with Miller as he was going out toward the shop. Miller asked me to walk with him. Miller overtook Baldwin in 20 yards from shop. Miller said Baldwin had gone out about the shop or Ed Robbins; and was going to hang out there that night, and that he was going to arrest him and take him to jail; described billy that Miller carried. Miller's pistol had one chamber shot and three cartridges snapped on. Miller was fighting all he could. When I took hold of Baldwin and took pistol from him, I stood where I could see it all. Never knew anything against the deceased as to truth." Redirect: "No injury on Baldwin—a little smut on his cheek."

With a view of showing malice, and with a view of showing that the killing was premeditated and deliberate, D. S. Lee was examined by the state, and testified: "I know prisoner when I see him. I know the deceased man, Miller. I heard a conversation between the deceased and prisoner on Friday evening before this killing on Tuesday, the 6th of July last. Mr. Miller and I met in front of Mr. Holsouser's store, and were talking, and Baldwin came up. When Mr. Baldwin came up Mr. Miller said, 'All I need to arrest a man with is the billy I have in my hand.' Mr. Baldwin then said, 'If you ever attempt to arrest or hit me with that billy I will kill you.' Mr. Miller said, 'I hope I will never have any cause to arrest you, but if I do you or any other man, this is all I need to arrest you.' Baldwin then said, 'By God, if you ever attempt to arrest me with it, you or I will one die.' I think this is the expression. By this time both Miller and Baldwin seemed to be a little mad, and Baldwin walked off, and Miller continued to talk to me. When Baldwin came up to where Miller and I were talking he was very abrupt."

For like purpose M. T. Shoemaker was introduced, and testified: "I saw the prisoner in about five minutes after the shooting occurred. I went up to where the shooting occurred. When I got there Henry Coffey said, 'Mr. Baldwin had shot Mr. Miller and killed him,' and I said to Mr. Baldwin, 'You have about fixed yourself to be hung, have not you?' and Baldwin replied and said, 'I have done just what I intended to do, and I don't care what in the hell they do with me.'"

Wm. Edmisten testified: "I accompanied defendant to jail from Blowing Rock. I asked him who shot first. He said, 'I did.' I said, 'You got yourself in trouble.' He said: 'I do not care; there would not have been

anything of it if Miller had not followed him' (me)"—Baldwin. Cross-examined: "Miller said he shot once; showed me how he shot; could not shoot any more on account of being wounded. I heard Miller tell Baldwin to leave town. He said Baldwin concealed whiskey, and if he did not, he would get warrant and arrest him. This evening of the shooting Baldwin told Miller he would be damned if he would go."

For the defendant, it appeared that the warrant under which deceased professed to act was void, and the court so held.

Defendant, a witness in his own behalf, testified to the occurrence as follows: "I am defendant. Live at Blowing Rock. Am 57 years old. Lived at Blowing Rock since 1865. Have been working for Ritter Lumber Company for last two years. Only returned to Blowing Rock three or four days before the trouble with Miller. I returned home because my wife was sick. I went to Blowing Rock on Tuesday; had been to Boone and was returning home. I got to Blowing Rock about 12 o'clock. I rested, and was looking for a man to go on a Mr. Greene's bond. I was on the porch of the drug store at Blowing Rock, and Mr. Miller came up and ordered me off. When he did this he talked ill to me. After he ordered me off I sat there about five minutes. Frank Robbins, Dr. Rabey, and others present. I walked away and left Miller standing there. After I left I went home and laid down on the bed; was sick. Wm. Edmisten came to my house while I was on the bed and told me I had better leave; that they were about to issue a warrant for me. I told him I was not able to leave—my wife was sick at the time. I had no one to leave with her. After Edmisten left I got up and left. Told the old woman I guess I had better go. I started to my work at Ritter Company's. I got as far as Robbins' shop, and there came up a shower of rain, and I went in to keep from getting wet. Stayed there a while, 15 or 20 minutes. I then started off. I then heard some one hollowing behind. I just kept walking on. First thing I knew a man took me by the coat collar and I looked around and saw it was Miller. I then turned around and said: 'I am going to my work. Let me go; I have started as you told me to do.' Miller then pulled his billy out of his pocket; and, when he did so, I jerked loose from him, and he then drew his pistol out of his pocket. I then jerked mine out and told him to stop. He then threw his pistol in my face, and I threw mine in his face, and Miller's pistol snapped, and I then began shooting and fired about four shots in rapid succession (identified pistol as his). During the time I was firing, the deceased was trying to shoot me. I never heard Miller shoot but once; that was last shot. I heard Miller snap once; this before fired. Held pistol on me all time I was shooting, trying to shoot me. He held pistol

in one hand. After last shot he grabbed me. We faced each other until Miller grabbed me. I did not know I had hit him until the firing was all over. We—right up to each other when Miller shot. Powder burned me in face. Henry Coffey took my pistol from me right after shooting. After shooting was over took me to Mr. Holsouser's store. Mr. Lentz and Robbins in shop while shooting was going on. I did not know who called me, and I walked on. I never had had any trouble with Miller. I shot Miller because he threw his pistol in my face and would not stop when I told him, and I thought he was going to kill me. We—right up together when pistols were drawn and shooting occurred. After the shooting Miller caught hold of me and I tapped him a few times over the head. He during this time trying to shoot me or trying to hit me with it. Miller and I were perfectly friendly—no trouble between us. Denies the conversation that Lee testified to about billy, also threats made about Miller. I do not use liquor—have not touched it in 13 or 14 years." Defendant admitted having been sentenced to the penitentiary many years ago for stealing money, and testified that he was not guilty and had been pardoned, and, further, that deceased had the reputation of being a dangerous, violent man, of using weapons on people when in difficulties with them.

Frank Robbins, for defendant, testified: "Was not present at shooting. Present at drug store time of conversation between Miller and Baldwin. I heard Miller tell Baldwin he must leave town. Baldwin said he was sick, and his wife was sick, and he had not done anything to leave for, and he would not be run off from home; that he had not done anything to leave, and he was not going to do so. Baldwin then walked off, and Miller asked the mayor, Mr. Sudderth, for a warrant, or demanded one. Said if he could not get a warrant there he would go where he could get one. Miller seemed a little wrought up or little mad when he was talking and when he called for the warrant."

C. A. L. Holsouser, for defendant, testified: "Some four or five days before killing I heard a conversation between Miller and Baldwin. Baldwin said 'If you ever hit me with that billy I will kill you.' Miller said: 'If I can't arrest you with that, I got something in my pocket that I can arrest you with, and if it will not do, I have a Winchester rifle I can get you with.'"

There was other evidence that the deceased was a resolute and determined man and officer, high-tempered and dangerous when aroused, and when he had animosity towards one. George Sudderth, the mayor of the town, testified, among other things: "That Henry Coffey told me he saw only a part of the difficulty; that he went into the shop and peeped out," etc.; that he knew Will Baldwin; that he had the reputation of being a good kind of man, and attended to his

business; that Miller was a man of high temper, so said; he had the reputation of being a man who would use a weapon in a difficulty.

Moses Johnson, for defendant, testified: "Tells about the difficulty between Baldwin and Miller. Saw Baldwin with pistol; then shooting followed. After shooting over I went up. Miller had pistol presented on Baldwin when I got there. Saw bullet hole in shop. I think I got to parties first after shooting. Could kill man with billy—weigh about a pound."

J. B. Clarke, testified: "Know defendant. Except charge against Baldwin going to pen, he is man of very good character, a harmless fellow, good worker."

J. W. Farthing, testified: "Knew deceased. Character of Miller was: He was a hasty man; liked to exhibit his firearms; would make motion like drawing weapon when things did not suit him; he was hasty; drank while he was in Boone."

Geo. W. Robbins, testified: "Reputation of Miller was that he was a man who would carry out his purposes regardless of consequences. Would arrest a man regardless of danger." Cross-examined: "Was a brave officer. Would go when called to do so. Never considered the danger."

The prisoner was convicted of murder in the first degree. Motion for new trial by prisoner on the ground that the court should have held that upon the entire testimony the prisoner could not be convicted of murder in the first degree. Overruled, and exception. There was judgment on the verdict, and prisoner excepted and appealed.

L. D. Lowe, M. N. Harshaw, and T. A. Love, for appellant. The Attorney General and G. L. Jones, for the State.

HOKE, J. (after stating the facts as above). We have given the appeal the extended and careful consideration that a case of this character should always receive, and are of opinion that, on the facts as they now appear, the element of malice, required by the law as a constituent feature of the crime of murder, has been negatived, and that if on another trial the facts should be substantially the same, the prisoner is entitled to have his cause submitted and determined on the question of his guilt or innocence of the crime of manslaughter. In *State v. Banks*, 143 N. C. 652-656, 57 S. E. 174, 176, speaking of malice as an element of the crime of murder, and of the suggested effect upon it of our statute dividing the crime of murder into two degrees, the court said: "There has been no change wrought in this respect by the statute dividing the crime of murder into two degrees (Revisal 1905, § 3631), as to the element of malice which must exist to make out the crime. Both before and since the statute, murder is the unlawful killing of another with malice aforethought. See

Clark's Crim. Law, p. 187. This malice may arise from personal ill will or grudge, but it may also be said to exist whenever there has been a wrongful and intentional killing of another without lawful excuse or mitigating circumstance. The statute does not undertake to give any new definition of murder, but classifies the different kinds of murder as they existed at common law, and which were, before the statute, all included in one and the same degree. Thus, all murder done by means of poison, lying in wait, etc., or by any other kind of willful, deliberate, or premeditated killing, or murder done in effort to perpetrate a felony, shall be murder in the first degree and punished with death. All other kinds of murder shall be deemed murder in the second degree, and punished by imprisonment in the state's prison." It will thus be seen that the constituent definition of murder remains as it was; and, while malice, in the popular sense of personal hatred or ill will, is not always required, and may be said to exist whenever there has been an unlawful and intentional homicide without excuse or mitigating circumstance, its presence is always necessary to the crime of murder, whether in the first or the second degree. Manslaughter is the unlawful killing of another without malice, and, under given conditions, this crime may be established, though the killing has been both unlawful and intentional. Thus, if two men fight upon a sudden quarrel, and on equal terms at least at the outset, and in the progress of the fight one kills the other, kills in the anger naturally aroused by the combat, this ordinarily will be but manslaughter. In such case, though the killing may have been both unlawful and intentional, the passion, if aroused by provocation which the law deems adequate, is said to displace malice, and is regarded as a mitigating circumstance reducing the degree of the crime.

This position, and the reason upon which it is properly made to rest, is well stated by Judge Gaston, delivering the opinion of the court in *State v. Hill*, 20 N. C. 634, 635 (34 Am. Dec. 896), as follows: "If instantly thereupon (after being grievously assaulted) in the transport of passion thus excited, and without previous malice, the prisoner killed the deceased, it would have been a clear case of manslaughter. Not because the law supposes that this passion made him unconscious of what he was about to do, and stripped the act of killing of an intent to commit it, but because it presumes that passion disturbed the sway of reason, and made him regardless of her admonitions. It does not look upon him as temporarily deprived of intellect, and therefore not an accountable agent, but as one in whom the exercise of judgment is impeded by the violence of excitement, and accountable therefore as an infirm human being. We nowhere find that the passion which in law rebuts

the imputation of malice must be so overpowering as for the time to shut out knowledge and destroy volition. All the writers concur in representing this indulgence of the law to be a condescension to the frailty of the human frame, which, during the furor brevis renders a man deaf to the voice of reason, so that, although the act done was intentional of death, it was not the result of malignity of heart, but imputable to human infirmity." Our decisions are also to the effect that, though there may have been previous ill feeling between the parties, yet if they afterwards meet accidentally, and a fight ensues in which one of them is killed, it shall not be intended that they were moved by the old grudge, "unless it so appear from the circumstances of the affair." This was directly held in the case of *State v. Hill*, supra, where there had previously been a fight between the parties; the ruling being expressed as follows: "Where two persons have formerly fought on malice and are apparently reconciled and fight again on a fresh quarrel it shall not be intended," etc. The principle was affirmed and again applied in *State v. Jacob Johnson*, 47 N. C. 247, 64 Am. Dec. 582, and in the opinion of this case is put by way of illustration: "But where A. bears malice against B., and they meet by accident, and upon a quarrel B. assaults A. with a grubbing hoe, and thereupon A. shoots B. with a pistol, the rule of referring the motive to the previous malice will not apply." And this is in accord with the doctrine generally prevailing.

Applying these principles to the facts presented, while the evidence tends to show that there was some animosity between these parties, there was nothing in the conversations between them, according to any version of them which would indicate a fixed and definite purpose to take the life of the deceased. The expressions imputed to the prisoner seem to have been in reply to a threat or boast by the officer that he could easily effect the arrest of the prisoner, and, according to all the testimony, the meeting in which the killing occurred was entirely accidental, certainly on the part of the prisoner. The witnesses, for both the state and the prisoner, who saw the occurrence say that the prisoner at the time was apparently leaving the town and going toward his place of work some distance away, when he was hailed by the officer, overtaken, arrested without any warrant or any conduct that presently justified it, turned back, and physically shoved along at least twice before he offered any active resistance. If these facts are established, we are of opinion, as stated, that they repel the idea of malice, and the question is presented only on the issue as to manslaughter, and the judge should so have instructed the jury.

Speaking to the question, in *State v. Miller*, 112 N. C. 885, 17 S. E. 169, an authority not inapplicable to the facts presented here,

Avery, J., delivering the opinion, said: "It is true that when the killing with a deadly weapon is proved and admitted the burden is shifted upon the prisoner, and he must satisfy the jury, if he can do so from the whole of the testimony, as well that offered for the state as for the defense, that matter relied on to show mitigation or excuse is true. *State v. Vann*, 82 N. C. 631; *State v. Willis*, 63 N. C. 26; *State v. Brittain*, 89 N. C. 481. But when it appears to the judge that in no aspect of the testimony, and under no inference that can be fairly drawn from it, is the prisoner guilty of murder, it is his duty, certainly when requested to do so, to instruct the jury that they must not return a verdict of any higher offense than manslaughter, just as it would be his duty to instruct, in a proper case, that no sufficient evidence had been offered to either excuse or mitigate the slaying with a deadly weapon. Though the law may raise a presumption from a given state of facts, nothing more appearing, it is nevertheless the province of the court, when all the facts are developed and known, to tell the jury whether in every aspect of the testimony the presumption is rebutted. *State v. Roten*, 86 N. C. 701; *Doggett v. Railroad*, 81 N. C. 459; *Ballinger v. Cureton*, 104 N. C. 474 [10 S. E. 664]."

Nor do we think that the statement of the prisoner to the witness Shoemaker within five minutes of the occurrence should be allowed to affect the view we take of the case. This witness testified that, going up to the place five minutes after the shooting, Henry Coffey said to witness, "Mr. Baldwin has shot Mr. Miller and killed him," and witness said to Mr. Baldwin, "You have about fixed yourself to be hung, haven't you?" and Baldwin replied, "I have done what I intended to do, and I don't care what in the hell they do with me." The question as put by the witness was well calculated to arouse the prisoner, and the conversation at the time and place it occurred, and under the attendant facts, should be regarded, we think, as the not unnatural expression of an angered man who had just passed through a fateful encounter with his fellow man, and should properly be referred to the occurrence itself, and not by any fair intendment construed as an expression of a preconceived definite purpose to kill.

In awarding a new trial to the prisoner, with an intimation that his cause should be submitted to the jury on an issue as to manslaughter, we give such intimation only on the assumption that the facts shall be again developed substantially as they now appear, and especially on the theory that the arrest of the prisoner was without a valid warrant or other lawful authority. The court so held in the case, and the presumption is that this ruling was correct. If it should otherwise appear on a second trial, the case would be presented in an entirely different aspect. Under our authorities, the new trial is at large, and the case will be proceeded with in accord-

ance with law and on the facts as they may be disclosed on a second hearing.

For the error indicated, there must be a new trial, and it is so ordered.

New trial.

(152 N. C. 610)

CALVERT v. ALVEY et al.

(Supreme Court of North Carolina. May 25, 1910.)

1. EVIDENCE (§ 251*)—ADMISSIONS—DECLARATIONS BY TRUSTEE.

In an action to set aside a trust deed, there was no error in excluding, as evidence against grantee, declarations of the trustee subsequent to the conveyance, where there was no evidence or admission that he was the grantee's agent in making the loan or procuring the execution of the deed, or, if so, it was not contended that the declarations were made at the time of the transaction, so as to render them a part of the *res gestæ*.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 983-988; Dec. Dig. § 251.*]

2. EVIDENCE (§ 241*)—ADMISSIONS OF AGENT—EFFECT AS TO PRINCIPAL.

Where the acts of an agent bind the principal, the declarations, representations, and admissions of the agent respecting the subject-matter will also bind him, if made at the same time, and constitute a part of the *res gestæ*.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 887-892; Dec. Dig. § 241.*]

3. EVIDENCE (§ 352*)—BOOKS OF ACCOUNT—RES INTER ALIOS ACTA.

In an action, by the assignee of judgments recovered by the receiver of a bank, to set aside as fraudulent a trust deed executed by judgment debtors, the books of the insolvent bank were clearly incompetent as to the grantee defendant, as she was in no wise responsible for or privy to them, and they were properly excluded as *res inter alios acta*.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1393, 1400; Dec. Dig. § 352.*]

4. FRAUDULENT CONVEYANCES (§ 155*)—SETTING ASIDE—KNOWLEDGE OR PARTICIPATION IN FRAUD.

The grantee's knowledge of or participation in the grantor's fraud is essential to set aside or vacate a deed as fraudulent against creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 493; Dec. Dig. § 155.*]

5. FRAUDULENT CONVEYANCES (§ 159*)—PREFERENCE TO CREDITOR—EFFECT OF KNOWLEDGE OF OTHER DEBT.

A creditor has a right to secure a bona fide existing indebtedness, though knowing the debtors are largely indebted to another.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 506-517; Dec. Dig. § 159.*]

6. FRAUDULENT CONVEYANCES (§ 162*)—TRUST DEED—TRUSTEE'S PARTICIPATION IN FRAUD—EFFECT.

The security of a creditor in a trust deed, who is himself innocent of fraud, is not affected by the trustee's participation therein, where the latter was merely the temporary repository of the legal title in an instrument securing a single debt, and had no previous connection with the trust property, nor any active duties to perform in connection with it, but in such case the secured creditor must be fixed with

notice, and the trustee's knowledge is not imputable to him.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 504, 505; Dec. Dig. § 162.*]

7. FRAUDULENT CONVEYANCES (§ 271*)—EVIDENCE—BURDEN OF PROOF.

Where a creditor shows facts raising a presumption of fraud in a conveyance by his insolvent debtor, the history of which is necessarily known to the debtor only, the burden of rebutting the presumption lies on the debtor, but the rule does not apply to one claiming as a mortgagee, who innocently made a loan on the property.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 796-798; Dec. Dig. § 271.*]

8. FRAUDULENT CONVEYANCES (§ 296*)—EVIDENCE—BONA FIDES OF DEBT.

In a suit to set aside a trust deed, evidence held to establish the bona fides of the secured debt.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 891; Dec. Dig. § 296.*]

Appeal from Superior Court, Buncombe County; M. H. Justice, Judge.

Action by George R. Calvert against C. B. Alvey and others. Plaintiff was nonsuited, and he appealed. No error.

Civil action tried at March term, 1910, of the superior court of Buncombe County, his honor Judge Justice presiding. The action is brought by the assignee of certain judgments against W. H. Penland and others to set aside on ground of fraud a certain deed in trust, dated July 20, 1897, executed by W. H. Penland, Mary B., Althea M., and Mary C. Penland to Joseph E. Dickerson, trustee, covering nine tracts of land, securing the payment of a note to Mrs. C. B. Alvey in the sum of \$10,000. It appears on the face of the deed in trust that it is made subject to a mortgage to J. E. Rumbough, trustee, for \$8,000, and also a deed in trust to Jacob Friedman, trustee, for \$7,000. On October 31, 1898, the deed in trust was foreclosed under the power of sale, and the nine tracts of land were purchased by and conveyed to C. B. Alvey in consideration of \$5,000. This action is brought to set aside said deed in trust to Dickerson, trustee, and the subsequent conveyance under it to Mrs. Alvey, and for an accounting from her for rents and profits and proceeds of sale of lands sold by her over and above the amounts disbursed in the discharge of the prior incumbrances on the land. At conclusion of plaintiff's evidence a motion to nonsuit was sustained. Plaintiff appealed.

Frank Carter and H. C. Chedester, for plaintiff. Moore & Rollins and Locke Craig, for defendants.

BROWN, J. This action is brought by a judgment creditor to set aside certain conveyances alleged to be fraudulent, and to subject the property so conveyed, together

with the rents and profits thereof, to the payment of the plaintiff's judgments, and to reach and subject in the hands of the defendant Alvey lands which are alleged to belong to certain of the defendants in said judgments with an accounting for the rents and profits thereof, and the proceeds of lands so held which are alleged to have been sold by said defendant. The judgments sued on were taken on notes due the First National Bank of Asheville by W. H. Penland, J. E. Dickerson, Mary C. Penland, Margaret P. Smith, Althea M. Penland, and Anna K. Smith. The bank failed July 30, 1897, and the receiver recovered judgments upon the notes and assigned them to plaintiff. W. H. Penland and J. E. Dickerson were directors in the bank, and the former was its cashier. Mrs. Alvey resided in Richmond, Va., and is the sister-in-law of Dickerson, who managed certain property owned by her in Asheville and attended to certain business matters for her. It is contended that the deed in trust of July 20, 1897, was fraudulent, that no real consideration passed, and that its purpose was to cover up the property of the grantors therein from the payment of their debts to the bank. It is contended that his honor erred in excluding the declarations of Dickerson, made subsequent to the conveyance, as evidence against Mrs. Alvey. We think the ruling correct. There is no evidence or admission that Dickerson was the agent of Mrs. Alvey in making the loan or in procuring the execution of the deed in trust; or, if so, it is not contended that the excluded declarations were made at the time of the transaction, so as to constitute them a part of the *res gestæ*. Where the acts of the agent will bind the principal, there his declarations, representations, and admission respecting the subject-matter will also bind the principal, if made at the same time, and constituting a part of the *res gestæ*. This seems to be well settled. 2 Taylor on Ev. § 602; Story, Agency, § 134.

The court also properly excluded the books of the insolvent bank. As to Mrs. Alvey they were clearly incompetent, as she was in no wise responsible for them or privy to them. "*Res inter alios acta alteri nocere non debet.*" The other exceptions to evidence are equally as untenable, and need not be discussed.

The last exception to the nonsuit brings up the question as to the sufficiency of the evidence of fraud to be submitted to the jury. We agree with his honor that there is no evidence showing, or tending to show, that the defendant C. B. Alvey was guilty of any fraud, or that she knew of or participated in any fraud on the part of the grantors in the deed. There is nothing in the way of proof to indicate that Mrs. Alvey knew of or participated in any fraudulent intent on the part of the Penlands, assuming their purpose was to delay, hinder, and defraud the

bank in the collection of its debt. It seems to be settled beyond controversy that knowledge of or participation therein by the grantee of fraud of the grantor is essential to set aside or vacate a deed. *Lassiter v. Davis*, 64 N. C. 498; *Allen v. McLendon*, 113 N. C. 321, 18 S. E. 206; *Rose v. Coble*, 61 N. C. 517; *Trust Company v. Forbes*, 120 N. C. 355, 27 S. E. 48; *Reiger v. Davis*, 67 N. C. 185; *Osborne v. Wilkes*, 108 N. C. 651, 13 S. E. 285; *Haynes v. Roger*, 111 N. C. 228, 16 S. E. 416; *Riggan v. Sledge*, 116 N. C. 87, 93, 20 S. E. 1016; *Savage v. Knight*, 92 N. C. 493, 53 Am. Rep. 423; *Peeler v. Peeler*, 109 N. C. 628, 14 S. E. 59; *Wolf v. Arthur*, 118 N. C. 890, 24 S. E. 671. It is true that the evidence discloses a large indebtedness upon the part of the Penlands to the bank, and that its affairs were in a very insolvent condition, but Mrs. Alvey had no knowledge of these facts. Assuming that she did, she had a right to secure any bona fide existing indebtedness if possible, and it would not be fraudulent for her to do so. But it is contended that the trustee in the deed in trust had knowledge of such conditions, and that such knowledge affects his *cestui que trust*. There are authorities to the effect that, although a *preferred creditor* in a trust deed is himself innocent of fraud, yet his trustee's participation therein destroys the security. But those authorities have no application to an instrument or transaction of this character. Dickerson was merely the temporary repository of the legal title in an instrument securing a single debt. He had no previous connection with the trust property, and had no active duties whatever to perform in connection with it. He held as a naked trustee, whose duties were nominal except in case of foreclosure, and then they are clearly marked and defined in the deed. In such cases the secured creditor must be fixed with notice, and the knowledge of the trustee is not imputable to him. *Bank v. Ridenour*, 46 Kan. 707, 718, 27 Pac. 150, 26 Am. St. Rep. 167; *Batavia v. Wallace*, 102 Fed. 240, 42 C. C. A. 310; 20 Cyc. 479, and cases cited.

It is contended that the burden of proof is on the defendant Alvey to show to the satisfaction of the jury the bona fides of this transaction. It is true, as contended, that where a creditor shows facts that raise a strong presumption of fraud in a conveyance made by his insolvent debtor, the history of which is necessarily known to the debtor only, the burden of proof lies on him to explain it. That would undoubtedly be true here if the Penlands were the interested defendants, but Mrs. Alvey occupies a different attitude. She claims as a mortgagee who has innocently made a loan upon property, and not as an insolvent debtor who is charged with conveying her property absolutely for her own benefit. There are no ties of kinship between Mrs. Alvey and the Penlands,

and none of the well-known and definite fiduciary relations exist which raise either a presumption of fraud to be decided by the court, or a question of fraud, as matter of fact, to be submitted to and passed on by the jury for what it is worth. *Lee v. Pearce*, 68 N. C. 87. The proof is singularly free from any suspicious facts calculated to put Mrs. Alvey on inquiry as to the purposes of the Penlands in executing the trust, assuming that such purpose was fraudulent. She resided a long distance from them, was not related or even a very intimate friend, and so far as the evidence discloses, had no motive to participate in fraudulent conduct for their benefit. Assuming for argument's sake that Mrs. Alvey could be called upon to offer proof of the bona fides of her debt, the plaintiff himself has offered evidence which establishes it for her. He introduced her check for \$10,000 on a bank in Richmond, together with the declarations of Dickerson in regard to the check and the debt, which tend strongly to prove a bona fide debt as the basis of the deed in trust. In view of that evidence the defendant Alvey might well rest her case upon plaintiff's proofs.

Upon a review of the record we find no reversible error, and the motion to nonsuit was properly sustained.

No error.

HOKE, J., concurs in result.

(153 N. C. 548)

PULLEN et al. v. CORPORATION COMMISSION.

(Supreme Court of North Carolina. May 17, 1910.)

(Syllabus by the Court.)

1. TAXATION (§ 386*)—BANK STOCK.

All bank stock is taxable at its full value after deducting the assessed value of the bank's real and personal property, although the capital is invested in North Carolina state bonds.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 637-647; Dec. Dig. § 386.*]

2. TAXATION (§ 218*)—SURPLUS OF BANKS.

So much of the surplus of the bank as is not invested in the nontaxable bonds of the state of North Carolina issued in pursuance of the act of the General Assembly of 1909 (Laws 1909, c. 510) is likewise taxable.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 357; Dec. Dig. § 218.*]

3. TAXATION (§ 218*)—EXEMPTIONS—BANK SURPLUS INVESTED IN STATE BONDS.

Under the provision of said act, so much of the surplus over and above capital as is invested in such nontaxable bonds is exempt and must be deducted from the surplus in assessing the stock for taxation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 357; Dec. Dig. § 218.*]

(Additional Syllabus by Editorial Staff.)

4. TAXATION (§ 218*)—EXEMPTIONS—STATE BONDS AND CERTIFICATES OF DEBT—STATE POLICY.

The uniform and well-settled policy of the state, at least since 1852, in view of the his-

tory of legislation (Acts 1852, c. 10, § 3; Rev. Code, c. 90, § 5; Acts 1879, c. 98, § 3; Code, § 3573; Acts 1905, c. 543, § 4; Revisal 1905, §§ 5022, 5031), has been to exempt its own bonds and certificates of debt from taxation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 357; Dec. Dig. § 218.*]

5. TAXATION (§ 47*)—PROPERTY OF SHAREHOLDER IN CORPORATE STOCK.

The property of a shareholder of a corporation in its shares of stock for the purpose of taxation is a separate and distinct species of property from the property, whether real, personal, or mixed, owned by the corporation itself as a legal entity.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 110; Dec. Dig. § 47.*]

6. TAXATION (§ 25*)—METHOD OF VALUATION—POWER OF LEGISLATURE.

It is within the power of the Legislature under the Constitution to prescribe the method by which the value of all property subject to taxation is to be determined.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 59; Dec. Dig. § 25.*]

7. TAXATION (§ 333*)—VALUATION—DEDUCTION OF DEBITS.

In listing property for taxation, taxpayers may deduct debts due by them and list the balance as taxable solvent credits.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 557; Dec. Dig. § 333.*]

8. STATUTES (§ 181*)—CONSTRUCTION—INTENT OF LEGISLATURE.

A statute should be construed with reference to the intent, scope, and purpose of the Legislature, and to ascertain such purpose the courts must give effect to all its provisions, unless to do so would violate the provisions of the fundamental law or produce irreconcilable conflicts in the statute itself, and the use of inapt, inaccurate, or improper terms will not invalidate a statute when the real meaning of the Legislature can be gathered from the context or general purpose and tenor of the enactment.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

9. BANKS AND BANKING (§ 41*)—PURPOSE OF SURPLUS.

The primary purpose of a bank surplus is the accumulation of a sum against which bad debts may be charged, so that at all times the capital may be kept unimpaired.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 55; Dec. Dig. § 41.*]

Clark, C. J., and Hoke, J., dissenting.

Appeal from Superior Court, Wake County; Gulon, Judge.

Submission of controversy by John T. Pullen and another against the Corporation Commission. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

This was a controversy without action submitted to Gulon, J. From a judgment adverse to the plaintiffs, filed on April 19, 1910, they have appealed to this court.

Omitting the merely formal parts of the submission, the facts agreed to as determining this controversy are thus stated:

(1) That the Corporation Commission is a department of the state government, created by law and charged with certain duties, among which duties is exercising the powers

and duties of state tax commissioners. That their office is in the city of Raleigh, Wake county, N. C.

(2) That the Raleigh Savings Bank & Trust Company is a bank and savings institution, duly created by law, having a capital and a surplus, whose office and place of business is in the city of Raleigh, and that John T. Pullen is a stockholder therein, as shown by the books of the company, and is a citizen of Wake county. (a) That the asylum or 1949 bonds, herein referred to, were sold by the state of North Carolina at a price of 103, the same bearing 4 per cent. interest per annum, payable semiannually, and not due until July 1, 1949, as expressed in said bond, and that said bonds were sold upon the faith of the state, as pledged in the act authorizing their issue. That at the time of such sale the legal rate of interest for money loaned in North Carolina was 6 per cent. per annum, all banking institutions being authorized to take interest in advance; and that at the time of such sale the outstanding bonds of the state of North Carolina bearing 4 per cent. interest were sold on the financial markets at 102, such sales being below the price brought by the bonds above referred to.

(3) That John T. Pullen is interested directly in the assessment of the stock, as the failure to deduct these asylum or 1949 bonds from the surplus in arriving at the assessment of the stock will directly affect to his injury and loss that amount of state, county, and city taxes paid by him on said stock.

(4) That on the 5th day of March, A. D. 1909, the General Assembly of North Carolina enacted "An act to issue bonds to carry out the act of 1907, for the care of the insane of the state," which act is known as chapter 510 of the Public Acts of 1909, a copy of which act is hereto attached and marked "Exhibit A"; said act reading, in section 4, as follows: "Sec. 4. The said bonds and coupons shall be exempt from all state, county or municipal taxation or assessment, direct or indirect, general or special, whether imposed for purposes of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation."

(5) That on or about the 1st day of July, 1909, the state of North Carolina, acting through its Governor and State Treasurer, issued \$500,000 of asylum bonds, now known as 1949 bonds, authorized by the act just above referred to, and sold the same to various parties, both within and without the state of North Carolina.

(6) That at the session of the Legislature of 1909 the General Assembly passed the revenue and machinery acts, known respectively as chapters 438 and 440, the same regulating the listing and collection of taxes levied and imposed for raising revenue for the state of North Carolina; the said chapter 440, among

other things, providing, in section 33 (in part) relative to taxation of banks, banking associations, or savings institutions, as follows: "The value of such shares shall be determined as is hereinafter in this section provided. Every bank, banking association or savings institution (whether state or national) shall list its real estate in the county, city or town in which such real estate is located, for the purposes of state, county and municipal taxation. Every such bank, banking association or savings institution shall, during the month of June, list annually with the Corporation Commission, in the name and for its shareholders, all the shares of its capital stock, whether held by residents or nonresidents, at its market value on the first day of June, or, if it have no market value, then at its actual value on that day, from which market or actual value shall be deducted the assessed value of the real and personal property which such bank, banking association or savings institution shall have listed for taxation in the county or counties where such real and personal estate is located. The actual value of such shares, where such shares have no market value, shall be ascertained by adding together the capital stock, surplus and undivided profits and deducting therefrom the amount of real and personal property owned by said institution on which it pays tax, and dividing the net amount by the number of shares in such institution. Insolvent debts due said institution may be deducted from the items of undivided profits or surplus, if itemized and sworn to, and forwarded to the Corporation Commission by the cashier of such institution. If the Corporation Commission shall have reason to believe that the market or actual value as given in is not its true value, it shall ascertain such true value by such examination and investigations as to it seems proper, and change the value as given in to such amount as it ascertains the true value to be, which action on the part of the Corporation Commission may be reviewed by the superior court, by an action brought against the Corporation Commission in its official capacity by the party aggrieved."

(7) That the Raleigh Savings Bank & Trust Company is a bank and savings institution, having a capital and a surplus, and that a part of said surplus is invested in the bonds issued under Acts 1909, c. 510, commonly known as the asylum bonds or 1949 bonds, and that it bought the same upon the faith of the state of North Carolina, as pledged in chapter 510 of the Public Laws of 1909, paying for the same out of its surplus.

(8) That the said Raleigh Savings Bank & Trust Company has made return to the Corporation Commission, as is required in section 33 of the machinery act of 1909 (Acts 1909, c. 440), for the assessing of the shares of stock held by the stockholders in said corporation, in accordance with law, which said assessment the Corporation Commission is directed to make and certify to the several

counties where the stockholders reside, as the value of said stock for taxation.

(9) That the Corporation Commission, in accordance with the statute providing for the assessment of capital stock of banks, have assessed and appraised the value of the shares of stock of the Raleigh Savings Bank & Trust Company by adding together the capital stock, surplus, and undivided profits and deducting therefrom the real and personal property owned by said institution, on which it pays tax, and dividing the net amount by the number of shares in said institution. That the said Corporation Commission did not deduct from the surplus the asylum or 1949 bonds (those authorized by chapter 510 of the Public Laws of 1909) owned by the said Raleigh Savings Bank & Trust Company; they holding that the same was not deductible, as a matter of law, in arriving at this assessment, to which assessment the said Raleigh Savings Bank & Trust Company and John T. Pullen, a stockholder of said company, have excepted and announced their intention of bringing an action against the Corporation Commission in the superior court of Wake county in its official capacity, to review the action of the said Corporation Commission.

(10) That a tender of all taxes, admitted by the aggrieved parties to be due, have been made before the submission of this controversy without action.

(11) With a view of facilitating the arriving at a determination of the rights of the parties, it has been agreed to present the submission of this case, containing the facts upon which the controversy depends, to the superior court of Wake county for its determination and rendition of judgment thereon, as if the action were pending.

The judgment rendered by his honor, upon the above facts, is as follows: "North Carolina—Superior Court. [Title of Cause.] The court, by consent of parties, having heard argument in this case agreed, is of opinion, and so adjudges, that the ruling of the Corporation Commission herein be and the same is hereby affirmed, and it is adjudged that the \$55,000 of surplus invested in these bonds should not be and shall not be deducted in arriving at the value of each share of stock for the purpose of taxation. The plaintiffs will pay the cost hereof. Plaintiffs except. Appeal by the plaintiffs. Bond of \$50 adjudged sufficient, on appeal, and the case agreed on the entire papers in this controversy without action, and this judgment will, by consent, constitute the case on appeal. April 19, 1910."

The plaintiffs appealed.

W. H. Pace, A. B. Andrews, Jr., and R. H. Battle & Son, for appellants. Aycock & Winston, for appellee.

MANNING, J. The General Assembly of this state, at its session in 1909, authorized

(chapter 510, Pub. Laws 1909) the issue of \$500,000 of bonds of the state to pay the expenditure of that sum, authorized by the General Assembly of 1907, for the enlargement of the state institutions for the care of its mental defectives. Section 4 of that act provides: "The said bonds and coupons shall be exempt from all state, county or municipal taxation or assessment, direct or indirect, general or special, whether imposed for purposes of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall said bonds or coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation." The uniform and well-settled policy of the state—certainly since 1852, and its power to do so seems never to have been doubted or questioned—has been to exempt its own bonds and certificates of debt from taxation. Acts 1852, c. 10, § 3; Rev. Code 1879, c. 90, § 5; Acts 1879, c. 98, § 3; Code, § 3573; Acts 1905, c. 543, § 4; Revisal 1905, §§ 5022, 5031. In the act herein quoted (section 4, c. 510, Acts 1909) this purpose and intent is expressed in language so clear and unambiguous that it can admit of no uncertainty. The particular inhibition of this section, which is presented for our interpretation, and which is not found in any preceding act authorizing the issue of state bonds, is the last clause, in these words: "Nor shall said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation." Omitting these words from the section, it is clear that the bonds and coupons and interest paid thereon are exempted from all state, county, or municipal taxation or assessment, direct or indirect, general or special, whether imposed for general revenue or otherwise, and this is true regardless of their ownership, whether by individuals, partnerships, joint-stock associations, or corporations, and whether constituting a part of the capital, surplus, or undivided profits of the corporation. In the hands of the owner, and however held, and regardless of what part of his money is invested in them, the state bonds issued under this act are clearly exempted from all taxation, general or special, direct or indirect. This being the clear intent and policy of the state speaking through the legislative department, and exercising a power uniformly recognized and conceded, it is our plain duty to uphold the will of the state, and not to be astute to search for ways to evade it.

It is, likewise, well-settled by the language of our state Constitution, by many decisions of this court, and of the Supreme Court of the United States, and now generally accepted law, that the property of a shareholder of a corporation in its shares of stock is a separate and distinct species of property from the property, whether real, personal, or mixed, held and owned by the corporation itself as a

legal entity. It would be useless to cite authority to support a proposition so well established and generally accepted. Const. art. 5, § 3, commands that: "Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all real and personal property according to its true value in money." It is apparent, from an examination of the taxing laws of the state, that the legislative department has attempted to observe and enforce the mandate of the Constitution. In *Com'r's v. Tobacco Co.*, 116 N. C. 441, 21 S. E. 423, in discussing the several forms of taxation to which corporations were subject under the Constitution, this court said: "As to corporations, by all the authorities, it is in the power of the Legislature to lay the following taxes, two or more of them in its discretion at the same time: (1) To tax the franchise (including in this the power to tax also the corporate dividends). (2) The capital stock. (3) The real and personal property of the corporation. This tax is imperative and not discretionary under the ad valorem feature of the Constitution. (4) The shares of stock in the hands of the stockholder. This is also imperative and not discretionary." In that case the court also held that it was competent for the Legislature, in the method adopted by it, to tax the shares of stock in the hands of shareholders, to require the corporation by its proper officer to file a list of the shareholders and the corporation to pay the taxes assessed against the shares of stock, and "this does not affect the liability of the shares to tax as the property of the shareholders, but is simply for the convenience of the state in collecting the tax. The effect is merely to change the situs of the shares for taxation from the residence of the owner to the locality where the chief office of the corporation is situated, as was held in *Wiley v. Commissioners*, 111 N. C. 399 [16 S. E. 542]." In *Home Savings Bank v. Des Moines*, 205 U. S. 503, 27 Sup. Ct. 571, 51 L. Ed. 901, the Supreme Court of the United States, speaking through Justice McKenna, said: "It, however, is not an uncommon, and is an entirely legitimate, method of collecting taxes, to require a corporation, as the agent of the shareholders, to pay in the first instance the taxes upon shares, as the property of the owners, and look to the shareholders for reimbursement." The tax in such cases would be a tax upon the shares of stock, and not a tax upon the corporation. It would be a mere method of collecting the tax, and not a change of the subject-matter of taxation.

It is, likewise, within the power of the Legislature, under the Constitution, to prescribe the method by which the value of all property subject to taxation is to be ascertained and determined; and the method prescribed by the Legislature, and which has been prescribed for many years, for fixing

the value for taxation of bank shares, is found in section 33, c. 440, Acts 1909, and is as follows: "Every bank, banking association or savings institution (whether state or national) shall list its real estate in the county, city or town in which such real estate is located, for the purpose of state, county and municipal taxation. Every such bank, banking association or savings institution shall, during the month of June, list annually with the Corporation Commission, in the name and for its shareholders, all the shares of its capital stock, whether held by residents or nonresidents, at its market value on the first day of June, or, if it have no market value, then at its actual value on that day, from which market or actual value shall be deducted the assessed value of the real and personal property which such bank, banking association or savings institution shall have listed for taxation in the county or counties wherein such real estate is located. The actual value of such shares, where such shares have no market value, shall be ascertained by adding together the capital stock, surplus and undivided profits, and deducting therefrom the amount of real and personal property owned by said institution on which it pays tax, and dividing the net amount by the number of shares in said institution. Insolvent debts due said institution may be deducted from the items of undivided profits or surplus, if itemized and sworn to, and forwarded to the Corporation Commission by the cashier of such institution." It is further provided that the commission may, if it desire, make such examination and investigation as it may believe to be advisable to ascertain the market or actual value, and its action may be reviewed by an action, such as the present case is, in the superior court. This has been for many years substantially the method prescribed by the Legislature of the state for ascertaining the taxable value of the shares of stock in banking institutions, whether state or national, and the only change of note was made by the Acts of 1909, in changing the authorities to appraise the stock from the Auditor of the State to the Corporation Commission. In speaking of this section, this court, in *Lumber Co. v. Smith*, 151 N. C. 70, 65 S. E. 641, through Mr. Justice Hoke, said: "In the case of banks, their realty is listed in the county, and, on report made as required by this section, the value of the shares is appraised and determined by the commission, and this, with the sworn list of stockholders, is certified by the commissioners to the county authorities, to the end that the proper amount may be assessed against the individual holders of the same. This is done in order to conform the taxation of all banks to the method permissible in the case of national banks, and in order to make the taxation equal and uniform throughout the state on all institutions of that class. There is much to be said in support of the scheme

of taxation contained in these statutes, tending, as it does, to uniformity and consistency of rulings on the various and important questions presented, and, under an intelligent and conservative administration, the law is proving itself to be a satisfactory and workable system. These are matters, however, more properly for legislative consideration, and are not dwelt upon; the only question for us being the power of the Legislature to enact the law and its correct interpretation."

It will be observed that, in the section of the machinery act under consideration, it is made the duty of the defendant commission to deduct from both the market and the actual value of the shares of stock, as ascertained by it before fixing the taxable value of such shares, the aggregate of the real and personal property listed by the banking institution. The principle of deduction is further recognized in the cases of individuals and corporations, when they come to list their solvent credits, in that from their solvent credits they are authorized to deduct their obligations or debts due by them, and the balance is to be listed as taxable solvent credits. This principle is recognized by the Supreme Court of Illinois as constitutional, in *Loan Ass'n v. Keith*, 153 Ill. 609, 39 N. E. 1072, 28 L. R. A. 65. The Legislature has for many years recognized this as an equitable system of taxation; it has been incorporated for more than 25 years in our system of taxation, and this notwithstanding that it has been well settled by repeated decisions of this and other courts that shares of stock are, in the hands of the shareholder, separate and distinct property from the property of the corporation. The fairness and justness of the principle of deductions in the method of ascertaining the taxable value of the subjects of taxation, in order to avoid the essential harshness and inequity of double taxation, was, we think, distinctly sanctioned as long ago as 1882, in *Railroad v. Com'rs of Wake*, 87 N. C. 414. That case was presented to this court on appeal by both parties, from the judgment of the superior court, and in delivering the unanimous opinion of the court Chief Justice Smith, as pertinent to the present matter, said: "3. The commissioners object, further, that the assessed value of the preferred stock should be reduced by the value of the real estate and franchise as taxed separately in the several counties traversed by the road. The ruling of the court in directing the reduction is obviously made to avoid the imposition of a double tax, since the value of all property owned by a corporation, in whatever consisting, and including the franchise, is the true and fair measure of the value of all its stock, and hence the General Assembly permits stockholders, in valuing their shares, to 'deduct their ratable proportion of tax paid by the corporation upon its property as such in this state.' Section 8, par. 6. The section leaves it somewhat uncertain wheth-

er the value of stock is to be reduced by the value of corporate property taxed, and the tax levied upon the difference, or the tax upon the former is to be abated to the extent of the tax upon the latter; but we interpret the latter to be the meaning. The effect of the ruling of the court is to deprive the counties through which the road passes of assessments of the corporate property in each, and transfer them to the county of Wake, while it is, in our opinion, the purpose of the statute to allow the taxpaying shareholder to deduct from the tax on his shares a ratable part of the tax paid upon the corporate property elsewhere by the corporation itself, but not to withdraw from taxation in other counties such property of the corporation therein as is liable to assessment and taxation." Again, in *Railroad v. Com'rs of Alamance*, 91 N. C. 454, this court, again speaking through the Chief Justice, interpreting Acts 1881, c. 117, § 8, subd. 6, said: "In the concluding clause, amended by Acts 1883, c. 368, § 8, to remove the obscurity pointed out in *Railroad v. Com'rs of Wake*, 87 N. C. 426, it is provided that 'stockholders in valuing their shares may deduct their ratable proportion of the value of taxable property, the tax whereof is paid by the corporation.'"

The power of the Legislature to authorize deductions to be made by the taxpayer in the method it has prescribed for ascertaining the taxable value of some of the subjects of taxations has been continuously exercised under the interpretation of the Constitution by this court in the cases cited above. If the reason moving the Legislature to concede a deduction was based upon a desire to avoid apparently double taxation, and this was a legitimate exercise of its discretion, we cannot see why it could not be moved to exercise a similar discretion in favor of a species of property which the fixed policy of the state, for more than half a century, has been to exempt from taxation, which the Legislature by its act in 1900 has, in the most unequivocal terms, forbidden to be taxed by the state, county, city, or town, generally or specially, directly or indirectly. This inhibition of taxation can only be of advantage to the state's own citizens and corporations; to the stranger it can be of no advantage, as, living beyond the territorial limits of the state, he is beyond the reach of its taxing power. The state and its taxpayers are not without compensating advantage for this exemption from taxation conferred upon the bonds issued by the state, because it is thereby enabled to sell its bonds, bearing interest at only 4 per cent., not only at their par value, but at a premium, and thus if residents and citizens of the state—those liable to pay it tribute in taxes—own the bonds of the state, what the state and its taxing subdivisions, created by it, may lose in revenue by permitting the bonds to be taxed, is saved by the state and

its taxpayers in having to pay a much reduced rate of interest on the bonds.

The only remaining question, presented by the argument and arising upon the record, to be determined by us, is: Does the act authorize the deduction of these bonds to be made when constituting a part of the surplus of any bank, trust company, or other corporation? Does this plainly appear to be the meaning of the act and the legislative intent?

The settled rule of statutory construction is that a statute should be construed with reference to the intended scope and purpose of the Legislature, and, in order to ascertain the purpose, the courts must give effect to all of its clauses and provisions unless to do so would violate the provisions of the fundamental law or produce irreconcilable conflicts in the statute itself; nor will the use of inapt, inaccurate, or improper terms or phrases invalidate a statute, when the real meaning of the Legislature can be gathered from the context or from the general purpose and tenor of the enactment. *Spencer v. Railroad*, 137 N. C. 110, 49 S. E. 96, 1 L. R. A. (N. S.) 604; *Fortune v. Commissioners*, 140 N. C. 322, 52 S. E. 950; *Board of Education v. Commissioners*, 137 N. C. 310; ¹ *Black on Interpretation of Laws*, 56. It is also said in *Mordecai's Law Lectures*, p. 22: "The construction given to a statute by the executive officers of the government contemporaneously with its passage is entitled to great weight with the courts." It appears from the public records of the state that for many years prior to 1909, and while the Auditor of the State was the authority authorized to ascertain and appraise the value of stock in banking institutions, he deducted, under the advice of the law officer of the state, the state bonds held by the banks from their total assets. Some doubt was suggested as to the validity of this uniform practice of the Auditor's office. The Legislature, in enacting the act now under consideration, added to section 4 these words: "Nor shall said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation." This same language will also be found in section 4, c. 399, Acts 1909, being the act "to authorize the issue of state bonds to pay off the state bonds which fall due on the first day of July, 1910." These words will be found in no other act authorizing the issue of state bonds. We must assume that these acts of such public importance, affecting the credit of the state and authorizing the issue of its bonds, received the careful examination and scrutiny of the General Assembly; and that provisions incorporated in them not found in other similar acts could not pass unobserved and would not have been adopted unless they expressed some new and distinct legislative intent. The acts were required by the Constitution and were passed with distinct form-

ality. The bills had to be read on three several days in each branch of the General Assembly, and on the second and third readings the ayes and noes were recorded as required on the journals of each House. In Acts 1905, c. 543, § 5, in the legislation authorizing the issue of bonds in settlement of the South Dakota judgment and the Schafer bonds, the only language used is, "Said bonds shall be exempt from all taxation including income tax." The language used in other acts authorizing the issue of state bonds will be found in sections 5022 and 5031, Revisal 1905.

In using the language in the act now under consideration, there must have been, as hereinbefore observed, some distinct legislative intent, and we think this will be found in the machinery act. The fact that the property exempt from taxation is made exempt by another act different from the machinery act does not support the argument that it is not exempt from taxation; nor does the fact that the machinery act in terms does not authorize the bonds to be deducted support the argument that it was not the legislative intent to have them deducted; for in section 32, c. 440, Acts 1909, that section, which specifies what property the taxpayer shall list for taxation, and calls specifically for the listing of the amount of credits, there is no reference whatever to state bonds or other bonds of the state's subdivisions that are legally exempt from taxation. To ascertain this exemption the taxpayer and the tax lister must each look elsewhere, to other acts whose provisions will be considered in *pari materia*. *Wilson v. Jordan*, 124 N. C. 683, 33 S. E. 139, and cases cited in *Annotated Reports*. Looking to and examining the machinery act, we find that the only connection in which the word "surplus" is used is in ascertaining the taxable value of shares of stock in a corporation, whether the entire tax is to be paid by the corporation for its shareholder or in part by the shareholder himself. This is true not only of the act of 1909, but of all previous acts extending over a period of many years, since the Legislature adopted the present method of ascertaining and appraising the shares of stock for taxation. So then it seems to us in our scheme of taxation the word "surplus" has a distinct legal signification, and it must have been used with that signification in the act now under review by the legislative branch of the government, which has created and established our taxing system, and which alone has the power to do so. Unless we so interpret the statute, we shall fail to give any force and effect to this language. This we cannot do under a well-settled rule of statutory interpretation. These words were not needed in addition to the other clear and unambiguous language of the section to exempt these bonds from taxation as the property of a bank, whether consisting of a part of its capital, surplus, or undivided

profits; the other words of the section were plenary for this purpose.

But it is objected that the Supreme Court of the United States has held, in *Bank of Commerce v. Tennessee*, 167 U. S. 134, 16 Sup. Ct. 456, 40 L. Ed. 645, that the surplus of a bank may be taxed as a distinct species of property; but that decision does not hold that, when that surplus consists of nontaxable bonds, it may be taxed. We do not think that case decisive of the present question. The facts presented in it are substantially these: The state of Tennessee, in granting a charter to the Bank of Commerce, stipulated that "said institution shall have a lien on the stock for debts due it by the stockholders before and in preference to other creditors, except the state for taxes; and shall pay to the state an annual tax of one-half of one per cent. on each share of capital stock, which shall be in lieu of all other taxes." Subsequently the state passed an act providing that "the surplus and undivided profits in such bank, banking association, or other corporation shall be assessable to said bank or other corporation, and the same shall not be considered in the assessment of the stock therein." Previous to this act the state had attempted to tax the shareholders upon their shares of stock in addition to the amount provided in the charter above quoted, and in a suit brought to test the validity of this tax, and which suit finally reached the Supreme Court of the United States as *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558, it was held that "the exemption was a contract between the state and the bank limiting the amount of tax on each share of stock, and that a subsequent revenue law of the state which imposed additional taxes on the shares in the hands of the shareholders impaired the obligation of the contract and was void." In the *Bank of Commerce* Case, supra, the court, in referring to the *Farrington* Case, said: "We do not think under the circumstances that we ought to come to a different conclusion upon the question of exemption from that which was arrived at by this court in the *Farrington* Case." And the court held that the provision of the bank charter having been construed to be a contract limitation of the power to tax the shares of stock as the property of the shareholder, it would not extend its benefits to exempt the corporate property from taxation, and, as the revenue act only taxed the surplus and undivided profits of the corporation, such tax did not impair the obligation of a contract and was within the power of the state; and therefore the state could tax the entire capital, surplus, and undivided profits of the bank.

We do not think that case authority against our interpretation of the act now under consideration. The primary purpose of a bank surplus is the accumulation of a sum against which bad debts may be charged so that at all times the capital may be kept unimpaired.

This is required by the national banking act. The only connection in which, as we have observed, that the word "surplus" is used in our taxing system, now established &c., more than a quarter of a century, is that it appears in the method prescribed for ascertaining the taxable value of shares of stock. We think, therefore, that it was within the power of the Legislature to authorize a deduction of the bonds issued under the provisions of this particular act of the General Assembly when they constituted a part of the surplus of a banking institution, in ascertaining the taxable value of the shares of stock, and that the legislative intent to have such deduction made is expressed with sufficient clearness for this court to discover such intent, especially when this act is construed in connection with section 33, c. 440, Acts 1909, known as the "machinery act." By such interpretation we give effect to the legislative intent without disregarding any clause of the act, which we could not do by any other interpretation; and at the same time we give effect to the well-settled policy of our plan of taxation to tax the shares of stock in banking institutions as a separate and distinct species of property. The deduction of investment in these bonds by a bank can be made only when the bonds constitute a part of the surplus of such institution. If a part or all of the capital stock or undivided profits are invested in these bonds, the claim of the shareholder for a deduction cannot be sustained, as the language of the act comprehends only the surplus. If all the surplus is invested in these particular bonds, and there are no undivided profits, then the shares of stock would be appraised at not over their par value, subject to the deduction of the value of the real estate and personal property owned by the bank and already taxed. As to the validity of the deduction of the real estate and personal property no question seems to be raised. If a less amount than the entire surplus is invested in these bonds, then the appraisement of the shares of stock for taxation would be correspondingly increased. We do not think that this interpretation of the act in any wise impairs the right of the state, under the consent of Congress given in section 5219 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3502), to tax the shares of stock in national banking associations, for our interpretation in no way violates either of the two restrictions imposed by that section of the Revised Statutes. We say this much in reference to the effect upon the taxation of the shares in national banks, because the question was suggested on the argument and in the brief of counsel for the defendant.

We conclude, therefore, that the judgment of the superior court sustaining the ruling of the Corporation Commission in appraising the stock of the plaintiff Pullen in the Raleigh Savings Bank & Trust Company is erroneous, in that the investment of

a part of the surplus by the said bank and trust company in these bonds, known as the "asylum bonds," should have been deducted from the aggregate value of the assets of the said bank and trust company in ascertaining and appraising the value of the shares of stock in said corporation for taxation.

The judgment is reversed, and the cause remanded for further proceeding in accordance with this opinion.

Reversed.

BROWN, J. (concurring). I agree fully to the views so lucidly and strongly presented in the opinion of the court by Mr. Justice MANNING. I agree also that it is well settled that the shares of stock in any corporation, when owned by individuals, are separate and distinct property from the assets of the corporation and may be taxed as such. But it must be conceded that it rests exclusively with the Legislature to determine how and by what method such shares are to be valued for taxation, as much so as to provide a method for valuing lands and all other property. The right upon the part of a state to exempt its own bonds from all taxation is universally conceded, and, when the General Assembly declared expressly that they should not be taxed when constituting a part of the surplus of a bank, it exercised an undoubted power, which heretofore has never been denied to it. It remains only to determine: Why were such words employed in the statute, and what end were they intended to accomplish?

That has been clearly demonstrated, I think, in the opinion of the court. No such language is contained in any act of Congress relating to national bonds, nor in any of our own statutes heretofore, and hence the cases cited are of no value. This new provision introduced in this state no new method of valuing bank stock. It was plainly intended to give legislative sanction to a practice which had been followed here for many years up to 1909. Under the ruling of the former Attorney General, the Auditor of the State, in assessing the value of bank stock for taxation, always deducted from the bank's surplus all North Carolina bonds, because they were nontaxable, and that was the only way under our system of bank taxation of obeying the law and exempting them from taxation. It is well known that when the General Assembly of 1909 was considering this act for refunding a large part of the state debt, it intended to incorporate in the bill a provision which would make that practice mandatory in the future. Hence that provision was put in the bill and drawn expressly for that purpose, as is generally understood, by the present Attorney General at the instance of the committee on finance. It is also well known that the same construction we are giving to this statute has been given to it by the present state admin-

istration under the opinion of the Attorney General, and that the bonds were purchased and paid for in reliance upon that construction. If I were doubtful about the true meaning and purpose of the General Assembly, I should solve it in favor of that construction by which the good faith of the state is maintained. As it is, I have no doubt that the state administration under the advice of the Attorney General has construed the act correctly. Any other construction, in my opinion, destroys the purpose of the Legislature and converts its language into foolish and meaningless terms, a snare with which to trap the unwary purchaser. The charge that we are exempting bank stock from taxation is without any foundation to support it. As pointed out in the opinion of the court, such stock cannot possibly escape taxation at its full par value.

This, however, is not a matter of such grave importance to the state as we are led to believe. I have it from the Treasurer of the State that, although for years past our state bonds have invariably been deducted from the surplus of banks in assessing shares of stock for taxation, yet not more than 10 per cent. of the state debt has at any time been owned in North Carolina. I quote verbatim from the opinion of the State Treasurer: "At no time has more than 10 per cent. of the bonds been held inside of North Carolina, and I do not think there is any probability in the future of more than that amount being held in the state, and only a part of that by the banks. I do not think this state can absorb \$4,000,000 worth of 4 per cent. securities, but the increased value of a part of these bonds in the state will in my judgment affect the value of the entire issue, as the outside bidders will always regard the value in the home market." This statement from the efficient and experienced Treasurer of the State, Mr. Lacy, shows how utterly groundless is the assertion that the construction we place upon the statute will exempt \$4,000,000 of property from taxation. The wisdom and policy of this legislation is not a matter for our consideration. We should not destroy an act of the General Assembly because we do not approve of it. It is for us to declare the law, not make it.

But I am of opinion that this legislation is in line with a wise and enlightened public policy. Our recognized state debt is over \$7,000,000, which will not be paid off for many generations to come. The debt will from time to time be refunded and new bonds issued. The wisdom of the General Assembly prompted it to create, if possible, a reliable home market for our bonds so that the large sums paid out by the state as interest may be kept at home. It therefore offered the stockholders of banks and other corporations of this state an inducement to purchase its bonds by exempting them from taxation when the surplus earnings of the bank over and above its capital shall be invested in them.

The stockholders of a bank will not permit its surplus to be invested in these low-rate interest bonds if thereby their shares of stock are to be valued for taxation just as high as if the surplus was invested in more productive investments. Therefore it is perfectly manifest to me that the General Assembly intended to provide that in valuing the shares for taxation state bonds must be exempted by deducting them from the surplus.

It is a matter of common knowledge in the financial world that commercial banks do not as a rule invest in such bonds. Their deposit accounts are too active, and discounting short-time paper is much more lucrative. It is generally the savings institutions that invest their deposits in state bonds. In the New England and other states, where savings banks are greatly fostered, they have been encouraged to invest their funds in the securities of their own state not only because such institutions are productive of thrift and prosperity among a people, but because such investments are the safest and best for their depositors' funds. Such has been the enlightened policy of the statesmen of France, a most thrifty nation, and as a result of which it was enabled, without outside help, to pay off at once the most stupendous fine ever imposed upon a conquered people in the history of the world.

The stockholders of the plaintiff bank, having purchased these bonds, admittedly at a large premium, relying upon the language of the statute and the opinion of the state's officials, are entitled to have them deducted from the surplus in valuing their stock. With perfect deference to others, I think that good faith and fair dealing require it.

CLARK, C. J. (dissenting). Though much has been said on the argument in regard to this decision affecting the price of state bonds, reference to the complaint and the judgment of the Corporation Commission discloses that the sole purpose of the action, and the only point presented, is as to whether the stockholders in a bank which holds state bonds are exempt to the amount of these bonds from the payment of taxes on their individual property—the shares which they buy and sell at will and which is as much their private property (though paying larger profits) as the horses and plows with which the farmer makes his living or the taxed tools which a mechanic uses. When the state issues its bonds, it has never been denied that it can exempt them from taxation by state, county, and municipal authorities. This is on the principle that the state thereby in effect does collect tax by deducting it in the rate of interest which the bonds bear.

The \$55,000 of state bonds in this case are owned by the Raleigh Savings Bank & Trust Company and have not paid one cent of tax to the state, county, or city, and no one has ever suggested, or does now suggest,

that they should. By reason of such exemption from taxation, the bank saves some \$1,375 annually, which swells to that extent the fund annually available to be divided among its stockholders. Not content with that, the stockholders in this case are asking for a second exemption, another \$1,375 annually, by again deducting the same \$55,000, in assessing the value of their private property, the shares of stock, for taxation. The shareholders do not own these bonds. They are owned by the bank itself, and the bank has been already exempted from taxation on \$55,000 on account of the bank's ownership of them.

Nothing is better settled by the uniform decisions of this court and of the United States Supreme Court than that the property of a bank and the shares of the stockholder are entirely separate and distinct, and that the taxation, or exemption, of the one is in no wise a taxation or exemption of the other. *Belo v. Commissioners*, 82 N. C. 415, 33 Am. Rep. 688; *Commissioners v. Tobacco Co.*, 116 N. C. 446, 21 S. E. 423. Indeed, so thoroughly is this principle settled by repeated decisions of the Supreme Court of the United States that in *Shelby County v. Bank*, 161 U. S. 149, 16 Sup. Ct. 558, 40 L. Ed. 650, it is declared that no one now disputes that they are separate and distinct classes of property.

In numerous cases in which stockholders in banks, holding United States bonds, have contended that their shares in such bank were exempt from taxation to the extent of such United States bonds, and that the value of their bonds should be deducted in assessing the shares of stock for taxation, that court has uniformly rejected the contention upon the ground that the bonds were the property of the bank and exempt as such, and that the shares were the property of individuals and not entitled to any exemption in assessing their value on account of the bonds so held by the bank. This is the very contention which the plaintiffs are making in this case, and which has been rejected whenever presented, by the highest court in the land. *Van Allen v. Assessors*, 8 Wall. 573, 18 L. Ed. 229; *Bradley v. People*, 4 Wall. 459, 18 L. Ed. 433; *Trust Co. v. Lander*, 184 U. S. 111, 22 Sup. Ct. 394, 46 L. Ed. 456.

In *Commissioners v. Tobacco Co.*, 116 N. C. 447, 21 S. E. 424, following the decisions of the Supreme Court of the United States and the previous decisions of this court, it was said: "The capital stock belongs to the corporation. The shares or certificates of stock are entirely a different matter. They belong to the shareholders individually, and under the Constitution must be taxed ad valorem like other property belonging to the holder, independently of the taxation upon the corporation, its franchises, etc."

If it is now held otherwise as to the plaintiffs, shareholders in a bank, as to our state

bonds in this case reversing all previous decisions, we may not only strike from the tax books \$4,000,000 in value of shares of stock in state banks, but we may very probably be exempting all national banks from any taxation whatsoever. The state cannot discriminate against United States bonds.

The act before us exempts three classes of property: (1) The bonds themselves are exempt from all taxation, direct or indirect, general or special. (2) The dividends paid on such bonds are not subject to taxation as an income tax. (3) The surplus of any bank, when consisting of such bonds, shall be exempt from taxation. Not a word is said about exempting shares of stock.

The argument that the shares of stock in the plaintiff's bank are nontaxable because their value is due in part to the fact that if the bank was wound up, and the surplus divided, the proceeds of such nontaxable bonds, derived from the sale thereof, would be divided among the shareholders, is fallacious because it confounds the surplus owned, held, and controlled by the bank with the shares of stock which are owned, held, and controlled by individuals. The Corporation Commission is required by law to assess the value of shares of stock in all banks for taxation. When this matter was presented to that body, it assessed the value of the plaintiff's shares of stock at \$104.40 per share, and its decision was in the following words:

"In assessing the shares of stock in this bank, the Corporation Commission followed the direction of the statute, as it did not appear such shares had a market value, by adding together the capital stock, surplus, and undivided profits, and deducting therefrom the amount of real and personal property owned by said institution on which it paid taxes, as follows: Capital stock, \$15,000, surplus, \$60,000, undivided profits, \$342.25, making a total of \$75,342.25; and deducting therefrom the assessed value of real and personal property, as follows: Office furniture, \$3,000, Commercial National Bank stock, \$8,700, Fidelity Bank stock, \$1,000, making a total of \$12,700—leaving a balance of \$62,642.25, which, divided by 600, the number of shares of stock of said bank, ascertained the value of each share to be \$104.40, subject to taxation. There was no allegation that there was any insolvent debts due this institution.

"This assessment is not satisfactory to John T. Pullen, who owns 14 shares of stock in this institution. He contends, and the report on which this assessment is based shows, that the bank has a surplus of \$60,000, and has invested \$55,000 of this surplus in North Carolina state bonds, issued under chapter 512, Laws 1909, and that this amount should also be deducted from the aggregate value of all the shares of stock. In other words, the contention is that, in addition to the assessed value of real and personal property on which the corporation

pays taxes, \$55,000 should be deducted, because this much of the surplus of the bank was invested in the above-named bonds. The Corporation Commission failed to see the force of this contention, as they were not assessing the capital stock, or surplus, or undivided profits of the bank, but a distinct species of property, to wit, the shares of stock of the bank in the hands of the shareholder. The bank is not required by law to list any of its property, whether capital stock, surplus, undivided profits, or other property, except so much of it as is invested in real estate inside of the state. And so this bank already had the full exemption from taxation of its North Carolina state bonds. The only property listed by the bank for taxation was office furniture, \$3,000; Commercial National Bank stock, \$8,700; and Fidelity Bank stock, \$1,000—and these amounts were deducted.

"The General Assembly did not intend that the value of the property exempt from taxation which is owned by a corporation should be deducted from the aggregate value of all the shares of stock in said corporation in order to ascertain the value of such shares for taxation, as appears from the plain directions of the statute. 'The value of such shares of stock in the hands of shareholders shall be the market value. If they have no market value, the value shall be ascertained by adding together the capital, surplus, and undivided profits and deducting therefrom,' not such property as is exempt from taxation, but 'the amount of real and personal property owned by said institution on which it pays taxes.' See Machinery Act (Laws 1909, c. 440) § 33. There is no conflict between this statute and chapter 510 of the Laws of 1909.

"That the shares of stock in the hands of shareholders are a distinct species of property from that owned by the corporation, and that the General Assembly can require it to be taxed at its value, notwithstanding that a part or the whole of it is invested in property exempt from taxation, has been held in our courts in *Belo v. Commissioners*, 82 N. C. 415, 33 Am. Rep. 688, *Commissioners v. Tobacco Co.*, 116 N. C. 441, 21 S. E. 423, and numerous other cases, and by the Supreme Court of the United States in case of *Cleveland Trust Company v. Lander*, 184 U. S. 111, 22 Sup. Ct. 394, 46 L. Ed. 456. Notwithstanding the number of words used to exempt the same, namely, 'The bonds and coupons shall be exempt from all state, county and municipal taxation or assessment, direct or indirect, general or special, whether imposed for general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as income, nor shall state bonds or coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation,' we are of the opinion that the same cannot be construed so as to authorize the

deduction contended for by the plaintiff, in view of the authorities cited above.

"Franklin McNeill, Chairman."

The statute requires that taxation on the shares of bank stock in the hands of individual owners shall be laid upon the value of such stock, which valuation shall be reached: (1) Taking the market value of the stock; (2) deducting the value of the real and personal property of the bank, which has been already taxed; (3) by dividing the remainder thus left by the number of shares. By these processes the Corporation Commission found that the balance was \$62,672, and that the shares of stock are worth \$104.40. The plaintiffs are seeking, in this case, to deduct \$55,000 (on which its owner, the bank, had already had exemption), leaving the taxation value of the total shares in this bank for taxation \$7,642, being a little more than \$12 a share.

It is a matter of universal knowledge that within the last three months a large part of this stock, in fact more than five-sixths thereof, has been purchased by another bank at \$175 per share, or seven times its par value (\$25). On the stock for which the purchasers paid \$175, it is now asked that assessment for taxation shall be laid at a little more than \$12 per share.

The statute law of the state (Laws 1909, p. 705, c. 440, § 33) provides: "The residents of this state who are shareholders in any bank, banking association or savings institution (whether state or national) shall list their respective shares in the county, city or town precincts or village where they reside, for the purpose of county, school or municipal taxation. * * * All shares, whether owned by residents, or nonresidents, shall be listed at the time for listing taxes. The county commissioners, list takers or other county municipal officers shall have the same power to enforce the listing of shares of stock in any such bank, banking association or savings institution, whether held by residents or nonresidents, as they have for enforcing the listing of their personal property. The taxation of shares of any such bank, banking association or corporation, or savings institution, shall not be at a greater rate than is assessed upon any other monied capital in the hands of individual citizens, whether such taxation is for state, county, school or municipal purposes." And the next section provides that in assessing the value of the shares of stock the highest price of sales of stock during the year and the average price of sales of stock during the year shall be taken into consideration. These provisions show that the lawmaking powers are at one with the decisions of the courts in considering that the shares of stock are entirely separate and distinct property from the property held by the bank itself.

The Constitution of the state (article 5, § 3) provides: "Taxation shall be by uniform

rule ad valorem. Laws shall be passed taxing by uniform rule all moneys, credits, investments in bonds and personal property according to its true value in money." And then follows section 5 of the same article, which authorizes the General Assembly to exempt cemeteries and property held by schools, churches, charities, and the like, and also personal property, not to exceed \$300 to each taxpayer.

The statute law of the state (Laws 1909, p. 725, c. 440, § 63), in accordance with the provisions of the Constitution, provides: "The following personal property and no other shall be exempt from taxation, state and local." Then follows the exemptions of property, school and charity property, and an exemption (page 726) "not exceeding \$25" of wearing apparel, etc., to each taxpayer. And then, to prevent any possible misunderstanding, Laws 1909, c. 438, § 5, repeals all other exemptions of any other kind than that above enumerated which have heretofore been granted. This legislation shows conclusively that there was no intention on the part of the Legislature to extend an exemption to the shares of bank stock held by the plaintiffs. Such property is proverbially the best in the state, and the shareholders of a bank whose stock, by good management and exemption from taxation, has increased in value to "7 for 1," certainly do not own an interest in "an infant industry" requiring a subsidy from the state in the shape of exemption from taxation. Owing to increased demands for public purposes, the Legislature has not felt that the state was able to grant to less prosperous taxpayers the exemption of \$300 per head, which it is authorized to do by the Constitution, but restricts the exemption to \$25. It is not reasonable to assume that it intended to exempt many thousands of dollars from taxation in the shape of shares in the banks.

As the statute (Laws 1909, p. 696, c. 440, § 14½) defines the "market value" as the amount for which property is sold for cash in the ordinary course of dealing, it would seem that the error in the action of the Corporation Commission is in not assessing this property at \$175 instead of \$104.40, and the shareholders certainly cannot complain, as they have received an exemption of \$70 per share from the "true value," or 40 per cent. exemption.

It was further argued by the plaintiff that, inasmuch as the statute provided that, in assessing the value of the shares in the hands of the shareholders, the Corporation Commission should deduct "the real and personal property on which the bank has paid taxes"; that, therefore, the Corporation Commission should also deduct the property on which the bank has not paid taxes. It is impossible to adopt this as logic. If the Legislature had meant to do so, it would certainly have said it, and in a simpler way,

by saying that "all shares of bank stock shall be exempt from taxation," since that is what it would amount to.

But the Corporation Commission, in this case, have deducted the value of such real and personal property, to wit, \$12,700, before arriving at the amount at which the plaintiffs' shares were assessed. Though the point is not presented, it is well to call attention here and now to the fact that, unless we deny, what all the courts have held, that the shares of stock in the hands of individuals are separate and distinct from the property of the corporation, the exemption in favor of the shareholders of the value of the property on which the bank has paid taxes is in violation of the provision of the Constitution which forbids exemption, and the state has lost many thousands of dollars in taxation annually by this point not having been considered. It is very clear that one man cannot have an exemption on his property because another man has paid taxes on his own property. It was contended in the argument, by the plaintiffs' counsel, that the effect of a decision by this court that the stock in the hands of shareholders would be exempted from taxation to the amount of the state bonds, owned by the bank, would be to create a demand which would take up possibly the whole of the issue of \$4,000,000 of bonds.

It is no part of the province of a court of justice to render decisions because of the effect, one way or another, on the financial market in which bonds and stocks are traded for. The questions before us are only whether the Legislature attempted and had the power to exempt the shares of stock in the hands of the shareholders when it provided that "the bonds and coupons shall be exempt from all state, county and municipal taxation or assessment, direct or indirect, general or special, whether imposed for general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation." These bonds have not been subject to any tax, direct or indirect, general or special, either as surplus or in any other way. The exemption is to the bonds, and is given to the owner, whether an individual or a bank, and when constituting a part of the surplus of the latter.

But it is contended that the word "indirect" should be construed to extend the exemption, not only to the bank which has already had the benefit of exemption, but further to the shareholders. There is no such intimation in the statute. The expression "indirect taxes" is well known, and in this connection it can only mean taxes "direct or indirect, general or special," on the bonds themselves in the hands of the own-

er, to wit, the bank. To give it the construction contended for would give the word "indirect" a construction which has never been placed upon it by any court. A tax on the shares in the hands of the owner cannot possibly be a tax on the property of the bank.

The owner of more than five-sixths of the shares of the Raleigh Savings Bank & Trust Company is another bank; and the only effect of the decision, if rendered in favor of the exemption, would be to increase vastly the value of the shares of stock in the Raleigh Savings Bank & Trust Company and also the value of the shares of stock in the bank which holds five-sixths of the capital stock of the former bank.

The complaint frankly avers the true object of this suit, which is to obtain a coveted and most valuable exemption from taxation of the shares in the hands of the shareholders. It does not aver that the plaintiffs are seeking to benefit the state by raising the value of the state bonds, nor that they are here to advance the interests of the state. They are seeking an exemption of their shares because of state bonds which the bank has already bought, and it is not reasonable to suppose that they should wish to advance the value of state bonds which either bank may hereafter desire to purchase. Counsel for the plaintiffs, however, have contended that such would be the effect. If it is proper for the court to consider such matter, it may be well to insert here, from the defendant's brief, the answer which they make to the suggestion: "The capital stock of the plaintiff's bank is \$15,000. Its surplus is \$60,000. It holds \$55,000 of these nontaxable bonds as a part of its surplus. The life of these nontaxable bonds is 40 years. Let us see what would be the result to the state if the law requires the taxing power to deduct these \$55,000 of bonds from the actual value of the capital stock of this bank in order finally to ascertain the value of the share of stock therein: The total tax rate in Raleigh is about \$2.50. Two and one-half per cent. of \$55,000 equals \$1,375. Forty times \$1,375—that is to say, the loss of taxes each year, multiplied by the number of years that the bonds run—equals \$55,000. So the state in 40 years would lose the principal of the bonds, and for what—to gain one point by way of premium when first sold. Record, p. 2. A pretty costly whistle, to be sure! It will be noted that the 'controversy without action' states that, by exempting the shares of stock from taxation, the premium upon the bonds will be increased one point. Taking, therefore, these \$55,000 of bonds as a basis, the state would receive by way of extra premium, if sold with the exemptions contended for, 1 per cent., or \$550. But at the end of 40 years the state, etc., would lose, as above, \$55,000, and under the contention of exemption, if allowed because the

tax is not on the shares but on the corporation, all national banks would go scot free of all taxes. And yet we are authorized to state from the Corporation Commission that it is not the financial view of this matter which they would call to the attention of the court, by the legal phases of the same. We simply contend that a statute, which results in such disastrous consequences financially to the state should not be, by the court, interpreted as contended for by the appellant, unless the meaning of the statute is clear beyond doubt, without inference and without presumption. And we maintain that the plaintiffs have not shown, and cannot show, that the intention of the Legislature is clear beyond all doubt in respect to this matter."

In reply to that, the plaintiff's counsel subsequently contended that only a very small part of the bonds would be bought by the banks in this state. If so, such a very small demand could not materially affect the price of the bonds. Indeed, the only evidence adduced before the Corporation Commission that the exemption of the shares of stock would affect the price of these bonds is that of a witness who thought, perhaps, the price would be raised three-fourths of one per cent. That was only his opinion, and the contrary opinion, that the price of the bonds would not be affected at all, is probably entertained by the large majority of the bank officials of this state.

Exemptions of any property from its fair and just share of public burdens increases the taxation paid by all other property. Such exemption has, indeed, been expressly prohibited by the state Constitution. It may with truth be said that no legislation can be more unjust or more odious. For many years the state contended for the annulment of an exemption from taxation which had been granted to two great railroads in the state. Such grant had been made at a time when railroads were an "infant industry" and the state thought their construction should be encouraged by contribution from the other taxpayers by exempting those railroads from taxation. Besides, at that time there was no provision in the Constitution, as now, forbidding the exemption of any property. Yet the state strongly contended for years that the exemption was unjust and illegal, and finally the repealing act was held valid by this court in *Railroad v. Alsbrook*, 110 N. C. 137, 14 S. E. 652, which opinion was affirmed upon a writ of error by the United States Supreme Court. In that opinion by this court (110 N. C. 147, 14 S. E. 653), it was said, quoting from Chase, C. J., and Miller and Field, JJ., in *Washington v. Rouse*, 8 Wall. 441, 19 L. Ed. 498: "We do not believe that any legislative body, sitting under a state Constitution of the usual character, has a right to sell, to give, or to bargain away forever the taxing power of the state. * * * If the Legislature can exempt in perpetuity, one piece of land, it can exempt

all land. It can as well exempt persons as corporations. They go on to say that rich men and rich corporations, with the appliances they are known to use, may obtain perpetual exemption 'from taxation and cast the burden of government and the payment of debts on those who are too poor or too honest to buy such immunity'; and they say further: 'With as full respect for the authority of former decisions as belongs, from teaching and habit, to judges trained in the common-law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of the courts, and the one we have here considered is of this character. We are strengthened in this view of the subject by the fact that a series of dissents from this doctrine by some of our predecessors shows that it has never received the full assent of this court, and, referring to those dissents for more elaborate defense of our views, we content ourselves with thus renewing the protest against a doctrine which we think must be finally abandoned.'"

In the above case, we were holding invalid an exemption from taxation granted under a Constitution which did not forbid such exemption, and purely on the ground that the Legislature could not grant an irrevocable exemption. In the present case, the exemption is not given by any words which refer to shares of stock or to shareholders and is a most far-fetched deduction from the use of the word "indirect," and, if it can be construed to convey the meaning the plaintiffs contend, then the exemption is in direct violation of the Constitution of the state.

It has been uniformly held by the United States Supreme Court, by courts of other states, and by this court, that in respect to corporations "the Legislature can levy any two or more of the following taxes, simultaneously: (1) On the franchise (including dividends); (2) on the capital stock; (3) on the tangible property of the corporation; and (4) on the shares in the hands of the shareholders. The tax on the two subjects last named is imperative." *Commissioners v. Tobacco Co.*, 116 N. C. 441, 21 S. E. 423, and cases there cited. That action was brought by an eminent lawyer, now a member of this court, whose contentions to the above effect were sustained. Notwithstanding that it was there held that a corporation must pay tax on all its property, like every one else, the counsel for defendant says truly that "not a bank in North Carolina to-day pays one cent of tax to the state, county or town, for franchise tax, income tax, nor any tax whatever upon its capital stock (which taxes are optional with the Legislature), nor upon any of its property (which last tax is imperative by the Constitution), save the tax on its banking house and furniture and the like" (in this case \$12,700), and even that tax is recouped by unconstitutionally deducting the amount

of the property thus taxed from the assessment of the shares against the shareholders. This is in direct violation of the Constitution. If the farmers, and other citizens, and all other corporations, were treated to a like total exemption from all taxation, they, too, would show a great degree of prosperity.

To sum up: "Exemptions from taxation are regarded as in derogation of the sovereign and of the common right and, therefore, not to be extended beyond the exact and express requirements of the language used, construed strictissimi juris." *Railroad v. Thomas*, 132 U. S. 174, 10 Sup. Ct. 68, 33 L. Ed. 302. Here there are no words conferring an exemption upon stockholders in the banks, and it requires an ingenious and most unusual interpretation of the words "indirect tax" to confer an exemption upon the plaintiffs.

"Where a doubt arises as to the existence of the exemption, it is to be decided in favor of the state." *Bank v. Tennessee*, 104 U. S. 495, 26 L. Ed. 810. Here it requires an ingenious construction, an unusual one, of a single word to raise a doubt in favor of the exemption.

"The exemption must be clearly stated and will not be inferred from facts which do not irresistibly point to the existence of a contract." *Judson on Taxation*, § 86. There can be no lawful contract of exemption made, even if the Legislature had so intended, because their action would be in violation of the Constitution.

"No claim of exemption from taxation can be sustained unless established beyond all doubt." *Railroad v. Supervisors*, 93 U. S. 595, 23 L. Ed. 814; *Railroad v. Missouri*, 120 U. S. 569, 7 Sup. Ct. 693, 30 L. Ed. 732. In this case, of the nine judicial officers to whom, under the laws of this state, this matter has been submitted, only three, a bare majority of this court, considered that such exemption has been granted. The three corporation commissioners, the judge of the superior court, and two judges of this court, have a contrary opinion. Surely the point is not "established beyond all doubt"—the test which the Supreme Court of the United States applies.

Such exemptions must be expressed in clear and unambiguous terms. *Railroad v. Alsbrough*, 110 N. C. 158, 14 S. E. 652. Can any one claim that such is the case here when neither "shares" nor "shareholders," nor exemption to them, are named in the statute, which only refers to exemption of the bonds when owned as the surplus of the bank.

The buyers of the bonds, if the court holds that the shareholders are exempt on their stock, will claim that the decision of this court is a contract, an exemption of bank shares annexed to the exemption of \$4,000,000 of bonds, being a double exemption, for 40 years, and that such exemption is irrevocable, even though the Legislature should strike out the act, or the court should here-

after express a contrary opinion, either in another suit or by a rehearing in this case and change of opinion by one member of the court, as now constituted, or by a change in its personnel. This dissenting opinion will not be without its value if it puts the bond buyers upon notice that if the act, as thus construed, is unconstitutional, no valid contract of exemption of shares has been granted.

There is nothing in the judgment of the Corporation Commission of which the plaintiffs have a right to complain.

HOKE, J. (dissenting). I am constrained to differ from the court in its decision of this case, and, the question presented being a matter of importance both to the parties litigant and to the public, I deem it proper that I should state briefly the reason for my position.

It has been long an accepted principle that the shares of stock in a bank, when owned by individuals, are entirely separate and distinct from the corporate property and assets. This was held for law in *Van Allen et al. v. Nolan et al.*, and several other cases of like import, sometimes called the bank tax cases, decided as far back as 1865, and reported in 70 U. S. 573, 18 L. Ed. 229. The question there chiefly determined was whether the bonds of the United States government should be first deducted in estimating the value of shares of stock in the hands of individual owners for the purpose of state taxation, permissible under the federal statute; and it was held that while the bonds of the federal government were exempt from any and all forms of taxation, direct or indirect, yet the shares of stock owned by individuals, being an entirely distinct and separate species of property, the government bonds, though held and owned by the bank, should not be deducted in determining the value of these shares.

In the case referred to, Associate Justice Nelson, delivering the opinion, thus states the principle and the reason for it as follows: "But in addition to this view, the tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations. * * * The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him." *Van Allen*

v. Nolan, 70 U. S. 573, 18 L. Ed. 229. While this principle was originally established by a divided court, it has been since repeatedly affirmed and applied by the Supreme Court of the United States, as in *Bank v. Tenn.*, 161 U. S. 134, 16 Sup. Ct. 456, 40 L. Ed. 645, *Bank v. Des Moines*, 206 U. S. 518, 27 Sup. Ct. 571, 51 L. Ed. 901, and many other cases; and has been so long recognized and acted upon by courts and Legislatures that, in the impressive language of Associate Justice Moody, delivering the opinion in the case last cited, "It has come to be inextricably mingled with all taxing systems, and cannot be disregarded without bringing them into confusion that would be little short of chaos."

The decisions of our own state are equally pronounced in recognition of this principle. *Commissioners v. Tobacco Co.*, 116 N. C. 441, 21 S. E. 423; *Belo v. Commissioners*, 82 N. C. 415, 33 Am. Rep. 688. In the last case, Chief Justice Smith, speaking to this question, said: "In an able opinion of the author of that valuable work on Railways, commenting on the law, he says: 'We here find the clear recognition of this kind of corporate property, taxable to the corporation, and the shares in the hands of the corporators, distinctly defined as a fourth species of corporate property, taxable only to the owners or holders: (1) The capital stock; (2) the corporate property; (3) the franchise of the corporation, all of which is taxable to the corporation; and the shares in the capital stock which are taxable only to the shareholders.' 1 Red. Am. Cases, 497. A tax on the shares of stockholders in a corporation is a different thing from a tax on the corporation itself, or its stock, and may be laid irrespective of any taxation of the corporation where no contract relations forbid it. *Cooley*, Const. Lim. 169; *Field on Corp.*, 521. * * * In *Van Allen v. Assessors*, 3 Wall. 573, 18 L. Ed. 229, it is held that shares in a national bank may be taxed to the holder, although the whole capital is invested in securities of the national government, which an act of Congress declares to be exempt from taxation by state authority."

This being the doctrine as it now universally prevails, the revenue acts of the state establishing the method of taxation applicable to banks provide that the shares of stock of all banks of this state, both state and national, shall be taxed as the property of the individual owners, and for that purpose said shares shall be assessed at their market value, and, if they have no market value, then at their actual value; that this actual value, when there is no market value, shall be ascertained and determined by adding together the capital stock surplus and undivided profits and deducting therefrom the value of the real and personal property on which it pays tax under local assessment, and insolvent debts, if properly itemized and sworn to, may also be deducted. It will be noted here that the

shares of stock are assessed and taxed, and the deductions are to be made only in determining the value of these shares as property of individual owners, and separate and distinct from the property and assets of the bank, and the only deductions allowed by the law are the real and personal property locally assessed and taxed and insolvent debts.

This, then, being the provision of the law under which the taxes are assessed, the Legislature of 1909 enacted chapter 510, Laws 1909, entitled "An act to issue bonds, etc., to care for the insane of the state," and, after providing for such issue to an amount of \$500,000, the statute contains the following section: "Sec. 4. The said bonds and coupons shall be exempt from all state, county or municipal taxation or assessment, direct or indirect, general or special, whether imposed for purposes of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation." It is contended that, under and by virtue of this provision, the bonds to be issued under this act shall not be considered in determining the value of shares in the hands of individual owners for purposes of taxation under the revenue laws above referred to.

This being a claim for exemption from taxation, it can only be allowed in case the claim is clearly established. *Railroad v. Alsbrook*, 110 N. C. 137, 14 S. E. 652; *Railroad v. Mo.*, 120 U. S. 569, 7 Sup. Ct. 693, 30 L. Ed. 732; *Railroad v. Supervisors*, 93 U. S. 595, 23 L. Ed. 814; *Judson on Taxation*, § 86. In *Alsbrook's Case*, supra, it was held: "(2) The grant of an exemption from taxation must be expressed by words too plain to be mistaken; if a doubt arise as to the intent of the Legislature, that doubt must be resolved in favor of the state." In *Railroad v. Mo.*, supra, it was held: "Immunity from taxation will not be recognized unless granted in terms too plain to be mistaken." These decisions, while quoted as indicating the only condition under which an exemption from taxation should ever be allowed, can hardly be considered apposite to the question presented; for, bearing in mind the cardinal principle that shares of stock in the hands of individual owners are entirely distinct from property of the bank, the statute in question nowhere provides that the valuation of these shares, as the property of the individual holders, should be in any way diminished by reason of the ownership of the bonds in question on the part of the bank, nor in my opinion does it use words that justify or permit of any doubt on that question. The section quoted provides: (1) That the bonds shall be exempt from all taxation, direct or indirect, etc. (2) That the interest thereon shall not be subject to taxation as for in-

come. (3) Nor shall they be taxed when constituting a part of the surplus of the bank. And in language both plain and explicit these are all the exemptions which the statute sanctions or allows. There is nothing obscure or ambiguous in them, and in such case the courts have no power to add what is, to my mind, an entirely distinct provision, to wit: "Nor shall said bonds be considered in determining the value of the shares when assessed and taxed as the property of the individual stockholders."

The first exemption specified in the law, "Shall not be subject to taxation direct or indirect," comes clearly under the decisions referred to, which hold that United States government bonds shall not be deducted in estimating the value of the shares in national banks for purposes of taxation. An exemption by statute cannot be expressed in terms more comprehensive and searching than that which arises from the principle that the bonds of our national government may not be taxed by the states. Such a power involves its very existence as an independent sovereignty, and, notwithstanding this, these bonds, when owned by a bank, are not deducted in determining the value of the shares, because, as stated, the shares are an entirely distinct and separate species of property.

The terms of the second exemption in the statute are not relevant to the discussion, and the third, "Nor shall the bonds be taxed when constituting part of the surplus of the bank," in clear and express terms applies to the bonds when constituting part of the corporate property, and in no way affects the valuation of the shares which are the property of the individual.

It is insisted, in support of the proposed change from the express terms of the law, that, unless it shall be interpreted as affecting the valuation of the shares, it would be meaningless; and it is further urged that the history of this legislation and the action of the executive departments of the state government should lend force to the position taken in the principal opinion; but these are considerations and rules of construction and interpretation permissible only when the language of a statute is of doubtful meaning, and have no place when its expressions are plain and do not permit of construction.

In *Black on Interpretation of Laws*, § 26, quoted with approval in *Re Applicants for License*, 143 N. C. 3, 55 S. E. 636, 10 L. R. A. (N. S.) 238, it is said: "Sec. 26. The meaning of a statute must first be sought in the language of the statute itself. And further: 'If the language is plain and free from ambiguity and expressed a simple, definite, and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended to convey.' And in *Lewis' Sutherland Statutory Construction* (2d Ed.) § 267, it is said: 'When the intention of the Legislature is so apparent from

the face of the statute that there can be no question as to its meaning, there is no room for construction.'"

In *McCluskey v. Cromwell*, 11 N. Y. 601, Allen, J., quotes with approval the rule as expressed by Johnson, J., in *Newell v. People*, 7 N. Y. 9, as follows: "Whether we are considering an agreement between parties, a statute, or a Constitution, with a view to its interpretation, the thing we are to seek is the thought which it expresses. To ascertain this, the first resort, in all cases, is to the natural signification of the words employed, in the order and grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning apparent upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed." And in the same opinion it is said further: "In the construction, both of statutes and contracts, the intent of the framers and parties is to be sought first of all in the words and language employed, and if the words are free from ambiguity or doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation, or when the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning. Statutes should be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending their operation."

These views are quoted with approval both in the opinion and dissenting opinions in *Nance v. Railroad*, 149 N. C. 366, 63 S. E. 116, and express a well-recognized principle of law. As heretofore stated, there is nothing in the statute which in express terms, or by any permissible intendment, refers to the omission of these bonds in determining the value of shares when taxed as the property of individual holders, and the courts, in my opinion, are without power to add such a provision to the law.

Speaking generally to the question presented, Associate Justice Peckham, delivering the opinion of the court in *Bank of Commerce v. Tennessee*, 161 U. S. 146, 147, 16 Sup. Ct. 460 (40 L. Ed. 645), says: "These cases show the principle upon which is founded the rule that a claim for exemption from taxation must be clearly made out. Taxes being the sole means by which sovereignties can maintain their existence, any claim on the part of any one to be exempt from the full payment of his share of taxes on any portion of his property must on that

account be clearly defined and founded upon plain language. There must be no doubt or ambiguity in the language used upon which the claim to the exemption is founded. It has been said that a well-founded doubt is fatal to the claim; no application will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power. The capital stock of a corporation and the shares into which such stock may be divided and held by individual shareholders are two distinct pieces of property. The capital stock and the shares of stock in the hands of the shareholders may both be taxed, and it is not double taxation. *Van Allen v. Assessors*, 3 Wall. 573 [18 L. Ed. 229]; *People v. Commissioners*, 4 Wall. 244 [18 L. Ed. 344] cited in *Farrington v. Tennessee*, 95 U. S. 687 [24 L. Ed. 558]. This statement has been reiterated many times in various decisions by this court, and is not now disputed by any one. The surplus belonging to this bank is 'corporate property,' and is distinct from the capital stock in the hands of the corporation. The exemption, in terms, is upon the payment of an annual tax of one-half of one per cent. upon each share of the capital stock, which shall be in lieu of all other taxes. The exemption is not, in our judgment, greater in its scope than the subject of the tax. Recognizing, as we do, that there is a different property in that which is described as capital stock from that which is described as corporate property other than capital stock, and remembering the necessity there is for a clear expression of the intention to exempt before the exemption will be granted, we must hold that the surplus has not been granted exemption by the clause contained in the charter under discussion. The very name of 'surplus' implies a difference. There is capital stock, and there is a surplus over, above, and beyond the capital stock, which surplus is the property of the bank until it is divided among stockholders."

There is no one who is more jealous for the honor and reputation of this state and its government than the writer. I know full well that it is their desire and fixed purpose to meet every obligation and duty incumbent upon them as an enlightened, progressive, and Christian people, and where such purpose has been enacted into law their courts should at all times and under all circumstances be swift to enforce it; but this sentiment, deep as it is, does not permit, on the contrary it forbids, that in expounding their laws we should depart from fixed principles of interpretation, or read into their statutes an effect and meaning contrary to the clear import of their terms.

I am of opinion that the judgment below should be affirmed.

(153 N. C. 639.)

MILLER v. PITTS et al.

(Supreme Court of North Carolina. May 25, 1910.)

1. PRINCIPAL AND SURETY (§ 197*)—CONTRIBUTION—JUDGMENT AGAINST SURETY—EFFECT AS TO CO-SURETY.

A judgment, recovered by the United States against a surety on a distiller's bond, is at least prima facie evidence of the debt, in a subsequent action in a state court by him against the co-surety for contribution, provided payment by him of the amount recovered is shown or admitted.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 632, 632½; Dec. Dig. § 197.*]

2. PRINCIPAL AND SURETY (§ 187*)—REIMBURSEMENT—JUDGMENT AGAINST SURETY—EFFECT AS TO PRINCIPAL.

A judgment recovered by the United States against a surety on a distiller's bond is at least prima facie evidence of the debt in a subsequent action in a state court by him against his principal for reimbursement, provided payment by him of the amount so recovered is shown or admitted.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 554-556; Dec. Dig. § 187.*]

Appeal from Superior Court, McDowell County; J. S. Adams, Judge.

Action by L. H. Miller against Abel Pitts and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Sinclair & Carlton, for appellant. W. T. Morgan and T. A. Morphew, for appellees.

WALKER, J. This action was brought by the plaintiff, as a surety on the distiller's bond of the defendant Abel Pitts to recover the amount which he was compelled to pay under a judgment recovered in the United States District Court for the Western District of North Carolina, against Pitts, as principal, and himself, as surety, for \$500, the amount or penalty of said bond. The parties waived a trial by jury, and agreed that the judge might find the facts, and it appears from his findings that the bond was executed by Abel Pitts, as principal, and the defendants Lee Miller and Thomas Epley, as sureties. It further appears that an action was brought upon the said bond for a breach thereof by Pitts, which breach consists in his failing to pay the taxes due from him by law on 363 gallons of spirits, which he had removed from the premises where said distillery was operated without complying with the law by paying the taxes assessed against him. Issues were submitted to the jury at the trial of said case, which, with their answers, are as follows:

"(1) Did the defendants execute the bond sued on? Answer: Yes.

"(2) Did the defendants commit a breach of said bond? Answer: Yes.

"(3) What amount of damages, if any, has the plaintiff sustained on the bond sued on? Answer: \$374.88, with 5 per cent. penalty and

interest 12 per cent. from October 1, 1896; \$53.68, with 5 per cent. penalty and interest 12 per cent. from March 1, 1896; \$26.91, with 5 per cent. penalty and interest 12 per cent. from March 1, 1897."

The United States court rendered judgment upon the verdict for an amount in excess of the penalty of the said bond. Execution was issued upon the said judgment, and the amount of the bond and the costs were paid by the plaintiff, Miller. He brought this action to recover the said amount so paid by him, and offered in evidence a certified copy of the record in the District Court, showing the amount of the recovery there against him and the payment of the same. He contended in the court below, and also in this court, that this record which showed a verdict and judgment against him for the amount which he was compelled to pay, under the execution thereafter issued upon the judgment, was, at least, prima facie evidence that Pitts, as principal, owed the amount, and that he had been compelled to pay it by judicial proceedings in the United States court. There was no controversy as to the fact that the plaintiff had paid the amount of the bond and the costs, but this fact was admitted. The court below ruled that the record of the proceedings in the United States court was not prima facie evidence of the debt and the payment thereof by the plaintiff as a co-surety of the defendant Epley, and it was thereupon adjudged that the plaintiff take nothing by his action, and that the defendant Epley recover his costs. The plaintiff excepted to this judgment and appealed to this court.

We think his honor erred in holding that the record of the United States District Court, which was duly and properly certified, was not prima facie evidence of the indebtedness of Pitts as principal, under the distiller's bond, to the government. The case in that court was tried upon issues submitted to the jury, who found the fact of indebtedness, and judgment was rendered thereon. The plaintiff was thereafter compelled, by the execution issued from that court, to pay the sum of \$500, which was the penalty of the bond, and the costs of the suit. It is true that Epley, by his answer in this case, denies that there was any breach of the bond, but he offered no proof in the court below to that effect, and there is no suggestion by him or his counsel that there was any collusion between the government and the defendants in the prosecution of the action in the United States court upon the bond to recover the penalty thereof, or in obtaining the judgment. In 2 Brandt on Suretyship and Guaranty (3d Ed.) § 807, it is stated that: "In an action for contribution between co-sureties, the record of a judgment recovered by the creditor against

the principal and one of the sureties, to which the other surety is not a party, is competent evidence to prove the rendition of such judgment by way of inducement to further evidence that the surety, against whom it was rendered, has paid it." See, also, section 805, where it is said that: "In an action of assumpsit by a surety against his principal, to recover indemnity for money paid for the latter by the former, the record of a judgment against the surety, although rendered without notice to the principal, is prima facie evidence of the sum due by the principal of the obligation of the surety to pay, and of the assent of the principal to the payment." *Preslar v. Stallworth*, 37 Ala. 402. This court, in *Armistead v. Harramond*, 11 N. C. 339, held that a judgment against an administrator is evidence against his surety of the existence of the debt upon which the judgment was recovered, though it was not at that time evidence against the surety that the administrator had sufficient assets with which to discharge the indebtedness. This case was cited with approval in *Brown v. Pike*, 74 N. C. 531. In consequence of prior decisions of this court, the act of 1844 (chapter 38) was passed, and in the construction given to that act in *Brown v. Pike*, supra, the judgment was made evidence against the surety, both as to the existence of the debt and of assets sufficient to pay it, but by the act of 1881, (chapter 8), the Legislature amended the act of 1844 so as to make such a judgment only presumptive evidence against the sureties, whether they were parties to the action in which the judgment was recovered against the principal or not. *Revisal 1905, § 285*. We think, therefore, it is settled as a general principle of the law that a judgment recovered against a surety is, at least, prima facie evidence, or presumptive evidence, of the debt in an action afterwards brought by him against his principal or co-surety to be indemnified, provided that the payment by him of the amount so recovered is either shown or admitted. *Leak v. Covington*, 99 N. C. 559, 6 S. E. 241. He recovers of the principal the entire debt which he has paid, and of the surety his ratable part. It was admitted in this case that the principal, Abel Pitts, is insolvent.

It is true the court ruled that the record of the United States District Court was not evidence against the defendant, but it is apparent from the pleadings and findings of fact that there is no real dispute between the parties as to the truth of the matters set out in the record, if it is evidence against the defendant. We, therefore, hold that there was error in the ruling of the court as to the effect of the record, and reverse the judgment. The case will be remanded, with directions to enter a judgment for the plaintiff.

Reversed.

(152 N. C. 625)

MORSE et al. v. HEIDE.

(Supreme Court of North Carolina. May 25, 1910.)

1. PILOTS (§ 1*)—STATUTORY PROVISIONS—REGULATIONS.

The Legislature may authorize a local board to prescribe limits for pilot grounds and require pilots to cruise therein, as well as adopt regulations to promote the purpose of such service.

[Ed. Note.—For other cases, see Pilots, Cent. Dig. §§ 1-3; Dec. Dig. § 1.*]

2. PILOTS (§ 3*)—REGULATIONS—POWER OF BOARD.

Laws 1907, c. 625, § 2 (Pell's Revisal 1908, c. 104, § 4957b), requires the board of commissioners of navigation and pilotage, from time to time, to establish such regulations as to the arrangement and station of pilots, for the purpose of compelling them to be on duty at all times, as they shall deem advisable, and to impose reasonable fines and penalties to enforce such rules. The commissioners adopted rules prohibiting pilots from leaving their station to go to a neighboring port to pilot a vessel bound from such port for Cape Fear river, except under peculiar circumstances, at the discretion of the chairman of the board and provided that the cruising grounds of Cape Fear pilots should be restricted to a certain area, in which area only they should cruise and offer their services. *Held*, that the statute authorized the board to adopt such regulations, and the regulations adopted were a reasonable exercise of the authority conferred.

[Ed. Note.—For other cases, see Pilots, Cent. Dig. §§ 1-3; Dec. Dig. § 3.*]

3. PILOTS (§ 10*)—COMPENSATION—FEES FOR CRUISING OUTSIDE GROUNDS.

Acts 1907, c. 625, § 9 (Pell's Revisal 1908, § 4957j), authorizes the board of commissioners of navigation and pilotage to grant written permission to any pilot to run regularly as pilot on steamers between the port of Wilmington and other ports, and gives such pilot all the rights and emoluments of river and bar pilots. *Held*, that pilots at Cape Fear bar, on which Wilmington is, should be allowed to speak vessels only within the Cape Fear cruising grounds, as fixed by the commission, and they cannot recover fees for services rendered in cruising outside of such grounds.

[Ed. Note.—For other cases, see Pilots, Dec. Dig. § 10.*]

Appeal from Superior Court, New Hanover County; O. H. Allen, Judge

Action by T. M. Morse and others against A. S. Heide. From a judgment for defendant, plaintiff appeals. *Affirmed*.

Herbert McClammy, for appellant Rountree & Carr, for appellee.

WALKER, J. This action was brought by the plaintiff to recover pilotage fees alleged to be due him, and which were held by the defendant to abide the judgment of the court as to whether said Morse is entitled to recover the same. The suit was commenced in the court of a justice of the peace. The defendant filed an answer to which the plaintiff demurred. The justice gave a judgment for the plaintiff, and the defendant appealed to the superior court, where the case was heard upon the answer and demurrer. The facts

disclosed by the record are that the plaintiff, who was a duly licensed pilot of the Cape Fear bar and river, sailed from Southport for Charleston, S. C., on the boat Herman Oelrichs, and that at or near Charleston, and far beyond the bounds or station established by the board of commissioners of navigation and pilotage for the Cape Fear bar and river, and pretending to be in the performance of his duty as a pilot, spoke the ship Soutra off the lightship near Charleston harbor, and the plaintiff was taken aboard said ship for the purpose of piloting her over the Cape Fear bar at the mouth of the river. When the said vessel had reached the cruising grounds established by the said board of commissioners for the Cape Fear river and bar, L. J. Pepper, who was also a licensed pilot of the said river and bar, spoke the vessel Soutra and demanded the right to pilot her in, which demand was refused on the ground that the Soutra already had a pilot on board; that is, the plaintiff, T. M. Morse. When the Soutra had passed over the bar, certain licensed pilots, including L. J. Pepper, filed a complaint against the plaintiff for violating the rules and regulations of the said board of commissioners with reference to the station or cruising grounds for pilots and their boats, and the matter was heard, and the commissioners decided that the plaintiff had violated said rules and regulations, and ordered that the plaintiff should not pilot the said vessel out to sea, and further decided that he was not entitled to the pilotage fees, either inward or outward, and adjudged that L. J. Pepper was entitled to pilot the vessel out to sea, which was done by him. By agreement, the amount of the fees was deposited with the defendant, who was the agent of the ship, to await the result of this action.

It is conceded that the plaintiff is not entitled to recover if the commissioners acted within the scope of their power in making the rules and regulations as to the station of pilots and their cruising grounds, because the plaintiff had transgressed these rules and regulations, which are as follows:

"(1) No pilot will be permitted to leave his station to go to a neighboring port for the purpose of piloting a vessel bound from that port for the Cape Fear river, unless under peculiar circumstances, at the discretion of the chairman of this board. And every licensed pilot is expected and required to provide the means of boarding and leaving vessels at sea by pilot boats or cutters. Arrangements with tug boats or fishing boats or any other means of approaching or leaving vessels at sea will not be permitted under penalty of the revocation of license at the discretion of the board.

"(2) The cruising grounds of the Cape Fear pilots shall in future (after April 24, 1908) be restricted to that area bounded on the south by Little river and an imaginary line

drawn directly southeast from Little river, and bounded on the north by Bogue Inlet, and an imaginary line drawn directly southeast from Bogue Inlet, and in such area only shall Cape Fear pilots cruise and offer their services for pilotage."

The defendant contended that the Legislature had conferred authority upon the board of commissioners of navigation and pilotage, by Laws of 1907, c. 625, § 2 (Pell's Revisal 1908, c. 104, § 4957b), to adopt said rules and regulations. That section is as follows: "The commissioners shall from time to time make and establish such rules and regulations respecting the arrangement and station of pilots for the purpose of compelling them to be on duty at all times, as to them shall seem advisable, and shall impose reasonable fines, forfeitures and penalties for the purpose of enforcing the execution of such rules and regulations."

We have held, in the case of *St. George v. Hardie*, 147 N. C. 88, 60 S. E. 920, that the act of 1907 is constitutional and is a lawful exercise of the power vested in the Legislature. It is customary to confer upon such boards of navigation and pilotage the power to make reasonable and proper rules and regulations for the government of those who are licensed as pilots, and we can see no reason why this custom is not sanctioned by law, or why the board of commissioners of navigation and pilotage may not, in the exercise of the power thus vested in them, prescribe the limits of cruising grounds and the stations of pilots. 30 Cyc. p. 1611. Nor do we see how any person, who accepts a license which confers upon him the privilege of piloting ships on their inward or outward passage on the river and over the bar, can well complain of the conditions upon which such license is granted, provided they are reasonable, and it must necessarily be that the rules and regulations adopted by the board of navigation and pilotage for the Cape Fear river and bar, to which we have referred, were not only reasonable, but necessary, for the safety of vessels and the convenience of navigation. The plaintiff's counsel, in his brief, as we construe it, deems the general policy of the law to be that there should be an early tender of pilotage services, and that a pilot may, therefore, in the absence of statutory prohibition, cruise for incoming vessels beyond the pilot waters or pilotage grounds of his port. He argues that this prohibition must be by statute directly; but no reason appears to us why the Legislature, if it has the right to prescribe the limit of cruising or pilotage grounds, may not confer authority upon a local board, better acquainted than itself with the nature of the service to be rendered and the conditions and circumstances of the particular case, to carry out the legislative will by marking out the grounds and adopting such rules and regulations as in its judgment will best promote the object and purpose of

providing for such a service. No authority was cited to us which sustains the contention of the plaintiff that the Legislature cannot confer such power upon a local board.

The only question, therefore, which is now presented for our consideration, is whether such authority was conferred by Acts 1907, c. 625, and of this we have no doubt. It is true that, as said in some of the decisions, the policy of the law is to induce pilots to cruise somewhat largely, for the purpose of speaking incoming vessels at an early period; but it is also true that it is more important they should not cruise so far afield as to be absent from their post of duty—that is, the proper cruising ground at the mouth of the Cape Fear river—so that there may not be a sufficient number always present to pilot vessels which require their services to cross the bar. If a pilot can go as far from Wilmington as the port of Charleston, how much farther south or north on the coast can he go in order to obtain an advantage over other pilots? If the law permitted such a course to be pursued, it would seriously interfere with the safe and prompt navigation of vessels plying between the different ports. It is much better and safer to hold that the Legislature can, either directly or indirectly, provide for the stations and cruising grounds for pilots somewhere near the port for which vessels are bound. So far as we can see from the facts of this case, the Legislature has made a wise provision in conferring authority upon the board of navigation and pilotage to fix the limits of cruising grounds and to establish pilotage stations, and there has been, in this case, no abuse of the authority thus conferred, but it seems to have been reasonably exercised. 30 Cyc. 1611, and notes.

The authority of the Legislature to act in such matters and to prescribe rules and regulations for the government of pilots seems to have been settled. *The Whistler* (D. C.) 13 Fed. 295; 30 Cyc. 1615. There is a provision in the statute that the commissioners shall have power to grant permission in writing to any pilot in good standing and authorized to pilot vessels, to run regularly as pilots on steamers between the port of Wilmington and other ports in the United States, and that he shall have all the rights and emoluments that belong to the river and bar pilots. Acts 1907, c. 625, § 9 (Pell's Revisal 1908, § 4957j). We think from the provision of this section, and the general scope of said act as gathered from the terms in which it is expressed so clearly, that it was the intention of the Legislature that pilots at the Cape Fear bar should be allowed to speak vessels only within the cruising grounds, and that their right to recover fees for their services, when tendered and refused, depends upon their compliance with the provisions of the act as thus construed.

Our conclusion is that T. M. Morse, and the other plaintiffs associated with him in the

case, are not entitled to recover the fees which they now demand of the defendant, and, therefore, that the judgment of the court below was correct.

Affirmed.

(152 N. C. 633)

GRESHAM MFG. CO. et al. v. CARTHAGE BUGGY CO.

(Supreme Court of North Carolina. May 25, 1910.)

SALES (§ 474*)—CONDITIONAL SALES—LIEN OF SELLER.

A manufacturing company sold goods on agreement that the title should remain in the seller until the price had been paid. The contract was signed on the part of the purchasing company by an officer of the company. Held that, if the officer did not have the power to execute the contract, no title to the goods passed to the purchaser, and consequently none would pass to its receiver in insolvency proceedings, but, if by receiving the goods the purchaser ratified the act of the officer in executing the contract, it was bound by its provisions, and therefore the seller had a lien upon the property prior to that of the other creditors of the purchaser.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 474.*]

Appeal from Superior Court, Moore County; Lyon, Judge.

R. W. Pleasants and others brought an action against the Carthage Buggy Company, which they alleged to be insolvent, and a receiver was appointed, and the Gresham Manufacturing Company intervened. From a judgment in favor of the creditors as against the Gresham Manufacturing Company, the Manufacturing Company appealed. Judgment reversed and new trial ordered, unless the parties consent to a sale of property furnished the Carthage Buggy Company by the Gresham Manufacturing Company, and a distribution of the proceeds in accordance with the opinion of the Supreme Court.

Aycock & Winston and Cox & Cox, for appellant. H. F. Seawell and U. L. Spence, for appellee.

WALKER, J. This action was brought by R. W. Pleasants and others, creditors of the Carthage Buggy Company, to recover judgment on their several claims against the buggy company, which they alleged to be insolvent, and to wind up and settle its affairs; the buggy company having been duly incorporated under the laws of this state. C. S. Brewer was appointed as receiver of the assets of the buggy company, and afterwards the Gresham Manufacturing Company intervened in the cause, and alleged that it had contracted to sell to the buggy company certain articles of personal property which are described in the pleadings, and that the buggy company was indebted to it at the time of the intervention in the sum of \$1,725. It also alleged that at the time of the sale it had retained the title to the

said goods so sold by it to the buggy company, the contract between the two companies having been reduced to writing and executed on behalf of the buggy company by its secretary and treasurer, and on behalf of the manufacturing company by E. W. Becky. Execution of the contract was proven before a justice of the peace as to the Carthage Buggy Company, by Charles A. Jones, its secretary and treasurer, and purported to have been executed by authority of the board of directors. The plaintiffs in the action claimed that the receiver acquired title to the property and held the same for the payment of the general debts of the corporation, and that the manufacturing company had no prior lien or right thereto by virtue of the contract of sale and the registration of the same. The issue submitted to the jury, with their answers thereto, were as follows: "(1) In what sum is the Carthage Buggy Company indebted to the Gresham Manufacturing Company? Answer: \$1,496.86, with interest from the 8th of November, 1908.

"(2) Is the Gresham Manufacturing Company, at this time, entitled to a lien on the materials mentioned in the complaint in preference to all other creditors of the Carthage Buggy Company and the receiver of the Carthage Buggy Company? Answer: No.

"(3) Is the Gresham Manufacturing Company at this time entitled to a lien on the materials described in the complaint as against the Carthage Buggy Company? Answer: Yes."

There was evidence tending to support the contentions of the parties as above stated. The court charged the jury that, if they believed the evidence, they would find, in answer to the first issue, that the buggy company was indebted to the Gresham Manufacturing Company in the sum of \$1,496.86, with interest from November 8, 1908. This issue was answered by consent of the parties. The court further charged the jury that, if they believed the evidence, they should answer the second issue, "No." To this instruction the Gresham Manufacturing Company excepted. As to the third issue, the court charged the jury that, if they believed the evidence, they would answer that issue, "Yes." The court refused to adjudge that the Gresham Manufacturing Company was entitled to a lien on the property which it had contracted to sell to the buggy company, but adjudged that the buggy company was indebted to the Gresham Manufacturing Company in the sum of \$1,496.86, and that the latter was entitled to a lien on the property sold by it to the buggy company, as between it and the said buggy company, and further adjudged that the debt due by the buggy company to the manufacturing company should be paid by the receiver pro rata with the other debts due by the buggy company out of the proceeds of the sale of said

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

property, upon which the manufacturing company claimed a lien. The court also directed the property to be sold and the proceeds of sale to be held by the receiver for the purpose of distribution under its order, and further adjudged that certain costs of the action should be paid by the Gresham Manufacturing Company to the other creditors, and that the manufacturing company should recover its costs against the buggy company, to be taxed by the clerk and to be paid by the receiver after all the debts of the buggy company shall be satisfied out of the proceeds of the sale of the property. The Gresham Manufacturing Company excepted to the said judgment, and appealed to this court.

We think the court erred in its charge to the jury upon the second issue. This case is governed by *Mershon v. Morris*, 148 N. C. 48, 61 S. E. 647. The paper writing upon which the Gresham Manufacturing Company relied as creating a lien upon the property was nothing more than an offer by the buggy company to buy the goods and an agreement by the manufacturing company to sell the same, upon condition that the title should remain in the seller until the purchase money had been paid. As said in that case by Justice Connor: "The contract was simply an order for a machine, with the terms or proposition to purchase set out, among others, that the title to the property was to remain in the vendor until paid for. It would be a singular result if the corporation or its receiver could retain the property thus coming into its possession without paying for it, and repudiate so much of the president's proposition as secured to the vendor payment of the purchase money because he did not put the corporate seal to the proposition to buy. If he had no authority to make the contract, or did not observe the form prescribed in doing so, no title passed to the corporation. By ratifying his act and taking the property, it waived any informality, if there was any, in the form of making the contract. It is immaterial whether the paper was recorded. The receiver takes whatever title the corporation had, and nothing more. In no point of view is there any error in his honor's judgment." The case of *Duke v. Markham*, 105

N. C. 131, 10 S. E. 1017, 18 Am. St. Rep. 889, which was cited by the plaintiffs, has no application to the facts of this case. There the officers of the company, without having had a sufficient corporate meeting for the purpose, and without having any authority so to do, executed a mortgage upon the company's property, while in our case, if the officer did not have the power to execute the instrument, no title passed to the buggy company, and consequently none to its receiver. If by receiving the goods the buggy company ratified the act of the officer in executing the contract, it was bound by its provisions in every respect, including the reservation of title to the Gresham Manufacturing Company until the purchase money had been paid.

The error committed by the court, as above indicated, entitles the Gresham Manufacturing Company to a new trial, but, if the parties see fit to do so, they can have a sale of the property by the order of the court, and a distribution of the proceeds, according to the principles declared in this opinion. The judgment as to the costs will also be modified in accordance with our view of the case.

New trial.

(152 N. C. 766)

DOBSON v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. May 25, 1910.)

Appeal from Superior Court, Burke County; Justice, Judge.

Action by W. F. Dobson against the Western Union Telegraph Company for damages because of an unreasonable delay in the delivery of a telegram announcing a death. Judgment for plaintiff for \$500, and defendant appeals. Affirmed.

Avery & Avery and G. H. Fearons, for appellant. Avery & Ervin, for appellee.

PER CURIAM. We have examined the record, and considered the assignments of error of the defendant, and are unable to find any substantial error committed which warrants us in directing another trial. The cause seems to have been tried in line with the settled principles laid down in the decisions of this court.

No error.

(67 W. Va. 559)

STATE v. MOORE.

(Supreme Court of Appeals of West Virginia.
May 17, 1910.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§§ 63, 81*)—ILLEGAL SALE—INVALID LICENSE.

A license to sell intoxicating liquors, granted by a county court, upon a petition filed with its clerk less than 30 days before the day for hearing it, as required by Code 1906, c. 32, § 12, is granted without jurisdiction, is void, and may be collaterally attacked upon trial of an indictment for selling without license, and is no defense.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 81; Dec. Dig. §§ 63, 81.*]

Error from Circuit Court, Wetzel County.

U. S. Moore was convicted of selling liquor without a license, and brings error. Affirmed.

M. R. Morris, P. D. Morris, and Thos. P. Jacobs, for plaintiff in error. Wm. G. Conley, Atty. Gen., and D. M. Matthews, for the State.

BRANNON, J. U. S. Moore was indicted in the circuit court of Wetzel county for selling liquor without a license, and was found guilty by a jury on facts agreed, and by the judgment of the court was sentenced to pay a fine of \$25 and be imprisoned in jail two months. Moore presented as his defense a license for part of a year, and the case turns upon the validity of that license.

We have a statute in Code 1906, c. 32, § 12, which provides that an applicant for license to retail intoxicating liquors shall file a petition with the clerk of the county court "at least thirty days before the session of said court at which the same may be heard." Moore did file a petition on the 4th day of February, 1909, fixing the 2d day of March as the time for hearing such application by the county court, and the clerk published notice of such application as required by that section. On the 2d day of March Moore appeared to prosecute his petition, and 57 residents of the county also appeared and moved the county court to quash the notice, for the reason that said petition had not been filed with the clerk for at least 30 days before the 2d day of March, and the first day of the session of the county court at which the application could be heard, but that it had been filed only 26 days, and said persons then filed a written remonstrance against granting the license. The court adjourned until the 3d of March, and again adjourned until the 4th of March, when said motion to quash and remonstrance were overruled, and an order made granting Moore a retail license.

We have seen that said statute required an applicant for a license to file his petition at least 30 days before its hearing. Is the requirement to file for that length of time imperative and mandatory as to time, and there-

fore jurisdictional? That is, must that petition be filed for that time in order to enable the county court to grant its consent for license? This being a proceeding, not to cancel the license, but a prosecution under an indictment, the attack upon it is collateral. It is claimed for the defendant that when the court grants the license it is not void, but good until revoked, and that no collateral attack can be made upon it; and on the side of the state it is claimed that without compliance with the statute in the filing of the petition for the time fixed the county court has no jurisdiction or power to act, and that its action is void and affords no protection to the holder of the license. After mature consideration we have concluded that the latter proposition is sound. The county court order is not conclusive in such a matter as that of a court of general jurisdiction. I confess that I have the inclination, as Moore paid his money for the license, to hold otherwise; but an examination of the law and a consideration of the objects of the statute have led me to the conclusion stated. Now, what is the character of this statute provision? Very material. It is designed to give notice to the public that anybody may show cause against the license, because the statute expressly provides that residents of the county may file remonstrance and show cause therefor. The statute gives residents 30 days after the filing of the application. The public is interested in this provision. Certain residents did appear within the time; but may not others have appeared presenting other evidence, showing other cause, against the license, if the requisite time had been allowed? Consider the object of the regulations touching license. Consider the many provisions of chapter 32. They will tell us that that chapter is not only designed for revenue purposes, but that it regards the improper use of liquor as an evil, hurtful to society, and it hedges about a license when granted many provisions against its improper exercise, such as selling to minors, or to persons addicted to intemperance, or under the influence of drink, and on certain election days, and on Sunday, and makes the liquor dealer liable for injuries suffered by members of families of persons to whom liquor has been unlawfully sold, and many other provisions and guards against the improper exercise of the license when granted. Furthermore, the statute is very careful as to persons to whom a license shall be granted, providing that it shall be granted only to fit persons, persons fit to exercise the license. These and many other provisions that could be cited tell us plainly that the statute is designed to restrict and regulate the evil, and to grant license only to fit persons, and only after a prescribed notice, and after a hearing of all residents opposed to it, after they have had notice and opportunity to know of the application. In this

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
68 S.E.—12

important matter, the use of license to sell intoxicating liquors, we know from our statute that the Legislature has been very guardful by restrictions upon the business and made guards against evils resulting therefrom.

The Legislature has prescribed the limit of 30 days after the filing of the petition for a material purpose. It gives that period after the filing of the petition to enable remonstrants to know of the filing of the application. The Legislature has spoken in plain words in this important matter, and how can a court ignore its intent? How can a court enforce that intent if it shall say that a license granted, in willful departure from its requirements, is just as good as if the law had been fully complied with? Will it be said that only a few days ought not to make any difference? If you can dispense with 4 days, why not with 10 or 20? Very rarely should a court dispense with the plain letter of a statute, and surely it should not do so in such a matter as this. I believe this provision for petition and notice has only been incorporated into our liquor law for a few years. One time there was no notice to the public. Now there is. Shall we defeat this amendment of the liquor law by a liberalism which would emasculate it of its object in a vital particular? Let us see what the authorities say. I admit that there is some conflict, some cases holding that a license cannot be collaterally attacked; but I think I may say that the weight and logic of authorities sustain our position in this particular. In this country there is a vast conflict of authorities, and all a court can do is to choose that line which in its opinion is the sound one, and the better enforcing the law as applied to the subject in hand. "It is generally provided, by statute or ordinance, that notice shall be given, in such public manner, of all applications for liquor licenses, for a prescribed period of time, in order that persons interested in contesting particular applications may be fully informed when and where to take action. This is held to be a prerequisite to the jurisdiction of the licensing authorities to pass upon the application, and until the expiration of the time during which the notice must be given they have no power to take any action thereon." Black on Intoxicating Liquors, § 158. "Compliance with such requirements is a jurisdictional requisite and essential to the validity of a license." 23 Cyc. 128, is there speaking of the notice. I find it laid down in 17 Am. & Eng. Ency. L. 245, that: "The statutes usually require that petition shall be filed with a designated officer and remain on file for a designated period of time before it is acted upon. The statutes are not directory, but are mandatory, and no jurisdiction to grant a license can be acquired unless this requirement is strictly complied with." That page also says that notice is intended to give as wide publicity as possible, so that if any person knows

of any violation of the license law by the applicant, or any valid reason why a license should not be granted to him, he may make objection. This notice is jurisdictional process, and essential to confer power upon the licensing board to act.

In 119 La. 410, 44 South, 156, 12 Am. & Eng. Ann. Cas. 711, is the Louisiana case of *State v. Laborde*, holding that a license emanating from a body without authority to issue it is no protection against an indictment and its validity must come up on its trial. True there the body had no power to issue it; but that case asserts most definitely that where there is a want of authority to issue the license it can be attacked collaterally. In that case the cases on the subject have undergone review, and the copious note presents additional ones. That note says that the authorities on the question whether in a prosecution the validity of a license can be inquired into are not entirely harmonious, but that the weight of authority supports the rule that such a license is not conclusive upon the state and may be shown to be irregular and void. In *Russell v. State*, 77 Ala. 89, an affidavit was not such as the statute required and the license was granted upon it. The case was an indictment for selling without license. The court held that "a probate judge acts ministerially in granting a license and is bound to require substantial compliance with all precedent statutory conditions, and while the license itself is prima facie evidence of such compliance, the fact of non-compliance, when affirmatively shown, renders the license void, and its invalidity being thus shown, it affords no protection." *Muncey v. Collins*, 132 Iowa, 50, 106 N. W. 262, holds that the court has no jurisdiction to act unless statute requirements are complied with. *State v. Selbert*, 97 Mo. App. 212, 71 S. W. 95, says that "all jurisdictional facts to authorize the granting of dramshop license by the county court must affirmatively appear on the face of the proceedings." I remark just here that it appears in this proceeding that the petition had not been filed the requisite time. That petition is the basis of the proceeding for a license. Notice for the time is essential to jurisdiction. *Pisar v. State*, 56 Neb. 455, 76 N. W. 869. The statute requiring three weeks' notice is mandatory. *Kelper's License*, 21 Pa. Super. Ct. 512. In *State v. Moore*, 48 N. C. 276, upon a trial of an indictment a license was offered in defense which had been issued without recommendation from the board of commissioners. The court held the license void, and said that when the record showed the defect the judgment was void. I will add that this court has held that a license granted without the town authority is void, thus enunciating the position that statute requirements must be complied with. Why prolong this opinion by citation of further authority? I will only add that this matter of granting license is one of statute regulation; there is no other

chart or guide but the statute; and I enunciate the general proposition that in this important matter it must be complied with. This duty of filing his petition a certain time was one placed imperatively upon Moore and he failed therein. It was his own act. The public has a right to inspect that petition all through the period specified. Whilst there is some hardship in the case, he was bound to know the law, and his attention was specially called to it by those contestants in his presence in the county court, and he was told that his petition had not been filed the requisite time. The petition was his own act, not a public officer's act.

This case may be of little importance in and of itself; but it is of great public importance in view of the fact that our present liquor laws contain the new important feature of allowing residents to oppose a license, and make the application contestable, and subject the applicant to more rigorous scrutiny than by the law prior to that provision. It is important that the statute be sustained by giving it a construction carrying out its policy and purpose.

We must affirm the judgment.

(87 W. Va. 564)

**CRAWFORD'S ADM'R v. TURNER'S
ADM'R et al.**

(Supreme Court of Appeals of West Virginia.
May 17, 1910.)

(Syllabus by the Court.)

**1. EQUITY (§§ 87, 219*)—LEGAL DEMAND—
LIMITATIONS.**

Whenever a mere legal demand is properly cognizable by suit in equity, the statute of limitations will be observed in relation to it by the equity court; and if the bill discloses the bar of the statute, a demurrer thereto will be sustained.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242-244, 498; Dec. Dig. §§ 87, 219.*]

**2. LIMITATION OF ACTIONS (§ 82*)—CLAIMS TO
DECEDENT'S ESTATE.**

As to a demand which accrues to a decedent's estate after his death, the statutory period of limitation of suit is counted from the time his personal representative qualifies, if that is within five years after his death; but if there is no qualification of a personal representative within five years after his death, then the period is counted from the end of that five years.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 425, 427; Dec. Dig. § 82.*]

Appeal from Circuit Court, Jefferson County.

Bill by J. Garland Hurst, Sheriff, as administrator with the will annexed of David Crawford, deceased, against W. F. Turner's administrator and others. Decree for defendants, and plaintiff appeals. Affirmed.

Forrest W. Brown, for appellant. Joseph Trapnell and Benj. Trapnell, for appellees.

ROBINSON, P. This suit was once before in this court on appeal. The decision then announced is reported in 58 W. Va. 600, 52 S. E. 716, 112 Am. St. Rep. 1014. A reference to it suffices to disclose the original character of the suit. By that decision the bill was held to be bad, and the cause remanded with leave to amend. Then amendments of the bill were made in the court below. But the court sustained a demurrer to the bill as amended and dismissed it. From the decree in the premises, the plaintiff brings this appeal. Let us here observe that what we shall say must be read in the light of the former opinion. We shall not iterate what is already in the reports.

The bill as amended charges a personal liability against Ellen Beirne Saunders, one of the heirs of William F. Turner, deceased, and, through the attachment formerly issued in the suit, seeks to enforce the same against land purchased and owned by her in this state. It seeks to collect from her a debt originally due from the estate of the ancestor from whom she inherited other real estate. The liability is charged against her on the ground that she inherited real estate from that ancestor which she sold for a sum largely in excess of the debt demanded. The real estate inherited by her was situate in Illinois. Under the law of that state, she was personally liable to the creditors of the ancestor from whom she inherited the real estate, to the amount of the value thereof, provided the personal assets of the ancestor were insufficient to pay his debts.

As the case comes to us, our consideration is directed wholly to the sufficiency of the bill as amended. Many of the objections to this amended bill need not be noticed. They are precluded from discussion by a single point that is so decisive in showing insufficiency as alone to justify the decree sustaining the demurrer and dismissing the bill. We shall pass upon no other point in relation to the amended bill's sufficiency. Even if the allegations and proceedings are sufficient in other particulars to fix a liability on Ellen Beirne Saunders, and to call for enforcement of that liability against the land attached, the amended bill is fatally bad and unsustainable, because on its face it plainly discloses that the liability alleged against her was barred at the time the suit was instituted. This insufficiency did not appear on the former appeal. The bill then under consideration was uncertain in its allegations relative to the source from which it sought payment. That bill did not plainly aver from whom it was seeking to collect the debt, or upon what land it sought to charge the same. If the original bill related to land owned by Ellen Beirne Saunders which she had inherited from Turner subject to his debts, or related to a demand against Turner's ad-

ministrator, the debt may not have been barred as against his estate for all that appeared from the original allegations. But now, with the amendment seeking clearly to make a case of personal liability against Ellen Beirne Saunders, the bar appears on the face of the bill as amended. No facts are set forth to take the case out of the statute—to excuse the plaintiff for delay beyond the legal period. The statute of limitations is applicable on demurrer to a bill in equity. 9 Enc. Dig. Va. & W. Va. Rep. 445.

The demand alleged in the amended bill is purely a pecuniary one. A personal debt is demanded from Ellen Beirne Saunders. Though the jurisdiction for this suit in equity on that alleged personal debt may be well founded, the claim is nevertheless of the character of those ordinarily cognizable at law. It is in fact a mere legal demand. Therefore, the legal statute of limitations is applicable. That statute will be followed by the equity court. *Sibley v. Stacey*, 53 W. Va. 292, 44 S. E. 420. It bars the claim in five years from the time it begins to run. And notwithstanding the liability arose in Illinois, yet in the enforcement of it our courts will apply our own law of limitation of suit, because that law really refers to the remedy for collection and not to the liability itself. The Illinois law ordaining the liability does not particularly apply time to it—does not by limitation affect it substantively. Minor on Conflict of Laws, § 210.

Now, what is the age of this debt which is presented as a personal liability against Ellen Beirne Saunders. The debt originally accrued to the estate of David Crawford in the year 1861. It accrued against Turner when he received from that estate slaves and money under the mistaken belief that he was entitled to them as an heir of Crawford. When Turner died and his daughter, Ellen Beirne Saunders, inherited the Illinois property, the liability for the debt, if it still existed, was thrust upon her. *Hurd's Rev. St. Ill.* 1908, c. 59, § 12. Turner died prior to October 27, 1876. His heir sold the Illinois property in 1879. So Ellen Beirne Saunders became liable, if at all, as early as 1876 to pay this debt to Crawford's estate. Then is it not barred by the long lapse of time? But it was not until 1881 that Crawford's will was produced and probated in Maryland, thereby disclosing that Turner had received slaves and money belonging to others. It was not until this time that the alleged liability of Ellen Beirne Saunders became known. Let us assume, but not decide, that the allegations of the bill are sufficient to excuse the delay in bringing to light the will and the liabilities thereby disclosed—that the bill shows fraud and concealment preventing the running of the statute until the discovery of the will. Even then the statute would begin to run from the date of the probate—August 16, 1881. Five years from that time

would bar, if nothing further prevented the running of the statute. So the bar would set in on August 16, 1886.

It may be thought, however, that, as there was no personal representative in this jurisdiction to enforce the liability against property here subject by attachment to it, the statute did not run until the administrator was appointed. Formerly the statute did not run against a claim in favor of decedent's estate, if the claim accrued after the death of the party to whose estate it became due, unless there was a personal representative to assert it. 1 *Robinson's Practice* (new) 589. No personal representative for Crawford's estate qualified, within the jurisdiction where the liability against Ellen Beirne Saunders could be asserted as this bill undertakes to do, until October 20, 1886. On that date the plaintiff was appointed and qualified as administrator and at once began this suit. But, in determining whether or not the liability is barred, our law makes that appointment to relate back. Thus the delay of the old law has been by statute limited in time. Since the administrator was not appointed within five years after Crawford's death, the appointment is deemed by statute, to have been made on the last day of the five years after his death. *Code* 1906, c. 104, § 17; 1 *Barton's Law Practice*, 68; 1 *Robinson's Practice* (new) 590. Crawford died prior to April 6, 1861. The liability accrued long after his death. So the law deems this administrator to have been appointed prior to April 6, 1866, so far as the statute of limitations is concerned. Then in contemplation of law there was an administrator against whom the statute is deemed to have run long before the date of his actual appointment in 1886. In other words, as to a demand which accrues to a decedent's estate after his death, the statutory period of limitation of suit is counted from the time his personal representative qualifies, if that is within five years after his death; but if there is no qualification of a personal representative within five years after his death, then the period is counted from the end of that five years.

At the latest, even assuming that fraud and concealment taking the case for a time out of the statute of limitations are sufficiently alleged in the bill, time began to run in favor of Ellen Beirne Saunders when the will was produced and probated on August 16, 1881. In any event, the five years of the statutory limitation on the liability then set in. They were out on August 16, 1886—more than two months before the institution of this suit. They had run and barred the liability even before the administrator was appointed.

The bill disclosed plainly that the debt it sought to collect was barred. It set up a dead legal claim which equity will not enforce. The decree dismissing the bill is affirmed.

(67 W. Va. 546)

STATE v. YOE.(Supreme Court of Appeals of West Virginia.
May 17, 1910.)*(Syllabus by the Court.)***1. CRIMINAL LAW (§ 1088*)—PRESENCE OF ACCUSED—EVIDENCE.**

An order in a criminal case, reciting an appearance by the prisoner in discharge of his recognizance and an announcement of his readiness for trial, suffices to show his presence in court in his own proper person at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2766; Dec. Dig. § 1088.*]

2. CRIMINAL LAW (§§ 641, 965*)—TRIAL—ASSISTANCE OF COUNSEL.

The clause of section 14 of article 3 of the Constitution (Code 1906, p. li) providing that, in the trial of criminal cases, the accused "shall have the assistance of counsel," is permissive and conditional upon the pleasure of the accused, in its application to the conduct of the trial; and, to make a conviction valid, the record need not affirmatively show the prisoner had the assistance of counsel.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1496-1506, 2518-2543; Dec. Dig. §§ 641, 965.*]

3. CRIMINAL LAW (§ 1092*)—APPEAL—BILLS OF EXCEPTIONS—RECORD.

Though bills of exception be settled and signed in due time, they are not parts of the record, unless made so by a certificate, or an order, entered upon the record.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1092.*]

Error to Circuit Court, McDowell County. Annie Yoes was convicted of grand larceny, and brings error. Affirmed.

Lawson Worrell, for plaintiff in error. Wm. G. Conley, Atty. Gen., for the State.

POFFENBARGER, J. A writ of error was awarded Annie Yoes to a judgment on a verdict convicting her of grand larceny in the criminal court of McDowell county.

The first assignment of error is based upon the contention that the record fails to show the prisoner was in court in her own proper person during the trial. The order says: "The defendant appeared in discharge of her recognizance entered into herein and both parties announced themselves ready for trial." The issue had been made up at a former term. Her appearance in discharge of her recognizance was necessarily a personal appearance. The recognizance could not otherwise have been discharged. The order shows no appearance by attorney, and yet it says both parties announced themselves ready for trial. Hence it is clear, not only that she appeared in her own proper person, but also that she appeared for the purposes of the trial. This exception is not well taken.

The next assignment is based upon the failure of the record to show that the prisoner was assisted by counsel. The right to have counsel is a mere privilege guaranteed by the Constitution. The provision of the

Constitution, relating to the right of a prisoner to have the assistance of counsel, was inserted for the purpose of abrogating the common-law practice under which prisoners, accused of felony, were denied such right, and to restrain the Legislature from denying it by statute. It differs in nature as well as form from the guaranty of trial by jury. The latter is prohibitory in form, while the other is permissive, and conditional upon the pleasure of the accused. Preferring the protection of the court, or choosing to rely upon his own skill and ability, he may not desire the assistance of counsel. No invasion of this guaranty is disclosed, therefore, unless a request for the assistance of counsel appears by the record to have been denied by the court. *Barnes v. Commonwealth*, 92 Va. 794, 23 S. E. 784; *State v. Raney*, 63 N. J. Law, 363, 43 Atl. 677; *Sahlinger v. People*, 102 Ill. 241; 12 Cyc. 533; *Cooley Const. Lim.* 474, 475.

The other assignments of error involve the consideration of the evidence and other matters not disclosed by the record, unless the bills of exception, found in the printed record, are legally parts of the record. As there is no order making them such, they cannot be so considered. *Wells v. Smith*, 49 W. Va. 78, 38 S. E. 547; *Ketterman v. Railroad Co.*, 48 W. Va. 606, 37 S. E. 683; *Craft v. Mann*, 46 W. Va. 478, 33 S. E. 260.

For the reasons stated, the judgment will be affirmed.

(111 Va. 214)

CITY OF RICHMOND v. JONES et al.

(Supreme Court of Appeals of Virginia. March 10, 1910. Rehearing Denied June 9, 1910.)

1. ADVERSE POSSESSION (§ 67*)—CONSTRUCTIVE POSSESSION OF PRIOR PATENTEE—OUTER.

There can be no ouster of the constructive possession of an older patentee except by actual adversary possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 384-386; Dec. Dig. § 67.*]

2. ADVERSE POSSESSION (§ 85*)—WILD LANDS—ABSENCE OF IMPROVEMENT—EVIDENCE OF REASONS FOR.

Where the question is the adverse possession of a wild and uncultivated island, evidence that good reasons existed why there was not a fence placed around the island and that the land would not be good for cultivation, is inadmissible, since it has no bearing on the adversary character of the possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 501; Dec. Dig. § 85.*]

3. EVIDENCE (§ 518*)—OPINION EVIDENCE—CONSTRUCTION OF WRITINGS.

Where adverse possession of an island in the constructive possession of an older patentee is claimed, a witness who states that he has made a specialty of the examination of land titles and that he has examined all the land title records of islands and shoals in the river may not give his opinion that the island in question is not within the older patent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2326; Dec. Dig. § 518.*]

4. EJECTMENT (§ 9*)—TITLE TO MAINTAIN.

A plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of the title of his adversary.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 18; Dec. Dig. § 9.*]

5. EJECTMENT (§ 86*)—BURDEN OF PROOF.

Where, in ejectment to recover an island held by defendant by virtue of an older patent, where plaintiff claims by adverse possession, and in which the plea is not guilty, an instruction which places the burden on defendant to prove that the island is included in the patent under which it claims is erroneous.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 238-245; Dec. Dig. § 86.*]

6. ADVERSE POSSESSION (§ 37*)—EXCLUSIVE POSSESSION—EFFECT OF CONSTRUCTIVE POSSESSION OF FORMER OWNER.

Where one enters land claiming under a deed or paper title, his possession as against one claiming by adverse possession is extended beyond the portion actually occupied, so as to embrace the entire parcel or lot of land described in the deed or paper writing, and hence such claimed adverse possession is not exclusive of the former owner.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 144-146; Dec. Dig. § 37.*]

Error to Law and Equity Court of City of Richmond.

Ejectment by one Jones and another against the City of Richmond. From a judgment for plaintiffs, defendant brings error. Reversed.

H. R. Pollard and Geo. Wayne Anderson, for plaintiff in error. A. C. Goode and Hunsdon Cary, for defendants in error.

KEITH, P. Jones and another brought an action of ejectment in the law and equity court of the city of Richmond to recover from the city a parcel of land situated in James river. The case was tried before a jury upon the plea of not guilty, and a verdict and judgment rendered for the plaintiffs, which is before us for review upon a writ of error.

The first error assigned is to the admission of certain evidence.

Jones, one of the plaintiffs, was asked: "Would a fence around that island in any way add to the uses to which it can be put?" to which he replied as follows: "The only thing would be to put a fence on the Henrico shore in case of men running around the island and swimming. Of course, it would benefit in that way; but we always tried to plant trees and vines for that purpose to keep anybody from seeing us. Of course, in swimming, we would go into the water naked, and we didn't want anybody to see us."

It appears that the island or a large part thereof had never been inclosed or cultivated, and was still in a state of nature. The city of Richmond was in possession under a grant from the commonwealth, dated July 1, 1840, and there could be no ouster of the constructive possession of the older patentee except

by actual adversary possession. *Taylor v. Burnsidess*, 1 Grat. 165. The object of the plaintiffs in asking the question was to show that the island, though uninclosed, was at the time of the alleged ouster in the actual occupancy of the plaintiffs, as far as it could be under the particular circumstances of the case.

We think that the admission of this question and answer, while not very material, was erroneous and misleading. To show that a fence or other improvement was not made upon the land, however sufficient the reason may have been, certainly did not tend to show occupancy or any element of adversary possession.

The witness was asked: "Is there a sufficiently large area on that island capable of being cultivated which would warrant any man in cultivating it, taking into consideration its distance from the mainland?" to which the witness gave the answer. "No." This is assigned as error, and the assignment must be sustained for the reason just given.

As was said in *Taylor v. Burnsidess*, supra: "Wild and uncultivated lands cannot be made the subject of adversary possession while they remain completely in a state of nature. A change in their condition to some extent is therefore essential; and the acts by which it is effected are often the strongest evidence of actual possession. Without such change, accomplished or in progress, there can be no residence, cultivation, or improvement; no occupation, use, or enjoyment. Evidence short of this may prove an adversary claim; but in the nature of things cannot establish an adversary possession."

In *Harman v. Ratliff*, 93 Va. 249, 24 S. E. 1023, it is said: "While lands remain uncultured, or in a state of nature, they are not susceptible of adverse possession against the older patentee, unless by acts of ownership effecting a change in their condition, and to constitute adverse possession there must be occupancy, cultivation, improvement, or other open, notorious, and habitual acts of ownership."

Surely the proof of absence of occupancy and improvement by fencing, cultivation, or otherwise, however good or sufficient the reason for not building, or not fencing, or not cleaning or performing any other act of ownership may be, cannot prove or tend to prove a claim by adversary possession. If it were otherwise, it is conceivable that lands remaining in a state of nature might be recovered by adversary possession, or the possession might be retained against the older patentee by proving, item by item, and circumstance by circumstance, a plausible excuse to the jury for the failure to do or perform this or that act essential to adversary possession.

A witness was introduced in rebuttal on behalf of plaintiffs, who testified that he had

made a specialty of the examination of land titles, and that he had attempted to identify all islands in James river from the old pump-house up to the Belt Line bridge, and in doing so he had examined every land grant of islands and shoals in James river in the register of land office, and had also examined the records in the circuit court of Henrico, and that as a result of that investigation he was unable positively to identify that island as the island deeded to the city of Richmond. This evidence was excepted to, and the ruling of the court in admitting it is assigned as error.

In *Holleran v. Meisel*, 91 Va. 143, 21 S. E. 658, witnesses were introduced to prove that an alleged patent embraced the lands there in controversy, and, while admitting that they could not identify it from the entries or memoranda in the books of patents, deeds, and other documentary evidence, they gave it as their opinion that it included the land in controversy. The court said: "This was not knowledge. It was not the statement of a fact, but merely an opinion. Even if Carrington, who was an examiner of titles, and Redd, who was county surveyor of Henrico county, were experts, this was not a case in which expert testimony was admissible. It was perfectly proper for them, or either of them, to examine the deeds and other documentary evidence given in before the jury, and to state from their knowledge whether the land in controversy was within the boundaries of the entry purporting to be a memorandum of the issue of a patent to Joshua R. Stappa, but not to give merely their opinions upon the subject. Such mode of identification was inadmissible under the law, and the instruction to the jury that they might regard such opinions as proper evidence to that end, if they believed them to be correct inferences from the evidence in the case, was erroneous."

The case before us is even stronger than that cited, for here the witness was allowed to give his opinion, not only upon records and papers which had been introduced in evidence, but upon those which he had examined elsewhere and which had not been introduced before the jury. In the case cited the witness was of opinion that the land in controversy was embraced within the deeds and patents which he had examined, while in this case the witness was of opinion that the land in controversy was not embraced in those deeds and patents. In both cases it is the mere opinion of the witness upon a question which is not the subject of expert or opinion evidence.

The fourth assignment of error, as to the admission of evidence of T. Crawford Redd, is governed by the same principle.

It is assigned as error that the court gave the following instruction: "The court instructs the jury that, if they believe from the evidence that the plaintiffs and those under

whom they claim title obtained a grant from the commonwealth of Virginia for the island in question in the year 1900, it is necessary, to enable the defendant to recover, if she claims title under a grant in the year 1840, that she should identify the island as the one conveyed to her by said grant by a preponderance of evidence, and, unless the defendant does identify said island by a preponderance of evidence as the one granted to her by the commonwealth of Virginia in the year 1840, they must find for the plaintiffs."

The city of Richmond was the defendant, and not the plaintiffs, in this action. A plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of the title of his adversary. This proposition is elementary, and needs no authority for its support. When to the plaintiffs' demand the defendant pleaded not guilty, it put in issue the plaintiffs' entire case. The burden of proof was never shifted.

Speaking of the burden of proof in *Wallen v. Wallen*, 107 Va. 181, 57 S. E. 596, the court said: "Fraud is never presumed, but must always be proved by the party alleging it. This burden never shifts; and while it is necessary for the propounder of a will; the probate of which is resisted on the ground of undue influence, to bring forward evidence to repel evidence of undue influence which has been offered by the other side, the real burden of proof upon the issue of undue influence has not changed, and it is misleading and erroneous, after having instructed the jury correctly on the subject, to further instruct them that the burden of proof in this case lies upon said propounder to satisfy the jury by evidence that the paper writing propounded is the last will and testament of a free and capable testator."

In other words, the burden of proof, where the issue is fraud, is always upon the party alleging the fraud, and never shifts, though in the changing aspects of a case the one party or the other may find it necessary to bring forward evidence to repel that of his opponent; and so with the plea of not guilty in an action of ejectment. The burden of proof rests from the beginning to the end upon the plaintiff to maintain his action. *Wigmore*, c. 86, and especially section 2489.

Now, in this case, the court tells the jury that if they believe that the plaintiffs claim title under a grant from the commonwealth in the year 1900 to enable the defendant to recover, if it claims title under a grant in 1840, it is necessary that it should identify the island as the one conveyed to it by a preponderance of the proof, placing the defendant, who has to recover nothing but rests secure in its possession until the plaintiffs have established their case, in the attitude of a plaintiff, who can only recover by adducing in support of his contention a preponderance of proof upon the issue joined.

The sixth instruction was as follows: "The court instructs the jury that, even if they believe the island in question is the one which was granted to the city of Richmond under the grant of 1840, yet if the only act of ownership exercised over the island by the city from 1840 to June 1, 1908, was the erection of a dam which did not encroach upon the island or come within 100 feet of it, such act of ownership by the city was not such a possession of the island as will repel the title of the plaintiffs by adverse possession, if such title has been perfected, and has been proven to the satisfaction of the jury by the preponderance of the evidence."

The city of Richmond claims under a grant from the commonwealth given to it in 1840.

In *Howdashed v. Krenning*, 103 Va. 30, 48 S. E. 491, it is said that: "A grant from the commonwealth confers constructive seisin sufficient to enable the patentee or those claiming under him to recover in an action of ejectment. Actual seisin is not necessary."

So that by this patent the city of Richmond acquired the title, and under it constructive seisin or possession. The plaintiffs had no color of title down to the year 1900, when they also procured a patent from the state. The adverse possession of the plaintiffs, then (assuming for the present that such adverse possession existed), was confined to the land within their actual occupancy.

Where one enters claiming under a deed or paper title, their possession is extended beyond the portion actually occupied so as to embrace the entire parcel or lot of land described in the deed or paper writing. *Sharp v. Shenandoah Furnace Co.*, 100 Va. 27, 40 S. E. 103.

In *Green v. Pennington*, 105 Va. 801, 54 S. E. 877, it is said that: "Actual possession of a part of a tract of land, under color and claim of title to the whole, is possession of the whole, and this principle applies to the lands of the commonwealth, as against persons not lawfully claiming under her."

But there is no evidence of claim or color of title down to the year 1900. The adversary possession, therefore, of the plaintiffs, conceding it to have existed at any time, had not ripened into a title, except as to such part of the island as was in the actual occupancy and possession of the plaintiffs.

As was said by Judge Buchanan in the case just cited: "The grant put the first patentee of the land constructively into possession, * * * and, being in the constructive possession of the premises, he cannot be disseised or ousted except by an actual invasion of his boundary by some act or acts palpable to the senses, and which will serve to admonish him that his seisin is molested; otherwise, as was said by Judge Baldwin, he might be disseised of his freehold not only without his knowledge, but without the possibility of his knowing it."

From what has been said it follows that the court should have given instruction No. 2, asked for by the defendant, the effect of which would have been to limit the recovery of the plaintiffs by force of adversary possession to that part of the land in controversy so adversely held.

What we have said will be sufficient to settle the law of the case upon a future trial, and for that reason, without passing specifically upon other questions of law presented, or upon the motion to set aside the verdict as contrary to the evidence, we are of opinion that the judgment should be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

Reversed.

(111 Va. 309)

BROWN v. AUSTIN WESTERN CO., Limited.

(Supreme Court of Appeals of Virginia. March 10, 1910. Rehearing Denied June 9, 1910.)

1. SALES (§ 168½*)—SALE ON APPROVAL.

Where there is a sale on trial, it is not complete until the approval, and the failure to return the property within the time specified for trial, or within a reasonable time, renders the sale complete.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 409-421; Dec. Dig. § 168½.*]

2. SALES (§ 168½*)—SALE ON APPROVAL—RIGHTS OF PURCHASER.

An order for stone crushers of a specified capacity provided that, on their arrival, defendant would furnish power, cartage, and assistance to give them a fair trial, that, if they equaled the stipulated capacity, defendant would pay the price, if not he would notify plaintiff, and, if plaintiff failed to make the crushers do the prescribed work within 30 days, plaintiff would receive them back. Held that, on plaintiff's failure to make the crushers do the amount of work contracted for, defendant could not demand payment for the expense of the permanent foundations constructed by him for the crushers as a condition precedent to his returning them.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 409-421; Dec. Dig. § 168½.*]

3. SALES (§ 168½*)—SALE ON APPROVAL—BREACH OF CONTRACT BY PURCHASER.

Where the purchaser of a machine on approval refused to return the same after it had failed on the trial to work according to contract, the sale became absolute, and he was liable for the price.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 409-421; Dec. Dig. § 168½.*]

4. SALES (§ 288*)—WARRANTY—WAIVER.

Where the purchaser kept machines purchased on approval, after trying them, he thereby waived any warranty as to capacity.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 817-823; Dec. Dig. § 288.*]

Error to Law and Equity Court of City of Richmond.

Action by the Austin Western Company, Limited, against J. Henry Brown. Plaintiff had judgment, and defendant brings error. Affirmed.

Ro. H. Talley, for plaintiff in error. H. St. John Coalter, for defendant in error.

HARRISON, J. This action of assumpsit was brought by the Austin Western Company, Limited, to recover of J. Henry Brown \$2,249, the purchase price of two rock crushers. The defendant filed a plea of nonassumpsit, and a special plea of set-offs, amounting to \$5,121.60. There was a verdict and judgment in favor of the plaintiff for \$2,249 and costs, subject to a credit of \$221.60, which we are asked to review and reverse.

It appears that the defendant, J. Henry Brown, owned and operated certain granite quarries in Henrico county, and that the plaintiff manufactured machinery in Chicago. On the 6th day of July, 1906, the defendant placed in the hands of the plaintiff an order for two stone crushers and all necessary driving connections, to be shipped to Richmond, Va. This order was in form a written contract signed by the defendant, which set forth in detail the terms of purchase agreed upon between the parties. It provided that crusher No. 2 should have the capacity of turning out from 18 to 30 tons per hour, and that No. 3 should turn out from 30 to 40 tons per hour; that, upon the arrival of the crushers, the defendant would pay the freight charges, and at his own expense furnish power, cartage, assistance, etc., to give the crushers a fair and thorough trial. It provided further, that, if the crushers should equal the stipulated capacity, the defendant would pay for them according to the terms of the contract, but that, if they did not, he would notify the plaintiff in writing at Chicago of such failure, and that, if within 30 days from the receipt of such notice the plaintiff failed to make the crushers do the prescribed work, then the plaintiff would refund the freight charges and receive back the crushers at the Richmond railroad station from which they had been taken, and would cancel the contract. The crushers are warranted to be thoroughly made of good material and workmanship, capable of doing the work for which they were intended, without breakage, the plaintiff agreeing to replace, free of charge, any parts which may break within 12 months from the date of the contract through fault of material or construction. Finally, it is agreed that the contract embodies the entire understanding, that it is not subject to countermand, and is not to be affected by any verbal agreements.

In pursuance of this contract, the plaintiff delivered at the Richmond railroad station two stone crushers Nos. 2 and 3, which were received by the defendant and removed by him to his granite quarries, having first paid the freight charges as stipulated. The contract provided that the defendant should, at his own expense, furnish the power, cartage, assistance, etc., necessary to give the crushers a fair and thorough trial, and the evi-

dence abundantly shows that the contemplated test could have been made at a cost of from \$25 to \$35. The defendant, however, before making any test, proceeded to build heavy concrete foundations and other equipment for a permanent plant at a total cost, as alleged, of \$2,121.60. After this expensive plant was completed, the defendant placed the crushers in position for permanent use, and then, for the first time, subjected them to any test. The only reason given by him for pursuing this course was that the agent from whom he bought was a friend of his, in whom he had great confidence, and that he did not doubt that his representations with respect to the capacity of the machines was true. When the crushers were finally subjected to trial, the defendant found that they fell very far short of the capacity called for by the contract, and he notified the plaintiff of that fact. There was considerable delay and correspondence about the matter; it being suggested by the plaintiff that the diminished capacity was the result of lack of power in operating the machines. Finally, the plaintiff wrote to the defendant, calling his attention to the clause in the contract giving him the right to return the machines to the Richmond railroad station and to be reimbursed the freight charges paid by him, and insisting that he should, without further delay, decide whether he would keep the machines or return them, and be reimbursed the freight charges which were tendered. The defendant refused to return the crushers, which he had been in the meantime using, unless the plaintiff would agree to pay him the damages he claimed to have suffered as a result of the transaction. These are stated in the special plea of set-offs to be \$2,121.60, the cost of the permanent structure and its equipment, and \$3,000 cost of removing and storing waste stone from the quarry after he was ordered to stop using the crushers.

Throughout this case the contention on behalf of the defendant has assumed that the contract under consideration evidenced an absolute sale; that the title passed at once upon the delivery of the crushers, with a warranty that they would do a certain amount of work. This position is not tenable. The contract evidences what is termed a "sale on trial." Where there is a sale on trial, there is no sale until the approval is given, either expressly or by implication, resulting from keeping the goods beyond the time allowed for trial, which is a reasonable time if not expressly fixed; and the failure to return the goods within the time specified for trial or within a reasonable time makes the sale absolute. Benjamin on Sales (2d Am. Ed.) § 595; 2 Schouler's Personal Property, pp. 309, 310; Machine Co. v. Smith, 50 Mich. 585, 15 N. W. 906, 45 Am. Rep. 57.

In the case at bar, the contract, which was filled up in large part by the defendant, furnishes no warrant for the position taken that he could demand payment of the damages

claimed in his plea of set-offs as a condition precedent to his returning the machines. The extent of the defendant's right under his contract was to subject the machines to trial at his own cost, and, if they did not equal a certain capacity, to return them to the railroad station at Richmond, and have the freight charges paid by him refunded. This the defendant refused to do, and therefore the sale became absolute, and he became liable to pay the plaintiff the purchase price.

It is by no means clear that the warranty clause in the contract was intended to cover the capacity of the crushers, but, if it was so intended, the title would have to pass before such a warranty could become effective. *Bunday v. Machine Company*, 148 Mich. 10, 106 N. W. 397, 5 L. R. A. (N. S.) 475. Under the contract before us, the title to the stone crushers never passed until the defendant had tried them and refused to return them. If he kept them after trying them, he thereby waived any warranty express or implied.

The instructions given by the court were in conformity with the view herein taken of the contract, and properly submitted the case to the jury. The instructions asked for by the defendant were wholly in conflict with the principles herein announced, and were properly refused.

There is no error in the judgment complained of, and it is affirmed.

Affirmed.

(134 Ga. 530)

GRAHAM v. STATE.

(Supreme Court of Georgia. May 11, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 955*)—NEW TRIAL—DIRECTING RECITALS IN MOTION.

Although the presiding judge had approved the brief of evidence filed with a motion for a new trial, yet where, on the hearing of the motion, counsel for the movant presented an amendment thereto, complaining of the admission of certain evidence, and the adverse counsel objected to the approval of such recitals, and although counsel for the movant stated that his recollection was clear on the subject, while neither counsel for the respondent nor the judge was clear in his recollection, a reversal is not required because the judge sent for the official stenographer, had him examine his notes, and corrected the recitals of the ground of the motion and the brief of evidence, as to the evidence in question, in accordance with the stenographic report as to the same.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 955.*]

2. REVIEW ON APPEAL.

Under the recitals of the ground for new trial set forth in such amendment and the note of the judge appended thereto, it cannot be held that a reversal is necessary.

3. REVIEW ON APPEAL.

The evidence amply supported the verdict, and there was no error in refusing a new trial.

Error from Superior Court, Early County; W. C. Worrell, Judge.

Sam' Graham was convicted of crime, and brings error. Affirmed.

Glessner & Park, for plaintiff in error. J. A. Laing, Sol. Gen., R. R. Arnold, and Jno. O. Hart, Atty. Gen., for the State.

FISH, C. J. Judgment affirmed. All the Justices concur.

(86 S. C. 137)

GILLILAND v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina. May 11, 1910. On Rehearing, June 1, 1910.)

1. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

In an action for injuries to a brakeman while attempting to couple an engine to a car, evidence held to justify a finding of a negligent failure of the railroad to maintain the coupling device in proper repair.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.*]

2. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

A brakeman of about a week's experience, who in coupling cars containing defective coupling appliances observed a custom in vogue and was injured while at work, and who had previously pursued such method in the presence of the conductor, and who had seen the conductor use such method, and who had not been warned as to the custom being dangerous, and who without any objection from the conductor pursued the method at the time of the accident, was not, as a matter of law, guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

3. APPEAL AND ERROR (§ 173*)—QUESTIONS REVIEWABLE—QUESTIONS NOT RAISED IN TRIAL COURT.

Assumption of risk not interposed by a master sued by a servant for a personal injury either as a ground of nonsuit or new trial will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1120; Dec. Dig. § 173.*]

On Rehearing.

4. MASTER AND SERVANT (§ 204*)—INJURY TO SERVANT—ASSUMPTION OF RISK—STATUTES.

Under Const. art. 9, § 15, providing that knowledge by a railroad employe of the defective condition of any machinery shall be no defense to an action for injury caused thereby, except as to conductors and engineers in charge of unsafe cars or engines, a brakeman injured while attempting to couple cars containing defective coupling devices did not assume the risk because he had knowledge of the defect.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 204.*]

Appeal from Common Pleas Circuit Court of Greenville County; C. C. Featherstone, Special Judge.

Action by Samuel Gilliland against the Charleston & Western Carolina Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Cothran, Dean & Cothran, for appellant.
Jos. A. McCullough and Geo. M. Pritchard,
for respondent.

GARY, A. J. This is an action for damages, alleged to have been sustained by the plaintiff, through the negligence of the defendant. The acts of negligence on the part of the defendant, and the detailed manner in which the plaintiff was injured, are thus alleged in the complaint:

"Plaintiff was ordered by the conductor to couple the engine to the box car next to it upon the side track, which was engaged in the handling of interstate traffic, and signaled the engineer back for the purpose of making such coupling; that the said box car was provided with an automatic coupler, which was manipulated by means of a crank, projecting upon the side of the car, and by means of which the car could be coupled or uncoupled without necessitating one's going between said cars for such purpose, and if the said coupler had been, on this occasion, in proper condition, the said coupling would have been effected without necessitating plaintiff's using his hands or feet for the purpose of effecting the said coupling, and the injury which plaintiff sustained, as hereinafter complained of, would have been avoided; but the defendant carelessly and negligently permitted the said coupler to become defective and out of ordinary repair, so that, when plaintiff attempted to adjust the lips by manipulating the crank, one of the lips of the coupler would not open, as it would have done had the coupler been in ordinary repair, and the said coupling was not made when the engine backed, thereupon the plaintiff signed the engineer forward, for the purpose of adjusting the said coupler with his hand, which he did, and, taking his position on the side of the car, he signed the engine back. When plaintiff signed the engine back for the second time, for the purpose of making the said coupling, when the said engine was within what appeared to the plaintiff to be a safe distance from the coupler plaintiff first observed that the bumpers on the said box car and the engine were out of adjustment and would not match, and in order for the coupling to be effected force would have to be applied to the bumpers for the purpose of putting them in position where they would match and come together so as to couple by impact. It appears to the plaintiff, and, upon information and belief, plaintiff alleges, that it would so appear to any man of ordinary prudence and foresight that by pushing with his hand or kicking with his foot the bumper attached to the engine the said coupling could be effected, and while the engine was backing, as plaintiff then believed, at a slow rate of speed, and it appearing perfectly safe so to do, and it being rendered necessary by reason of the worn

and defective condition of the bumpers, which were out of repair, due to the carelessness and negligence of the defendant, plaintiff did kick the said bumper, as it approached the box car, using all due care, when suddenly and unexpectedly the said engine backed at a greater rate of speed than plaintiff was accustomed, or had a right to expect, and his left foot was caught between the said bumpers and horribly mangled to such an extent as to necessitate amputation. The plaintiff alleges that in applying his foot to the said bumper he observed a custom which had been in vogue upon the defendant's road, with its knowledge and consent since his employ and for several years; that he had never been warned of the danger incident thereto; that he had frequently pursued this method when necessary, in the presence of the conductor and other employees of the said road; that he has often seen the conductor himself pursue the same method; that in his effort to effect the coupling in this manner, in the presence of the conductor of the defendant railway, and under his immediate supervision, he adopted what appeared to him to be the safest method, and one with no risk attached, and the plaintiff exercised due care and caution, and in doing the said work acted as a man of ordinary firmness and prudence would have acted, as he is informed and believes under the circumstances."

The defendant denied the allegations of negligence, and set up the defenses of contributory negligence and assumption of risk. At the close of the plaintiff's testimony, the defendant's attorneys made a motion for a nonsuit, on the grounds that there was no evidence of negligence on the part of the defendant, and that the testimony showed that the plaintiff was guilty of contributory negligence. The motion was refused. The jury rendered a verdict in favor of the plaintiff for \$5,000. Thereafter, the defendant made a motion for a new trial, and for an order revoking the order refusing the nonsuit, on the same grounds as those urged upon the motion for nonsuit. This motion was also refused, and the defendant appealed, upon exceptions which present, practically, but two questions: (1) Whether there was any testimony tending to sustain the allegations of the complaint as to negligence; and (2) whether the testimony showed that the plaintiff was guilty of contributory negligence.

We will consider, first, whether there was any testimony tending to show negligence on the part of the defendant. The plaintiff testified as follows: "Q. What were you required to do? A. To couple up the cars on the side track. Q. Who ordered you to do that? A. The conductor. Q. State whether or not he was there present superintending and supervising your work. A. Yes, sir; he was there. Q. What did you do when the

engine came back on the side track? A. It came back and hit the first time and the coupling wouldn't make. Q. Why wouldn't it make? A. Because it wouldn't match. Q. What do you mean by that? A. It didn't hit right. They have got to hit right before they will go together and the pin will fasten. It has one way to fail. It was too far to one side. They have a play backwards and forth, and it was pushed a little too far one way. Q. If the coupler had been in ordinary condition and worked as it was intended to work, what would have been their position? A. They would match. Q. Why wouldn't this coupling match? A. Because one was pushed too far to one side. Q. Was that the way it was intended to work? A. No, sir. Q. How was it intended to work? A. It ought to work in the center. They have a play, and they go backwards and forwards. I don't know how far. That one was not fixed right, and it needed adjustment. Q. Did it couple when the engine came back? A. No, sir. Q. State whether or not if it had been in proper condition it would have coupled when it was back. (Objected to by Mr. Cothran: The witness has not said it was out of order, or that there was a defect in it.) Q. Was there a defect in that coupling? A. Yes, sir; there was a lip on the car, and it wouldn't open. Q. I believe you stated awhile ago, when they were working right, when they come together, they ought to couple. A. Yes, sir."

John Huntsinger, a witness for the plaintiff, thus testified: "Q. Are you familiar with the automatic coupler, the coupling we have been talking about, coupled by the manipulation of a crank on the side of the cars? A. Yes, sir. Q. I wish you would tell the jury, whether or not, where the bumpers and the coupling are in ordinary repair an engine and a box car, notwithstanding the play which the bumpers necessarily have, whether if they are in ordinary repair, when they come together, will they couple or not? A. Yes, sir; they will couple. In some cases on a sharp curve you have to open both nipples, we call them, on the end of the drawhead; the drawhead extends through the cars, and when they come together if the curve is very sharp, and they are worn the least bit they won't couple, and we then open both nipples. Q. Suppose you are not on a curve, but on a straight line? A. Well, sir, they ought to couple anywhere."

There is other testimony to the same effect, which it is unnecessary to reproduce. This testimony tends to sustain the allegations of negligence set out in the complaint, and the exceptions raising this question are overruled.

We will consider, next, whether the testimony showed that there was contributory negligence on the part of the plaintiff. The plaintiff testified as follows: "Q. You say that you had pursued this method before?

A. Yes, sir. Q. State whether or not it was in the presence of the conductor? A. Yes, sir; it was. Q. Tell the jury whether or not— You say that you had been brakeman about a week? A. Yes, sir. Q. Tell the jury whether or not you had ever been warned as to any such custom being dangerous? A. No, sir. Q. Tell them whether or not you had seen the conductor and other officials of the railroad do the same thing? A. Yes, sir. Q. Had you seen this conductor do it, the man in charge of this train? A. Yes, sir. Q. State whether or not this particular conductor was right there and saw you doing this work? A. Yes, sir. Q. Did he make any objection to it, the way you were doing it? A. No, sir." Under such circumstances it cannot be said that there was negligence per se on the part of the plaintiff. *Youngblood v. Ry.*, 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824; *Carson v. Ry.*, 68 S. C. 55, 46 S. E. 525; *Hall v. Ry.*, 81 S. C. 522, 62 S. E. 848; *Brown v. Ry.*, 82 S. C. 528, 64 S. E. 522; *Lyon v. Ry.*, 66 S. E. 282.

We have not discussed the question whether it appeared from the evidence that the plaintiff assumed the risk which caused the injury, as this was not made a ground for nonsuit or for a new trial. We may say, however, that the testimony does not show that he assumed such risk.

It is the judgment of this court that the judgment of the circuit court be affirmed.

On Rehearing.

This is a petition for a rehearing. The only ground which we deem it necessary to discuss, other than in a general way is: "That the court has inadvertently stated that the defense of assumption of risk was not interposed by the defendant, either as a ground of nonsuit or new trial." The record shows that this was not urged as a ground for nonsuit, but was relied upon as a ground for a new trial. The court, however, said: "We have not discussed the question whether it appeared from the evidence that the plaintiff assumed the risk which caused the injury, as this was not made a ground of nonsuit or for a new trial. We may say, however, that the testimony does not show that he assumed such risk." Thus showing that the question was considered by the court, and that the statement "that it was not made a ground for a new trial," while erroneous, was not prejudicial to the rights of the appellant.

Furthermore, section 15 of article 9 of the Constitution, relative to railroad corporations, provides that "knowledge by any employé injured, of the defective or unsafe character or condition of any machinery, ways or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers, in charge of dangerous or unsafe cars or engines, volun-

tarily operated by them," and the plaintiff was neither a conductor nor an engineer.

After careful consideration of the other grounds for a rehearing, this court is satisfied that no material question of law or of fact has either been overlooked or disregarded.

It is therefore ordered that the petition be dismissed, and that the order heretofore granted staying the remittitur be revoked.

JONES, C. J., and WOODS and HYDRICK, JJ., concur.

(153 N. C. 615)

PITTS v. CURTIS et al.

(Supreme Court of North Carolina. May 25, 1910.)

1. SALES (§ 208*)—CONTRACT—IDENTIFICATION OF PROPERTY—NECESSITY.

A contract of sale for a large number of articles, not identified in the contract, will pass title if the articles sold are separated and understood by the parties.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 561; Dec. Dig. § 208.*]

2. EVIDENCE (§ 460*)—PAROL EVIDENCE—EXPLAINING DEEDS—IDENTIFYING TRACTS.

If the language of a deed is applicable to several tracts or species of property, parol evidence is admissible to show what property was intended to be conveyed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115-2128; Dec. Dig. § 460.*]

3. LOGS AND LOGGING (§ 3*)—SALE OF STANDING TIMBER.

Since growing timber is a part of the realty, deeds thereto are governed by the law applicable to realty.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*]

4. LOGS AND LOGGING (§ 3*)—STANDING TIMBER—CONVEYANCE—DESCRIPTION OF PROPERTY—SUFFICIENCY.

A deed conveyed to plaintiff all of the grantor's pine, oak and poplar timber that plaintiff might want for lumber that would measure 16 inches across the stump, and upwards. *Held*, that even if the deed was not void for indefiniteness, in absence of evidence identifying the timber conveyed, it was not effective to pass title to any timber.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*]

Appeal from Superior Court, McDowell County; Council, Judge.

Action by J. D. Pitts against John Curtis and others. From a judgment for plaintiff, defendants appeal. Reversed, and case dismissed.

These issues were submitted:

(1) Is the plaintiff the owner of the timber trees sued for, as alleged? Answer: "Yes (by court)."

(2) What damage has plaintiff sustained by reason of the defendants cutting and removing said timber trees? Answer: "\$1,833."

From the judgment rendered, the defendants appeal.

J. F. Spainhour, Hudgins, Watson & Johnston, and W. T. Morgan, for appellants. Pless & Winborne, for respondent.

BROWN, J. Plaintiff claims title under a deed dated January 15, 1901, executed by S. C. McNeely to plaintiff purporting to convey the timber alleged to have been wrongfully cut and removed by defendant Curtis. The descriptive part of this conveyance is as follows: "I, S. C. McNeely, of the first part, do this day sell and convey to the party of the second part all my pine, oak and poplar timber that the said J. D. Pitts may want for lumber that will measure 16 inches across stump and upward at 40 cents per tree; all under that size that said Pitts may want at 30 cents per tree." Defendant Curtis claims under a deed executed by S. C. McNeely to his wife, Mary, dated October 23, 1897, and recorded August 29, 1904, fully and particularly describing and conveying the lands (three tracts) upon which the timber in controversy was growing. On October —, 1909, Mary McNeely and her husband conveyed the timber upon these lands to defendant by deed fully describing the lands and timber and referring specifically to the above-named deed to the wife. Assuming for the sake of the argument that the deed to plaintiff is not absolutely void for indefiniteness and insufficiency of description, there is no evidence in the record which identifies the timber upon which the instrument could operate. It does not undertake to convey all of grantor's timber, but only such portion of it as the grantee may want for lumber. Even if the instrument is not wholly void, it could only be made effective by evidence that at the time of its execution, and accompanying the act of selling, the parties entered upon the grantors' land, selected and plainly marked the trees which the grantee then and there selected.

The precedents sustain the general proposition that a sale of a part of a larger number of articles of property, not distinguishable upon the face of the contract, will be operative to pass title if at the time they are separated and understood by the parties. *Goff v. Pope*, 83 N. C. 123; *Harris v. Woodward*, 96 N. C. 232, 1 S. E. 544; 1 *Greenleaf*, Ev. § 287, 288. Prof. *Greenleaf* lays down the general doctrine in these words: "If the language of the instrument is applicable to several persons, to several tracts of land, to several species of goods, parol evidence is admissible of any extrinsic circumstances tending to show what person or persons or what things were intended by the party or to ascertain his meaning in any other respect." This language, of course, is not intended to apply to an indefinite and uncer-

tain description that fits no property, but where its uncertainty arises from the fact that it fits more than one article of property, and there such evidence is admitted to show what is meant. In respect to personal property, Chief Justice Bearson states the rule in the "buggy case" (*Blakeley v. Patrick*, 67 N. C. 40, 12 Am. Rep. 600), wherein he says: "To vest the title and ownership in any particular buggies, it was necessary to set them apart, so as to make a constructive delivery and effect an executed contract. In the absence of such identification, the agreement, as we have seen, was executory only." The case is cited, approved, and the same principle applied by Chief Justice Smith in *Carpenter v. Medford*, 99 N. C. 499, 6 S. E. 786, 6 Am. St. Rep. 535, to the sale of timber trees, wherein he says: "It is very clear that the selection and marking of the trees accompanying the sale separates and distinguishes the subject-matter of the contract from all other trees of the same kind upon the premises so as to transfer the property therein." "The trees were designated, after examination by marks of identification, the only way in which it could be done."

We have in recent years settled upon and adhered to the theory that growing timber is a part of the realty, and deeds and contracts concerning it are governed by the laws applicable to that kind of property. *Hawkins v. Lumber Co.*, 139 N. C. 160, 51 S. E. 852. It may be, as contended by defendants, that upon that principle the deed to plaintiff is absolutely void for uncertainty of description as to the "thing granted"; but it is unnecessary to pass on that contention, as the only evidence that could possibly help out the conveyance is entirely lacking.

Therefore his honor should have sustained the motion to nonsuit.

Reversed and dismissed.

(152 N. C. 472)

ROANOKE RAPIDS POWER CO. v. ROANOKE NAVIGATION & WATER POWER CO.

(Supreme Court of North Carolina. May 4, 1910.)

1. NAVIGABLE WATERS (§ 39*) — RIPARIAN OWNERS — USE OF WATER — EXTENT OF RIGHT.

Defendant's rights to divert the waters of the Roanoke river into a canal were based on statutory rights acquired by its predecessor. The first statute under which it claimed (Acts 1812, c. 843) provided only for improving navigation. Acts 1817, c. 959, provided that, in view of the fact that the proprietors of lands through which the canal was authorized to extend might desire to erect mills, the canal should not be used except for navigation without the consent of such proprietors, and empowered defendant's predecessor to agree with the proprietors as to the proportion of the expense for constructing a canal for navigation and manufac-

turing purposes, and denied the right to any such proprietor to withdraw any water from the canal for his mill. Acts 1874-75, c. 198, directed the dissolution of defendant's predecessor, and judgment of dissolution was rendered, and a sale of its property made by the receiver to defendant. Priv. Acts 1885, c. 57, confirmed said sale, and provided that the act should not interfere with the rights of any persons operating mills, or prevent any person owning land on the Roanoke river from operating or erecting any mill run by water power, provided that he should not unreasonably interfere with the rights of any person or corporation, and authorized defendant to improve the canal for manufacturing purposes, and to use the water of the Roanoke river, to be drawn through the canal, for navigation, manufacturing, and other purposes. Defendant's predecessor diverted by a wing dam only sufficient water for navigation purposes, and defendant attempted to divert no more until about 1897, which was after plaintiff had acquired the land along the river between the intake of the canal and its outlet. *Held*, that defendant had no right to obstruct the flow of the river in order to draw the water into its canal for manufacturing purposes solely; that plaintiff's delay in asserting its rights is not sufficient to constitute an estoppel or acquiescence; and that an extension of the wing dam should be enjoined.

[Ed. Note.—For other cases, see *Navigable Waters*, Dec. Dig. § 39.*]

2. NAVIGABLE WATERS (§ 39*) — RIPARIAN OWNERS — USE OF WATER — EXTENT OF RIGHT.

Priv. Acts 1891, c. 2, § 2, subsec. 2, amending plaintiff's charter, authorizes plaintiff to develop and utilize the water power of the Roanoke river along the Great Falls thereof for manufacturing purposes, and to that end to erect and maintain all necessary dams, waste-ways, and obstructions in said river, and cut such canals from and to such river on its lands as may be required to fully develop and utilize such power, provided that, in so doing, the rights of others shall not be unreasonably interfered with to their injury. *Held*, that plaintiff had the right to challenge the right of defendant to divert the flow of water in the Roanoke river from plaintiff's property, and this right was not affected by an agreement relating to the location of a few acres of land owned by defendant, or by correspondence passing between them, in which it was expressly stated that there was no waiver of any rights; the agreement and correspondence being intended merely as a temporary arrangement until matters in dispute should be finally decided.

[Ed. Note.—For other cases, see *Navigable Waters*, Dec. Dig. § 39.*]

3. COURTS (§ 90*)—PREVIOUS DECISIONS AS PRECEDENTS.

The case of *Bass v. Navigation Co.*, 111 N. C. 439, 18 S. E. 402, 19 L. R. A. 247, decides only two questions: (1) That on the dissolution of the Roanoke Navigation Company its property did not revert to the original owner; and (2) that the parcel license given by the navigation company to place a bridge over its canal was revocable.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 90.*]

4. JUDGMENT (§ 720*)—RES JUDICATA—MATTERS CONCLUDED.

A former judgment is *res judicata* only as to those matters which were in issue and passed on therein.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1251; Dec. Dig. § 720.*]

5. ARBITRATION AND AWARD (§ 82*)—AWARD—CONCLUSIVENESS.

An award is conclusive on the parties there-to only as to matters submitted to the arbitrators and passed on by them.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 440-450; Dec. Dig. § 82.*]

Appeal from Superior Court, Halifax County; Guion, Judge.

Action by the Roanoke Rapids Power Company against the Roanoke Navigation & Water Power Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with instructions to issue the injunction prayed for.

This action was brought by the plaintiff to recover damages for the interference, by the defendant, with its water rights in the Roanoke river, and to enjoin the defendant from further interference therewith. The case was heard in the court below upon the following facts, which were agreed upon by the parties and submitted to the court for its decision:

(1) The plaintiff and the defendant are corporations duly chartered and organized under the laws of this state.

(2) The plaintiff was originally chartered under the name of "The Great Falls Water Power, Manufacturing & Improvement Company," but its corporate name was changed to that which it now bears by an act of the General Assembly passed at the session of 1895. With this change in its corporate name, it exists under and by virtue of letters of incorporation granted the 18th day of August, 1890, by the clerk of the superior court and by an act of the General Assembly, amendatory of said letters, ratified January 20, 1891 (Acts 1891, c. 2), which act is to be considered as a part of this case.

(3) The defendant company is successor to the Roanoke Navigation Company, which company derived its charter rights from the following acts of the Legislature: (a) Acts 1812, c. 848; (b) Acts 1815, c. 896; (c) Acts 1816, c. 929; (d) Acts 1817, c. 959; (e) Acts 1885, c. 57.

(4) On June 1 and 8, 1880, in a quo warranto proceeding against the Roanoke Navigation Company, then pending in the circuit court of the city of Richmond, Va., which was instituted pursuant to a resolution of the General Assembly of Virginia, adopted at its session of 1877 and 1878, judgments were entered, copies of which are hereto attached as a part of the facts agreed. There was no appeal from said judgments, and the court had jurisdiction to hear and determine said proceedings in so far as they affected the privileges and franchises exercised by said company within the state of Virginia and no further. The effect of the proceedings and judgment in the said cause was to vacate and annul the charter of the Roanoke Navigation Company in Virginia, and to restrain the said

company from exercising any of the franchises, powers, and privileges granted by the charter which it received from the Legislature of that state.

(5) The navigation of Roanoke river was opened up by the Roanoke Navigation Company, pursuant to its aforesaid charters, from Weldon, N. C., westward to Clarksville, Va., and beyond. The boats used in this navigation were known as "bateaux," from 60 to 65 feet long, 6 to 8 feet wide, drawing, when loaded, about 18 inches of water, with a capacity of from five to eight tons each, and were propelled by poling.

(6) The works and improvements of the Roanoke Navigation Company between Weldon, N. C., and Gaston, N. C., consisted of two canals, one around Eaton's Falls and the other, being the main canal, around the Great Falls. From the head of Eaton's Falls, which is a little over half a mile below Gaston, to the foot of the Great Falls at Weldon, the river falls about 104 feet, and, from the head of the Great Falls to the foot thereof at Weldon, a distance of about nine miles, and around which the main canal of the Roanoke Navigation Company was cut, the river falls about 90 feet. On account of these falls and other obstructions, there never has been, and cannot be, any water communication on Roanoke river between Weldon and Gaston, except by means of said canals.

(7) The obstructions to navigation between Gaston, N. C., and Clarksville, Va., were projecting ledges, points of rock, and steep slopes at falls or rapids occurring at intervals along said river, most of them being of minor importance, but several being of such character as to require considerable effort and expenditure to effect safe channels through or by them for the aforesaid bateaux. These obstructions were removed by the Roanoke Navigation Company with the aid of wing dams, and by blasting and cutting sluices through them, so that channels were secured through or by them sufficient for the safe passage of the bateaux heretofore described. Ordinarily it required seven days for these boats to make a round trip between Gaston and Clarksville. Occasionally it was done in five days. The navigation so established by the Roanoke Navigation Company began about 1824, continued for many years, and reached large proportions. The country along the river between said points was then, and is now, well settled and fertile and produced large quantities of tobacco, corn, wheat, and cotton for market, practically all of which was transported over the river by bateaux until some time between 1850 and 1856, and during that period said boats carried into the adjacent country practically all of the goods, wares, etc., required for its use and trade, so that practically the entire commerce of said country, even beyond Clarksville, up the Dan and Staunton rivers, was carried upon

the river and canal. When said transportation was at its full height, there were engaged therein on the river and canal about 353 of said bateaux, which carried a commerce of the estimated value of \$6,000,000 per year. About 1854 or 1856, there having been built railroads to Gaston and from Manson, N. C., to Clarksville, Va., which furnished quicker or more expeditious transportation than said boats, the public ceased to patronize the boats on the canal from Weldon to Gaston, and navigation was discontinued. The canal ceased to be used thereafter, and the locks were not kept up, and got in such condition that boats could not pass through them, and have not since been used for navigation. At said time the transportation by means of said boats from Gaston to Clarksville also materially decreased until about 1864, when the railroad from Manson to Clarksville was torn up. Thereafter the commerce upon said river by means of bateaux from Gaston, where they connected with the railroad, to Clarksville, again assumed large proportions, there being one firm of tobacco manufacturers at Clarksville who shipped by said boats 1,000,000 pounds of manufactured tobacco a year during part of said time. There was also operated on Staunton river for several years, about 1875, a steamboat, "Nellie," of about 12 tons capacity, which plied the river from Randolph, about 15 miles above Clarksville, to about 17 miles above Randolph, and sometimes as far as Brookneal, about 30 miles above Randolph. The bateaux had traffic connections with the railroads, and through bills of lading for freight were issued. The bateaux continued to navigate the river from Gaston to Clarksville until about 1887, after which time only about three of the boats continued said navigation for about six months in the year, carrying about 1,000 bales of cotton and about 400 tons of fertilizer per year, until about 1893 or 1894. After that time traffic was entirely discontinued, except from Clarksville down the river for 18 or 20 miles, where some of said boats are still operating. It has never been practicable for said boats to pass some of the obstructions in said river between Gaston and Clarksville, except through the channels made by the Roanoke Navigation Company, and at present it is not practicable for said boats, when loaded, to ascend and descend the river between the state line and Gaston, owing to the fact that several of the works erected by said company are not in sufficiently good repair to furnish a safe way through said obstructions. The Roanoke river is navigable by steamboats of considerable size from its mouth to Weldon. At its mouth it communicates, by Albemarle Sound, with the ocean, and by the Dismal Swamp Canal with Norfolk, Va. The aforesaid obstructions in the river between Gaston and Clarksville would prevent the passage of steamboats, but the river between said obstructions, which consists of ledges and points of rock and steep slopes at the rapids, is of a character and depth sufficient for the nav-

igation of such boats of from 20 to 30 tons capacity. The Roanoke river from Gaston to Clarksville is from 500 to 1,300 feet wide, the water varying therein from one to ten feet in depth. The places where the depth is one foot are at several rapids or ledges, where water flows over the same. The average depth of the river between said points at low water is about 2½ feet. Congress has made appropriations which have been expended in the improvement of the navigation of the Dan and Staunton rivers above Randolph, which rivers by their conjunction form the Roanoke. A steamboat now runs on the river between Randolph and Brookneal, a distance of about 30 miles, over a part of the river so improved by the government.

(8) The distance by the river from Weldon, N. C., to Gaston, N. C., is 13½ miles, from Gaston, N. C., to the state line is 24 miles, and from the state line to Clarksville, Va., is 30 miles.

(9) The General Assembly of North Carolina, at its session of 1874-75 (Laws 1874-75, c. 198), passed an act for the dissolution of the "Roanoke Navigation Company," which is to be taken as a part of this case.

(10) The action for dissolution which the Attorney General by said act was authorized and directed to institute was brought in the superior court of Halifax county, and at the fall term, 1881, judgment of dissolution was rendered and a receiver appointed to take charge of and make sale of the property of the company. Said property was sold and conveyed by the receiver in 1883, the conveyance being to the purchasers under the corporate name of the "Roanoke Navigation & Water Power Company."

(11) The General Assembly of North Carolina at its session of 1885 (Laws 1885, c. 57) passed an act confirming said sale and conveyance, a copy of which act is herewith filed as a part of this agreement.

(12) The defendant, so far as this action is concerned, has acquired no property other than that it acquired at the receiver's sale, except the purchase by it from Charles Shaw and wife by deed dated October 24, 1906, of the lower end of Moseley's Island, formerly known as Jones' Island, containing about 245 acres, which deed is recorded in Northampton county, in book 135, at page 218. The property acquired at the receiver's sale consists, so far as this controversy is concerned, of a strip of land 165 feet wide, through which its canal flows around the Great Falls and extending from the upper terminus of said canal to the town of Weldon, a distance of about nine miles, and four acres of land at the "locks" of the canal, which property it owns in fee. It was purchased and condemned by the Roanoke Navigation Company under its charter, and through its entire length a canal was cut. The boundaries of said 165-foot strip, especially the northern boundary thereof, are described in the award of Lanier and Armfield, and the agreement of May 28, 1897, hereinafter set out.



(13) A controversy having arisen between the defendant and one George P. Phillips, the owner of the Cadwalader Jones tract of land, as to certain rights claimed by Phillips, as incident to his said land, and in order to test the right of defendant to use its canal and the waters of the river for manufacturing purposes, as against the alleged rights of Phillips, as owner of said land, the same was by agreement submitted to Messrs. M. V. Lanier and R. F. Armfield as arbitrators, who rendered their final award on August 30, 1889. The submission and award are made a part of this case. Under the award, George P. Phillips was declared to be the owner in fee of a parcel of land lying on the southerly side of said canal property. It is a triangular piece of land, the location of which will appear from a map annexed as an exhibit to this agreement. It is also declared that Phillips was the owner in fee of all the land between the northerly boundary of said canal property and Roanoke river. This is a narrow strip of land extending from the upper terminus of the defendant's canal easterly to the eastern boundary. These two parcels of land are indicated on the map as the "C. Jones" tract. On the 1st day of February, 1892, the plaintiff purchased this property from Eva P. Phillips, wid-

ow and sole legatee and devisee of George P. Phillips, who died in 1891, the deed for which was duly recorded in Halifax county. The plaintiff had full notice of said award at the time of purchasing said land, and all its other property.

(14) The defendant did not repair, improve, or develop its said property, owing to its controversy with Phillips, until the same was determined as aforesaid. In January, 1890, it started to work on its property, enlarging its said canal through its entire length, a distance of about nine miles, and completed this work some time in 1892, at an expenditure of over \$100,000. About the time defendant commenced its work, negotiations were opened by it with one T. L. Emry for the purchase of the tract of land indicated on the map as the T. L. Emry, or Moore tract, but a price could not be agreed upon, and defendant declined to purchase. Shortly thereafter Emry sold said tract to other parties, designated in the following section as "promoters."

(15) About three months after the defendant commenced this work, negotiations were opened by Emry with the promoters of the plaintiff company for the purchase of the Moore or Emry tract of land, designated on the map, with a view of forming the plaintiff

corporation for the purpose of developing the power now owned by the plaintiff. This purpose coming to the knowledge of the Hon. J. D. Cameron, then president of the defendant company, he on the 19th of September, 1890, addressed a letter to the president of the plaintiff company, to which letter the president of the plaintiff company made two replies. The substance of this correspondence was that the president of the defendant company claimed that the said company had acquired the right to the exclusive use of so much of the waters of the Roanoke river as it might at any time need for navigation, manufacturing, or other purposes, and he objected to any use of the waters of the said river, or the construction of any dam or other works, by the plaintiff company, which would in any manner injure, impair, or interfere with the property rights, franchises, or privileges of the defendant company. The president of the plaintiff company claimed that his company did not intend to interfere with any of the legal rights of the defendant company which it had acquired in the waters of the Roanoke river, but he denied that it had any right, exclusive or otherwise, at that or any future time, to use the waters of said river for purposes other than those of navigation, and asserted the right of his company to use the waters of the river not required for the said purposes of navigation, and to have them flow down the entire channel of the stream, so that the lower proprietors and owners of riparian or water rights on the margin of the stream might have the free and uninterrupted use of the same. At the time said letter of September 19, 1890, of the Honorable J. D. Cameron was written, the plaintiff had acquired the said Emry or Moore tract, and shortly thereafter its other properties and rights, which it holds in fee. Its said properties consist of a large body of land lying in, on, and along both sides of and bounded by Roanoke river, along that stretch of said stream known as the Great Falls, and divided by said stream into two unequal parts, the one situated in Northampton county, N. C. and the other part in Halifax county, N. C. Its lands in Northampton county contain about 400 acres, known as the Squire, Garner, Grant, and Thomas and Lee tracts, and have a continuous river front of over three miles, extending from Green's creek eastward down and along and bounded by the Roanoke river. Its lands in Halifax county contain about 2,300 acres, consisting of several tracts known as the M. A. Hamilton, T. L. Emry (also known as the Moore tract), B. T. Bockover, R. N. Ivey, and C. Jones tracts, and have a continuous river front of between four and five miles, beginning at a point where the upper terminus of the defendant's aforesaid canal property (the aforesaid 165-foot strip of land) taps or touches Roanoke river, and thence eastwardly down and along

and bounded by said river, and is divided by the aforesaid property of the defendant into two unequal parts or parcels. One of said parcels and the smaller is a narrow strip of land of varying width, lying between the northern boundary of defendant's canal property, which boundary has heretofore been defined, and Roanoke river. The other and larger parcel lies between the southern boundary of the aforesaid canal property of the defendant and Chocayotte creek. The plaintiff also owns in fee all the islands in Roanoke river, from Goat Island to Holly Island, inclusive of both; also Haynes and Crittendon Islands, below Holly Island. For a fuller description of the above-described properties, both of the plaintiff and the defendant, and for a better understanding of their location with reference to each other, reference is made to the map filed herewith as a part of this agreement. There are a number of small islands between Goat Island and Holly Island which are not shown on the map; it being considered necessary to give only the most prominent and important ones.

(16) In the spring of 1891, the plaintiff began developing the water power of that part of Roanoke river flowing by and to its property. Its dams and other works for developing its said water power are located from one to two miles below the upper, and from four to five miles above the lower, terminus of the defendant's canal, so that all the water flowing into said canal is diverted entirely from plaintiff's property, works, and dam, and carried past and beyond the same and discharged at the lower terminus of defendant's canal at Weldon. For a better understanding of the location of said dam and works, especially with reference to the aforesaid properties of the plaintiff and defendant, reference is hereto made to the aforesaid map or plat marked "Exhibit P." Up to 1898 plaintiff had expended in the purchase of its property and rights and in developing its water power about \$250,000, and since then it has expended about \$200,000 more in such development.

(17) The dimensions of defendant's canal, as constructed and used by its predecessors, the Roanoke Navigation Company, and which was cut and graded for navigation purposes, was about 25 feet wide at the top of the water level and 16 feet wide at its bottom, and from 2 to 3 feet deep and with a very slight fall or current. The quantity of water which was taken into and flowed through the canal did not exceed 50 cubic feet per second. The present dimensions of said canal are about 35 feet wide at the top of its water level and 25 feet wide at its bottom, and about 4 feet deep, with an increased fall or current; it being enlarged and regraded for hydraulic purposes. In addition to such enlargement and gradation of the canal, the defendant, about the latter part of 1897, built a rock breakwater, constructed of loose stone

piled together from or near the upper terminus of the canal, and extending about one-third of the distance across Little river, and which was not further extended until some time in 1901, when the same was extended entirely across Little river. Plaintiff had no knowledge of the construction of said breakwater across said river until September, 1907, and on October 30, 1907, it notified the president of the defendant company of that fact by letter, and threatened that, unless the same was removed, it would institute suit to abate the same and for damages. No dam or obstruction in and across said river or any part thereof was ever constructed by the Roanoke Navigation Company, except a wing dam, extending about 100 feet into said river at said point, and of less elevation than the aforesaid rock breakwater. By reason of the enlargement and gradation of said canal, the greater part of the flow of said Little river during the stages of low water is diverted into the canal and from the property of the plaintiff. The defendant's canal, as enlarged and with said dam across Little river, diverts substantially a greater quantity of water than the old canal diverted. Little river is the smaller of the two channels made by Roanoke river dividing and flowing around Moseley's Island. It carries one-fourth of the flow of the entire river, whereas the other and larger channel carries three-fourths of said flow. The waters of the larger channel are made inaccessible to defendant's canal by said island, as their works are now constructed, but both channels unite at the lower end of said island and before reaching the mouth of the plaintiff's canal, all of which is shown by the annexed map or plat.

(18) All the water drawn into defendant's canal is to develop power for manufacturing purposes, and is used solely for that purpose. The canal, by reason of the works of the defendant, is so disconnected from the river that boats cannot pass from one to the other, and defendant has no purpose of opening up or using said canal for navigation purposes unless there should arise some public requirement therefor.

(19) While, before the erection of said dam by the defendant, plaintiff had expended over \$300,000 in the purchase and development of its property, and was still making large expenditures in the development of its water power for future leases, the plaintiff and the few lessees of its water power had been little, if any, inconvenienced by the diversion of water by the defendant, and had sustained little actual damage thereby until within four or five months of the institution of this action. For these reasons, the plaintiff had made no demand upon the defendant to abate such diversion. In 1902 the plaintiff was negotiating for other leases, and, actuated by this and also by the information that defendant contemplated increasing such diversion, the president of the plaintiff company on December 18, 1902, wrote the presi-

dent of the defendant company, protesting against such action. During the year 1906 plaintiff succeeded in making large leases of its power, to be furnished by September 1, 1907. When demand was made upon it for such additional power, it was unable to supply a large part thereof on account of the diversion of water by defendant, and this inability continued for several months during the fall of 1907, and until the plaintiff could make large additions to its dam it was then extending across the river.

(20) As shown by the map hereto annexed, plaintiff has now extended its dam entirely across the river, by which it is enabled to develop water power to the amount of 8,000 horse power, but with its present works and developments it will require the entire flow of the river in its normal stages to enable it to do so. The defendant's canal by reason of its said enlargement and grading and the extension of said breakwater or dam diverts water from plaintiff's canal and works, which, if allowed to flow into them, would develop a large amount of power. Of this 8,000 horse power plaintiff has already leased 4,000 and the lessees thereof have been using the same since January 1, 1908. The remaining 4,000 horse power will be converted into electrical power, and the plaintiff has erected and equipped a power house for generating the same. Of this electrical power it has leased about 800 horse power, and can dispose of the remainder within the next one or two years, unless the aforesaid diversion of the defendant continues.

(21) The said water which the plaintiff claims the right to draw into its canal to develop said 8,000 horse power is for use in the manner and for the purposes following, to wit: A sufficient quantity of said water is to be delivered from its canal, through pipes or sluices, to the wheels or turbines of the owners of the mill sites, Nos. 1, 2, and 3, on the lands of the said millowners, to generate in conjunction with said wheels or turbines, under the head of water maintained in the canal, 4,000 horse power. This power is for the operation of the mills and machinery of said millowners upon their said lands. This is the 4,000 horse power plaintiff has already leased, as aforesaid. Mill site No. 1 is owned by the United Industrial Company, No. 2 by the Roanoke Mills Company, and No. 3 by the Roanoke Rapids Paper Manufacturing Company, and are located as shown on the map herewith filed. They were originally parts of the Emry, or Moore, tract of land. Sites Nos. 1 and 2 were donated, and mill site No. 3 was sold and conveyed by plaintiff in consideration of the donees and grantees erecting mills thereon and leasing water power from the plaintiff to operate the same. The water taken by said mills from plaintiff's canal is discharged and returned to the river from said mills before passing the lands of any other riparian proprietor, and flows down the river, along plaintiff's lands. The

remainder of the water is to be used to operate the electric power plant located on plaintiff's lands by which the plaintiff proposes to generate 4,000 horse power. This power will be transmitted and used to operate machinery or mills to be erected by plaintiff, or used by other parties when plaintiff may be able to lease the same. The water used to generate said power is discharged on plaintiff's land and returned to the river before passing any other riparian owner. Eight hundred horse power has been already leased, to be used in the operation of mills on mill sites Nos. 1 and 2. The plaintiff has now no mills or factories upon its lands other than the said electrical power house.

(22) The main contention of the plaintiff in this action is that it has the right to have abated or enjoined the alleged diversion by the defendant of the water of Roanoke river into its canal; and, while it is admitted that plaintiff has thereby sustained such damages and will continue to sustain such damages so long as substantial diversion continues, if said diversion or any part thereof is wrongful, it is agreed that there shall be no recovery of actual damages in this action, but this shall be without prejudice and with the reservation to the plaintiff of the right to institute a separate action for any damages it has already or may hereafter sustain; but the aforesaid admission, which is made for the above purpose, that plaintiff has sustained actual damages, shall not be used as evidence against the defendant in any action it may hereafter institute against the defendant for the recovery of damages. It is further agreed that no such subsequent action shall be barred by the statute of limitations further than it already is.

(23) In 1896 a controversy arose between the plaintiff and the defendant as to the location of four acres of land owned by the defendant at or near the locks, and as to other matters, and, in order to adjust and settle the same, the plaintiff and defendant entered into a written agreement for that purpose. When this agreement was entered into, the contentions of the plaintiff and the defendants as to their respective rights to the use of the water of Roanoke river were well understood by them. At the time of entering into this agreement, plaintiff knew that defendant had enlarged its canal to its present dimensions, and was using the water solely for manufacturing purposes. The plan adopted by the defendant and put into execution for developing its water power was to utilize the water drawn into its canal, first, at the "locks," about four miles below the upper terminus of its canal, where all the water so used was and is returned to said canal, from which point it flows through said canal to Weldon, and is used and discharged. The plan adopted by the plaintiff for developing its water power was in the manner and at the place its said power is now developed and used. These respective plans were known

and understood by both parties before and at the time of the aforesaid agreement, and the same was entered into in furtherance of said plans.

(24) At the time said agreement of May 28, 1897, was entered into, the defendant had not leased any of its water power. Its first lease of power was to the Weldon Cotton Manufacturing Company on the 1st day of February, 1899, when it contracted to furnish it with horse power to an amount not to exceed 250 horse power. Said company had never used to exceed 100 horse power. In the summer of 1900 defendant commenced the erection of a power house at the "locks," located about four miles below the upper terminus of its canal. In contemplation of such erection, the defendant contracted with the Patterson Textile Company on August 29, 1900, to furnish it with not exceeding 1,000 electrical horse power, beginning on January 1, 1901. It did not begin to furnish the power until September 1, 1901. It has furnished at no time to exceed 800 electrical horse power.

(25) Defendant, relying on the decisions in the George P. Phillips Case and the case of Bass v. Navigation Company, 111 N. C. 439, 18 S. E. 402, 19 L. R. A. 247, as a determination of its rights to enlarge its canal and use the water of the river drawn through it for manufacturing purposes, did enlarge and repair the same, at the expense aforesaid, to wit, over \$100,000, and built thereon a large corn and flour mill at Weldon, an electric power house at Weldon, which furnishes electric lights for said town, its stores, factories, and residences, and an electric power plant at Roanoke Rapids, which furnishes electric lights to said town, and power plant, by transmission, for the operation of a large damask mill of the Patterson Textile Company at Rosemary. Said improvements cost about \$300,000. Defendant's canal is so constructed that it can use the water drawn through the same to operate its power plant at its lock at Roanoke Rapids under the fall of about 30 feet, and by reason of said locks return the same water to the canal, so that it is carried on to Weldon, where it is again used under a fall of 45 feet. Plaintiff has in its canal only one fall of about 30 feet. The Patterson Textile Company, heretofore referred to, desiring to build a large damask mill at Rosemary, to be operated by power from defendant's canal, and being advised of plaintiff's contentions that defendant had no right to draw water from the river in excess of that used by the Roanoke Navigation Company, or to apply the same to manufacturing purposes, before building said mill examined the decisions in said Phillips and Bass Cases, and, being advised that they were, and relying on them as, adjudications of the said questions in favor of the defendant, erected said mill, dependent upon the power of defendant's canal for its operations, and entered into a contract with defendant accordingly to furnish it not ex-

ceeding 1,000 electrical horse power. Said mill cost about \$350,000. The Weldon Cotton Manufacturing Company's mills were also built on defendant's canal, to be operated by its power. The aforesaid Patterson Textile Company's mills and the town of Roanoke Rapids can be served as readily from the power plant of the plaintiff as from that of the defendant. The corn and flour mill of the defendant was completed in 1892, and its power house at Weldon was erected in 1898.

It was further agreed by the parties that the presiding judge should hear and determine the matters in controversy upon the case agreed, and enter judgment accordingly. Judgment was rendered in favor of the defendant, denying the plaintiff's prayer for an injunction, and dismissing the action. Plaintiff, having duly excepted, appealed to this court.

W. E. Daniel and Claude Kitchin, for appellant. E. L. Travis, Geo. Green, J. H. Pou, and T. M. Mordecai, for appellee.

WALKER, J. (after stating the facts as above). This action was brought by the plaintiff to recover damages for a nuisance which it alleges was committed by the defendant, and to enjoin the continuance of the same, which the plaintiff also alleges has caused special damage to it by reason of the diversion of the waters of the Roanoke river from the usual and natural flow by and along the lands of the plaintiff, which are situated below the intake or upper end of the defendant's canal. The plaintiff bases its right to recover on the ground that, as the owner of the land through which the river would flow in its natural state, it is a lower riparian proprietor, and that the defendant has no legal right to so obstruct the flow of the water in one of the prongs of the Roanoke river, known as Little river, as to diminish the volume of water which would otherwise flow by and through plaintiff's land, except to the extent that the defendant may have acquired the right, under the charter of its predecessor, the Roanoke Navigation Company, to use the water, and for that purpose to obstruct the flow of said stream in a reasonable manner and consistently with the rights and privileges granted to it. We think the decision of the case must depend upon the construction of the charters of the Roanoke Navigation Company, under which the defendant claims, and all the acts of assembly which relate to the rights and privileges of that company and of its successor, the defendant, with regard to the use of the waters of the Roanoke river for the purposes specified in the said acts.

Act 1812, c. 848, provides only for improving the navigation of Roanoke river from the town of Halifax to the place where the Virginia line intersects the same. It is not necessary that we should refer to the acts of 1815 and 1816, which amended the act of

1812, because the provisions of those acts do not affect materially the decision of the question presented in this case. By the act of 1817, the Legislature of this state adopted an act which was passed by the General Assembly of Virginia in 1816, and which provided for improving the navigation of the Roanoke river and its branches. It is provided in sections 4 and 5 of the latter act as follows:

"Whereas, some of the places through which it may be necessary to conduct the said canals may be convenient for erecting mills, forges and other waterworks and the person possessing such situations may desire to improve the same:

"Be it therefore enacted, that the water, or any part conveyed through any canal cut or made by the said company, shall not be used for any purpose but navigation, unless the consent of the proprietors of the lands through which the same shall be led, be first had, and the said president and directors, or a majority of them, are hereby empowered and directed, if it can be conveniently done, to answer both the purposes of navigation and the waterworks aforesaid, to enter into reasonable agreements with the proprietors of such situations, concerning the just proportion of the expenses of making large canals, or cuts capable of carrying such volume or volumes of water as may be sufficient for the purposes of navigation, and also for any such waterworks as aforesaid; but in no case whatever shall the owner or proprietor of such land, through which any canal may be cut as aforesaid, withdraw from any canal, cut by the aforesaid company, the water for the purpose of working any mill, forges or other waterworks whatever."

The act of 1812 provided only for improving the navigation of the Roanoke river, and made no provision for the use of its waters for any other purpose. It is contended by the defendant that the act of 1817, the provision of which we have just quoted, enlarged the rights, privileges, and franchises of the Roanoke Navigation Company, so that by the said act it acquired not only the right to improve the navigation of the river, but also to use its waters for manufacturing and other purposes, and that, by reason of the provisions of the said act, it was not restricted in the quantity of water taken by it from the stream to so much as might be necessary only for the purpose of navigation as it was by the act of 1812. In the exercise of the rights, privileges, and franchises conferred by the said acts, the Roanoke Navigation Company constructed a canal and diverted the waters of the river into it by what is known in the case as a "wing dam," which extended about 100 feet into the river. The navigation of the river through the said canal began in 1824 and continued until 1854, when it was abandoned, and it has not since been resumed. The plaintiff has extended the said wing dam entirely across Little river, and has thereby practically obstructed the flow of the

stream, so that the plaintiff does not receive any benefit therefrom, but the use of the said river by it, as a riparian owner or proprietor, if it is entitled to be so considered, has been totally destroyed.

It is clear from the statement of facts which we have made that the defendant by the dissolution and sale of the franchise and property of the Roanoke Navigation Company, under the act of the Legislature of 1874-75, and by virtue of the judicial proceedings authorized by the said act, did not by the deed of the commissioner, which was made under a decree of the court, acquire anything except "the rights, franchises, privileges, works and property of the Roanoke Navigation Company between the towns of Gaston and Weldon and at Weldon." The deed of the commissioner, Mr. Hill, does not convey anything else, nor does Act 1885, c. 57, which ratified the sale and conveyance of the commissioner, confer any other rights, franchises, or privileges or franchises, or vest in the defendant any other property or effects than those which were required by the deed of the commissioner. The primary object, and we may say the chief purpose, of the acts of 1812 and 1817 were to promote and improve the navigation of the Roanoke river by the construction of a canal, and the right to use the water of the canal for the other purposes mentioned in the act of 1817 was intended to be subsidiary or subordinate to the main purpose, and not to permit the Roanoke Navigation Company to take more water from the river through its canal than should be necessary for improving the navigation of the stream. The Legislature did not contemplate that a greater quantity of water should be taken from the river than would be necessary for the purpose of navigation, and within this prescribed limit the navigation company was authorized to contract with the proprietors of lands bordering on the canal for the use of the water in the canal when required to supply motive power for milling, manufacturing or other industrial plants mentioned in the act. It would seem that the company placed this construction upon the act because it so cut its canal with reference to the diversion of water from the river as to supply a sufficient quantity for the purposes of navigation only by erecting the wing dam; and, while the canal was in use and operation for 30 years, it did not assert the right to obstruct the flow of the water to any greater extent than had been done in the beginning, nor was any attempt made to do so by its successor until about the year 1897, when it built a rock breakwater, extending about one-third of the distance across Little river and which was not further extended to the other bank of the river until some time in the year 1901.

In the construction of the legislative acts, under which the defendant acquired its rights, privileges, and franchises, as the successor of the Roanoke Navigation Company, by vir-

tue of the judicial sale to which we have referred, we can derive little or no aid from the authorities, nor did counsel cite any. The original company constructed the wing dam under the power given to it by the act of 1812, as amended by the act of 1817, and deemed it sufficient for all purposes of navigation and so used it for a period of 30 years. It does not appear in this case that it was necessary to extend that dam to the opposite bank of the stream for the purpose of supplying an additional quantity of water for improving the navigation of the river as contemplated by the said act. It is very clear, we think, that the Legislature, by the acts of 1812 and 1817, did not intend to permit any obstruction of the Roanoke river for the sole purpose of using its waters for manufacturing purposes. The title and the language of the two acts forbid any such construction. The right to establish manufacturing plants on the canal was intended to be incidental to the navigation of the river, and the latter could be obstructed only to the extent that it was necessary to improve its navigation. The defendant contends that it has acquired the right to obstruct the river by virtue of Act 1885, c. 57, but we do not think that statute will bear any such construction. It is provided by section 6 of the act as follows: "This act shall not materially interfere with the legal or vested rights of any persons owning or operating mills in Northampton county, or prevent any person owning land on Roanoke river from operating or erecting any mill or other structure to be operated by water power, and using the water of said river for operating said mill or other structure: Provided, in so doing he shall not interfere with the legal or vested rights of any other person or corporation in any unreasonable manner." The right given to the defendant by section 7 to erect buildings or make other improvements upon the canal for the purpose of manufacturing, and by section 1 to use the water of the Roanoke river, to be drawn through the canal, for navigation, manufacturing, and other purposes, refers only as the context of the act clearly shows to the same rights, privileges, and franchises that were given by the acts of 1812 and 1817 to the Roanoke Navigation Company. This construction of these two sections is entirely consistent with the language of section 6, which forbids the defendant from obstructing or interfering with the right of any lower riparian proprietor on the Roanoke river from erecting and operating any mill by the use of the water of the said river. And any other construction would nullify that section. The plaintiff has complied with the proviso in that section, for it appears in this case that the water which passes through its canal is returned to the river before it reaches the land of any lower proprietor, and therefore there has been no interference by it with the right of any other person or corporation.

The next question presented in the case is

whether the plaintiff is in a position to challenge the right of the defendant to obstruct the flow of water in the Roanoke river. We do not think it is necessary for us to decide, in order to pass upon this question, whether or not the plaintiff is a riparian owner in the sense that it has the right to use the water of the river for manufacturing purposes, though there are authorities for the contention of the plaintiff that it has such right and all the rights of a riparian owner, and especially that it had "a right to the undisturbed flow of the river which passed along the whole frontage of its property in the manner in which it had formerly been accustomed to pass." *Land Company v. Hotel Company*, 132 N. C. 517, 44 S. E. 39, 61 L. R. A. 937; *Gould on Waters*, §§ 149, 204; 1 *Farnam on Waters*, §§ 287-288, 598-602; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984; 29 Cyc. 333-335; *Webster v. Harris*, 111 Tenn. 663, 69 S. W. 782, 59 L. R. A. 332; *Lamprey v. State*, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 526; *Sanborn v. Ice Co.*, 82 Minn. 43, 84 N. W. 641, 51 L. R. A. 829, 88 Am. St. Rep. 401. But whether or not the plaintiff had the right to use the waters of the Roanoke river, as claimed by it, we think that the act of 1891, amending its charter, does expressly confer such right, and that the proviso in subsection 2 of section 2 does not restrict its right in this respect, as, if the defendant acquired only the property rights, privileges, and franchises of the Roanoke Navigation Company, the operations of the plaintiff do not interfere with its rights, if it had no authority to extend its dam across the river to the bank on the other side, but only the right to obstruct the river by the wing dam, which was built by its predecessor. Nor do we think that the rights of the parties were changed or affected by their agreement dated May 28, 1897, or the correspondence between them, as it is evident from their express language that they did not intend to waive or surrender any of their rights, which are now in controversy in this case, but the said rights are distinctly reserved. The said agreement and correspondence were intended merely to provide a temporary arrangement between the parties which was to last until the matters in dispute between them should be finally decided.

The defendant further contends that the plaintiff is concluded or estopped by the award which settled the controversy between George P. Phillips and the defendant concerning the boundaries of the property of the defendant and its rights in the canal; the plaintiff having afterwards purchased the Phillips land. The fourth section of the award is as follows: "The Roanoke Navigation & Water Power Company has the right under its charter, without the consent of the said Phillips, to enlarge its canal as it may see fit upon its own land aforesaid, but not to condemn land for such purpose, and it has also the right, without the consent of

the said Phillips, to own, use, and enjoy the use of the water of the Roanoke river to be drawn into or through said canal, as well for navigation as manufacturing and other purposes, and to rent or lease the same, and to erect and operate manufacturing establishments upon its own land, both that now owned or hereafter acquired under its charter, or to rent or lease the same and to sell and alien any of its said property, all without the consent of the said George P. Phillips." The arbitrators intended by their award merely to fix the boundaries of the defendant's property and to define its right to use the canal and the waters of the Roanoke river for navigation and manufacturing purposes, as conferred by the acts of 1812 and 1817, and to confine it within the limits prescribed by the said acts. This is apparent from the striking similarity between the words employed by the arbitrators in their award and the language of the two acts to which we have referred. They did not intend that the defendant should possess or enjoy any other rights, privileges, or franchises than were acquired by the deed of the commissioner, executed under the order of the court and the act of the Legislature of 1885, which ratified the same. The question as to the quantity of water which the defendant was entitled to draw from the Roanoke river without the consent of Phillips was not submitted to the arbitrators for their decision, nor involved in the controversy between the parties, so far as appears from the submission or the award. The question which the arbitrators decided, and which was submitted to them, was whether the defendant as between it and Phillips had the right to divert any water from the river into its canal.

We have read very carefully the case of *Bass v. Navigation Company*, 111 N. C. 439, 18 S. E. 402, 19 L. R. A. 247, upon which the defendant relies as deciding what rights it has in the waters of the Roanoke river by virtue of the statutes and proceedings to which we have referred. We find only two questions decided in that case, and they are: (1) Whether by the dissolution of the corporation known as the Roanoke Navigation Company the property which it acquired by purchase or otherwise reverted to the original owners; and (2) whether the parol license to construct a bridge over the canal which was formerly given by the Roanoke Navigation Company was revocable. The court decided that there was no reverter, and that the license was revocable. We do not see how the questions now under consideration in this action were presented in that case, and the language of the court excludes the idea that they were considered or decided. We are therefore of the opinion that neither the award in the Phillips Case nor the decision in the Bass Case adjudicated the rights of the parties which are involved in this suit, nor do they render applicable

to this case the rule of *stare decisis*, as laid down in the case of *Hill v. Railroad Company*, 143 N. C. 539, 55 S. E. 854, 9 L. R. A. (N. S.) 606, as they establish no rule of property pertinent to the facts of this case, which require us to adhere to them as decisive of the questions we now have under consideration. If the arbitrators in the *Phillips Case* or the court in the *Bass Case* intended to pass upon the question as to whether the defendant had the right to extend its dam across Little river so as to completely obstruct the stream, and thereby to prevent the use of the waters of the river by the lower riparian proprietors, they would have made some reference to the right of the defendant so to do in plain language. Instead of doing so, it was assumed that the defendant possessed only the rights and privileges with reference to the river and the diversion of its waters which it acquired from the Roanoke Navigation Company, and which had been conferred upon the latter by its charter and the amendments thereof.

It appears in the case agreed that the defendant has acquired by prescription if not by purchase at the judicial sale the right to obstruct the flow of Roanoke river by continuing to maintain what is known in the case as the "wing dam," which was originally erected by its predecessor, but it has no right to impede the flow of the stream beyond the end of said dam—that is to say, by any extension of the same—and to the extent that it has done so it should have been enjoined by the court below, as there has been no sufficient delay by the defendant in asserting its right to the removal of the obstruction to constitute an acquiescence on its part, or an estoppel against it. *Pugh v. Wheeler*, 19 N. C. 50; *Emery v. Railroad*, 102 N. C. 232, 9 S. E. 139, 11 Am. St. Rep. 727; *Geer v. Water Company*, 127 N. C. 349, 37 S. E. 474. The plaintiff has acquired no easement as against the lower proprietors on the river to obstruct the same. *Griffin v. Foster*, 53 N. C. 337.

The question as to the amount of damages the plaintiff may be entitled to recover is not now before us upon the case agreed. Our conclusion is that the court erred in refusing the injunction to the extent above indicated, and the case is therefore remanded to the court below, with instructions to issue an injunction against the defendant restraining it from maintaining the dam across Little river, except that part of the said dam which was originally erected by the Roanoke Navigation Company, and which is known in the case as the "wing dam." The amount of damages which the plaintiff is entitled to recover will be determined hereafter, according to the stipulation contained in the case agreed.

Error.

(152 N. C. 656)

VOLIVA v. RICHMOND CEDAR WORKS.
(Supreme Court of North Carolina. May 27, 1910.)

1. LIMITATION OF ACTIONS (§ 88*)—COMPUTATION OF PERIOD—NONRESIDENCE.

The appointment of a local agent on whom process can be served by a foreign corporation put in force the statute of limitations, which is suspended by Revisal 1905, § 366, as to non-resident defendants.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 463; Dec. Dig. § 88.*]

2. JUDGMENT (§ 818*)—FULL FAITH AND CREDIT.

A judgment against a foreign corporation based on service of process on an agent appointed to receive service is entitled to full faith and credit in another state.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1460-1465; Dec. Dig. § 818.*]

On rehearing. Petition allowed.

For former opinion, see 67 S. E. 42.

BROWN, J. The defendant is a foreign corporation owning property and doing business in this state prior to the act complained of and up to this time. The alleged damage occurred in 1904, and this action was commenced November 12, 1908. The defendant at all times maintained a process agent in the state, upon whom service could be had, and upon whom service actually was had in the case now being considered. The defendant pleaded the three-year statute of limitations. This court held that the plea is not available to a nonresident corporation.

Some of the earlier utterances of this court upon the subject would indicate that the plea is open to a nonresident corporation upon which service of process can be had within the state and against which a personal judgment may be rendered. *Armfield v. Moore*, 97 N. C. 34, 2 S. E. 347; *Williams v. B. & L. Association*, 131 N. C. 267, 42 S. E. 607. In this last case Mr. Justice Clark, speaking for the court, and quoting with approval *Armfield v. Moore* says: "The plain intent of the statute is to put nonresidents on the same footing as residents, and not to protect them from an action unless they have been for two years exposed to service of summons." Since those decisions it has been held by this court that the plea is never available to a nonresident corporation, although it may have fully complied with our statutes (Revisal 1905, § 1243) and appointed and maintained an agent here upon whom process can be at all times served. *Green v. Insurance Co.*, 139 N. C. 309, 51 S. E. 887, 1 L. R. A. (N. S.) 623, and cases cited. We are now of opinion that these last cases are not well decided, and that the better doctrine, more consonant with reason and justice, is that expressed in the citation from *Williams v. B. & L. Association*.

The overwhelming weight of judicial precedent recognizes the doctrine as expounded

by the Supreme Court of Iowa in *Wall v. Railway*, 69 Iowa, 501, 29 N. W. 428: "The theory of the statute of limitations is that it operates to bar all actions except as against persons and corporations upon whom notice of the action cannot be served because of their nonresidence. If such notice be served, and a personal judgment obtained which can be enforced in the mode provided by law against the property of such person or corporation, wherever found, then such person or corporation is not a nonresident as contemplated by the statute of limitations." To the same effect are the following cases, and particularly the strong case of *Huss v. Central Railroad & Banking Co.*, 66 Ala. 472; *Sidway v. Land & Live Stock Co.*, 187 Mo. 673, 86 S. W. 150; *Lawrence v. Ballou*, 50 Cal. 258; *Hubbard v. Mortgage Co.*, 14 Ill. App. 40; *St. Paul v. Chicago, etc., R. Co.*, 45 Minn. 387, 48 N. W. 17; *Louisville, etc., R. Co. v. Pool*, 72 Miss. 487, 16 South. 753; *Colonial, etc., Mortgage Co. v. Northwest Thresher Co.* (1905) 14 N. D. 147, 103 N. W. 915, 70 L. R. A. 814, 116 Am. St. Rep. 642; *Turcott v. Yazoo, etc., R. Co.*, 101 Tenn. 102, 45 S. W. 1067, 40 L. R. A. 768, 70 Am. St. Rep. 661; *Connecticut Mut. L. Ins. Co. v. Duerson*, 28, Grat. (Va.) 630; *Thompson v. Texas Land, etc., Co.* (Tex. Civ. App.) 24 S. W. 856; *U. S. Express Co. v. Ware*, 87 U. S. 543, 22 L. Ed. 422; *Taylor v. Union Pac. R. Co.* (C. C.) 123 Fed. 155; *McCabe v. Illinois Cent. R. Co.* (C. C.) 13 Fed. 827; *Winney v. Sandwich Mfg. Co.* (Iowa) 50 N. W. 565; *Id.*, 86 Iowa, 608, 53 N. W. 421, 18 L. R. A. 524; *Abell v. Penn. Mut. L. Ins. Co.*, 18 W. Va. 400; *Norris v. Atlas Steamship Co.* (C. C.) 37 Fed. 426; *Johnson, etc., Dry Goods Co. v. Cornell*, 4 Okl. 412, 46 Pac. 860.

After adverting to the few decisions to the contrary, 13 Am. & Eng. Ency. p. 904, says: "The majority of decisions maintain a rule believed to be more consonant with justice. The rule, briefly stated, is that if, under the laws of the domestic state, the corporation has placed itself in such a position that it may be served with process, it may avail itself of the statute of limitations when sued. Ability to obtain service of process is the test of the running of the statute of limitations." To same effect is 25 Cyc. 1238, which cites in support of the text, among a large number of cases, our own case of *Williams v. B. & L. Association*, *supra*.

In *Murfree on Foreign Corporations* it is said: "As to the second question, whether a foreign company, when sued, can plead the bar of the statute in defense, it may be said that the great weight of authority is in favor of the conclusion suggested above that the true test of the running of the statute is the liability of the party, invoking its bar, to the service of process during the whole of the period prescribed, that, if the operations of the company within the jurisdiction were such as to render it liable to suit, then it

may plead the statute." The soundness of this doctrine has nowhere been more forcibly stated than by Mr. Justice Pleasants in *Penn. Co. v. Sloan*, 1 Ill. App. 364, a most instructive and well-reasoned case. The Tennessee court, in *Turcott v. R. R.*, 101 Tenn. 102, 45 S. W. 1067, 40 L. R. A. 768, 70 Am. St. Rep. 661, holds on a statute exactly like ours that a corporation is a person, within the purview of the statute, excluding absences from the state in computing the time for the running of the statute of limitations, and that a foreign corporation doing business in the state upon which service of process may be made may plead the statutes of limitations. The Constitution of Alabama contains a provision similar to our statute, requiring all foreign corporations doing business within the state to maintain an agent upon whom service of process may be made. That court held that such corporation could plead the statutes of limitation. *Huss v. Railroad*, 66 Ala. 475. In rendering the opinion, Chief Justice Brickell says: "The true test of the running of the statute of limitations is the liability of the party invoking its bar to the service of process during the whole of the period prescribed. If there is the continuous liability, the residence or domicile of the party is immaterial." In *Express Co. v. Ware*, 87 U. S. 543, 22 L. Ed. 422, the Supreme Court of the United States held: "A statute of limitations as against a foreign corporation begins to run from the time such corporation has a person within the state upon whom process to commence a suit may be served." The Court of Appeals of New York, it seems, at one time held to the contrary, but what is called the "New York rule" by Mr. Murfree has not been often followed. In speaking of it the Supreme Court of the United States says, through Mr. Justice Bradley: "These decisions upon the construction of the statute are binding upon us, whatever we may think of their soundness on general principals." *Tloga Railroad Co. v. Railroad*, 87 U. S. 143, 22 L. Ed. 331. In the same case Mr. Justice Miller says: "The liability to suit, where process can at all times be served, must in the nature of things be the test of the running of the statute. A different rule applied to an individual because he is a citizen or resident of another state is a violation at once of equal justice and of the rights conferred by the second section of the fourth article of the federal Constitution that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." The latest decision of the Supreme Court of the United States holds that a foreign corporation owning property and doing business within a state and amenable to its process is a "person," and as such is protected by the equal protection clause of the United States Constitution. *Railway v. Greene*, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. Ed.—.

Statutes like ours, requiring all foreign corporations doing business within the state to maintain an agent therein upon whom process may be served, have been enacted in a great majority of the states, and in nearly all of them where the question has arisen the right to plead the statutes of limitation of such state has been accorded. This is the more consonant with elementary principals of justice because a judgment obtained by such service in the courts of the state is entitled to the full faith and credit in another state as it is in the state where rendered. *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; 13 Am. & Eng. Ency. 895.

For these reasons, we think that our precedents to the contrary should no longer be authoritative.

We are of the opinion that the action is barred.

Error. Petition allowed.

WALKER and MANNING, JJ., concur fully in the above opinion, but think that the judgment should not be retroactive upon the principle expressed in the concurring opinion of Justice Walker in *State v. Fulton*, 149 N. C. 492, 63 S. E. 145; *State v. Bell*, 186 N. C. 674, 49 S. E. 163.

(152 N. C. 671)

BENNETT v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. May 27, 1910.)

Appeal from Superior Court, Anson County; W. J. Adams, Judge.

Action by J. B. Bennett against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed.

Civil action for damages for personal injury, alleged in the complaint to have been received in Savannah, Ga., in May, 1901. These issues were submitted:

"(1) Was the plaintiff injured by the negligence of the defendant as alleged in the complaint? Answer: Yes.

"(2) Did the plaintiff by his own negligence contribute to his injury as alleged in the answer? Answer: No.

"(3) Did the plaintiff voluntarily assume the risk of the work he was doing at the time he was injured, as alleged in the answer? Answer: No.

"(4) Is the plaintiff's cause of action barred by the statute of limitations? Answer: No.

"(5) What damages, if any, is the plaintiff entitled to recover? Answer: Three hundred (\$300) dollars."

From the judgment rendered, the defendant appealed.

Robinson & Caudle, for appellant. Tillett & Guthrie, for appellee.

BROWN, J. The defendant requested the court to instruct the jury that upon the allegations of the complaint and the plaintiff's testimony, as well as all the evidence, the action is barred by the statute of limitations. This question has been fully considered at this term upon petition to rehear the case of *Voliva v.*

Richmond Cedar Works, 68 S. E. 200. The disposition of that case upon rehearing controls this. The prayer for instruction should have been given, and the jury directed to answer the fourth issue, "Yes."
Error. Reversed.

(152 N. C. 714)

HASKETT v. TYRRELL COUNTY et al.

(Supreme Court of North Carolina. May 27, 1910.)

COUNTIES (§ 173*)—CONTRACT FOR CONSTRUCTION OF JAIL—ISSUANCE OF BONDS—EFFECT OF SUBSEQUENT STATUTE.

County commissioners on February 1, 1909, passed a resolution declaring it necessary to build a jail, and on the following day entered into a contract for the construction of the jail in which it agreed to issue bonds to the contractor, and on March 1, 1909, the contractor delivered a written order to the commissioners directing them to deliver the bonds to a third person. Held that, while it was within the power of the General Assembly to restrict county commissioners in the incurring of debts, such contract was not invalidated by an act ratified on March 2, 1909 (Laws 1909, c. 413), which prohibited such county from contracting for any public building without first advertising for bids and annulling the contract of February 2, 1909, since the bonds issued in pursuance of such contract were, in effect, delivered on March 1st.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 264; Dec. Dig. § 173.*]

Appeal from Superior Court, Tyrrell County; Ferguson, Judge.

Action by M. F. Haskett against Tyrrell County and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Ward & Grimes, for appellant. I. M. Meekins, for appellees.

CLARK, C. J. On February 1, 1909, the county commissioners of Tyrrell passed a resolution that it was necessary to build a jail for said county, and contracted with the "Stewart Jail Works" to build the same for the sum of \$6,895. On the succeeding day, said board contracted with the Stewart Jail Works, in order to raise funds to pay for said work, to issue \$6,500 in 6 per cent. bonds, i. e., 13 bonds of \$500 each, bond No. 1 to fall due February 1, 1918, and one bond to fall due February 1st of each succeeding year till all of said bonds should be paid for which bonds the said jail works should pay cash at par. On March 1, 1909, I. M. Meekins presented to the commissioners a written request from the Stewart Jail Works to turn over to him said \$6,500 of bonds for them, stating that he would pay cash for the same. Meekins on that day paid the commissioners \$500 in cash and gave his check for \$6,000 on a bank in Norfolk, Va., which was paid on presentation. The bonds were left with the company treasurer till the check was paid, whereupon the bonds were duly delivered and are now held by an innocent purchaser for value. The \$6,500 received for

the bonds has been paid out from time to time to the contractors for building said jail.

On March 2, 1909, the General Assembly ratified an act (Laws 1909, c. 413) which prohibited the county of Tyrrell to contract for work on any public building without first advertising for bids, in the manner therein prescribed, and annulling the resolution of February 2d to issue the bonds, and prescribing that bonds for such purposes should be issued only with the approval of a commission named in the act.

It was within the power of the General Assembly to restrict the company commissioners in incurring debt even for necessary purposes (*Burgin v. Smith*, 151 N. C. 561, 66 S. E. 607); but the act ratified March 2, 1909, came too late so far as this transaction is concerned. A "jail" is a public necessity, and the county commissioners, in the absence of statutory restriction, had the power to make the contract of February 1st to build the same (*Burgin v. Smith*, supra; *Vaughn v. Com'rs*, 117 N. C. 432, 23 S. E. 354) and to issue bonds to raise money to pay for the work (*Com'rs v. Webb*, 148 N. C. 123, 61 S. E. 670). The contract for sale of bonds February 2, 1909, was valid, as the statute then stood. The bonds were in effect delivered March 1st, when the commissioners received part cash and part in a check. The bonds were held as the property of the purchaser, as security for payment of the check, which was paid on presentation.

Fraud vitiates everything; but none is alleged and proven in this case. The judge properly denied the motion for a restraining order and injunction.

Affirmed.

(153 N. C. 718)

POWERS et al. v. BAKER et al.

(Supreme Court of North Carolina. May 27, 1910.)

1. ACKNOWLEDGMENT (§ 41*)—RECORDED DEED—CLERICAL ERROR IN COPYING.

When a recorded deed purported to be acknowledged before "J. N., Nee and Deputy Consul General, U. S. A.," and it appears N. was at the time a "Vice and Deputy Consul General of U. S.," "Nee" must be held to be a clerical error in copying for "Vice."

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 224; Dec. Dig. § 41.*]

2. ACKNOWLEDGMENT (§ 18*)—WHO MAY TAKE—CONSULAR OFFICERS—"CONSUL."

Rev. St. U. S. § 1674 (U. S. Comp. St. 1901, p. 1149), in force in 1880 when a deed executed in London, England, was acknowledged before the United States "vice and deputy consul general," provided for "vice" and "deputy" consuls. Section 1750 (page 1196) conferred on every "consular officer" the "authority and powers of a notary public." Revisal 1906, § 1024, validates acknowledgments before "vice consuls and vice consuls general." Held, in view of the above, Code, § 1245 (4), which authorized such acknowledgments before "any ambassador, minister, consul or commercial agent of the U. S.," included any consul, wheth-

er consul, consul general, or vice consul or deputy consul.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 85; Dec. Dig. § 18;*

For other definitions, see Words and Phrases, vol. 2, pp. 1480-1481.]

3. CONSTITUTIONAL LAW (§ 194*)—DEFECTS—CURATIVE STATUTES.

Statutes of the nature of Revisal 1905, § 1024, validating acknowledgments before consular officers, have always been within the power of the Legislature, though such statute would not be valid against a duly registered deed from the grantor, or a lien acquired against the grantor, before the validating act, but the validating of the probate of a deed would be good against a party not claiming under the grantor.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 548; Dec. Dig. § 194.*]

4. ACKNOWLEDGMENT (§ 6*)—ACKNOWLEDGMENT OF WIFE—PRIVY EXAMINATION.

If there was a defect in the privy examination of the wife of grantor, she might, if she outlived him, claim her dower against a party claiming under the deed, but that would not concern a party not claiming under grantor.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 51-53; Dec. Dig. § 6.*]

5. PUBLIC LANDS (§ 164*)—GRANT—DESCRIPTION.

If land lay in a certain county when entered, and, on creation of a new county, lay in the latter when granted, the grant is not invalidated because, following the words of the entry, it describes it as being in the old county.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 470; Dec. Dig. § 164.*]

Appeal from Superior Court, Graham County; Ferguson, Judge.

Action by Carolyn S. Powers and others against J. Q. Baker and others. From a judgment for plaintiffs, defendants appeal. No error.

Dillard & Bell, for appellants. A. D. Raby, T. A. Morphey, and Avery & Avery, for appellees.

CLARK, C. J. The plaintiff claims title under a grant No. 3,993, issued in 1877 to Jos. L. Stickney, upon an entry No. 6,317, made by him February 23, 1857. Stickney conveyed to the plaintiff by deed executed January 1, 1880, in London, England. The first exception is that the execution of this deed purports to have been acknowledged before "Joshua Nunn, Nee and Deputy Consul General, U. S. A." "Nee" is clearly a clerical error in copying for "Vice," for the evidence shows that Nunn at that time was "Vice and Deputy Consul General of U. S.," in London. He signs himself in above capacity and "ex officio notary public." The judge of probate of Graham county adjudged that "the foregoing deed has been duly acknowledged" and ordered it to registration. Rev. St. U. S. § 1674 (U. S. Comp. St. 1901, p. 1149), in force at that date, provides for "vice" and "deputy" consuls, and section 1750 (page 1196) confers upon every "consular officer" the "authority and powers of a notary public."

Code N. C. § 1245 (4), authorized such acknowledgments to be taken before "any ambassador, minister, consul or commercial agent of the U. S." This would seem to include any consul, whether consul, consul general or vice or deputy in view of the United States statute, *supra*, giving to every "consular officer" the authority and power of a notary public. It was so held in *Mott v. Smith*, 16 Cal. 533; 1 A. & E. Enc. 506, note 1. But to make the matter sure, the curative statute (Laws 1905, c. 451, § 2, now Revisal 1905, § 1024) validates acknowledgments before "vice consuls and vice consuls general." Validating statutes of this nature have always been within the power of the General Assembly (*Tatom v. White*, 95 N. C. 453), though such statute would not be valid against a deed from the same grantor duly registered, or a lien acquired against the grantor, before the validating act (*Barrett v. Barrett*, 120 N. C. 127, 26 S. E. 691, 36 L. R. A. 226). But the validation of the probate of a deed from Stickney to the plaintiff would be good against the defendant, who does not claim under Stickney.

The second exception is that there is a defect in the privy examination of the wife of Stickney. If so, she might claim her dower against the plaintiffs if she outlived her husband, but that is a matter that does not concern the defendant. The land when entered was in Cherokee county. When granted it lay, as the jury finds, in Graham, because that county had been then cut off in 1872 from Cherokee. There is nothing irregular in this. *Harris v. Norman*, 96 N. C. 59, 2 S. E. 72, has no application. There the entry and surveys were of land in Watauga, when at the time of the entry and survey the land claimed lay in Mitchell and had never been in Watauga. The grant to Stickney is of "640 acres lying and being in the county of Cherokee, section No. — in district No. 6, warrant No. 6,317, it being part of the land lately acquired by treaty from the Cherokee Indians, and sold in obedience to an act of the General Assembly of this state, bounded as follows, viz.: Beginning on a Spanish oak and hickory and runs west with Mauney's lien three hundred and twenty poles to a stake at the corner of E. L. Morron's survey, thence north three hundred and twenty poles to a rock in Big Snow Bird creek, thence east three hundred and twenty poles to a cucumber, thence south to the beginning, as by the plat on file in the office of the Secretary of State." The court properly held that if in fact the land lay in Cherokee when entered and by reason of the creation of Graham county it lay in the latter county when granted, the fact that the grant, following the words of the entry, described the land as being in Cherokee would not invalidate the grant.

There was uncontradicted evidence that Big Snow Bird creek is entirely in Graham

county, and evidence identifying the beginning corner and the location of the land, as claimed by the plaintiffs, but it was in evidence that district No. 6 is still in Cherokee. The plaintiffs contended that this was a mere clerical error for No. 9, in which district their evidence showed that the beginning corner and boundaries actually lay, which district is now in Graham. The court charged the jury: "Now, if you should find from the evidence from the time the survey was actually made that the corner of 6,317 was established at the point marked 'Hickory', and the other corners made as called for in the deed at that location, then it would be your duty to answer the third issue, 'Yes.'" The defendant's exception to this charge cannot be sustained. *Higdon v. Rice*, 119 N. C. 623, 26 S. E. 256, and cases there cited. In *Houser v. Belton*, 32 N. C. 358, 51 Am. Dec. 391, the jury were allowed to find that a corner which in the deed read "east" of a certain creek should have been written "west." Here the real contention was over the location of the land, and the jury, upon evidence and on a proper charge, have found the issue for the plaintiffs.

No error.

(153 N. C. 712)

McBRAYER v. HARRILL

(Supreme Court of North Carolina. May 27, 1910.)

1. MORTGAGES (§ 90*)—NECESSITY OF REGISTRATION.

Although Revisal 1905, § 982, provides that a mortgage shall be a lien only from its registration as between the parties to a mortgage or deed, the instrument is valid without registration; and it is also valid as against the personal representative of the mortgagor.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 199, 200; Dec. Dig. § 90.*]

2. EXECUTORS AND ADMINISTRATORS (§ 402*)—SALE OF PROPERTY—PAYMENT OF CLAIMS.

Under Revisal 1905, § 87, subd. 1, providing that debts of a decedent which by law have a specific lien on property are debts of the first class as to order of payment, an unregistered mortgage upon property of a decedent is a debt of the first class having a specific lien, with priority over all other classes of debt, and on a sale of the property by the mortgagor's administrator, after payment of a prior mortgage, the remaining proceeds should have been devoted to the payment of the unregistered mortgage, and not to other claims, after notice of the plaintiff's mortgage.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 402.*]

Appeal from Superior Court, Rutherford County; M. H. Justice, Judge.

Action by T. O. McBrayer against R. M. Harrill. Judgment for defendant, and plaintiff appeals. Reversed.

R. S. Eaves and B. A. Justice, for appellant. McBrayer, McBrayer & McRorie, for appellee.

CLARK, C. J. This is an action by the plaintiff (appellant) to recover out of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defendant, administrator, and the surety on his administration bond, a sum due by the defendant's intestate which was secured by a second mortgage on realty, which mortgage was unregistered at the date of the debtor's death, and remained so for some time after the order to sell the realty to make assets.

The appellant states in his brief: "The sole question before the court is: Will a mortgage not recorded till after the death of the mortgagor create a lien from the date of its registration as against other simple debts?" But in fact no subsequent registration is necessary. Revisal, § 982, provides that a mortgage shall be a lien only from its registration. But, as between the parties, a mortgage or deed is valid without registration. *Wallace v. Cohen*, 111 N. C. 103, 15 S. E. 892; *Deal v. Palmer*, 72 N. C. 582; *Leggett v. Bullock*, 44 N. C. 283. The personal representative stands in the shoes of his testator or intestate, and the unregistered mortgage has the same lien as it had between the parties. The mortgaged property brought enough to pay both mortgages over and above the costs of the sale. After paying off the costs of sale including defendant's commissions on the sale and the taxes on the mortgaged property, and the first mortgage, the surplus left should have applied to the lien of plaintiff's unregistered second mortgage. It was a specific lien with priority over all other classes of debt (Revisal, § 87 (1)) to the extent of the net proceeds of the realty covered by the mortgage. *Jones on Mortgages* (6th Ed.) § 509, *Jones, Chattel Mortgages*, § 239, which are cited with approval in *Williams v. Jones*, 95 N. C. 508; *Hinkle v. Greene*, 125 N. C. 489, 35 S. E. 554. It seems that the personal representative of the debtor applied the proceeds of the sale of the realty, after paying off the amount of the first mortgage, to other claims, after notice of the plaintiff's unregistered mortgage. He was evidently under the erroneous impression that, the plaintiff's mortgage being unregistered at the death of the mortgagor, the plaintiff had no specific lien. This was error.

The judgment below is reversed.

(152 N. C. 767)

BRYAN v. COWLES et al.

(Supreme Court of North Carolina. May 27, 1910.)

1. BROKERS (§ 86*)—COMPENSATION—EVIDENCE—SPECIAL CONTRACT.

In an action for services in selling real estate, evidence held insufficient to establish plaintiff's claim made on a special contract.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. § 86.*]

2. APPEAL AND ERROR (§ 1062*)—HARMLESS ERROR—SUBMISSION OF ISSUES.

In an action for services based both on a special contract and on quantum meruit, re-

versible error cannot be predicated on submission of the plaintiff's demand on a special contract not sustained by the evidence, where it is clear that this claim was rejected by the jury, which evidently awarded a verdict for plaintiff on the quantum meruit.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4218; Dec. Dig. § 1062.*]

3. WORK AND LABOR (§ 28*)—RECOVERY FOR SERVICES—EVIDENCE.

Evidence held to support a quantum meruit claim for services in a sale of land.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. § 55; Dec. Dig. § 28.*]

Appeal from Superior Court, Watauga County; Council, Judge.

Action by W. L. Bryan against Chas. H. Cowles and another, executors of Calvin J. Cowles, deceased. From a judgment for plaintiff, defendants appeal. Affirmed.

Plaintiff brought this action against C. J. Cowles, deceased, defendants' testator, before his decease, and after his death the present defendants qualified as his executors and were made parties. Plaintiff in first cause of action sues for \$10,950, which he alleges is due him under a paper writing, dated February 13, 1897, and hereinafter set out on account of the alleged sale of the defendants' testator's timber lands; and in a second cause of action he sues for the same amount, which he alleges is due him upon the quantum meruit on account of alleged sale of said lands. Defendants denied any and all liability for plaintiff's claim. On the trial the jury rendered the following verdict: "In what sum, if any, are defendants indebted to the plaintiff? Answer: \$5,000." Judgment on verdict for plaintiff, and defendants excepted and appealed.

Finley & Hendren, T. C. Bowie, and Manly & Hendren, for appellants. L. D. Lowe and T. A. Love, for appellee.

PER CURIAM. We have carefully considered the record and exceptions noted, and are of opinion that there has been no reversible error committed to defendants' prejudice.

It appeared that in 1903, 1904, and 1905, the testator, Calvin J. Cowles, had conveyed large bodies of mountain land, to wit, over 7,300 acres, to certain purchasers at an average price of \$4 per acre; the amount received therefor being \$29,364.40, and plaintiff claimed that these sales were brought about as result of plaintiff's labor and efforts, and under and by virtue of a special contract between plaintiff and defendant plaintiff was to have all the proceeds of said sale over and above \$2.50 per acre net to the owner, C. J. Cowles; the amount of plaintiff's demand in this aspect of the case being something over \$10,000. In case this claim is not established, plaintiff makes demand on a quantum meruit for services rendered in effecting said sales. The court submitted the claim to

the jury in both aspects and on a single issue, and the jury, as stated, rendered a verdict in plaintiff's favor for \$5,000, for which judgment was entered.

On consideration of the testimony, we concur with defendants in the position that the plaintiff has failed to establish his claim made on the special contract. According to plaintiff, this phase of his demand was made to rest on a letter written by the testator to plaintiff, in reference to a sale of these lands, bearing date February 18, 1897, and in terms as follows: "Wilkesboro, N. C., February 18, 1897. W. L. Bryan, Esq.—Dear Sir: I am glad you contemplate a visit to Washington City to effect a sale of a large body of mountain land; and as I have property of that kind which I would like to find a market for, I authorize you to make sale of as much as six thousand acres, at not less than two and 50-100 dollars per acre, net; one and 25-100 dollars cash and one and 25-100 dollars on one, two and three years, bearing six per cent. interest, interest payable annually, and the deferred payments secured by mortgage on the land situated in Wilkes and Watauga counties and west of Lewis Creek Fork. I repeat the price per acre, which is to be two dollars and fifty cents, net. Of course, I give good titles; but to enable me to clear them of liens it may be necessary for the purchasers to advance money or to pay into the office a part of the above purchase money. Wishing you success, I am, respectfully, Calvin J. Cowles"—with evidence tending to show a sale after and in pursuance of authority contained in the letter.

Defendants, denying that plaintiff properly interpreted the letter, further offered in evidence two letters of later date in terms as follows:

"Wilkesboro, N. C., July 1, 1897. W. L. Bryan, Esq.—Dear Sir: Yours of the 12th ult. duly received. Nothing since from you. We are now four (4) months away from the period of your deal with Pennsylvania friends; and, so far as I can see, there is little if any progress to the goal. The money promised and so much needed. This is extremely discouraging. Being compelled to have money, I have concluded to throw my lands open to the first applicant. If you come first, you have it; but if others come first, with the cash or its equivalent, before you do, why, just let him have it. So you see where I stand. Land for sale. 'First come, first served.' I hope you will get it, but all depends on celerity. Respectfully yours, [Signed] Calvin J. Cowles."

"Wilkesboro, N. C., July 19, 1897. W. L. Bryan, Esq.—Dear Sir: Yours of 2d, 8d and — inst., to hand—three letters. So far, nobody has appeared amongst us with money to buy lands; and, speaking for myself, I repeat that I am open for a trade. You have doubtless been disappointed. This has led to disappointment all along the line. If your

folks were here now, or if they beat the Dotson set, you will get my land; but I cannot extend the time only when the money is in sight. My necessities are too great to allow much lapse. S. J. G. and Absher have given H. an option of thirty days only. Yours truly, [Signed] Calvin J. Cowles."

And we are disposed to agree with defendants that if the letter relied on by plaintiff had amounted to the contract, as claimed by him, these subsequent letters written before any sale or contract or option looking to that end had been effected would have amounted to a revocation of the agreement; but we do not think that a proper construction of the first letter supports the plaintiff's position, that it was a binding agreement to allow plaintiff all over \$2.50 that the lands might net defendant. It was simply an authority to sell at the price indicated, and if more was obtained, the increase was to inure to the owner's benefit, the plaintiff to be paid for what his services were worth, if such was the understanding and agreement of the parties in the light of all the attending facts and circumstances. We are of opinion, therefore, that his honor should not have submitted the plaintiff's demand to the jury in the aspect of a claim under and by virtue of a special contract. We do not think, however, that this should be held for reversible error, because it is perfectly plain, from a perusal of the testimony and the charge of the court and verdict, that this claim was rejected by the jury. The lands sold were over 7,000 acres at an admitted price of \$4 per acre, and, if the jury had sustained plaintiff's demand on a general contract, the claim would have been not less than \$10,000. The jury have, therefore, evidently awarded this verdict on the quantum meruit, and, unless there was error in submitting the claim in this phase of the matter, we do not think the result of the trial should be disturbed. *Rhyne v. Rhyne*, 151 N. C. 400, 68 S. E. 348.

There was abundant testimony to support such a claim. The evidence on the part of plaintiff tended to show that after the writing of the letter of February, 1897, the plaintiff was engaged for six years and over in the endeavor to effect a sale of these lands for testator; that he spent both time and money in such service, and that this was done with the full knowledge and approval of the testator; and that the sale was brought about by reason of plaintiff's labor and efforts to that end. This view of the case was submitted to the jury under a charge free from error, and their verdict is justified on the testimony and the familiar principle last stated in *Winkler v. Killian*, 141 N. C. 575, 54 S. E. 540, 115 Am. St. Rep. 694, as follows: "It is ordinarily true that where services are rendered by one person for another, which are knowingly and voluntarily accepted, without more, the law presumes that such services are given and received in expectation of be-

ing paid for, and will imply a promise to pay what they are reasonably worth."

There is no error disclosed in the record, and the judgment in plaintiff's favor is affirmed.

No error.

(152 N. C. 720)

HARBISON v. ALLEN et al.

(Supreme Court of North Carolina. May 27, 1910.)

1. REMOVAL OF CAUSES (§ 73*)—DIVERSE CITIZENSHIP — RELIEF EXCEEDING JURISDICTIONAL AMOUNT.

A cause between citizens of different states, wherein plaintiff sought \$2,000 damages and a permanent injunction to prevent his land from becoming "wholly worthless," is removable as a cause wherein the relief asked for exceeds the jurisdictional amount.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 73.*]

2. REMOVAL OF CAUSES (§ 116*)—EFFECT OF VALID PETITION—DISSOLUTION OF INJUNCTION.

On filing in apt time a valid petition, the court's jurisdiction is determined, and defendant's remedy, as to an injunction granted in the cause, is by motion in the federal court to dissolve it.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 116.*]

Appeal from Superior Court, Burke County; M. H. Justice, Judge.

Action by J. M. Harbison against W. H. Allen and others. Defendants' motion to remove the cause was refused, and they appeal. Reversed.

Avery & Ervin, for appellants. J. F. Spainhour, for appellee.

CLARK, C. J. It was error to refuse the motion of the defendants to remove the cause to the United States Circuit Court. The petition and bond were filed in apt time. The court finds as a fact that the controversy is wholly between citizens of different states and wholly determinable between them. The court further finds that plaintiff, in his complaint, asks damages in the amount of \$2,000 and a permanent injunction against defendants, and that defendants claim in their petition for removal that the granting of this injunction will deprive them of property to the amount of \$3,000 over and above the \$2,000 claimed by plaintiff for damages accrued. Upon these findings, defendants were entitled to a removal of the cause.

In Corp. Com. v. R. R., 135 N. C. 80, 47 S. E. 229, the court cites with approval, R. R. v. McConnell (C. C.) 82 Fed. 85, which lays down the rule in equity cases as to removals: "It is the value of the whole object of the suit to complainant which determines the amount in controversy."

In Ayers v. Watson, 113 U. S. 594, 5 Sup. Ct. 641, 28 L. Ed. 1068 (a case decided when the jurisdictional amount was \$500 instead

of \$2,000, as now), Justice Bradley, for the court, says: "The plaintiff's petition demanded the recovery of the land and \$500 damages. This was certainly a demand for more than \$500, unless it can be supposed that the land itself was worth nothing at all, which will hardly be presumed. Sheriff v. Turner, 119 Fed. (C. C.) 231; R. R. v. Conningham (C. C.) 103 Fed. 708; Smith v. Bivins (C. C.) 56 Fed. 352."

In the case at bar the plaintiff seeks \$2,000 damages and a permanent injunction. Plaintiff states in his complaint that, unless defendant is restrained, plaintiff's two tracts of land "will be rendered wholly worthless." He claims \$2,000 for damages already done. That is as far as he could go without making his cause removable. But he goes further, and asks the benefit of a permanent injunction to prevent his lands from becoming "wholly worthless." If that relief is worth one penny, he has exceeded the jurisdictional amount, upon his own showing.

"Where a bill in equity is filed to abate a nuisance or to set aside a deed, or for a decree giving other mandatory or preventive relief, it is the value of the property of which the defendant may be deprived by the decree sought which is the test of jurisdiction, and not the claim of plaintiff alone." Baltimore v. Postal Co. (C. C.) 62 Fed. 502; 18 Enc. Pl. & Pr. 270.

"Where the object of a suit is to restrain the use of property by a party other than the owner, the right to use the property is the matter in dispute, and the value of such right determines the question of jurisdiction." Olson v. R. R. (C. C.) 44 Fed. 1.

"The sum or value of the matter in dispute which conditions the jurisdiction of a federal court is the amount or value of that which the complainant seeks to recover, or the amount or value of that which the defendant will lose if the complainant obtains the recovery he seeks." Cowell v. Water Co., 121 Fed. 53, 57 O. C. A. 393.

"It is conceded that the pecuniary value of the matter in dispute may be determined not only by the money judgment prayed, where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief, or by the pecuniary results to one of the parties immediately from the judgment." Smith v. Adams, 130 U. S. 174, 9 Sup. Ct. 569, 32 L. Ed. 895.

"Where property itself, or its title, is in litigation, or some question per se affecting its enjoyment and possession, its value is the real matter in controversy, as distinguished from the claim of the contending parties." 1 Enc. Pl. & Pr. 726.

"In a suit in equity for an injunction, the value of the matter in dispute is that of the object of the bill, namely, the value to the complainant of the right for which he prays

protection, or the value to defendant of the acts of which plaintiff prays prevention, together with the amount of damages which plaintiff claims he has already sustained, and prays to have awarded to him." 84 Cyc. 1235; Scott v. Donald, 165 U. S. 107, 17 Sup. Ct. 262, 41 L. Ed. 648.

The appellants ask that we also pass upon the exception for granting the injunction. But upon filing in apt time a valid petition to remove, the jurisdiction of the state court determined. The remedy of the appellants is by motion in the federal court to dissolve the injunction.

Reversed.

(152 N. C. 672)

GODWIN v. PARKER.

(Supreme Court of North Carolina. May 27, 1910.)

1. INSANE PERSONS (§ 61*) — CONTRACT — KNOWLEDGE OF INSANITY.

Where plaintiff obtained a contract for the conveyance of real estate from a person who he knew had been adjudged insane, while under such adjudication such contract would be regarded as void for fraud.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 93; Dec. Dig. § 61.*]

2. CANCELLATION OF INSTRUMENTS (§ 59*) — CONVEYANCE BY INSANE PERSON — CONDITIONS PRECEDENT.

Where, after plaintiff obtained a contract for the sale of real estate from an adjudicated insane person, he entered into possession and placed improvements on the land of the value of \$475, and remained in possession for nearly eight years, receiving the rental value of the land, which was \$100 per year, the insane person, on obtaining a decree, vacating the contract was not liable for the improvements; plaintiff not being required to account for prior rents and profits received nor entitled to charge defendant with taxes assessed, etc.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 124; Dec. Dig. § 59.*]

Appeal from Superior Court, Harnett County; W. R. Allen, Judge.

Action by H. L. Godwin against T. A. Parker, as guardian of Bud Tart, to compel specific performance of a contract for the sale of real estate. From a judgment for plaintiff, but requiring him to pay a certain sum for improvement on the land and imposing a lien thereon for the amount, defendant appeals. Reversed.

The plaintiff brought this action to compel specific performance of the following contract:

"North Carolina, Harnett County.

"I, Bud Tart, of said county and state, have this day given to H. L. Godwin the privilege of erecting a store building on my lot in Dunn, N. C., the same being lot No. 11 in the subdivision of the original lot No. 8 in block R in the blueprint, plan of town of Dunn, N. C. The said H. L. Godwin has the privilege of remaining in possession of said

lot for three years from the date of this contract, and he is required to keep the taxes paid on said lot. And it is agreed and understood, and I do hereby bind myself, my heirs, executors and administrators to make a good and lawful deed to H. L. Godwin, his heirs or assigns, upon the receipt of the sum of \$360, which must be paid indefinitely (immediately) upon the expiration of this contract, or at any time before it expires.

"This June 17, 1902.

his
"Bud X Tart. [Seal.]
mark
"H. L. Godwin. [Seal.]"

His honor submitted the following issues to the jury, which were responded to as set out: "(1) Did the plaintiff and the defendant Bud Tart execute the contract set out in the complaint? Answer: Yes. (2) Did Bud Tart, at the time of executing the said contract have sufficient mental capacity to make same? Answer: No. (3) If not, did the plaintiff have notice of said mental incapacity? Answer: Yes. (4) What was the value of said lot on the 17th day of June, 1902? Answer: \$360. (5) What was the value of the improvements put on said land by H. L. Godwin? Answer: \$1,000. (6) What was the annual rental value of the lands before the improvements were put upon it by the plaintiff? Answer: Nothing. (7) What was the annual rental value after the improvements were put upon it by the plaintiff? Answer: \$100."

Upon the verdict, his honor rendered the following judgment: "This cause came on for trial at the November term, 1909, of the superior court of Harnett county, before W. R. Allen, judge, and a jury, and the jury having returned their verdict, as appears in the record, it is, upon said verdict and the admissions in the pleadings, considered and adjudged that the defendant Bud Tart is the owner in fee of the lot described in the complaint, and that he is entitled to recover possession thereof of the plaintiff, H. L. Godwin, upon the payment to him of the sum of one thousand dollars, the value of the improvements placed on said land by the plaintiff. And it further appearing to the court that the defendants still refuse to perform the contract referred to in the issue, and that they demand possession of said lot, it is further considered and adjudged that said sum of one thousand dollars is due to the plaintiff, H. L. Godwin, and the same is a lien on said lot, and, upon failure to pay the same within ninety days, it is ordered that the said lot be sold for the satisfaction thereof by N. A. Townsend and E. F. Young, now appointed commissioners for that purpose, who shall report their proceedings to this court. It is further ordered that each party pay his costs. Let the pleadings be amended, if so advised."

The plaintiff testified, over the objection of the defendant, that he had been in possession of the lot since June, 1902; that he knew Bud Tart had been in the asylum; that he returned to the asylum at Raleigh; that the building put by him on the lot cost him \$475, not exceeding \$500; that its rental value was \$100 per year; that he had received the rents; that he had tendered the amount he was to pay to defendant Parker, as guardian of Bud Tart, and demanded a deed from him; that Parker declined to make the deed. Another witness for plaintiff testified that Bud Tart, at times, looked dangerous. The summons showed service on Dr. James McKee, superintendent of the State's Hospital at Raleigh, N. C., where Bud Tart was confined; the service was made June 17, 1905. There was evidence that the unimproved lot was worth, in June, 1902, from \$300 to \$400, and that it had since then increased in value. The defendant tendered the following judgment: "This cause coming on to be heard and being heard before his honor, W. R. Allen, and a jury, and the issues answered as follows (here follow the issues as set out above): It is now considered, ordered, and adjudged that the defendants, Bud Tart and his guardian, T. A. Parker, recover of the plaintiff, H. L. Godwin, the possession of the said land described in the complaint; and it is further ordered and decreed that the paper writing or contract referred to and set out in the complaint be canceled of record; and it is further adjudged that the plaintiff pay the costs of this action, to be taxed by the clerk."

To the judgment of the court, defendant excepted and appealed to this court.

E. F. Young and H. E. Norris, for appellant. Godwin & Townsend and J. C. Clifford, for appellee.

MANNING, J. In our opinion, the judgment of his honor is not supported by the adjudications of this court. The jury found that Bud Tart was insane at the time he attempted to contract with the plaintiff, and his insanity was known to the plaintiff. Upon a verdict establishing the same facts, this court, in *Creekmore v. Baxter*, 121 N. C. 31, 27 S. E. 994, said: "The first two issues found facts which constitute fraud in law. No other kind of fraud was charged in the pleadings; and the third issue, referring to actual fraud in fact, is neither necessary nor contradictory. It cannot be doubted that any one dealing with an insane person, knowing his insanity, deals with him at his own peril." "The ground upon which courts of equity interfere to set aside the contracts and other acts, however solemn, of persons who are idiots, lunatics, and otherwise non compos mentis, is fraud. Such persons being incapable, in point of capacity, to enter into any valid contract or to do any valid act,

every person dealing with them, knowing their incapacity, is deemed to perpetrate a meditated fraud upon them and their rights." *Story*, Eq. Jur. § 227; *Adams*, Eq. 183; *Odom v. Riddick*, 104 N. C. 515, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. Rep. 686; *In Sprinkle v. Wellborn*, 140 N. C. 163, 52 S. E. 668, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827, Mr. Justice Walker, speaking for this court, said: "If, therefore, one person induces another, who lacks this capacity or this freedom, to enter into an apparent contract, equity will not recognize the transaction, however, as one author says, it may be fenced by formal observances, but, deeming it fraudulent, will in proper cases afford relief against it at the suit of the party imposed upon. *Fetter on Equity*, 143. On this ground, the contracts of idiots, lunatics, and other persons non compos mentis are generally regarded, in a certain sense, as invalid. It has been said by many courts that the contracts of a lunatic, made after the fact of insanity has been judicially ascertained, are absolutely void, and that he can have no power to contract at all until there is reversal of the finding and he is permitted to resume control of his property. *Fetter*, Eq. 143; *Odom v. Riddick*, 104 N. C. 515 [10 S. E. 609, 7 L. R. A. 118, 17 Am. St. Rep. 686]." *Beeson v. Smith*, 149 N. C. 142, 62 S. E. 888. The plaintiff's evidence established the fact that the insanity of Bud Tart had been judicially ascertained, for it appeared that he had previously been committed to the State's Hospital for the care of the insane, and the verdict establishes the fact of his insanity at the time of the alleged contract, to the knowledge of the plaintiff. In *Creekmore v. Baxter*, supra, this court said: "Courts of equity always protect innocent purchasers as far as possible, and ordinarily place the parties back in statu quo, when it can be done without injury to either; but if any one contracts with a lunatic, knowing his insanity, he must bear alone whatever loss arises from the transaction." The evidence of the plaintiff himself shows, however, that a reversal of the judgment can work no loss or inequity to him; he has now had possession of the property for nearly eight years, at a rental of \$100 per year, and the improvements put by him on the lot cost him, by his own evidence, \$475. From this statement it clearly appears that the plaintiff will sustain no loss by the improvements placed by him upon the property. In no event is he entitled to betterments. It is our opinion that his honor should have signed the judgment tendered by the defendant, and that he was in error in signing the judgment tendered by plaintiff. We therefore reverse the judgment of his honor and direct judgment to be entered in accordance with this opinion, without liability to the plaintiff to further account for the rents and profits by him received to June 17, 1910, and without charge to the defend-

ant for the taxes which may have been assessed against said property, and which are to be a charge against the plaintiff. The plaintiff will pay the costs of this action.

Reversed.

(153 N. C. 702)

COORE v. SEABOARD AIR LINE RY. CO.
(Supreme Court of North Carolina. May 27, 1910.)

1. MASTER AND SERVANT (§ 264*)—ACTION FOR INJURIES—PLEADING—"MATERIAL VARIANCE."

A complaint by an injured brakeman alleged that the engineer negligently, and without any warning, applied the steam, and violently jerked the slack out of the train, causing plaintiff to miss his footing, whereby he was thrown between the cars, etc., and that when the engineer started the train he was working on top in the act of stepping from one car to another, and that as the train was started and the cars were jerked apart he fell between them and was injured. *Held*, that there was no variance between the complaint and evidence that the engineer started the train at a high rate of speed, and that if there was it was immaterial, in view of Revisal 1905, § 515, providing no variance shall be deemed material unless the adverse party is actually misled to his prejudice in suing on the merits.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

For other definitions, see Words and Phrases, vol. 5, p. 4408.]

2. PLEADING (§ 398*)—MATERIAL VARIANCE—PROOF OF BEING MISLED—NECESSITY.

Under Revisal 1905, § 515, providing that a party claiming to have been misled by a variance in maintaining his case on the merits shall prove that fact and in what respect he has been so misled, the variance will be deemed immaterial in the absence of such proof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1338; Dec. Dig. § 398.*]

3. APPEAL AND ERROR (§ 1053*)—HARMLESS ERROR—WITHDRAWAL OF EVIDENCE.

Withdrawal of testimony from consideration of the jury cures any error in admitting it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.* Trial, Cent. Dig. § 977.]

4. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS. So far as a request to charge is substantially given, error cannot be predicated on its refusal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

5. MASTER AND SERVANT (§ 137*)—INJURY TO BRAKEMAN—NEGLIGENCE OF CONDUCTOR OR ENGINEER—RECOVERY THEREOF.

If a conductor orders a brakeman to go up on the cars, release the brakes, and signal to the engineer when to start, and while he is performing this duty the engineer moves the train in obedience to a signal from the conductor, and the brakeman is thereby thrown from a car and injured as the proximate result of the negligence of the conductor or engineer, he may recover therefor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 270-278; Dec. Dig. § 137.*]

Appeal from Superior Court, Moore County; Lyon, Judge.

Action by Thos. J. Coore against the Seaboard Air Line Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Douglas & Lyon and H. F. Seawell, for appellant. Walter H. Neal and U. L. Spence, for appellee.

WALKER, J. This action was brought by the plaintiff to recover damages for injuries alleged to have been sustained by him while engaged in the performance of his duties as a brakeman in the service of the defendant. The plaintiff alleged that he was ordered by the conductor to go up on the freight cars, which were coupled to an engine, for the purpose of giving a signal to the engineer to start the train, and of attending to his other duties. That when he was on the top of one of the cars, and about to step to another car, the engineer, without any signal or warning from him, but after receiving a signal from the conductor to go ahead, suddenly and negligently started the train and violently jerked out the slack, which caused him to fall as he was passing from one car to the other. There was evidence tending to show negligence on the part of the defendant. The plaintiff, when testifying in his own behalf, was permitted by the court to state that "the engineer started off at a high rate of speed—quick start." The defendant objected to this testimony upon the ground that it is not alleged in the complaint that the engineer started the train at a high rate of speed. The allegation of the complaint is that the engineer suddenly, negligently, carelessly, and without any signal or warning to the plaintiff, applied the steam to the engine and violently jerked the slack out of the said train, pulling the cars further apart, and causing the plaintiff to miss his footing, and thereby he was thrown between the said cars and seriously injured. It is further alleged that, at the time the train was started by the engineer, the plaintiff was walking along the running board on the top of the car, and was in the act of stepping on the running board of the car immediately in the rear, which was coupled to the one upon which he was walking, and that as the train was started and the cars were jerked apart he fell between them and was injured.

It is provided by Revisal 1905, §§ 515, 516, as follows: "No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the judge may order the pleading to be amended upon such terms as shall be just.

Where the variance is not material as provided in the preceding section, the judge may direct the fact to be found according to the evidence, or may order an immediate amendment without costs."

We do not think there was any substantial variance between the allegation of the complaint and the proof. If there was any variance at all, it was immaterial, and, if material, the defendant did not comply with the requirements of the sections in the Revisal to which we have referred. There was, though, no variance, as it clearly appears by the allegation in the complaint and the proof that the plaintiff was injured before the train had acquired any speed, and that his fall between the cars was caused by the sudden and unexpected movement of the train, which jerked the cars apart. This exception is without any merit.

The court permitted the plaintiff, as a witness, in his own behalf, to testify that he was acting carefully when he stepped from the one car to the other, but afterwards withdrew this testimony from the consideration of the jury. The defendant duly excepted to the testimony, but the withdrawal of the same cured the error of the court, if any was committed. *Bridgers v. Dill*, 97 N. C. 225, 1 S. E. 767; *Cowles v. Lovin*, 135 N. C. 488, 47 S. E. 610.

The defendant requested the court to charge the jury that the defendant, upon the allegations of the complaint and proof, is not liable for a sudden, violent, or careless jerk of the train, nor for a jerk without a signal, unless the same was necessary in the handling of the train, there being no evidence that it was unnecessary. We think the instruction was substantially given by the court, except in the following respect: The court charged the jury that if the engineer should not have started the train without a signal from the plaintiff, and he did start it and jerked the cars apart, so that the plaintiff was thrown between the cars and engine, and if the jury should further find that the act of the engineer was the proximate cause of the injury, they should answer the first issue, "Yes;" and if they did not find the facts to be as above stated, they should answer the issue, "No." If the conductor ordered the plaintiff to go up on the cars, release the brakes, and signal to the engineer when to start the train, and while the plaintiff was in the performance of his duty the engineer moved the train in obedience to a signal from the conductor, who had given the order to the plaintiff, and the plaintiff was thereby thrown from the car and injured, as the proximate result of the negligent act of the conductor or the engineer, we are unable to see why the plaintiff is not entitled to recover. *Redman v. Railroad*, 150 N. C. 400, 64 S. E. 195; *Railroad v. Murray*, 55 Kan. 336, 40 Pac. 646.

It is unnecessary to consider the other exceptions, as some of them were withdrawn, and those remaining have been sufficiently considered and disposed of by what we have already said.

No error.

(152 N. C. 710)

HIGHWAY COMMISSION OF VALLEY-TOWN TP. v. C. A. WEBB & CO.

(Supreme Court of North Carolina. May 27, 1910.)

1. TOWNS (§ 52*)—PUBLIC ROADS—BONDS—POWER TO ISSUE.

Under Laws 1905, c. 210, as amended by Laws 1909, c. 237, authorizing the highway commission of Valleytown township to improve the public roads of the township, and to issue bonds of the township not exceeding \$25,000 to pay necessary expenses, the commission has no power to issue bonds in addition to the \$25,000 without the special approval of the Legislature.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. § 90; Dec. Dig. § 52.*]

2. MUNICIPAL CORPORATIONS (§ 72*)—INDEBTEDNESS—NECESSARY EXPENSES—TERMS AND CONDITIONS.

While the special approval of the Legislature is not required to enable a municipality to contract a debt for necessary expenses, the Legislature may prescribe the terms and conditions upon which such a debt, or any other debt, may be incurred.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 176; Dec. Dig. § 72.*]

Appeal from Superior Court, Cherokee County; J. S. Adams, Judge.

Submitted controversy by the Highway Commission of Valleytown Township against C. A. Webb & Co. Judgment for defendant, and plaintiff appeals. Affirmed.

Dillard & Bell and T. H. Calvert, for appellant.

WALKER, J. This case was submitted to the court below as a controversy without action, under the statute, to determine the validity of certain bonds proposed to be issued by the plaintiff, and which the defendants had contracted to purchase. They refused to pay for the bonds upon the ground that the plaintiff had no power to issue them, and that, therefore, when issued, they would be invalid. It appears from the case agreed that the plaintiff was incorporated by the Public Acts of 1905, c. 210, and was vested with all the powers, rights, duties, and authority of the board of county commissioners, with respect to the public roads of Valleytown township. By the acts of 1909, c. 237, the plaintiff was authorized to improve and macadamize the public roads of the said township, and for that purpose it was authorized to issue coupon bonds of the township "for an amount sufficient, not exceeding \$25,000, to pay the necessary expenses of constructing and improving and

macadamizing the public roads in the township, and to sell the same publicly or privately, at not less than their par value." Bonds to the amount of \$25,000 were issued in accordance with the terms and provisions of the act of 1909, and were sold by the commission, and the proceeds applied in constructing, improving, and macadamizing the public roads in the township, but it was found that the amount realized from the sale of the bonds, namely, \$25,000, was not sufficient to carry out the scheme of improvement contemplated by the commission. It was thereupon decided that additional bonds be issued, to an amount not exceeding \$75,000, and the defendants contracted to buy the same. The question, therefore, is whether the commission has the power, under the law, to issue any additional bonds without the special approval of the Legislature. This question has been so recently decided, after a thorough investigation and full discussion by this court, that it would seem to be now well settled that no such power resides in the commission. While the expense of improving and macadamizing the public roads may be conceded, for the sake of argument, to be a necessary expense, we held in *Wadsworth v. Concord*, 133 N. C. 587, 45 S. E. 948, that wherever the debt of a municipality is to be incurred, even for a necessary expense, it is within the province of the Legislature to prescribe the terms and conditions upon which municipal corporations may enter into a contract, by which such a debt is incurred. This principle was approved in *Davis v. Fremont*, 135 N. C. 538, 47 S. E. 671. We recognized the correctness of the principle in the case of *Wharton v. Greensboro*, 149 N. C. 62, 62 S. E. 740. In the recent case of *Burgin v. Smith*, 151 N. C. 561, 66 S. E. 607, the subject was fully discussed by Mr. Justice Manning, and it was held by the court that where the right to incur a debt, even for a necessary expense, was limited to a certain amount by an act of the Legislature, that amount could not be exceeded where the contract was an entire one, and we further held that the Legislature had the constitutional power to restrict or limit the amount of indebtedness to be incurred by a county or municipality, even for a necessary expense. The court cited and approved *Hightower v. Raleigh*, 150 N. C. 569, 65 S. E. 279, in which we held that, "while it is within the province of the court to determine what are necessary public buildings, and what classes of expenditure fall within the definition of necessary expenses of a municipal corporation, the authority for determining the kind of building which is needed, or what would be a reasonable cost for it, is not within the purview of the judicial authority, but is vested in the Legislature and the municipal authorities, and not in the courts." We have held at this term, in *Ellison v.*

Williamston, 67 S. E. 255, that the Legislature has the power to restrict the authority of a municipality to issue bonds. The case of *Burgin v. Smith*, was approved, and it was said by Mr. Justice Hoke, when referring to the previous decisions of this court upon the question now presented, that where the limit as to the amount of bonds is fixed by the Legislature in the act authorizing them to be issued by the municipality, the latter cannot exceed that limit without further legislative sanction. It may be said generally that in all such cases the Legislature has plenary power to control the action of the municipalities in this state in the creation of any indebtedness, even for necessary expenses, and there is nothing in the Constitution which is in conflict with this statement of the law. When that instrument is read as a whole, it appears to have been the intention that the Legislature should have complete control and authority in such matters. We do not mean to say that the special approval of the General Assembly is required in order that a municipality may contract a debt for necessary expenses, but only to decide that where the Legislature does take action and restrict the right of a municipality to contract a debt, even for necessary expenses, by limiting the indebtedness to a certain amount, it is only exercising power which is clearly recognized by the Constitution. There was no error in the ruling of the court, by which its decision was given against the plaintiff upon the case agreed.

Affirmed.

(153 N. C. 663)

WELLS et al. v. BOARD OF COMRS OF CHEROKEE COUNTY.

(Supreme Court of North Carolina. May 27, 1910.)

1. HIGHWAYS (§ 118*)—DAMAGES—ACTION—NATURE—MONEY DEMAND.

A suit to compel county commissioners to pay damages caused by laying out a road improvement is one to enforce a money demand.

[Ed. Note.—For other cases, see *Highways*, Dec. Dig. § 118.*]

2. HIGHWAYS (§ 118*)—ESTABLISHMENT—DAMAGES—LIABILITY.

Acts 1905, c. 210, providing for the government of the roads of a particular township by a special commission, exempts the township from the general road law, including the provision of Revisal 1905, § 2885, making damages assessed for new roads a county charge; and hence the remedy to recover damages assessed is against the township road officers, and not against the county commissioners.

[Ed. Note.—For other cases, see *Highways*, Dec. Dig. § 118.*]

Appeal from Superior Court, Cherokee County; Ferguson, Judge.

Mandamus suit by H. N. Wells and others against the Board of Commissioners of Cher-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

okee County. From a judgment for defendant, petitioners appeal. Petition dismissed.

Upon the hearing his honor rendered the following judgment:

"In the above-entitled case the summons was made returnable to August term of the superior court. See summons. An alternative mandamus issued returnable on second Monday in August, being the first day of said term, commanding the board of commissioners to pay, or cause to be paid, the several sums of the respective petitioners, or show cause why they did not. It appears from the statute creating the highway commission of Valletown township and the petition filed herein that the proceedings were regular, and that the jury assessed the damages as claimed by the respective petitioners, and that the report of the jury was confirmed by the said highway commission of Valletown township, and that demand has been made on the board of commissioners for payment of the respective sums assessed as damages, and payment refused. On the call of the petition for hearing the respondents did not answer, but moved the court to transfer the case to the appearance or summons docket, to be tried as other civil actions. This motion was based on the contention that the suit was for a money demand. With light before the court, the motion of the board of county commissioners was granted and the petitioners excepted. The board of commissioners filed a demurrer to the petition. After argument it was agreed by and between counsel that the judge should take the papers and review the former ruling as well as to render judgment on the demurrer and render his decision out of term.

"I am of the opinion: That the statute creating the highway commission is authorized by the Constitution. That, so far as appears from the petition, the proceedings were regular and damages assessed just. I regard the report of the jury laying off the roads and assessing the damage, and the confirmation of the report of the highway commission of equal and no greater force than the report of a jury appointed by the board of commissioners under section 2685 of Revisal of 1905. That in neither instance is the county or individual bound by the report but the same is subject to review by the board of county commissioners. That said board may allow the claim for damages as reported, or may increase or decrease the damages as awarded, or disallow it altogether, and from such order the individual may appeal to the superior court if so advised, or taxpayer of the county, by making himself a party to the action, may appeal to the superior court. This being my view of the law and method of procedure, I sustain the demurrer, and adjudge that the petitioners pay the cost of the proceeding. The petitioners, if so advised, have leave to formally present the report to the board of

commissioners of Cherokee county, take such other course as to them may seem most advisable."

Dillard & Bell, for appellants. Ben Posey and W. M. Axley, for appellee.

BROWN, J. As we construe the act to improve the public roads in Valletown township, in Cherokee township, Cherokee county (chapter 210, Acts 1905), this proceeding cannot be maintained. We agree with his honor that the mandamus is sought to enforce a money demand, but, in our opinion it is not a money demand payable from the general funds of Cherokee county, and a mandamus will not lie against its board of commissioners to compel payments.

The aforesaid act created a body corporate under the name of the highway commission of Valletown township, and gave to such commission complete jurisdiction over the roads of that township, including the laying out of new roads as well as the repair and maintenance of all roads. The act provides for the election of commissioners by the justice of the peace of the township and also for the appointment of a secretary and treasurer. It also provides that all road taxes for Valletown township in the hands of the sheriff be paid over to such treasurer, and that all moneys arising from taxes in that township levied for road purposes be kept separate to be expended upon the roads of the township. Section 4 of the act provides: "The treasurer of said highway commission shall make payments out of the road funds belonging to said township only upon the written order signed by the president and secretary of the commission." It is contended that by section 2685 of the Revisal of 1905 the damages assessed on account of laying out public roads are deemed and made a county charge. That is true under the general road law, but Valletown township has a road law of its own which exempts it from the general road law of the state.

Under that law, the remedy of petitioners is to be had by proceedings against that corporate body and treasurer thereof.

Petition dismissed.

(152 N. C. 715)

FORTUNE v. HUNT et al.

(Supreme Court of North Carolina. May 27, 1910.)

1. DEEDS (§ 129*)—CONSTRUCTION—INTEREST CONVEYED.

A deed stated that in consideration of \$800 the grantor conveyed the property specified to the grantee named, who was the widow of the grantor's son, "during her widowhood, then to her children, the heirs of" said son. The grantor warranted the premises to said grantee during her lifetime or widowhood, then to the said heirs of her husband (the grantor's son) forever, in the following manner, to wit, William Hunt is to pay \$50 to E. S. Hunt, \$50 to John

Hunt, and \$5 to Collace Hunt, and to the heirs of my daughter Elizabeth Hunt, namely, Alsaline and Sarah Hunt, \$50. The above obligation being filled, the lands above described to belong to William Hunt and his heirs, forever." Held, that the deed should be construed as giving the widow a life estate, with remainder in fee to her children who were the children of the grantor's son, and as charging the interest of one of the children, William Hunt, with the payment of \$155.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 360-364; Dec. Dig. § 129.*]

2. DEEDS (§ 97*)—CONSTRUCTION—REPUGNANT CLAUSES.

If there are repugnant clauses in a deed, the first clause will control.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 289; Dec. Dig. § 97.*]

3. APPEAL AND ERROR (§ 984*)—ORDERS REVIEWABLE—TAXATION OF COSTS.

Under Revisal 1905, § 1268 (7), providing that all costs and expenses in partition proceedings, whether by sale or actual division, shall be taxed against either party or apportioned among the parties in the discretion of the court, taxation of costs in partition proceedings is irreviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3881, 3882; Dec. Dig. § 984.*]

Appeal from Superior Court, Rutherford County; J. S. Adams, Judge.

Action by Mrs. M. E. Fortune against Hal Hunt and others. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 149 N. C. 358, 63 S. E. 82.

J. M. Carson, for appellants. McBrayer & McBrayer, for appellee.

CLARK, C. J. This is a petition for partition, transferred upon "issue of title" joined to the superior court. The deed executed in 1870 recites that in consideration of \$800 the grantor conveys the property to "Elizabeth Hunt" (who was the widow of grantor's son, Alferia Hunt) "during her widowhood, then to her children, the heirs of said Alferia Hunt." Said children took "as heirs" in fee simple, for in the warranty clause the grantor warrants the premises to "said Elizabeth Hunt during her lifetime or widowhood, then to the said heirs of her husband, Alferia Hunt, forever, in the following manner, to wit: William Hunt is to pay \$50 to E. S. Hunt, \$50 to John Hunt, \$5 to Collace Hunt, and to the heirs of my daughter Elizabeth Hunt, namely Alsaline and Sarah Hunt, \$50. The above obligation being filled the lands above described to belong to William Hunt and his heirs, forever."

It will be noted that the life tenant paid \$800. It is to be presumed that the remainder, given by the grantor to his grandchildren, was worth much more. It is unreasonable to suppose that the grant to them in

the conveying clause is revoked by the warranty clause, or that immediately after the warranty clause warrants the premises to "the heirs of Alferia Hunt, forever," it should immediately deprive them of it in favor of William Hunt upon payment by him to Collace Hunt of \$5, on payment to A. W. Hunt of nothing, on payment to Elizabeth Hunt of \$50, and \$50 to her daughters. It is true that the warranty clause says that on payment of above sums "the lands above described to belong to William Hunt and his heirs, forever." But this is strictly construed, *au pied du lettre*, it gave to William Hunt the life estate of the widow as well as all the five shares of the remaindermen. This would contradict the entire conveying clause and all the first part of the warranty clause, both of which gave the land to the mother for life with remainder to the five "heirs." The true meaning is, of course, that upon payment by William of the \$155 William Hunt's interest in the lands as already "described" is to go to him. The grantor was evidently charging his share with said \$155, which \$155 it is not even claimed that he has ever paid, though the deed was made 40 years ago, and the other heirs have not sought to make him pay it, even now. Had the clause meant to cancel all the previous parts of the deed, William and his heirs are barred by the delay for 40 years to pay the \$155 and take the property.

We think his honor correctly held that this conveyance was to the widow for life, with remainder to the five children named, "heirs of Alferia" (the deceased son of grantor) in fee simple, and one of them (John) being dead without issue, and, the life tenant being lately deceased, the proceeds of the sale were properly decreed to be divided into four shares, the heirs, or assignees, of each of the four taking one-fourth, as recited in the judgment. The recital in the warranty does not vitiate the conveying clause. It was a crude attempt to charge William Hunt's share with payment of the sundry amounts set out, but there is no judgment charging said sums and neither side excepts. If there are repugnant clauses in a deed, the first will control. *Wilkins v. Norman*, 139 N. C. 40, 51 S. E. 797, 111 Am. St. Rep. 767.

Revisal 1905, § 1268 (7), provides that "all costs and expenses" in partition proceedings, whether by sale or actual division, shall be "taxed against either party or apportioned among the parties, in the discretion of the court." The taxation of costs is therefore irreviewable. The judgment is, in all respects, affirmed.

WALKER and HOKE, JJ., concur in result.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

(152 N. C. 686)

BROOKSHIRE v. ASHEVILLE ELECTRIC CO.

(Supreme Court of North Carolina. May 27, 1910.)

1. MASTER AND SERVANT (§ 180*)—FELLOW SERVANTS—ABOLITION OF DOCTRINE—STATUTES.

Revisal 1905, § 2646, making every railroad company liable for injuries to an employe occasioned by the negligence of any other employe, applies to street railroads.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 360; Dec. Dig. § 180.*]

2. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

In an action for injuries to a servant while assisting in handling a large pole for use for telegraph and telephone wires, evidence held not to show actionable negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 954; Dec. Dig. § 278.*]

Appeal from Superior Court, Buncombe County; Justice, Judge.

Action by W. J. Brookshire against the Asheville Electric Company. From a judgment for plaintiff, defendant appeals. Reversed, and action dismissed.

Martin & Wright, for appellant. Craig, Martin & Thomason, for appellee.

BROWN, J. This action was brought to recover damages from the defendant on account of an alleged injury to plaintiff while working for defendant in the capacity of lineman, while defendant was engaged in the business of operating a street railway and "putting up and taking down telegraph and telephone poles and wires."

1. While possibly not necessary to a decision of this case, yet we deem it proper to say for future guidance that we approve the opinion in *Hemphill v. Lumber Co.*, 141 N. C. 487, 54 S. E. 420, and regard it as settled in this state that the fellow-servant act (Revisal 1905, § 2646) applies to street railways.

2. We are, however, of opinion that there is no sufficient evidence of negligence in the record, and that the motion to nonsuit should have been sustained. The only witnesses examined were the plaintiff and his brother, Jim Brookshire, and their evidence tends to prove that the injury to plaintiff was the result of an accident that ordinary prescience could not foresee nor ordinary care guard against. They, with four others, were engaged in unloading large poles from a car, and placing them in position for use on defendant's line. One pole rolled into the edge of the lake at Riverside Park. In getting it out, Williams and Wilson "were toting on left-hand side of pole," plaintiff and King on right-hand side, and Jim Brookshire and Reagan were "toting the tip end of the pole." There is no substantial difference in the testimony of the two witnesses. Jim Brookshire testified that "the pole was lying up along the side of the lake, and we started to 'tote'

the pole up the lake, and we all reached down to get it up, and Mr. Wilson and Mr. Williams were so much taller than my brother and Mr. Lon King, and that threw most of the weight on them, and the pole gave a kind of turn, and let my brother and Mr. Lon King drop down a little, and we started off with the pole, and Mr. Wilson said, 'Jeff, come up with the pole,' and Jeff straightened up, and my brother said, 'Let it down, boys; I am hurt.'" The court below should have sustained the motion to nonsuit, and it is so ordered. Reversed, and action dismissed.

(152 N. C. 745)

HIPPIE v. CHAMPION FIBRE CO.

(Supreme Court of North Carolina. May 30, 1910.)

1. MASTER AND SERVANT (§ 180*)—FELLOW SERVANTS—ABOLITION OF DOCTRINE—STATUTES.

The statute abolishing the fellow-servant doctrine applies only to railroads.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359-368; Dec. Dig. § 180.*]

2. MASTER AND SERVANT (§ 185*)—"VICE PRINCIPAL"—WHO IS.

An employe who has the right to give orders to other employes and to enforce obedience thereto, and who has the right to report and to procure the discharge of the other employes who understand the relation and their duty to obey, is a vice principal, and the employer is liable for his negligence in giving orders to the other employes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7318-7316; vol. 8, p. 7827.]

3. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

Evidence held to justify a finding that an order to servants engaged in moving to a lower level appliances, each weighing at least 2,000 pounds, was negligent, authorizing a recovery from the master for injuries to a servant while carrying out the order.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954-972, 977; Dec. Dig. § 278.*]

Appeal from Superior Court, Buncombe County; Justice, Judge.

Action by W. A. Hipp against the Champion Fibre Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Civil action to recover damages for alleged negligence of defendant company causing physical injury to plaintiff. There was evidence tending to show that plaintiff, one of a squad of hands engaged in moving a lot of economizers, in shape something like a steam radiator, each weighing not less than 2,000 pounds, had his hand seriously hurt by reason of a negligent order given by Ben Wright, who was foreman in charge of the work. The testimony on part of plaintiff tended to show that Ben Wright at the time was in the position of vice principal of de-

defendant company. This was denied by defendant, and the alleged negligence was also denied, and evidence offered in support of both positions.

The jury rendered the following verdict:

"(1) Was the defendant, Champion Fibre Company, a corporation at the date of plaintiff's injury? Answer: Yes; by consent.

"(2) Was the plaintiff, W. A. Hipp, injured by the negligence of the defendant, Champion Fibre Company, as alleged in the complaint? Answer: Yes.

"(3) What damage, if any, is the plaintiff entitled to recover? Answer: \$750."

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

Martin & Wright, for appellant. Craig, Martin & Thomason, for appellee.

HOKE, J. (after stating the facts as above). We find no reversible error in the record. Defendant is correct in the position taken that our statute, abolishing what is known as the "fellow-servant doctrine," applies only to railroads, and therefore does not affect the questions presented on this appeal. Under a proper charge, however, the jury have necessarily found that by reason of authority expressly conferred the foreman, Ben Wright, was acting on this occasion as vice principal of defendant company, and the position referred to therefore becomes no longer of moment.

On this question of vice principal the court, among other things, charged the jury as follows: "Now it is contended by the defendant that Ben Wright was a mere foreman, having charge and direction of the work simply and laying out the work and controlling the hands simply in doing the work, that then he would be a fellow servant, and the corporation would not be liable for his negligence. In order to establish the relation between the corporation and Ben Wright of middleman or alter ego, it is necessary for the plaintiff to show by the greater weight of the evidence that the foreman, Ben Wright, occupied the position of the company in this respect, and that he had the right to give the order and to force obedience to it. Not necessarily that he had the right to hire hands and to discharge them, but that he had the power to command them, and that they understood that it was their duty to obey him, and if he had the right to report and procure their discharge, or firing of the hands, why that would be the same as if he could discharge them himself, and if they understood and he understood that that relation did exist, and the relation really did exist between them, that he occupied the position of the company in the direction of the work, and that he had the power to report and bring about their discharge, why, then he would be the

alter ego." There was evidence on the part of plaintiff requiring an expression on this view of the case, and the charge is in substantial accord with the position of this court on the subject, as expressed in *Turner v. Lumber Co.*, 119 N. C. 387, 26 S. E. 23, and in which it was held as follows: "The test of the question whether one in charge of other servants is to be regarded as a fellow servant or vice principal is whether those who act under his orders have just reason for believing that neglect or disobedience of orders will be followed by dismissal." Considering the case in this aspect, that the foreman was vice principal of defendant company, we think there was ample evidence requiring that the question of actionable negligence should be submitted to the jury. The testimony on the part of plaintiff tended to show, and this the jury have accepted, that plaintiff, with a lot of hands, under the charge and direction of Ben Wright, the foreman and vice principal, were engaged in moving from a higher to a lower level a lot of economizers, weighing each not less than 2,000 pounds, and in shape something like a steam radiator. It was not a work of an ordinary kind, simple in its nature and placing, involving the principles applied in *Dunn's Case*, 151 N. C. 313, 66 S. E. 134, or in *House's Case*, 67 S. E. 981, or *Brookshire's Case*, at the present term,¹ but to do it properly, and in safety, required careful management and supervision. The method pursued in the present case was for some of the hands to push the implement to the edge of the higher platform until it was nearly on a balance, and then, when the skids were placed by other hands, it was toppled over onto the skids, and allowed to slide to the lower level. The hands who were shoving the economizer were not in a position to see those who were placing the skids, and in the present instance the foreman, who was standing to one side and in a position to see and observe both, and charged with the duty of giving careful directions, ordered the plaintiff and another hand to place the skids, and, before they could step back he ordered the men on the upper platform to shove the economizer forward onto the skids, and plaintiff's hand was thereby caught and injured.

The jury, we think, were well justified in finding this to be a negligent order, and the case is one very similar to that of *Wade v. Contracting Co.*, 149 N. C. 177, 62 S. E. 919.

On the facts established by the verdict, this authority is decisive against defendant.

There is no error, and the judgment is affirmed.

No error.

¹ 68 S. E. 215.

(152 N. C. 705)

RICHARDSON v. RICHARDSON et al.

(Supreme Court of North Carolina. May 27, 1910.)

1. WASTE (§ 15*)—ACTIONS BY REMAINDERMEN—NATURE OF REMEDY.

A contingent remainderman cannot sue for waste, but he must resort to equity for the protection of his interests.

[Ed. Note.—For other cases, see Waste, Cent. Dig. § 17; Dec. Dig. § 15.*]

2. WILLS (§ 634*)—"VESTED REMAINDER."

A "vested remainder" is one by which a present interest passes under the will to the devisee, though to be enjoyed in the future, and by which the estate is fixed to remain to a determinate person after the particular estate is spent, and one entitled to a vested remainder has an immediate fixed right of future enjoyment.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1488; Dec. Dig. § 634.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7305-7307, 7828-7829.]

3. WILLS (§ 634*)—"CONTINGENT REMAINDER."

A "contingent remainder" is one limited to take effect on an event or condition which may never happen or be performed, or which may not happen or be performed until after the determination of the preceding particular estate, in which case the remainder can never take effect.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1488; Dec. Dig. § 634.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1503-1506; vol. 8, p. 7615.]

4. WILLS (§ 634*)—CONSTRUCTION—CONTINGENT REMAINDER.

A devise to testator's widow for life, and at her death to a third person for life, and at his death to his children, if any, otherwise to others, creates a contingent remainder in the third person.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1496; Dec. Dig. § 634.*]

Appeal from Superior Court, Union County; W. J. Adams, Judge.

Action by John H. Richardson against Sarah A. Richardson and another. From a judgment for defendants, plaintiff appeals. Affirmed.

A. M. Stack and J. J. Parker, for appellant. Adams, Jerome & Armfield, for appellees.

WALKER, J. This is an action for waste, alleged to have been committed by the defendant, who is the owner of a life estate in the land, by virtue of a devise contained in the will of her husband, John Richardson, which is as follows: "I give and devise to my beloved wife three hundred and ninety-six acres of land, more or less, it being the home place whereon I now live, to have and to hold during her lifetime, and at her death I will and direct that lot No. 1 (as I have already divided it), containing 208½ acres, more or less, shall descend to and belong to John Richardson, son of S. J. Richardson, during his lifetime, and at his death the said land shall belong to his children, if he

shall leave any living, and in case he shall leave no living children at his death, in that event said land shall belong to his brothers, viz.: James Richardson, Lathan Richardson, Eli Richardson and Frank Richardson." The action is brought by John Richardson, son of S. J. Richardson, to whom a life estate in remainder was devised in the said will, to take effect at the death of Sarah A. Richardson, the widow. There was a limitation over at the death of the said John Richardson to his children. It is contended by the defendant that the plaintiff cannot maintain this action, as, by the will of John Richardson, he acquired only a contingent remainder, and it is conceded that an action for waste cannot be brought by a contingent remainderman, but, for the protection of his right or interest, he must resort to the remedy by injunction. *Latham v. Lumber Co.*, 139 N. C. 9, 51 N. E. 780, 111 Am. St. Rep. 764.

The only question which we deem it necessary to discuss and decide is whether the plaintiff, John Richardson, by the terms of the will, acquired a vested or a contingent remainder. There are, according to Mr. Fearne, four kinds of contingent remainders: (1) Where the remainder depends entirely on a contingent determination of the preceding estate itself, as if A. makes a feoffment to the use of B. till C. returns from Rome, and after such return of C. then to remain over in fee. Here the particular estate is limited to determine on the return of C. and only on that determination of it is the remainder to take effect, but that is an event which possibly may never happen, therefore the remainder which depends entirely upon the determination of the preceding estate by it is contingent. (2) The second kind of contingent remainder is where some uncertain event, unconnected with and collateral to the determination of the preceding estate, is by the nature of the limitation to precede the remainder. Thus, as Lord Coke says, if a lease for life be made to A., B., and C., and if B. survives C., then the remainder to B. and his heirs. Here the want of B.'s surviving C. does not affect the determination of the particular estate; nevertheless, it must precede and give effect to B.'s remainder, but, as such an event is dubious, the remainder is contingent. In the contingent remainders which fall under this head, the event which makes them contingent does not in any way depend on the manner in which the particular estate determines, as, whether it determines in one manner or another, the remainder takes place equally. This distinguishes them from the first sort. (3) The third kind of contingent remainder is where it is limited to take effect upon an event which, though it certainly must happen some time or other, yet may not happen until after the determination of the particular estate. For it is a rule of law that a

remainder must vest, either during the continuance of the particular estate or at the very instant of its determination. So that if the event does not happen during the continuance of the particular estate, the remainder becomes void. Thus, if a lease be made to A. for his life, and after the death of B. remainder to another in fee, this remainder is contingent, for though B. must die some time or other, yet he may survive A., by whose death the particular estate will determine and the remainder become void. (4) The fourth kind of contingent remainder is where it is limited to a person not ascertained, or not in being at the time when such limitation is made. Thus, if a lease be made to one for life, the remainder to the right heirs of A. Now there can be no such person as the right heir of A. until his death, for *nemo est hæres viventis*, and A. may not die until after the determination of the particular estate; therefore, such remainder is contingent. Again, where an estate is limited to two persons during their joint lives, the remainder to the survivor of them in fee, such remainder is contingent because it is uncertain which of them will survive.

Vested remainders, or remainders executed, are those by which the present interest passes to the party, though to be enjoyed in the future, and by which the estate is invariably fixed to remain to a determinate person, after the particular estate is spent. The person entitled to a vested remainder has an immediate fixed right of future enjoyment, that is, an estate in present, though it is only to take effect in possession and pendency of the profits at a future period, and such an estate may be transferred, aliened, and charged, much in the same manner as an estate in possession, as distinguished from one which is vested in interest. The remainder is said to be contingent when it is limited to take effect on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding particular estate, in which case, as we have shown, such remainder never can take effect. 1 Greenleaf's Cruise on Real Property (2d. Ed.) p. 703 et seq.

In 1 Fearné on Remainders (Ed. of 1845) p. 216, he thus states and illustrates the difference between a vested and a contingent remainder: "It is not the uncertainty of ever taking effect in possession that makes a remainder contingent; for to that, every remainder for life or in tail is and must be liable; but the remainderman may die, or die without issue, before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent. For instance,

if there be a lease for life to A., remainder to B. for life, here the remainder to B. is vested, although it may possibly never take effect in possession, because B. may die before A., yet, from the very instant of its limitation, it is capable of taking effect in possession, if the possession were to fall by the death of A.; it is therefore vested in interest, though perhaps the interest so vested may determine, by B.'s death, before the possession he waits for may become vacant." In commenting upon this passage from Mr. Fearné, this court, in a very able and learned opinion by Chief Justice Shepherd in *Starnes v. Hill*, 112 N. C. 1, 16 S. E. 1011, 22 L. R. A. 598, thus qualified or explained the language of Mr. Fearné: "In support of the plaintiff's contention, we are referred to the principle laid down by Mr. Fearné (supra, 217) in a passage which has often been quoted in textbooks and judicial opinions, but seldom accompanied with the explanation of the learned author in its immediate connection. Id. 216, 217. The language is as follows: 'The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent.' It is urged that, inasmuch as the death of Madara J. (his wife) is an event which must happen, and as R. O. Patterson is a person in esse, the latter would have the capacity of taking the possession should the preceding estate of the said Madara J. be presently determined by her death, and therefore, under the foregoing rule, his estate would be a vested remainder. The fallacy of the argument may be found in the failure to observe that at common law the particular estate may be determined during the lifetime of its tenant (as by forfeiture or surrender, Fearné, supra, 217; Tiedeman, Real Prop. 401; 4 Kent, Com. 254), in which case it is entirely clear that the remainder to R. O. Patterson would be defeated, because the event upon the happening of which his interest was to vest, to wit, the survival of his wife, would not have transpired during the continuance of the particular estate (Fearné, 217; 2 Minor, Inst. 170, 171), and it is common learning that the contingency must happen during the continuance of the particular estate or eo instanti it determines. 2 Blk. Com. 168."

In the case we are now considering, the plaintiffs seek, by their action, not only to recover damages for the waste alleged to have been committed, but to have the life estate of Mrs. Sarah A. Richardson, the widow of John Richardson, declared to have been forfeited by reason of the waste so committed by her. In other words, we have presented practically and in concrete form the very example which is given by Chief Justice Shepherd in the case to which we

have just referred. It is true that there the remainder could not vest in interest, or even in possession, unless R. O. Patterson survived his wife, and this, by its very nature, was a contingent event, but we do not perceive how any reasonable or practical distinction can be made between a case where the survivorship of one party by another is required to vest the remainder in interest and possession, and one where the remainder is limited to take effect, not generally after a life estate, but at the death of another. In this case the court entered a judgment of nonsuit at the close of the evidence and on motion of the defendant, but suppose this ruling had been just the reverse of what it was at the trial, and the court had entered judgment, not only for the damages assessed by the jury, but for a forfeiture of the life estate of the widow. Under the Statute of Gloucester (8 Edw. I), which we have adopted (Revisal 1905, § 858), it would follow that the life estate would have determined before the happening of the event, namely, the death of the widow, upon which the remainder was to vest in the plaintiff. The widow would have lost her life estate as the plaintiff would have recovered the place wasted, by virtue of the statute, but the interest in, and the possession of, the land would have vested in him under the judgment of the court declaring a forfeiture of the life estate, and not by virtue of the terms of the will, as it is evident the testator intended that the plaintiff should have no vested interest in the land until the death of the widow, and that intention of the testator must prevail. We have a case, therefore, where the life estate may be determined or destroyed before the happening of the event upon which the estate is limited to the plaintiff in remainder, and, if we follow the rule as laid down in *Starnes v. Hill*, we must hold that the remainder to the plaintiff was contingent, and therefore, that he cannot maintain this action.

Where an estate is limited to A. for life with remainder to B. for life, and there is a forfeiture or surrender of the first life estate, it determines, and the estate in remainder becomes immediately vested, as there is nothing in the limitation to prevent its vesting at once. But in our case, if the first life estate is determined by forfeiture, surrender, or otherwise, and the life tenant survives its determination, the remainder cannot take effect, by the express words of the will, until the death of the widow, whereas the imperative rule of the law requires that the remainder must vest—that is, the contingency must happen—during the continuance of the particular estate or eo instanti it determines. The life estate is destroyed by the forfeiture resulting from the waste under the statute, and yet the event upon which the plaintiff is to take his estate in remainder has not happened.

The court below ruled in accordance with the views we have expressed, and, finding no error in the judgment, we must affirm it.

Affirmed.

(153 N. C. 697)

**SANFORD, CHAMBERLAIN & ALBERS
CO. et al. v. EUBANKS et al.**

(Supreme Court of North Carolina. May 27, 1910.)

1. EVIDENCE (§ 151*)—ADMISSIBILITY—INTENT OF GRANTEE.

On suit to set aside a mortgage from husband to wife as fraudulent, she could testify whether she intended to defraud his creditors.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 440; Dec. Dig. § 151.* Fraudulent Conveyances, Cent. Dig. § 857.]

2. FRAUDULENT CONVEYANCES (§ 162*)—GRANTEE'S INTENT—EFFECT.

A mortgage to one's wife to secure a just debt is valid in her hands as against his creditors if she did not know of or participate in his fraudulent intent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 504, 505; Dec. Dig. § 162.*]

3. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—IRRELEVANT TESTIMONY.

Error in admitting defendant's wife's testimony in a suit to set aside a fraudulent mortgage that she did not intend a fraud was harmless if the testimony was irrelevant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

4. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL—MATTER COVERED.

On suit to set aside a fraudulent mortgage, a refused instruction that the mortgagee need not have known of the fraud, it being sufficient that she knew circumstances making it fraudulent, was substantially covered by an instruction to find for plaintiff, if the mortgagee knew of the mortgagor's intent to defraud his creditors.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

5. FRAUDULENT CONVEYANCES (§ 273*)—BURDEN OF PROOF.

A creditor who admits the justness of a debt for which a mortgage was given to another creditor has the burden to show that the mortgage was given with fraudulent intent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 805; Dec. Dig. § 273.*]

6. FRAUDULENT CONVEYANCES (§ 278*)—MORTGAGE TO WIFE—PRESUMPTION OF FRAUD.

A mortgage to one's wife is presumptively fraudulent, but, when she shows a just debt, the intent of the parties becomes a jury question; the burden being on the attacking creditor to show fraudulent intent if the mortgage was honest.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 801, 802; Dec. Dig. § 278.*]

7. FRAUDULENT CONVEYANCES (§ 309*)—INSTRUCTIONS—GRANTEE'S INTENT.

On suit to set aside a fraudulent mortgage to a wife, an instruction that if she "knew" of his intent to defraud his other creditors to find for plaintiff was not objectionable as pre-

cluding recovery, though she had "notice" of the fraud.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 309.*]

Appeal from Superior Court, Cherokee County; Ferguson, Judge.

Action by the Sanford, Chamberlain & Albers Company against L. M. Eubanks. From a judgment for defendant, plaintiff appeals. Affirmed.

Dillard & Bell, for appellant. Ben Posey, for appellee.

WALKER, J. This action was brought by the plaintiffs to set aside a mortgage executed on February 16, 1907, by the defendant L. M. Eubanks to his wife, Fannie D. Eubanks, and to Hattie Swaggerty, his sister-in-law, and J. L. Robinson, to secure the payment of certain debts alleged therein to be due by L. M. Eubanks to the mortgagees. The court submitted issues to the jury, which, with the answers thereto, are as follows:

"(1) Is the defendant L. M. Eubanks indebted to Sanford, Chamberlain & Albers Company? If so, in what sum? Answer: \$535.35, with interest from April 1, 1907, and \$4.65.

"(2) Is said defendant indebted to Briggs & Cooper Company, Limited? If so, in what sum? Answer: \$217.52.

"(3) Was the mortgage of February 17, 1909, from L. M. Eubanks to Fannie D. Eubanks and others executed with intent to hinder, delay, and defeat the creditors of said L. M. Eubanks? Answer: Yes.

"(4) Did the defendant Fannie D. Eubanks know of any fraudulent intent on the part of said L. M. Eubanks at the time of the execution and delivery of said mortgage to her? Answer: No.

"(5) Did the defendant Hattie Swaggerty know of such intent at said time? Answer: No."

The allegation of the plaintiff is that the mortgage was executed to defraud the creditors of the mortgagor. There was no dispute at the trial as to the indebtedness of L. M. Eubanks to the plaintiffs. The mortgagor was largely indebted to his wife for money which she loaned him in the amount of \$1,000, and further in the sum of \$2,500, for money which he had obtained by mortgage on her separate estate. It was admitted that L. M. Eubanks was insolvent at the time he executed the mortgage. There was some evidence tending to show that the mortgage was made with a fraudulent intent, and the question really involved in the case was whether Fannie D. Eubanks, the wife of the mortgagor, had notice at the time he executed the mortgage to her and the others named therein of such fraudulent intent. She was asked by her counsel the following question:

"Did you, at the time you took this mortgage from your husband, have any intention to defraud any of your husband's other creditors?" The plaintiffs objected to this question. The objection was overruled, and the plaintiffs excepted. The witness answered that she did not intend to defraud any of her husband's creditors. Her own testimony tended to show that the mortgage was taken by her in good faith and without notice of the fraudulent intent of her husband.

The plaintiffs requested the court to charge the jury as follows: "The defendant Fannie D. Eubanks need not have known as a matter of law that the mortgage executed to her was fraudulent, but it was sufficient if she knew of the circumstances which the law says made the deed fraudulent on the part of her husband if it was so, and, if the jury should find that she knew the circumstances and the deed was fraudulent, they should answer the fourth issue 'Yes'; that is, in favor of the plaintiffs." The court declined to give this instruction, and the defendants again excepted. The court charged the jury that if the mortgage was made with a fraudulent intent—that is, with an intent on the part of L. M. Eubanks to hinder, delay, or defeat his creditors, or any of them, in the collection of their claims—and the wife of the mortgagor, Fannie D. Eubanks, knew of this intent, they would answer the fourth issue "Yes," but if the jury found as a fact that she did not know of such intent, if it existed, but merely knew that he was indebted to other persons than those secured by the mortgage, and that his purpose in executing the same was merely to secure the payment of the indebtedness to her, and that was his only purpose when he executed the mortgage, and she did not know that he intended to hinder, delay, or defeat any of his creditors in the collection of their claims against him, they would answer the fourth issue "No." In other words, the court substantially charged the jury that if Fannie D. Eubanks, the wife of the mortgagor, believed the transaction to be an honest one, and did not know that there was any actual intent on the part of her husband to defraud any of his other creditors, as defined by the court, and she acted in good faith in taking the mortgage to secure the indebtedness to her, they would answer the fourth issue, "No." The plaintiffs assigned the following errors:

(1) That the court permitted the defendant Fannie D. Eubanks to testify, over the objection of the plaintiffs, that she had no intention to defraud any of the other creditors of her husband at the time the mortgage was executed to her.

(2) That the court refused to give the instruction as requested by the plaintiffs.

(3) That the court charged the jury that the defendant Fannie D. Eubanks must have

had knowledge of the fraudulent intent of the mortgagor, and not merely notice of the fraud.

As to the first assignment of error, we are unable to see why it was not competent and relevant for the witness Fannie D. Eubanks to testify as to what her intention was at the time the mortgage was executed to her. It cannot be denied that the mortgage would be valid in her hands as against the creditors of her husband, even if he had a fraudulent intent, provided she did not have notice of it or did not participate in the fraudulent execution of the mortgage, and, this being one of the questions involved in the case, how can the fact better be proved than by her own testimony as to what her intention was at the time? But the questions involved in the case were whether her husband had the fraudulent intent, and whether she had notice of it. In this aspect of the case, her intention was either irrelevant, and the testimony was therefore harmless, or, if relevant, as tending to show that she did not have any knowledge or notice of her husband's unlawful purpose, it surely would be competent to prove by her what her intention was; for it might be said, if her husband executed the mortgage with a fraudulent intent, and she executed it knowing, or having notice of, such intent, she in a legal sense intended to defraud her husband's other creditors, as she would then be participating in the fraud. If it is competent to inquire whether or not she had a fraudulent intent at the time she executed the mortgage, the fact that she did not have such an intent could be proved by her own testimony, as we held in the case of *Phifer v. Erwin*, 100 N. C. 59, 6 S. E. 672. In that case Chief Justice Smith, speaking for the court, said: "The test of the admissibility of the evidence of motive or intent is the materiality of the motive or intent in giving character to the act, and when they must, as separate elements, coexist to constitute guilt or produce a legal result. When, as distinct facts, each must be alleged and proved, the inference to be deduced may be met and repelled by the direct testimony of the party as to their being entertained by him"—citing *State v. King*, 86 N. C. 603, and 1 *Wharton*, Ev. § 482. In that case the question involved was whether or not the mortgage was fraudulent, and the decision seems to be a direct authority for the ruling of the court upon the objection we are now discussing.

As to the second assignment of error, we are of the opinion after a careful perusal of the charge of the court that the instruction was substantially given to the jury. If it was not given, there were no circumstances from which the jury could infer fraud in law. The plaintiff submitted to a nonsuit as to *Hattie Swaggerty* and *J. L. Robinson*, the other defendants, and the issue was confined,

therefore, to the validity of the mortgage as to *Fannie D. Eubanks*. The court properly submitted the case to the jury as involving the above questions of fact as to whether the mortgagor had an actual intent to defraud his creditors, and whether his wife had notice or knowledge of such intent. The plaintiff having admitted that the debt secured by the mortgage was justly due to *Fannie D. Eubanks* by her husband, the burden was upon the plaintiff to show that the mortgage was executed with a fraudulent intent on the part of the debtor. *Peeler v. Peeler*, 109 N. C. 628, 14 S. E. 59; *Redmond v. Chandley*, 119 N. C. 575, 26 S. E. 255. It is true that, where the husband executes a mortgage to secure an alleged indebtedness to his wife, the law casts suspicion upon the transaction and raises what has been called a presumption of fraud; but, when she has shown that the debt was honestly contracted and was justly due to her at the time the mortgage was executed, it then becomes a question for the jury to determine the intent of the parties, and to find the contract fraudulent or otherwise, as they may find the fact to be upon a consideration of the testimony, the burden being upon the attacking creditor to show the fraudulent intent of the debtor, if the debt which is secured by the mortgage was actually due to his wife. *Reiger v. Davis*, 67 N. C. 185. If the husband is indebted to his wife and executes the mortgage to secure such indebtedness, and the wife acts in good faith and without knowledge of any fraudulent intent on his part, if he had any, we do not see why the husband may not prefer his wife as one of his creditors, as well as any of his other creditors. The case in this respect seems to have been correctly and fairly tried in accordance with the decisions which we have just cited.

The third objection to the judge's charge is clearly untenable. If the husband had a fraudulent intent, the wife must have knowledge of it to invalidate the deed or mortgage as to her. This is decided in *Peeler v. Peeler* and the other cases above cited, but the court in its charge to the jury evidently used the word "knowledge" in the sense of "notice."

We have examined the case carefully, and find no error in the rulings of the court.

No error.

(153 N. C. 676)

WOODBURY v. KING.

(Supreme Court of North Carolina. May 27, 1910.)

1. PRINCIPAL AND AGENT (§ 126*)—DEEDS—EXECUTION BY AGENT—SUFFICIENCY.

A deed of land by an attorney in fact of the owner, signed and sealed by the attorney individually, and not by him as attorney in fact, does not bind the owner.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 430-450; Dec. Dig. § 126; * *Deeds*, Cent. Dig. §§ 276, 404.]

of title, and thereafter and before the execution of a deed incumbrances are discovered, he cannot be compelled to take the defective title or pay the bonds given for the price of the land, for an agreement to take a clear deed without warranty is not a waiver of the right to demand a clear title, citing *Batchelor v. Macon*, 67 N. C. 181; *Castlebury v. Maynard*, 95 N. C. 281, and other cases. In *Castlebury v. Maynard*, supra, Mr. Justice Ashe, speaking for the court, said: "The contention of the parties presents for our consideration the question whether the plaintiff can make a good title to the land described in the complaint. If he cannot, it would be against equity and good conscience that he should recover the amount of the note in suit, for a purchaser of land is never required to accept a doubtful title. *Batchelor v. Macon*, 67 N. C. 181; *Motts v. Caldwell*, 45 N. C. 289." In *Timber Co. v. Wilson*, 151 N. C. 154, 65 S. E. 934, Mr. Justice Brown, speaking for the court, said: "It is further contended that the defendants cannot make a good title to the timber, independent of the conveyance to the Tilghman Company, and for that reason cannot be made to perform the contract. This might avail the plaintiff if it was resisting the performance on its part, but it cannot avail these defendants, for it is well settled that, though the vendor is unable to convey the title called for by the contract, the purchaser may elect to take what the vendor can give him and hold the vendor answerable in damages as to the rest. *Kares v. Covell*, 180 Mass. 206 [62 N. E. 244, 91 Am. St. Rep. 271]; *Corbett v. Shulte*, 119 Mich. 249 [77 N. W. 947]; 29 Am. & Eng. Enc. 621." *Wilcoxon v. Calloway*, 67 N. C. 463; 1 *Warvelle on Vendors*, 349; *Haynes v. White*, 55 Cal. 38; *McCroskey v. Ladd*, 96 Cal. 455, 31 Pac. 558.

Different principles and different requirements apply where a deed has been made and delivered, and the purchaser then seeks, as a defense to an action brought to recover the purchase money, to set up damages for a partial failure of title. This difference is illustrated by the cases of *Etheridge v. Vernoy*, 70 N. C. 713; *Foy v. Haughton*, 85 N. C. 168; *Anderson v. Rainey*, 100 N. C. 321, 5 S. E. 182; *Woodbury v. Evans*, 122 N. C. 779, 30 S. E. 2. In *Etheridge v. Vernoy*, supra, an action brought to recover the balance on a note for the purchase price of land, where the deed had been executed and a note and mort-

gage given to secure it, this court said: "In contracts for the sale of land, it is the duty of purchasers to guard themselves against defects of title, quantity, incumbrances, and the like. If they fail to do so, it is their own folly, for the law will not afford them a remedy for the consequences of their own negligence. But if representations are made by the bargainor, which may reasonably be relied on by the purchaser, and they constitute a material inducement to the contract, and are false within the knowledge of the party making them, and they cause damage and loss to the party relying on them, and he has acted with ordinary prudence in the matter, he is entitled to relief. *Walsh v. Hall*, 66 N. C. 233." And this doctrine applies with equal force where the ground of relief, instead of fraudulent representations, is mutual mistake. *Wilcoxon v. Calloway*, 67 N. C. 463. In that case this court said: "But upon a contract for a hundred acres, even though there is no suggestion that the vendee for any reason, desired exactly that quantity, or that quantity was of any value except as quantity, yet a deficiency of one-third must be held material, and would probably entitle the vendee to rescind the contract if he chose to do so, or, at all events, to an abatement of the price." As to the rule for determining the amount of abatement of the price for the deficiency, the court said: "In this case, however, it does not appear that any part of the land has been improved, or that there is anything to give any one part of it extraordinary value over any other part, and we do not see why it will not be fair and reasonable to estimate the value of the deficiency at the average price per acre." This seems to have been adopted by the jury in fixing the value of the 47 trees cut from the Groves land allowed as an abatement. In view of the authorities above cited and accepting their reasoning as conclusive upon us, we are of the opinion that his honor erred in not permitting the defendant to prove a partial failure of title and the shortage or deficiency in the number of trees conveyed, which would be in reality a failure of title, and in not permitting the jury to determine the abatement of price to the defendant, if his contentions in these particulars shall be accepted by the jury as true.

For these errors, the judgment is reversed and a new trial awarded.

New trial.

(152 N. C. 738)

SANDERLIN v. LUKEN et al.

(Supreme Court of North Carolina. May 30, 1910.)

1. EMINENT DOMAIN (§ 31*)—PUBLIC PURPOSE—DRAINAGE DISTRICTS.

Acts 1909, c. 442, authorizing the establishment of a levee or drainage district, is for a public purpose, and not for the mere benefit of private landowners, and so not unconstitutional as authorizing the taking of property for a mere private purpose.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 77; Dec. Dig. § 31.*]

2. DRAINS (§ 75*)—IMPROVEMENT—NECESSITY OF A VOTE.

While a drainage district established under Acts 1909, c. 442, is regarded as a public quasi corporation, the making of improvements by it to be paid by assessment is not within Const. art. 7, § 7, providing that no municipal corporation shall contract any debt or levy any tax except for necessary expenses, unless by a vote of the majority of the people therein.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 75.*]

3. CONSTITUTIONAL LAW (§ 61*)—CONFERRING LEGISLATIVE POWERS ON THE JUDICIARY.

Acts 1909, c. 442, in conferring on the clerk of the superior court the power to establish a drainage district, is not invalid as delegating legislative power and duty to the judiciary; such duties and powers being of a judicial nature.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 103-107; Dec. Dig. § 61.*]

4. DRAINS (§ 49*)—LETTING WORK—LOWEST "RESPONSIBLE BIDDER."

Acts 1909, c. 442, requiring the commissioners of a drainage district to let the work of construction to the "lowest responsible bidder," confers a discretion, exercise of which is not to be interfered with unless influenced by fraud as to determining whether a bidder is responsible; such term including ability to respond to the requirements of the contract.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 59; Dec. Dig. § 49.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4254, 4255; vol. 7, pp. 6178, 6179.]

Appeal from Superior Court, Currituck County; Ward, Judge.

Action by Sanderlin against Luken and others. Judgment for defendants. Plaintiff appeals. Affirmed.

The facts relevant to the controversy, and the questions presented for decision, are very well stated in the brief of counsel for appellant as follows:

"This is a case involving the constitutionality of the act of the General Assembly of North Carolina of 1909 (chapter 442), authorizing the establishment of levee or drainage districts; of the validity of bonds which the commissioners of a drainage district, purporting to have been established under the act, have contracted to issue; and also of the action of the commissioners in letting the contract for the construction of the work to one who was not lowest bidder, in view of the provision of the statute requiring the contract to be let to the 'lowest responsible

bidder.' Under the statute a petition for the establishment of a drainage district in Currituck county was presented to the clerk of the superior court, and after proceedings duly taken was declared to be established as the Moyock district No. 1. The plaintiff herein is a citizen, taxpayer, and landowner within the boundaries of the district, and his lands have been assessed, for the costs of the improvements to be made, under the classification of the lands embraced in the district according to the provisions of the statutes. The plaintiff has brought this suit to restrain the commissioners of the drainage district from issuing bonds contracted for to defray the costs and expenses of the proposed improvements. Upon the case being brought to a hearing, it was adjudged by the court below that Acts 1909, c. 442, is valid, and that the proceedings of the commissioners were regular, and that the plaintiff was not entitled to the injunction prayed for. An appeal was taken and has been duly perfected.

"The following propositions, involving the constitutionality of the statute and the validity of the bonds, and also the action of the commissioners in letting the contract, are submitted to the court: (1) Conferring upon the clerk of the superior court the power to establish a levee or drainage district is invalid as constituting a delegation of legislative power and duty to the judiciary. (2) The statute shows upon its face that it is for the benefit of private landowners, and not for a public purpose. (3) As a levee or drainage district is a quasi municipal corporation, and the work is not a 'necessary expense' within the meaning of article 7, § 7, of the Constitution of North Carolina, a debt cannot be contracted 'unless by a vote of the majority of the qualified voters therein.' (4) The contract should have been let to the lowest bidder in this case, or the work should have been advertised for new bids. The foregoing propositions, so far as they involve the validity of the statute, are pointed to the provisions of the state and the United States Constitutions, declaring that the legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other; that no person ought to be deprived of his property but by the law of the land or by due process of law; and that no municipal corporation shall contract any debt except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

J. H. McMullan and T. H. Calvert, for appellant. Pruden & Pruden and Brown Shepherd, for appellees.

HOKE, J. The power of the Legislature to create special taxing districts for public purposes, separate and distinct from the or-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

inary political subdivisions of the state, such as counties, townships, etc., was declared and approved in the case of *Smith v. School Trustees*, 141 N. C. 143, 53 S. E. 524, and like power to create special assessment districts has been upheld by the court in several well-considered decisions. *Asheville v. Trust Co.*, 143 N. C. 360, 55 S. E. 800; *Busbee v. Commissioners of Wake*, 93 N. C. 143; *Commissioners v. Commissioners*, 92 N. C. 180; *Shuford v. Commissioners*, 86 N. C. 552; *Newsom v. Earnheart*, 86 N. C. 391; *Cain v. Commissioners*, 86 N. C. 8. The principle has been frequently extended and applied to the creation of these drainage districts, and while certain statutes may have been declared void, this as a rule was because the rights of persons affected had not been in some way sufficiently safeguarded, and, so far as we have examined, the power of the General Assembly to enact legislation of this character has not been successfully questioned. *Adams v. Joyner*, 147 N. C. 77, 60 S. E. 725; *Porter v. Armstrong*, 139 N. C. 179, 51 S. E. 928; *Pool v. Trexler*, 76 N. C. 297; *Norfleet, Adm'r. v. Cromwell*, 70 N. C. 634, 16 Am. Rep. 787; *Fallbrook v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; *Wurts et al. v. Hoagland*, 114 U. S. 606, 5 Sup. Ct. 1086, 29 L. Ed. 229; *Land & Stock Co. v. Miller*, 170 Mo. 240, 70 S. W. 721, 60 L. R. A. 190, 94 Am. St. Rep. 727; *Morrison v. Morey*, 146 Mo. 543, 48 S. W. 629; *Laguna Drainage Dist. v. Martin Co.*, 144 Cal. 209, 77 Pac. 933; *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707; *Bryant v. Robbins*, 70 Wis. 258, 35 N. W. 545.

Speaking to such legislation, and the reasons upon which it may be made to rest, *Rodman, J.*, delivering the opinion in *Norfleet v. Cromwell*, *supra*, said: "The defendant takes higher ground, and contends that the act of 1795 was unconstitutional, because it took his property for a mere private purpose. It is admitted that that cannot be lawfully done, and the only question on this point is as to the character of the purpose; whether it was to the benefit of one, or of a limited number of individuals only, or of such general and public utility, as justifies a state in the exercise of its power of eminent domain. It is well known that in the Atlantic section of this state there are hundreds of thousands of acres of what are called 'swamp lands,' which from the flatness of their surface and the filling up of the natural courses of drainage, if any ever existed, cannot be relieved of the water which ordinarily covers them, and made fit for human habitation and cultivation, except by cutting artificial canals from them into some convenient creek or river, which must necessarily pass through the intervening lands of the riparian proprietors. If these canals can be cut only by permission of the owners of the banks of the necessary outlets, this vast area of fertile land must remain for ages an uncultivated and

unpopulated wilderness, and it will be entirely valueless to those who bought it from the state on the faith of its laws. An act which aims to remedy so great an evil, affecting so many persons now living, and so many more in the future, must be deemed one of general and public utility. In an agricultural view it now benefits the whole population of that part of the state in which these swamps are found. The right of the state to condemn lands for drains rests on the same foundation as its right in cases of public roads, mills, railroads, cartways, schoolhouses, forts, lighthouses, etc. In the case of public roads, it has never been doubted, and the weight of authority is decidedly in favor of its existence for the other purposes mentioned. Roads and aqueducts are classed together in the Institutes as servitudes of the same public character. In the swamps which the act in question chiefly affects, the canals are more important than the roads, as they must always precede them. The right to drain through the banks of a natural water course is exactly similar in character to the right to construct dykes or levees to keep their excessive waters from overflowing the adjacent lands, a right which has been recognized in the legislation of all countries from the most ancient times. Witness the dykes which protect the coast of Holland, the fens of Lincolnshire, the lands on the Mississippi, and on the Po. Both purposes are classed together in our act of 1789. The act in question, and others of a like character respecting mills, etc., are of ancient date. They have been incidentally sanctioned by this court in many decisions, and, if their constitutionality has never been directly affirmed, it may be because it was never questioned. These acts are not peculiar to North Carolina. Acts concerning mills, similar to ours, exist in many of the states (*Washburn, Easements*, 394 [329]), and respecting drainage at least in Massachusetts (*Gen. St. c. 148*), and New York (2 Rev. St. 548; *People v. Nearing*, 27 N. Y. 306)."

The legislation in question here comes well within the principle established by these cases. It has evidently been prepared with great care, and seems to present a scheme for the drainage of these lowlands, at once comprehensive, adequate, and efficient, and in which the rights of all persons to be affected have been fully considered and protected.

When these drainage districts are created under statutes like this we are now considering, they are regarded as public quasi corporations, partaking to some extent of the character of a governmental agency, and for general purposes of taxation in the ordinary acceptation of the term they come, as a rule, within the restrictions established by the Constitution upon municipal corporations in reference to the imposition of taxes both as to the amount and method

(*Smith v. Trustees*, supra); but under our decisions these restrictive provisions as to taxation have been held not to apply to the case of local assessments, where, as in this case, such assessments are made and collected by some recognized method apportioning the burdens according to the benefits received by the property affected. *Busbee v. Commissioners*, supra; *Commissioners v. Commissioners*, supra; *Shuford v. Commissioners*, supra; *Newsom v. Earnheart*, supra; *Cain v. Commissioners*, supra.

In *Shuford's Case* it was held: "(1) A tax levied only upon land under the provisions of the 'stock law' (Acts 1879, c. 135) is not within the constitutional prohibition as to uniformity of taxation, and hence the assent of the qualified voters of the district affected is not necessary; and this, even though the act of the Legislature styles it a 'tax.' (2) It is regarded as a local assessment, and made with reference to special benefits derived from the property assessed, from the expenditure; while taxes are public burdens, imposed as burdens, for the purpose of general revenue."

And in *Commissioners v. Commissioners*, 92 N. C., supra, Chief Justice Smith, on this subject, quotes with approval from the opinion in *Cain v. Commissioners*, as follows: "As the greater burden is thus removed from the landowner, he, as such, ought to bear the expense by which this result is brought about. The special interest benefited by the law is charged with the payment of the sum necessary in securing the benefit. This and no more is what the statute proposes to do, and in this respect is obnoxious to no just objection from the taxed land proprietor, as it is free from any constitutional impediments."

The objection urged, therefore, that no vote of the people on the proposition was required or provided for by the statute, must be overruled.

Nor can the further objection be sustained that the act in question improperly undertakes to confer legislative power and duties on the clerk of the court, a judicial officer; for on authority the duties and powers conferred on the clerk by this statute are of a judicial nature. Speaking to this question, in *O'Dell v. Boyden*, 150 Fed. 731, 80 C. C. A. 397, 10 Am. & Eng. Ann. Cas., at page 230, it is said: "The better doctrine, however, seems to be that the duties of the municipal authorities in determining the necessity for sewers (dependent on a like principle), their location, and their general plan, are of a judicial or quasi judicial nature, while the work of construction and maintenance is ministerial." And authoritative decisions fully support the position as stated. *Johnston v. District of Columbia*, 118 U. S. 19, 6 Sup. Ct. 923, 30 L. Ed. 75; *Callen v. City*, 43 Kan. 627, 23 Pac. 652, 7 L. R. A. 786; *Bellingham Imp. Co. v. City*, 20 Wash. 53, 54 Pac. 774; *Wahoo v. Dickinson*, 23 Neb. 426, 36 N. W. 813. This disposes, we believe,

of the objections urged against the validity of the statute.

It was further contended for plaintiff that, under the provisions of the law, the commissioners had no right to accept and award the contract to a higher bidder, but that "the contract should have been let to the lowest bidder, or the work should have been advertised for new bids"; but the language of the statute is that "they, together with the superintendent of construction, shall convene and let to the lowest responsible bidder," and the decisions are to the effect that when, by the clear import of this or similar language, a discretion is conferred, the action of the authorities will not be interfered with, unless the same was influenced or procured by fraud. *People v. Kent*, 160 Ill. 655, 43 N. E. 760; *Brick & Pav. Co. v. Philadelphia*, 164 Pa. 477, 30 Atl. 383; *Commonwealth v. Mitchell*, 82 Pa. 343; *Clapton, Adm'r, v. Taylor*, 49 Mo. App. 117.

In *People v. Kent*, it was held: "(1) The word 'responsible,' applied to an undertaking to pay money only, means financial ability; but in the statute for letting contracts for public improvements, which requires a 'responsible bidder,' it has the wider meaning of ability to respond to the requirements of the contract, having full regard to the subject-matter thereof. (2) The requirement of a statute that contracts for a public improvement shall be let to the lowest responsible bidder does not require the letting of a contract to the lowest bidder upon the ascertainment of his financial responsibility only; but the term 'responsible' includes the ability to respond by the discharge of the contractor's obligations in accordance with what may be expected or demanded under the terms of the contract. (3) The courts cannot interfere, in the absence of fraud, with the exercise of the official discretion of a public officer intrusted with the duty of awarding a contract, in determining whether a certain person was the lowest responsible bidder, after investigation of such person's record in doing similar business before."

And in *Clapton v. Taylor*, supra: "(2) In letting contracts for street improvements, the duty of city authorities is not wholly ministerial, but partakes sufficiently of a judicial character, in the absence of fraud or misconduct, to render their conclusion binding; and the law in regard to the letting of such contracts does not mean absolutely that the contract shall be given to the lowest bidder without regard to fitness, and the city authorities are presumed to have done, and not to have exceeded, their duty."

The case was submitted for our decision near the close of the term, with a request that an early decision be rendered, and we may have written somewhat hurriedly. Our investigations, however, have been very much facilitated by the excellent briefs submitted by counsel for both parties, and we desire to express appreciation of the commendable dil-

igence they have shown in their preparation, and the great aid these briefs have been to the court in reaching a satisfactory conclusion on the questions presented.

For the reasons stated, we are of opinion that the judgment of his honor below must be affirmed, and it is so ordered.

Affirmed.

(152 N. C. 723)

HARPER v. TOWN OF LENOIR.

(Supreme Court of North Carolina. May 27, 1910.)

1. MUNICIPAL CORPORATIONS (§ 385*) — STREETS — CHANGING GRADES — LIABILITY FOR DAMAGES.

A municipal corporation is liable to the owner of property abutting on a street for changing the grade of the street only so far as damages arise from its doing the work negligently.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 925-928; Dec. Dig. § 385.*]

2. MUNICIPAL CORPORATIONS (§ 733*) — STREETS—CHANGING GRADES—SUPPORTS FOR ABUTTING PROPERTY.

Where a change of street grade involves an excavation of 12 or 14 feet, leaving abutting property on an embankment of that height, nearly perpendicular, and with a soil that will not stand in any such shape, proper care requires the municipal corporation to provide some kind of proper support therefor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1547-1549; Dec. Dig. § 733.*]

3. PLEADING (§ 249*) — COMPLAINT—AMENDMENT.

The complaint in an action by the owner of a lot abutting on a street to enjoin excavations for a change of street grade may be amended to seek recovery for negligence in the doing of the work; Revisal 1905, § 469, allowing the joinder of all causes of action arising out of the same transaction or transactions connected with the same subject of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 712; Dec. Dig. § 249.*]

4. JUDGMENT (§ 598*) — MERGER AND BAR — PERMANENT INJURIES.

The injury to abutting property from negligence of the municipal corporation in making a change of street grade being of a permanent nature, but one recovery is permissible, measured by the impaired market value of the property arising, and likely to arise, from the negligence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1113; Dec. Dig. § 598.*]

5. MUNICIPAL CORPORATIONS (§§ 394, 395*) — STREETS — CHANGE OF GRADE — DAMAGES — EVIDENCE.

While the general and better rule of damages for injury to abutting property from negligence of a municipal corporation in making a change of street grade is the impaired market value of the property, the cost of a retaining wall is relevant to the inquiry, and under some circumstances may be adopted as determinative, particularly where such cost is reasonable, and operates in restriction of amount of recovery.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 938, 945-948; Dec. Dig. §§ 394, 395.*]

6. EVIDENCE (§ 474*)—OPINIONS.

Witnesses who have had personal observation of relevant facts and circumstances, and whose opinions are calculated to aid the jury, may give them as to the amount a lot is damaged by negligence in change of the street grade.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2299; Dec. Dig. § 474.*]

7. WITNESSES (§ 287*)—REDIRECT EXAMINATION.

Where defendant, in cross-examination of a witness in an action for injury to property by negligence in change of street, brought out the statement that the property had been assessed for taxation at a much lower value than plaintiff claimed, the statement of witness on redirect that the tax assessors were accustomed to assess such property at about one-third its true value was relevant, certainly not ground for reversal.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1000-1002; Dec. Dig. § 287.*]

Appeal from Superior Court, Caldwell County; Council, Judge.

Civil action by George F. Harper against the Town of Lenoir. From a judgment on a verdict for plaintiff, defendant appeals. Affirmed.

Civil action tried at November term, 1909. There was evidence tending to show that the plaintiff was the owner of a house and lot in the town of Lenoir, abutting on Main street, and also on North Boundary street; that the authorities of the town in charge of the matter, having determined on a change of grade of these streets, proceeded to dig down and lower the Main street, leaving plaintiff's property 12 or 15 feet above the level of the sidewalk, and were about to commence like action on North Boundary street, when plaintiff instituted the present suit. While the record does not make the matter very clear as to what was the original purpose of the action nor what part of the digging took place, or damage was caused before the same was commenced, it seems to have been admitted on the argument that the suit was instituted to restrain the authorities from going on with the work complained of, and that, this having been stopped, no restraining order was issued, and the suit was proceeded with without process of that character, and was tried on an issue as to negligence. It appears to have been further conceded that the change of grade along Main street had been completed before suit commenced, but that some of the consequential damages had occurred from it since action brought, and evidence as to all such damage was admitted over defendant's objection. The original complaint, evidently drawn with a view of using same also as an affidavit on the hearing of an application for a restraining order, contained allegations of carelessness in the work on the part of the defendant, and was filed at the return term in 1908, and answer was then filed by defendant denying all material averments. At the trial term, in November, 1909, plain-

tiff was allowed, over defendant's objection, to amend his complaint, making a more extended and specific allegation of negligence on part of defendant in doing the work complained of, and amended answer was then filed by defendant. There was evidence on part of plaintiff tending to show injury to the plaintiff's property by reason of alleged negligence causing substantial damage to same, part of this damage occurring before commencement of the suit, and to all evidence tending to show damages subsequently occurring defendant objected and properly filed exceptions.

On issues submitted, the jury rendered the following verdict:

"(1) Did the defendant have authority under the law to lower the grade of North Main street in the town of Lenoir, and to remove earth therefrom up to the line of the plaintiff's property? Answer: Yes.

"(2) Was the plaintiff's property injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"(3) What damage, if any, is plaintiff entitled to recover? Answer: \$800."

Judgment on verdict for plaintiff, and defendant excepted and appealed.

Geo. W. Wilson, W. C. Newland, and Lawrence Wakefield, for appellant. W. A. Self and Mark Squires, for appellee.

HOKE, J. (after stating the facts as above). On the issue as to defendant's responsibility, the court below, among other things, charged the jury as follows: "Cities and towns have the right to improve streets and pavements for the public good, and, in the exercise of this right, may grade down streets and pavements to a lower or make them of greater elevation than the property of adjacent or abutting property owners, and if in doing such work the town or city exercises (A) care and skill—that is, does the work properly—(B) then if injury results to the adjacent or abutting owners, either by leaving their property below or above the grade so made, the property owners are not entitled to recover damages, even though their property is rendered of less value by reason of the work so done. Nor can property owners recover damages under such conditions because of the ingress or egress to their property being interrupted or hindered, nor can they recover because of the effect of such work upon the appearance of their property." And again: "Every one who owns real estate in a city or town that adjoins a public street or pavement holds it subject to the right of the city or town to grade such street or pavement down or to elevate it when in the exercise of the judgment of the authorities of the city or town it becomes necessary or advisable to do so. And where grading is done under such conditions (C) and is done properly—that is, with care and skill, and with due regard to the rights of the property

owners—(D) then the law affords no protection to the property owners on account of injury to their property resulting from being left at a higher or lower level than the street or pavement, or on account of ingress or egress to such property being affected, or for any injury to the appearance of the property." This is a very correct statement of the law as it obtains with us, where streets have been already established, and is in accord with numerous decisions of our court on the subject. *Dorsey v. Henderson*, 148 N. C. 423, 62 S. E. 547; *Jones v. Henderson*, 147 N. C. 120, 60 S. E. 894; *Wolfe v. Pearson*, 114 N. C. 621, 19 S. E. 204; *Meares v. Wilmington*, 81 N. C. 73, 49 Am. Dec. 412. Under the charge, and applying this principle, the jury have awarded plaintiff damages for the negligent manner in which this work was done by the town authorities, and, unless there is reversible error appearing in the record, the judgment in his favor must be affirmed.

It was objected to the validity of the recovery that the judge on the issue as to negligence imposed upon the defendant the duty of constructing a retaining wall for the protection of plaintiff's property, but, on the facts presented, we do not think the position can be sustained. The defendant certainly is not required to build a retaining wall in every case where an excavation of this character is made, nor is the cost of such a wall usually the correct measure of damages; but where, as in this case, the change of grade involves an excavation 12 or 14 feet, leaving plaintiff's property abutting on an embankment of that height, nearly perpendicular, and with a soil showing a tendency to crumble away, "a rotten, ashy kind of soil that has no body, has a good deal of isinglass and mica in it, not a kind of soil that will stand in any such shape as that," we think the court correctly held that proper care required that some kind of proper support should have been provided; and a failure to provide such support was correctly imputed for negligence on the part of the town. This was substantially held in *Meares' Case*, supra, and the decision was so interpreted in *Jones' Case*, supra; both cases certainly giving decided intimation that the failure to build a retaining wall under the conditions indicated was properly held to be actionable negligence.

It was objected, further, on the part of the defendant, that the action having been instituted primarily to obtain an injunction, and before any substantial damages had accrued from the alleged wrong, the court had no power to allow an amendment demanding damages for a negligent breach of duty on the part of defendant; the position being that such an amendment amounted to an entire change in the scope and purpose of the action, and constituted reversible error under the authority of *Clendenin v. Turner*, 96 N. C. 421, 2 S. E. 51, and that class of cases. As heretofore stated, it does not necessarily

appear that it was the sole purpose of the action to obtain an injunction, and the original complaint contains averments which by correct interpretation amount to a charge of negligence, so that the facts here are against the defendant, but, if it were otherwise, the position cannot be sustained. Courts of equity not infrequently award damages when such a demand is incident to some recognized source of equitable relief; and under our system, combining legal and equitable actions in one and the same jurisdiction, and permitting the joinder of "all causes of action arising out of the same transaction or transactions growing out of the same subject of action" (Revisal, § 409), it was not only permissible, but eminently proper, that the plaintiff should be allowed to amend and claim the damages accrued, and which were incident to the principal relief. Beach on Injunctions, § 10; Pomeroy's Equity Jurisprudence, §§ 112-237. Making a short extract from the last citation: "Equity, therefore, assumed a jurisdiction to grant an injunction restraining the commission of actual or threatened waste, and having obtained jurisdiction for the purpose of awarding this special relief, which in many instances is not complete, the court will retain the cause and decree full and final damages, and when necessary order the abatement of whatever creates the waste or causes the nuisance."

Again, it was contended that this is an action for withdrawal of lateral support; that this is never considered as an actionable wrong until appreciable damage has actually occurred, and, as there was no evidence tending to show any substantial injury to plaintiff's property prior to the commencement of the suit, the recovery cannot be sustained. There seems to have been no more fruitful source of litigation than actions for wrongful withdrawal of lateral support by excavations on the part of an adjoining property owner, and there are many learned discussions in the reported cases on the subject. Considering these cases, it is undoubtedly established by the weight of authority that in actions of this character a claim for damages does not arise until there has been some appreciable injury to plaintiff's property as by an actual subsidence of the soil, and then only to the extent of the injury suffered. *Kansas City R. R. v. Schwake*, 70 Kan. 141, 78 Pac. 431, reported in 68 L. R. A. 673; *Larson v. Street Ry.*, 110 Mo. 234, 19 S. W. 416, 16 L. R. A. 330; also reported in 33 Am. St. Rep. 439; *Charless v. Rankin*, 22 Mo. 566, in 66 Am. Dec. 642, with full and learned notes by the editors of these respective publications. These decisions, however, cannot avail defendant, for the reason that, in the respect suggested, the principle upon which they rest does not apply with us to an action against a municipal corporation for damages caused by changing the grade of a street already established. In such case, as heretofore stated, damages can only be recovered if

the work is negligently done and to the extent caused by such negligence. And this, too, is the answer to another and kindred exception noted by defendant to the admission of all testimony as to any damages accruing since action commenced. Recovery, then, being sustainable only for negligence, in this case a pure tort, the damages, as said in *Bowen v. King and Harris*, 146 N. C. 390, 59 S. E. 1047, "will include all that are directly caused by the wrong and all consequential damages which are the natural and probable effect of such wrong, under the facts as they existed at the time the same is committed, and which could be ascertained with a reasonable degree of certainty"—citing *Johnson v. Railroad*, 140 N. C. 574, 53 S. E. 362; *Sharpe v. Powell*, 7 L. R. 1892, p. 253; 8 Am. & Eng. Ency. p. 598; *Hale on Damages*, 34, 35, et seq.—and, having been caused by a change of grade done as a rule under statutory authority and considered of a permanent nature, under our decisions, there may, and ordinarily must be, but one recovery for the entire wrong. This general principle is well stated by Justice Avery in the case of *Ridley v. Railroad*, 118 N. C. 998, 24 S. E. 731 (32 L. R. A. 708), as follows: "But even where the injury complained of, either by the servant owner or an adjacent proprietor, is due to the negligent construction of such public works as railways which it is the policy of the law to encourage, if the injury is permanent and affects the value of the estate, a recovery may be had at law of the entire damages in one action"—citing *Smith v. Railroad*, 23 W. Va. 453; *Troy v. Railroad*, 3 Post. (N. H.) 83, 55 Am. Dec. 177; *Railroad Co. v. Maher*, 91 Ill. 312; *Bizer v. Railroad*, 70 Iowa, 146, 30 N. W. 172; *Fowle v. Railroad Co.*, 112 Mass. 334, 338, 17 Am. Rep. 106; s. c., 107 Mass. 352; *Railroad v. Esterle*, 13 Bush (Ky.) 667; *Railroad v. Combs*, 10 Bush (Ky.) 382, 393, 19 Am. Rep. 67; *Stodghill v. Railroad Co.*, 53 Iowa, 341, 5 N. W. 495; *Cadle v. Railroad Co.*, 44 Iowa, 11. And is said by Mr. Elliott in his work on *Roads and Streets* to obtain very generally in determining the damages recoverable on a change of grade by the authorities. Speaking to this question, the author said: "Sec. 488. All damages are recoverable in one action.—The change of grade is a permanent matter, and all resulting injury must be recovered for in one action, for the property owner cannot maintain successive actions as each fresh annoyance or injury occurs. The reason for this rule is not far to seek. What is done under color of legislative authority, and is of a permanent nature, works an injury as soon as it is done, if not done as the statute requires, and the injury which then accrues is, in legal contemplation, all that can accrue, for the complainant is not confined to a recovery for past or present damages, but may also recover prospective damages resulting from the wrong. It is evident that a different rule would lead to a multiplicity of actions, and

produce injustice and confusion. It is in strict harmony with the rule which prevails, and has long prevailed, in cases where property is seized under the right of eminent domain. * * * The presumption of the permanency of the grade once established is the only reasonable and defensible one, and it is therefore just to apply to such cases the rule which governs in cases where the improvement is permanent. It is not reasonable to apply the rule which prevails in cases where a nuisance is created which is capable of abatement or removal and is not a thing of a permanent nature. The general rule is that where the act complained of is of a permanent nature, all the damages must be recovered in one action, and this rule should govern in actions for injuries resulting from a change of grade." Applying the principle the entire damage for plaintiff's injury is recoverable in the present action, and from this it follows that the proper and only feasible rule for admeasuring the damage will be the impaired market value of the property arising, and which is likely to arise, by reason of the negligence established. We were referred to several decisions to the effect that the impairment of market value was not the correct rule, but rather the diminished value of the lot caused by subsidence of soil or other injury which has occurred (*Gilmore v. Driscoll*, 122 Mass. 190, 23 Am. Rep. 812; *McGuire v. Grant*, 25 N. J. Law, 356, 67 Am. Dec. 49), but these cases were actions for wrongful withdrawal of lateral support by an adjoining proprietor, which did not necessarily involve the question of negligence, nor permit the award of prospective damages. Even in actions of that character, there are authorities to the effect that the correct rule is the impaired market value of the lot, the estimate to include prospective damages. See note to *Kansas City R. R. v. Schwake*, supra, in 68 L. R. A. 702, 703. But when, as in this case, the recovery is for negligence arising from an injury permanent in its character and under color of statutory authority, the true rule should undoubtedly be the impaired market value to be determined on consideration of the entire damages arising from the wrong, past, present, and prospective. Taking the charge as a whole, and in connection with the special instructions given at the request of the defendant, this was the principle laid down for the guidance of the jury in the present case, and these exceptions of the defendant are also overruled.

There were several other objections made to rulings of the court on questions of evidence. One of them was pointed to the admission of evidence as to the cost of a retaining wall. Both plaintiff and defendant seem to have offered testimony on that question, and we think the evidence was properly admitted. As we have endeavored to show, the general and better rule for the admeasurement of damages in these cases is the

impaired value of claimant's lot by reason of defendant's negligence; but the cost of a retaining wall should, we think, be received as a fact relevant to the inquiry, and under some circumstances might be adopted as determinative, particularly when such cost is reasonable and operates in restriction of the amount recovered. As we have said in *Bowen v. King*, supra: "A well-recognized restriction applying in case of tort or contract, and as to both elements of damages (direct and consequential), is to the effect that the injured party must do what he can in the exercise of reasonable care and diligence to avoid or lessen the consequences of the wrong, and for any part of a loss incident to such failure no relief can be had." And a proper application of this principle in such cases might require that this cost of retaining wall should be accepted as controlling. See note to 68 L. R. A. 706, citing *Kopp v. Railroad*, 41 Minn. 310, 43 N. W. 73; *Richardson v. Webster City*, 111 Iowa, 427, 82 N. W. 920, and other authorities. And the case in our own reports of *Meares v. Wilmington*, supra, gives clear indication that the costs of such a wall, if reasonable, might under given conditions be accepted and acted on as the correct estimate in determining the damage.

Defendant excepted, further, that several witnesses were allowed to give their opinion as to the amount the lot was damaged. Evidence of this character from witnesses who have had personal observation of relevant facts and conditions, and whose opinion is calculated to aid the jury to a correct conclusion, is coming to be more and more regarded as competent, and its reception has been sanctioned and approved in several recent decisions of the court. *Lumber Co. v. Railroad*, 151 N. C. 220, 65 S. E. 920; *Wilkinson v. Dunbar*, 149 N. C. 20, 62 S. E. 748; *Davenport v. Railroad*, 148 N. C. 287, 62 S. E. 431, 128 Am. St. Rep. 599; *Tire Setter Co. v. Whitehurst*, 148 N. C. 446, 62 S. E. 523; *Taylor v. Security Co.*, 145 N. C. 385, 59 S. E. 139, 15 L. R. A. (N. S.) 583.

Again, defendant excepted that a witness for plaintiff, testifying to the value of the lot in question, was allowed to say that the tax assessors were accustomed to assess such property at about one-third of its true value. This as an independent proposition would not be regarded as competent testimony, but, on cross-examination of this same witness, defendant's counsel had brought out the statement that the property in question had been assessed for taxation at a much lower value than plaintiff claimed, and this statement of the witness on redirect examination became in this way, we think, a relevant circumstance; certainly it will not be held for reversible error.

Considering the entire matter, we are of opinion that the cause has been carefully and correctly tried, and that no reversible error

appears in the record. The judgment is therefore affirmed.

No error.

(152 N. C. 689)

RICH v. ASHEVILLE ELECTRIC CO.

(Supreme Court of North Carolina. May 27, 1910.)

1. APPEAL AND ERROR (§ 927*)—REVIEW—NONSUIT.

On review of a nonsuit, the evidence must be construed most favorably for plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 4024; Dec. Dig. § 927.*]

2. MASTER AND SERVANT (§ 97*)—STREET CAR EMPLOYEES—INJURY—LIABILITY OF EMPLOYER.

A street car conductor cannot recover for injury caused by falling from the running board of his car, resulting from his right hand slipping from a defective side curtain and striking his left hand by which he was maintaining himself, since the accident was not a natural result of the defect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. § 97.*]

3. NEGLIGENCE (§§ 6, 121*)—VIOLATION OF STATUTE.

Violating a statute is negligence, but, to entitle another to recover for an injury on account thereof, he must show that the violation proximately caused the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 8, 227; Dec. Dig. §§ 6, 121.*]

4. MASTER AND SERVANT (§ 94*)—STREET RAILWAYS—NEGLIGENCE—PROXIMATE CAUSE.

That a street railway violated Revisal 1905, §§ 2615e, 3800, requiring vestibule fronts on street cars, does not render it liable for injury to a conductor who fell from the running board of a car through his right hand slipping from a side curtain and striking his left hand with which he maintained himself, since there was no causal connection between the violation and the accident; the purpose of sections 2615e, 3800, being to protect the motorman from unnecessary exposure to the weather.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 159; Dec. Dig. § 94.*]

Clark, C. J., dissenting.

Appeal from Superior Court, Buncombe County; J. S. Adams, Judge.

Action by J. O. Rich against the Asheville Electric Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

The plaintiff sued to recover damages for injuries received by him on Sunday morning, December 3, 1905, between 10 and 11 o'clock a. m., while acting as conductor on one of the defendant's cars in Asheville. The plaintiff testified that he had been, prior to the injury, a conductor for three years; that he asked to be relieved of his regular run that morning, and to fill an extra man's run, which was to take cars empty to Riverside Park—a distance of about three miles—to bring the cadets of Bingham School in to church; that when he reported to the car barn he found "signed up" on the bulletin board two open summer cars for this special run; that the

weather was cold, something near freezing, a strong wind blowing from the north, cloudy and "spitting snow"; the thermometer had dropped from 49° Far. at midnight to 33° Far. between 10 and 11 a. m.; that the summer cars are not equipped with a vestibule, but they have a glass front in the rear of the front platform, and in front of the rear platform; that the seats run across the car and at each end there is a roller curtain which can be pulled down or rolled up as the weather conditions require; that these curtains work in grooves cut in posts at the ends of each seat; that fastened on the outside of each post is a substantial stanchion for holding to as one walks or stands on the running board or step, which board or step runs lengthwise the car on either side, and is used by passengers alighting from or getting on the car, and likewise used by the conductor in going from one end of the car to the other, in collecting fares of passengers; that after reporting at the car barn on the morning of December 3d to Mr. White, the man in charge, he observed that the open cars were "signed up" for the run he was to make; that he complained and requested closed cars on account of the weather; that White told him he would see about it; that he, the plaintiff, looked around and saw three closed cars apparently in good order, and went to report to White, but he had gone, and the other car crews had left, so he took out the open car at 10:5 a. m. and proceeded on his run to Riverside Park; that he had no passengers and took on none; that he had his overcoat, but did not put it on, and stood on the rear platform; that his car made the trip to the park in about 20 minutes; the cadets got aboard, pulled down the curtains, certainly on one side of the car, and the plaintiff started his car back to Asheville; that the car had gone about 200 or 300 yards when he started to collect fares; that he had to roll up the curtain, which was done by a pull, when it rolled up by a spring; that the curtain caught and he jerked it with his right hand, his hand slipped off and either struck his left hand with which he was holding to a stanchion, or it being numbed with cold, slipped loose, and he fell from the running board, and received the injuries for which he sues to recover damages. At the conclusion of the evidence, his honor allowed the motion, made under the statute, for judgment as of nonsuit, and the plaintiff excepted and appealed to this court.

Frank Carter and H. C. Chedester, for appellant. Martin & Wright, for appellee.

MANNING, J. Construing the evidence in the view most favorable for the plaintiff, as we must do under the uniform rulings of this court, where the motion for judgment as of nonsuit is allowed, we are not convinced that his honor committed error in allowing the

motion. In speaking of an injury occurring to the plaintiff, in *House v. Railroad* (at this term) 87 S. E. 961, where the plaintiff, a servant of the defendant, employed to clean its cars and wash its windows, was injured by attempting, with unusual force, to raise a window which had become tight in the sash, when her hand slipped, broke through the glass and was severely cut, Mr. Justice Hoke said: "We have repeatedly decided that an employer of labor is required to provide for his employes a reasonably safe place to work, and to supply them with implements and appliances reasonably safe and suitable for the work in which they were engaged. As stated in *Hicks v. Manufacturing Co.*, 138 N. C. 319-325, 50 S. E. 703, 705, and other cases of like import, the principle more usually obtains in the case of 'machinery more or less complicated, and more especially when driven by mechanical power,' and does not, as a rule, apply to the use of ordinary everyday tools, nor to ordinary everyday conditions, requiring no special care, preparation, or provision, where the defects are readily observable, and where there was no good reason to suppose that the injury complained of would result. The reason for the distinction will ordinarily be found to rest on the fact that the element of proximate cause is lacking—defined in some of the decisions as 'the doing or omitting to do an act which a person of ordinary prudence could foresee would naturally or probably produce the injury.' *Brewster v. Elizabeth City*, 137 N. C. 392, 49 S. E. 385. These windows not infrequently become tightened from different causes, and, while it may be a great inconvenience and should perhaps be given more attention than it receives, no one would say that an injury of this character would ordinarily arise or be likely to ensue, and therefore no actionable wrong has been established." This case, we think, is decisive of the point presented in the present case, as to the tightening of the curtain which plaintiff was attempting to roll up. No one would say that the injury which plaintiff received—falling from the running board or step—would ordinarily arise or be likely to ensue from this cause. No reason is given, nor does any appear, why the plaintiff, as he had charge of the car, did not examine these curtains before leaving the barn, if he had apprehended any injury as likely to ensue to him from their becoming tightened in the grooves, as such a condition was readily observable. The liability of the defendant, however, was urged before us chiefly upon the ground that it was operating a car for passengers on its line in violation of sections 2615e, 3800, Revisal, which provides that "all street passenger railway companies shall use vestibule fronts * * * on all passenger cars run by them on their lines during the latter half of the month of November, and during the months of December, January, February and March

of each year. * * * Provided, further, such companies may use cars without vestibule fronts in cases of temporary emergency in suitable weather," etc. While the evidence does not disclose any causal connection between the failure to use the vestibule front on the car the plaintiff was using and the injury received by him, or that defendant's failure to provide a vestibule front was an act which a person of ordinary prudence could foresee would naturally or probably produce the injury complained of, yet it is insisted by the plaintiff that the running of a passenger car without the vestibule front was forbidden by statute, and constituted negligence, for which the defendant is liable to plaintiff. In *Henderson v. Traction Co.*, 132 N. C. 779, 44 S. E. 598, this court said: "After a careful examination of a number of authorities, we are of the opinion that the sound doctrine is that a violation of the public statute or a city ordinance is evidence of negligence, to be submitted to the jury. It is generally held, and this we regard as the true doctrine, that the element of proximate cause must be established, and it will not necessarily be presumed from the fact that a city ordinance or statute has been violated. Negligence, no matter in what it may consist, cannot result in a right of action unless it is the proximate cause of the injury complained of by the plaintiff. *Elliott on Railroads*, § 711." This case has been approved in *Cheek v. Lumber Co.*, 134 N. C. 225, 46 S. E. 488, 47 S. E. 400.

In *Leathers v. Tobacco Co.*, 144 N. C. 330, 57 S. E. 11, 9 L. R. A. (N. S.) 349, Mr. Justice Connor, speaking again for this court, reviewed in an elaborate opinion the whole doctrine, and quoted with approval, as expressing the conclusion reached by the best-considered authorities, the following language from *Thompson on Neg.* vol. 1, § 10: "When the Legislature of a state or the council of a municipal corporation, having in view the promotion of the safety of the public or of individual members of the public, commands or forbids the doing of a particular act, the general conception of the courts, and the only one that is reconcilable with reason, is that a failure to do the act commanded, or doing the act prohibited, is negligence as mere matter of law, otherwise called negligence per se; and this, irrespective of all questions of the exercise of prudence, diligence, care or skill, so that if it is the proximate cause of hurt or damage to another, and if that other is without contributory fault, the case is decided in his favor, and all that remains is to assess his damages." The conclusion of this court is thus stated in that opinion: "Upon careful consideration, we conclude that the law is correctly laid down by Judge Thompson and the other authors quoted, and sustained by the best-considered decided cases. * * * While it is true that if there be any

dispute regarding the manner in which the injury was sustained, or if, upon the conceded facts, more than one inference may be fairly drawn, the question should be left to the jury, yet it is equally well settled that when there is no dispute as to the facts, and such facts are not capable of more than one inference, it is the duty of the judge to instruct the jury, as a matter of law, whether the injury was the proximate cause of the negligence of the defendant. *Rolin v. Tobacco Co.*, 141 N. C. 300, 53 S. E. 891, 7 L. R. A. (N. S.) 835. Again, this court was called upon to consider the question in *Starnes v. Mfg. Co.*, 147 N. C. 556, 61 S. E. 525, 17 L. R. A. (N. S.) 602, and, speaking through Mr. Justice Brown, said: "As to the second contention, it is decided squarely against the defendant in the recent case of *Leathers v. Tobacco Co.*, supra, where it is held not only that a cause of action accrues to the child, if injured, but that it is negligence per se, and not merely evidence of negligence, to violate the statute. Revisal 1905, § 3362. * * *

This brings us to consider defendant's third contention, a matter not fully determined in the *Leathers Case*, and which may be thus stated: That the plaintiff cannot recover, because the employment of him, although willfully and knowingly done in violation of the statute, was not the proximate cause of this injury, inasmuch as he did not receive the injury while in the discharge of the duties to which he was assigned." After reviewing the evidence in that case tending to show that the violation of the statute was the proximate cause of the injury received, the court proceeded: "We do not mean to hold that the employer violating the act would be liable in damages for every fatality that might befall the child while in its factory. For instance, had the plaintiff died of heart disease, or from a stroke of paralysis, or been seriously injured by the willful and malicious act of a workman in knocking him against a machine, or injured from some cause wholly disconnected from the unlawful employment, the defendant could not be held liable in damages simply on account of the employment in violation of the statute. But we do hold that the employment, when willfully and knowingly done, is a violation of the statute, and that every injury that reasonably and naturally results is actionable. In this case, the connection between the employment and the injury is that of cause and effect, and brings the defendant within the operation of the statute." *Fowle v. Railroad Co.*, 147 N. C. 491, 61 S. E. 282. It seems to us that the principle is clearly settled by this court in the cases cited that while the violation of a statute is negligence, yet to entitle the plaintiff seeking to recover damages for an injury sustained, he must show a causal connection between the injury received and the disregard of the statutory prohibi-

tion or mandate—that the injury was the proximate cause, and this requirement is fundamental in the law of negligence. In the present case, there is an entire absence of evidence tending to show such causal relation, but on the contrary the plaintiff's evidence negatives it. If we suppose the car equipped with a vestibule front, as required by statute, and the open cars are so equipped in many parts of the country, what causal connection existed between the injury and the negligence, or how could the inference that the failure to have a vestibule front be reasonably inferred as the proximate cause of plaintiff's injury? Besides, the manifest purpose of the statute, considered in the *Leathers Case* and the *Starnes Case*, being the statute forbidding the employment of children under 12 years of age in manufacturing establishments (Revisal 1905, § 3362), was not only to protect children of such tender years and immature judgment from injuries likely to ensue from their coming in contact with machinery, but their health from injury by such close confinement, as pointed out in *Rolin v. Tobacco Co.*, supra; while the manifest purpose of the statute in the present case was to protect the motorman (not the conductor) from unnecessary exposure to the weather while performing his duty. It will be observed that the statute does not require any particular kind or make of car to be used, but refers only to its equipment. The same necessity for showing the causal or proximate relation between the injury and the alleged negligence, is recognized as essential in *Troxler v. R. R.*, 122 N. C. 902, 30 S. E. 117, and the numerous cases citing and approving that decision, for as is said in that case: "Where the negligence of the defendant is a continuing negligence (as the failure to furnish safe appliances, in general use, *when the use of such appliances would have prevented* the possibility of the injury, there can be no contributory negligence which will discharge the master." And the second headnote in *Biles v. Railroad*, 139 N. C. 528, 52 S. E. 129, thus states the principle: "In an action against the defendant railroad, if the jury should find that the plaintiff, while in the performance of his duty, was injured, as the *proximate consequence of a defective engine or defective appliance*, then the defense of assumption of risk is not open to the defendant, by reason of the fellow servant act." We have found no case in which the plaintiff was not required to show that his injury was the proximate consequence of the defendant's negligence; even in those cases where the doctrine of "res ipsa loquitur" applies, this causal or proximate relation is sufficiently shown by the act itself, and is inferred from the act from which the injury results. The evidence of the plaintiff, construed in the view most favorable to him, failing to show this causal or proximate relation between the injury re-

ceived and the negligence of the defendant, we must hold that the judgment of nonsuit was properly rendered, and it is affirmed. Affirmed.

CLARK, C. J. (dissenting). Two sections of the Code, 2615 and 3800, forbade the defendant to use the summer car at the time it did—in December—and the latter section made it a misdemeanor. In *Leathers v. Tobacco Co.*, 144 N. C. 330, 57 S. E. 11, 9 L. R. A. (N. S.) 349, this court expressly repudiated the doctrine that the violation of a statute was merely "evidence of negligence" and held that such conduct was "negligence per se." Connor, J., pages 345-348 of 144 N. C., page 17 of 57 S. E., citing a wealth of authorities to that effect. He thus summed up: "Upon careful consideration, we conclude that the law is correctly laid down by Judge Thompson and the other authors quoted and is sustained by the best-considered cases." That case was well considered and is based upon numerous authorities of great weight. A due consideration for the dignity and consistency of our own decisions requires that we adhere to what was there said, after so great deliberation. Even if an unlawful act is only evidence of negligence, that would entitle the plaintiff to have the injury committed in the perpetration of the unlawful act submitted to the jury. If one is engaged in an unlawful act and unintentionally or accidentally slays another, he is not absolved from responsibility but it is manslaughter. *State v. Vines*, 93 N. C. 493, 53 Am. Rep. 466; *State v. Hall*, 132 N. C. 1107, 44 S. E. 553. If one while engaged in doing an unlawful act injures another, it is certainly negligence. The defendant was violating the law and in the commission of a misdemeanor in running the car. The injury to the plaintiff could not possibly have occurred if the defendant had not disobeyed the statute. There was no evidence of contributory negligence—though the burden to prove that was upon the defendant—and it was necessarily error to withdraw the case from the jury.

Aside from the statute, it was negligence for the defendant in midwinter, with the temperature down to freezing and a strong wind blowing from the north, cloudy and "spitting snow," to refuse the plaintiff's request for a closed or winter car, of which there were three, at least, idle under the shed ready for use. It was in violation of the ordinary dictates of humanity as well as of the statute to require the plaintiff to take instead an open summer car in such weather on a run of three miles out beyond the city limits and back. The plaintiff, in the regular winter car which could and should have been given him as he requested, would have been protected from the weather in the aisle, while collecting the fares, and

could not have slipped and been hurt. As it was, the curtains being left down to protect the passengers, the plaintiff was obliged to dodge along, under one curtain after another, which he had to lift so that he could collect the fares. While doing this he had to walk along the running board, which was slippery, for it was "spitting snow," and his hands being numb with cold, and the strong north wind blowing the curtains, his hands slipped when trying to raise a curtain which was "caught." The plaintiff in consequence fell off the running board and was hurt.

The facts not being denied, and the law fixing the defendant with negligence, the judge might well have held as a matter of law that such negligence was the proximate cause of the injury. Certainly he should not have denied the plaintiff the right to have a jury pass on the question. The exposure by the defendant to such weather, unnecessarily and over his protest, was more than negligence. It was inhumane. The statute made the conduct of the company a misdemeanor, even if no harm had accrued to the plaintiff.

The plaintiff, in my judgment, has a right to have a jury, instead of the judge, to pass upon his issues. Employees are entitled to protection from such heedless disregard of their comfort and safety as was shown on this occasion, and are surely entitled to recover for injuries which a jury shall find was sustained from such cause.

(182 N. C. 660)

LANCASTER TRUST CO. v. MASON.

(Supreme Court of North Carolina. May 27, 1910.)

1. CORPORATIONS (§ 155*) — "DIVIDENDS" — DEFINITION OF.

Where the word "dividend" is used without qualification or explanation, it signifies dividends payable in money (citing *Words and Phrases*, vol. 3, pp. 2143, 2147.)

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 560, 572; Dec. Dig. § 155.*]

2. CORPORATIONS (§ 157*) — "STOCK DIVIDENDS"—DEFINITION OF.

A "stock dividend" is not in the ordinary sense a dividend; a "dividend" being a distribution of the profits to stockholders as the income from their investment, while a "stock dividend" is merely an increase in the number of shares, such increase representing the same property that was represented by the smaller number of shares (citing *Words and Phrases*, vol. 7, p. 6664).

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 584; Dec. Dig. § 157.*]

3. CORPORATIONS (§ 157*)—SALE OF STOCK—RIGHT TO DIVIDENDS.

A corporation on December 16th declared a 4 per cent. semiannual dividend and a 6 per cent. extra dividend and a 50 per cent. stock dividend, payable to the stockholders of record on January 2d following. After the dividends were declared, but before they were due, plaintiff, a stockholder, sold four shares to defendant, the parties agreeing that the seller should receive the "January dividend," and the amount of the regular semiannual dividend due in Jan-

uary was added to a sight draft attached to the certificates of stock sent to a bank to be delivered upon payment therefor. Neither party had heard of extra cash dividend nor of stock dividend declared. Held, that the "January dividend" reserved included only the cash dividends, and the buyer was entitled to the increased stock represented by the so-called "stock dividend."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 586; Dec. Dig. § 157.*]

On rehearing.

Former judgment (65 S. E. 1015) modified, and judgment of trial court reversed, and new trial granted.

BROWN, J. When we considered this cause at last term, we concluded that under the terms of the contract of sale of the stock in the Durham Cotton Manufacturing Company the reservation of the "January dividend" by plaintiff entitled it not only to the regular 4 per cent. and extra 6 per cent. cash dividend declared and payable then, but also to the value of the so-called "50 per cent. stock dividend" which was declared at same time as the regular and extra cash dividends. Upon a careful review of the correspondence between the parties and a further consideration of the case, we are led to the conclusion that the words "allowing the January dividend to us," used in plaintiff's letter of December 23, 1907, were intended to refer to dividends payable in cash only, and do not embrace the so-called "stock dividend" of 50 per cent.

That was not strictly or in the usual sense of the word a dividend. It was simply an increase in the capital stock by dividing the capital of the corporation into a larger number of shares and allotting them to each stockholder in proportion to the number of shares he owned before the increase. This is not infrequent in these days when "watering stock" is no uncommon occurrence; not that we mean to intimate that such has been the case here. Therefore it has been held that, where the word "dividend" is used without qualification or explanation, it signifies dividends payable in money. 14 Cyc. 554, and cases cited; Black, Law Dict.; 3 Words & Phrases, pp. 2143, 2144; Smith v. Hooper, 95 Md. 16, 51 Atl. 844, 54 Atl. 95. This appears to us to be more consistent with the relationship which exists between the stockholders and the corporation. The distinction between the title of a corporation and the interest of its stockholders in the corporate property is familiar and well settled. Van Allen v. Assessors, 3 Wall. 573, 18 L. Ed. 229; Pullen v. Corp. Com'n (at this term), 68 S. E. 155. The ownership of that property is in the corporation, and not in the holders of shares of stock. The certificates of shares of stock denote the interest of each stockholder, which consists in the right to his proportionate part of the profits

when declared as dividends, and to a like proportion upon its dissolution, after its debts are paid. Therefore the value of the shares of stock is dependent upon the value of the property retained by the corporation. A cash dividend depletes the treasury of the corporation and detracts from its assets; but a stock dividend neither takes from nor adds to the corporate wealth. The interest of each stockholder remains the same when he receives his stock dividend as it was before. He is neither richer nor poorer. By it nothing is taken from the property of the corporation and nothing added to the interests of the shareholders. Its property is not diminished, and their interests are not increased.

Upon this principle it is held that "accumulated earnings" (upon which stock dividends are supposed to be based), so long as they are held by the corporation, being a part of the corporate property, the interest therein represented by each share is capital, and not the income of that share, as between tenant for life and the remainderman, legal or equitable, thereof. Gibbons v. Mahon, 136 U. S. 558, 10 Sup. Ct. 1057, 34 L. Ed. 525. In this case it is said that "ordinarily a dividend declared in stock is to be deemed capital, and a dividend in money is to be deemed income of each share." This view is taken by the Court of Appeals of Virginia: "A stock dividend is merely an increase in the number of shares; the increased number representing the same property that was represented by the smaller number of shares. One who sells stock, reserving the dividend that may be declared by a certain date, cannot claim the stock dividend thus declared, but only the cash dividend." Kaufman v. Charlottesville Woolen Mills, 93 Va. 673, 25 S. E. 1003. It is held by the Illinois court that: "A stock dividend gives the stockholder merely an evidence of the additions made by the corporation to its own capital. It adds nothing to the capital of the corporation nor to the capital of the shareholder." De Koven v. Alsop, 205 Ill. 309, 68 N. E. 930, 63 L. R. A. 587. "A stock dividend is not in the ordinary sense a dividend; the latter being the distribution of profits to stockholders as the income from their investments. A stock dividend is merely an increase in the number of shares; the increased number representing exactly the same property that was represented by the smaller number of shares." 7 Words & Phrases, p. 6864, and cases cited.

As it is admitted the plaintiff did not know of any stock dividend, it is manifest that it intended to sell and transfer to the defendant the entire interest in the corporate property represented by the four shares of stock it held prior to any increase in the capital stock. As the defendant testifies that he had no knowledge of such increase, and as

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

he paid \$675 per share for each share of the par value of \$500, we think it equally evident that he intended to purchase the entire interest of plaintiff in the corporate property.

Therefore we now think that, upon reason and authority, the proper construction of the contract is that the plaintiff sold its entire interest in the corporate property, retaining whatever cash dividend that should be declared on the fruit of the investment that it was parting with. The so-called "stock dividend" of 50 per cent. represented part of the corporate property sold to defendant in which plaintiff reserved no interest, and is therefore not entitled to the whole or any part of it. The former opinion is modified so as to hold that plaintiff is entitled to recover the extra cash dividend, but not the value of the stock dividend or any part of it.

The judgment of the superior court is reversed, and nonsuit set aside, and a new trial ordered. The costs of the appeal is taxed against the defendant. The costs of this rehearing is taxed against plaintiff.

Petition allowed.

(152 N. C. 683)

HUNTER v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 27, 1910.)

1. MASTER AND SERVANT (§ 320*)—INJURY TO THIRD PERSONS—INDEPENDENT CONTRACTORS.

In an action against defendant for the death of plaintiff's wife, alleged to have been caused by negligently conducting blasting operations near plaintiff's house, the fact that the work was done for defendant by an independent contractor did not alone exempt defendant from liability, but it appearing that defendant by its own servants had first attempted to perform the work, and became aware that its performance in the manner attempted would injure the plaintiff, and that defendant afterwards secured the work to be done through an independent contractor, who conducted it in the same negligent manner in which it was conducted by defendant, it was liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1261; Dec. Dig. § 320.*]

2. DEATH (§ 31*)—DAMAGES—HUSBAND AND WIFE.

Plaintiff, as administrator, was entitled to recover damages for the wrongful death of his wife, and was not prevented because as husband he was entitled to her earnings, so that she could accumulate nothing, and was valueless to her estate.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 31.*]

Appeal from Superior Court, Buncombe County; M. H. Justice, Judge.

Action by J. W. Hunter, administrator, against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The plaintiff, as administrator of his wife, brought this action to recover damages for the death of his wife, and alleged that:

"(4) During the spring and summer of 1906 the defendant railroad company did willfully, wantonly, and in a grossly negligent manner, and in utter disregard of the rights of the plaintiff's intestate, carry on and conduct its blasting operations across the French Broad river from where the plaintiff's intestate lived, and did use excessively large charges of explosives, and did wantonly, willfully, negligently, and carelessly fail to take proper precautions to prevent throwing of rocks by the explosions of the blasts around and about the home of the plaintiff's intestate.

"(5) The plaintiff in this case, James W. Hunter, who was at the time of the acts and negligence complained of the husband of the plaintiff's intestate, notified the defendant, its agents and servants, of the dangerous and negligent manner in which they and the defendant were conducting the said blasting operations, and the said defendants, its agents and servants, were requested by the said James W. Hunter to use the proper care in such operations, that his intestate was in a delicate state of health, and that such reckless and dangerous blasting so near her home would probably inflict upon her serious injury, and might cause her death; that the defendant railway company, through its agents and servants, replied to the said James W. Hunter, on being notified, that they, the said agents and servants of the defendant, had been instructed to 'tear hell out of the side of that mountain,' and that they intended to do it, regardless of consequences, and thereafter the said blasting was continued in the same negligent manner as before.

"(6) On account of the negligence of the defendant, its agents and servants, as hereinbefore set forth, the health of the plaintiff's intestate was destroyed, and her nervous system was so shocked and wounded that she became seriously ill therefrom and died, all of which was caused by the acts and negligence of the defendant, its agents and servants, as hereinbefore set forth."

The defendant, after denying the imputed acts of negligence, for a further defense pleaded that this defendant, Southern Railway Company, on the — day of June, 1906, made and entered into a written contract with Timothy Shea to construct a roadbed for extension of certain tracks at Alexander, N. C., and that said contract was in all respects a lawful one, which the parties thereto might lawfully make and perform; that the work of constructing a roadbed of the character and nature the said Timothy Shea was employed by this defendant to make was an independent avocation, calling, or business in which the said Timothy Shea was, and had for many years previously been, engaged, and for the exercise of which he had and owned all of the necessary means and appliances; that this defendant, under

said contract, was neither principal nor master, nor did it reserve any general or special control over said Timothy Shea either in respect of the manner of performance of said contract by him or in respect of the agents to be employed by the said Shea in doing said work, nor did this defendant, before the commencement of said contract by the said Shea heretofore mentioned, or at the commencement of the same or at any time during the progress of its performance assume or in any manner attempt to assume control of the said Shea or the said work or any of the workmen engaged upon the said work or in any other respect whatever; that the said Shea was neither the agent nor the servant of this defendant, but was an independent contractor, taking said work as a job and as a whole for a definite, fixed, agreed sum, and this defendant was only interested in the result of the work, and not in any way in the means employed by the said Shea in its performance; that in making said contract with said Shea, by which he agreed and contracted to do the work of constructing a roadbed for the extension of certain tracks at Alexander, N. C., this defendant ascertained that the said Shea was a man of experience in the kind and character of work which by said contract he bound himself to perform, and he was in every way thoroughly competent and skilled, and this defendant knew when it employed the said Shea that he for a long time had been engaged in the performance of such work, and this defendant, before making and signing said contract, made due inquiries as to the capacity and reliability of the said Shea in respect of such work, and ascertained that he was both capable and trustworthy, and this defendant is advised, informed, and believes that the said blasting mentioned in the plaintiff's complaint was the blasting done by the said Shea and his employes and subcontractors while engaged in doing the work set out in the contract made between this defendant and the said Timothy Shea. This defendant never authorized the said Timothy Shea or any one else to resort to blasting in constructing the roadbed for the extension of the tracks at Alexander, or to use powder, dynamite, or any other unlawful agency in the performance of said work.

The following issues were submitted to the jury, who answered them as set out:

"(1) Was the death of plaintiff's intestate caused by the negligence of the defendant Southern Railway Company, as alleged in the complaint? Answer: Yes.

"(2) What damages, if any, is plaintiff entitled to recover of defendant Southern Railway Company? Answer: \$2,000."

Judgment was rendered for the plaintiff, and defendant appealed to this court.

Moore & Rollins, for appellant. Craig, Martin & Thomason, Frank Carter, and H. C. Chedester, for appellee.

MANNING, J. In view of the verdict of the jury rendered under the charge of his honor, the following facts are established by the evidence: That in the month of April or May, 1906, the defendant, desiring to widen its roadbed at or near Alexander, in Buncombe county, and lay additional tracks or straighten its existing tracks, then used and having been used for many years, found it necessary to blast out a perpendicular cliff of rock, about 400 feet long and 42 feet high at its greatest height, situate on its right of way, and began the work of blasting down the cliff by its own employes. This continued two or three weeks. The plaintiff lived across the French Broad river with his wife and two small children, in the corporate limits of Alexander, and a quarter of a mile from the blasting. The result of defendant's operations was to throw rocks of large and small size across the river in plaintiff's yard, on his house and buildings, in his garden and field, and the blasting was of such violence that the window glass in plaintiff's house was shaken out, and his wife much frightened and rendered very nervous. The plaintiff made frequent complaints, but to no avail. The defendant suspended operations by its own employes, and in June, 1906, made a contract with one Timothy Shea to continue the work, and complete it according to certain plans and specifications. He soon thereafter began work, and conducted it in the same manner as the defendant had done, and he and his foreman and other witnesses offered by the defendant testified that the work could be done in no other way. The results, in so far as it affected the plaintiff's wife and his premises, were the same. Rocks were constantly thrown with great force in and around his house. In the latter part of August plaintiff's wife was taken with typhoid fever. The violent blasting continued with its results. The effect upon plaintiff's wife was that she was kept in a highly nervous condition; that her condition was made known to the foreman in charge and the effect of the blasting and falling rock upon her; that the blasting continued up to three or four days before her death. The physician testified that, in his opinion, but for the blasting and the nervous condition and alarm produced by it upon Mrs. Hunter, she would have recovered. After making several efforts to have the blasting stopped, the plaintiff succeeded, with a threat of suit, on Thursday or Friday before his wife's death on the following Monday night, September 11, 1906. This action was begun October 4, 1906. The liability of the defendant was presented to the jury in this language, given substantially in accordance with one of the prayers of the defendant: "The court charges you that the act of blasting, as a means of excavation of a railroad in North Carolina, is not in itself negligence; that it is

the recognized method of clearing the way of the railroad track, and the simple fact of the blasting making noise is not negligence, for that is the natural result of blasting. So that this, aside from the fact that rocks were thrown, if you find from the greater weight of the evidence that they were thrown, in the yard of the plaintiff, the court charges you that the noise of the blasting would not be negligence unless you find that after the contractor was notified of the sickness of Mrs. Hunter that he willfully and wantonly and negligently continued the blasting; that the simple act of blasting would not be negligence, and, if the result of it was to produce death even, the simple noise disassociated from the fact that if they had thrown any rocks in the yard, had produced her death, that would not be negligence for which the defendant would be liable, unless, as I say, it was done negligently, willfully, and wantonly, after notice on the part of the contractor." The defendant, however, contended that the vital error committed by his honor was his failure to give the following instruction: "The court charges the jury that under the terms of the contract introduced in evidence between the defendant Southern Railway Company and one Timothy Shea the relation of master and servant did not arise between them, but that the said Timothy Shea, under said contract, was an independent contractor, and anything done by said Timothy Shea under said contract he was responsible for, and not the Southern Railway Company." His honor held, and so charged the jury, that the contract created Timothy Shea an independent contractor, but declined to hold that that fact alone exonerated the defendant from liability to the plaintiff. In *Young v. Lumber Co.*, 147 N. C. 28, 60 S. E. 654, Mr. Justice Connor, speaking for the court, said: "When the contract is for something that may be lawfully done, and it is proper in its terms, and there has been no negligence in selecting a suitable person in respect to it, and no general control is reserved, either in respect to the manner of doing the work or the agents to be employed in doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work and not in the several steps as it progresses, the latter is not liable to third persons for the negligence of the contractor as his master." This is quoted with approval in *Gay v. Lumber Co.*, 148 N. C. 336, 62 S. E. 436, from the opinion of Mr. Justice Walker in *Craft v. Lumber Co.*, 132 N. C. 157, 43 S. E. 597, and expresses with clearness the general doctrine. In both these cases, however, the exceptions are recognized as well settled which impose liability upon the proprietor or owner for the acts of the independent contractor. In *Young v. Lumber Co.*, supra, it is said: "It is conceded that, upon grounds of public policy, certain exceptions are made by the law to the general rule. The one upon which plaintiff re-

lies is well stated by Andrews, C. J., in *Engel v. Eureka Club*, 187 N. Y. 100, 82 N. E. 1052, 33 Am. St. Rep. 692: "Where the thing contracted to be done is necessarily attended with danger, however skillfully and carefully performed, or is intrinsically dangerous, it is held that the party who lets the contract to do the act cannot thereby escape responsibility from any injury resulting from its execution, although the act to be performed may be lawful. But, if the act to be done may be safely done in the exercise of due care, although, in the absence of such care, injurious consequences to third persons would be likely to result, then the contractor alone is liable, provided it was his duty under the contract to exercise due care." In *Davis v. Summerfield*, 133 N. C. 325, 45 S. E. 654, 63 L. R. A. 492, the court, speaking through Mr. Justice Montgomery, says: "There is yet another class of cases where there is an exception to the exemption, and that is where the thing contracted to be done is necessarily attended with danger, however skillfully and carefully performed, said by Judge Dillon to be 'intrinsically dangerous.' There the employer cannot escape liability for an injury resulting from the doing of the work, although the act performed might be lawful." These rules by which is fixed the liability of the owner or proprietor for the acts of the independent contractor are stated in 2 *Cooley on Torts* (3d Ed.) p. 1060: "(1) If a contractor faithfully performs his contract, and the third person is injured by the contractor in the course of its due performance, or by its result, the employer is liable, for he causes the precise act to be done which occasions the injury; but for the negligence of the contractor not done under the contract, but in violation of it, the employer is, in general, not liable. (2) If I employ a contractor to do a job of work for me which, in the progress of its execution, obviously exposes others to unusual perils, I ought, I think, to be responsible on the same principle as in the last case, for I cause acts to be done which naturally expose others to injury. (3) If I employ as contractor a person incompetent or untrustworthy, I may be liable for injuries done to third persons by his carelessness in the execution of his contract. (4) The employer may be guilty of personal neglect, connecting itself with the negligence of the contractor in such manner as to render both liable." *Lawrence v. Shipman*, 39 Conn. 586; 1 *Thompson on Negligence*, §§ 652, 771; *Wetherbee v. Partridge*, 175 Mass. 185, 55 N. E. 894, 78 Am. St. Rep. 486; *Tiffin v. McCormack*, 84 Ohio St. 638, 32 Am. Rep. 408; *Railroad v. Morey*, 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701; *Hawver v. Whalen*, 49 Ohio St. 69, 29 N. E. 1049, 14 L. R. A. 828, and editor's note; *Thomas v. Harrington*, 72 N. H. 45, 54 Atl. 285, 65 L. R. A. 742, and editor's note; *Louisville & N. R. Co. v. Tow* (Ky.) 63 S. W. 27, 66 L. R. A. 941, and note. In *Wetherbee v. Partridge*, 175 Mass.

185, 55 N. E. 894, 78 Am. St. Rep. 486, the conclusion of the court is thus stated in the headnote: "At the trial of an action for injuries to the plaintiff's property by the blasting of rocks upon adjoining land of the defendant, what the defense relied on was that the work was done by an independent contractor. The contract contemplated that blasting would be done, and the place where it was done was within three or four feet of the line between the plaintiff's and the defendant's land, and about eight or nine feet from the plaintiff's house. Held, that it is plain that performance of the contract would do the damage complained of unless it was guarded against, and that the defendant was bound to see that due care was used to prevent harm." In the present case, from the evidence of the defendant, it was plain that performance of the contract would injure the plaintiff. The defendant by its own servants had first attempted to perform the work subsequently included in its contract with Shea—the independent contractor—and the injury to plaintiff was made plain. The independent contractor prosecuted the work in the same manner as the defendant had done, and testified it could be done in no other way, and he produced like results to the plaintiff. It therefore in our opinion results from the facts of this case that, whether we follow the New York rule (which this court in *Davis v. Summerfield*, supra, declined to follow, and the Massachusetts court in *Wetherbee v. Partridge*, supra, also declined to follow) or accept the doctrine of the cases cited, we must reach the conclusion that the defendant is liable under the evidence in this case.

The sole remaining question to be determined is whether plaintiff, as administrator of his wife, can recover damages for her wrongful death, or is he prevented because, as husband, he is entitled to her earnings, and she can accumulate nothing, and is valueless to her estate. We cannot yield our assent to this argument of the defendant. We are not prepared to so interpret our law that, under Lord Campbell's act, all the wives in the state could meet with a tortious and wrongful death, and yet, because the husbands are entitled to their earnings, the issue of damages must be answered, "Nothing." Nor can the defendant escape liability because the particular form of injury was not foreseen. "While the defendant could not foresee the exact consequence of his act, he ought, in the exercise of ordinary care, to have known that he was subjecting plaintiff and his family to danger, and to have taken proper precautions to guard against it." *Kimberly v. Howland*, 143 N. C. 398, 55 S. E. 778; *Hudson v. Railroad*, 142 N. C. 198, 55 S. E. 103; *Drum v. Miller*, 135 N. C. 208, 47 S. E. 421, 65 L. R. A. 890, 102 Am. St. Rep. 528; *Sawyer v. Railroad*, 145 N. C. 24, 58 S. E. 598, 22 L. R. A. (N. S.) 200; *Rolin v. To-*

bacco Co., 141 N. C. 300, 53 S. E. 891, 7 L. R. A. (N. S.) 335. A careful examination of the record and the brief of the learned counsel of the defendant has failed to discover to us any reversible error, and the judgment is affirmed.

No error.

(183 N. C. 781)

ROBERTS v. PRATT.

(Supreme Court of North Carolina. May 27, 1910.)

1. JUDGMENT (§ 820*)—FOREIGN JUDGMENT—ACTION ON—DEFENSES—FRAUD.

In an action on the judgment of a sister state, defendant may plead fraud in the procurement thereof.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1486, 1487; Dec. Dig. § 820.*]

2. JUDGMENT (§ 820*)—FOREIGN JUDGMENT—ACTION ON—DEFENSES.

In an action on a judgment of a sister state, defendant was precluded from pleading fraud in the procurement of the judgment, it appearing that his application to set aside the judgment on that ground had been denied by a court of that state having jurisdiction to entertain the application.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 820.*]

3. EVIDENCE (§ 80*)—PRESUMPTIONS—LAW OF SISTER STATE.

In the absence of evidence as to the law, statutory or otherwise, of a sister state, it will be presumed that the common law obtains.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80; * Common Law, Cent. Dig. § 14.]

4. JUDGMENT (§ 342*)—SETTING ASIDE.

The rule that courts, governed by the common law, will not as a rule entertain a proceeding to disturb a final judgment after the term in which it was rendered, a bill in equity being generally necessary, does not apply, when on the face of the record, or otherwise, it appears that the judgment was entered contrary to the course and practice of the court, including all cases where errors would be corrected by writs of error coram nobis or vobis.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 668-671; Dec. Dig. § 342.*]

5. JUDGMENT (§ 342*)—SETTING ASIDE—STATUTORY PROVISIONS.

Revisal 1905, § 513, permitting the granting of relief from a judgment at any time within one year after notice thereof, is restrictive on the powers inherent in common-law courts of general jurisdiction.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 342.*]

6. ABATEMENT AND REVIVAL (§ 13*)—BAR—ANOTHER ACTION PENDING.

The pendency of another action for the same cause in the courts of another state is not a bar to judicial proceedings in this state.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 92-98, 100; Dec. Dig. § 13.*]

7. JUDGMENT (§ 822*)—FOREIGN JUDGMENT—DEFENSES—COUNTERCLAIM.

Since a judgment does not embrace any matters which might have been brought into the litigation, or causes of action which plaintiff might have joined, but which in fact were neither joined nor embraced by the pleadings, in an action on a judgment of another state

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defendant was entitled to set up as a counterclaim a demand for rents, such demand not having been necessarily disposed of by the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1496-1500; Dec. Dig. § 822.*]

Appeal from Superior Court, McDowell County; Webb, Judge.

Action by Grace Roberts against William M. Pratt. Judgment for plaintiff, and defendant excepted and appealed. New trial.

The plaintiff instituted suit in said county to recover on a judgment rendered in her favor against defendant in the state circuit court of South Dakota for the sum of \$1,646, said court having jurisdiction of the cause and parties at the time the same was rendered. Defendant answered, alleging fraud in procurement of said judgment, in that while said suit was pending in the Dakota court, there being some matters of account and adjustment between plaintiff and defendant, the defendant paid several hundred dollars on the claim, and plaintiff and defendant then and there had a written agreement that no further steps should be taken in said suit without notice first served on defendant or his attorneys; that plaintiff in violation of said agreement had induced the Dakota court to proceed further and render the judgment sued on, without allowing credit for payments made, and without any accounting had, and by serving a pretended notice on an attorney known by plaintiff not to represent defendant at the time, and this with a fraudulent design and purpose, etc. Defendant further answered, and set up a counterclaim alleging, in substance, that plaintiff through her attorney and agent for the purpose, one Edwin Van Cise, had collected from certain real estate belonging to defendant, situate in Deadwood, S. D., rents at the rate of \$180 per year for about seven years next before action brought, for which said sum plaintiff was accountable to defendant. Plaintiff replied, and averred that defendant should not be allowed to further plead fraud in the procurement of the South Dakota judgment, for the reason that defendant had appeared in said court, and formally applied by motion to set aside said judgment on the ground of fraud and on the same facts as now contained in the answer, and, on the hearing, the South Dakota court denied the application. Plaintiff replied further that this counterclaim for \$1,260, set up by defendant, was involved and embraced in a suit now pending in South Dakota, said court having jurisdiction of the cause and parties, and in which Edwin Van Cise, as trustee, was seeking for a final account and settlement as trustee. The present cause coming on for trial, and the plaintiff having offered in evidence the record of the South Dakota suit showing that plaintiff had regularly obtained the judgment sued on, and

that defendant had moved to set aside the judgment for fraud, and the motion had been denied, the court being of opinion that defendant was thereby precluded from further averment of fraud in impeachment of the South Dakota judgment, entered judgment as follows: "This cause coming on for hearing at this time before the undersigned judge and a jury, and a jury having been impaneled, and the pleadings read, and the plaintiff having introduced in evidence the record of the proceedings, certified from the Eighth judicial circuit of the circuit court in and for Lawrence county, South Dakota, including the order to vacate the judgment theretofore rendered in that court, the same being the judgment sued upon in this action, with the affidavit of defendant, and the affidavits thereto attached (copies of the affidavits, etc., filed in the South Dakota court in the application to vacate said judgment), and the court being of the opinion that said order of said South Dakota court refusing to vacate said judgment is a bar to defendant in this action in this court. It is now considered and adjudged by the court that the plaintiff have and recover of the defendant judgment for the sum of said judgment, to wit, the sum of \$1,666.45, with interest from the date of rendition, or from June 2, 1906, until paid, together with the costs of this action to be taxed by the clerk. [Signed] Jas. L. Webb, Judge Presiding."

Whereupon defendant excepted and appealed.

Pless & Winborne, for appellant. W. T. Morgan, for appellee.

HOKE, J. (after stating the facts as above). Under our system of procedure, it is permissible for a defendant to plead fraud in the procurement of a judgment rendered against him in the courts of a sister state. The question has been so recently and fully discussed in the case of *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969, that we do not think further comment is at this time either necessary or desirable.

We agree with his honor below, however, that the defendant is precluded from availing himself of any such plea in the present case by the judgment of the South Dakota court denying his application to set aside the judgment on that ground, a position undoubtedly correct if, on the facts as they now appear, the South Dakota court had jurisdiction to entertain and determine the question of fraud as presented in defendant's application. The proceedings were introduced showing that defendant had personally appeared in the Dakota court, and moved to set aside the judgment for fraud, and on averment of substantially the same facts which he now sets up in his answer by way of defense, and that court had entered judgment denying the motion. No reasons for this denial are set forth

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in the judgment or elsewhere, and no evidence was introduced as to the law of South Dakota, statutory or otherwise, bearing on the subject. The question presented must, therefore, be decided on the principles of the common law, this being in accordance with the presumption ordinarily obtaining in such cases. *Moody v. Johnson*, 112 N. C. 798-801, 17 S. E. 578; *Brown v. Pratt*, 56 N. C. 202. South Dakota having been a part of the Louisiana Purchase, it might be suggested that a different presumption would obtain; but, considering the facts and conditions which prevailed when that state was settled, the principle is established as stated. Thus in *Moody v. Johnson*, *supra*, it was said: "In the absence of any judicial knowledge of the statutory law of another state, the courts of this state must act upon the presumption that the common law of England, as modified by statutes passed previous to our separation, and so far as they are consistent with the genius of our republican institutions, prevailed in the original colonial states and all other states formed primarily by emigration from them."

It will be noted that the fact of emigration from a country having its jurisprudence based upon the common law and its doctrines is given weight rather than the territorial placing of the new country—that is, where the movement was principally into an unsettled portion of the new territory, and at a time when the same was without government of civilized community. The distinction being very well stated in the case of *Norris v. Harris*, 15 Cal. 226, in which, among other things, it was held: "(2) In the absence of proof to the contrary, the common law is presumed to exist in those states of the Union which were originally colonies of England, or were carved out of such colonies. (3) The same presumption prevails as to the existence of the common law in those states which have been established in territory acquired since the Revolution, where such territory was not, at the time of its acquisition, occupied by an organized and civilized community; but where the population, upon the establishment of government, was formed by emigration from the original states." And on this subject, Chief Justice Field, delivering the opinion, said: "A similar presumption must prevail as to the existence of the common law in those states which have been established in territory acquired since the Revolution, where such territory was not at the time of its acquisition occupied by an organized and civilized community; where, in fact, the population of the new state upon the establishment of government was formed by emigration from the original states. As in British colonies, established in uncultivated regions by emigration from the parent country, the subjects are considered as carrying with them the common law, so far as it is applicable to their new situation; so, when American citizens emigrate into territory

which is unoccupied by civilized man, and commence the formation of a new government, they are equally considered as carrying with them so much of the same common law, in its modified and improved condition under the influence of modern civilization and republican principles, as is suited to their new condition and wants."

Applying, then, the doctrine as indicated, courts administering justice according to course and practice of the common law would not as a rule entertain a proceeding to disturb a final judgment instituted after the term in which it was rendered; to effect such a purpose a bill in equity was generally required. *Phillips v. Negley*, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013; *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797; *Mock v. Coggin*, 101 N. C. 366, 7 S. E. 899.

The rule stated, however, does not apply when, on the face of the record, or otherwise, it was made to appear that a judgment had been entered contrary to the course and practice of the court, including, also, all cases where errors would be corrected by writs of error coram nobis or vobis. The scope and purpose of these writs it seems being the same, the former being the proper designation when the proceedings were heard in the Court of King's Bench where the monarch was presumed to be present, and the second when the matter was carried on in courts of lesser dignity, but having full jurisdiction. The power to correct errors by means of these writs was very generally regarded as inherent in common-law courts of general jurisdiction; and, wherever it formerly prevailed, the same results may be obtained in modern practice by means of a motion. In systems like ours, where law and equity are combined, and relief administered in one and the same jurisdiction, the power is universally exercised, and, when not regulated by statute, there is a disposition and tendency to extend its scope and application. *Bronson v. Schulten*, *supra*; *Oraig v. Wroth*, 47 Md. 281; 5 Ency. Pl. & Pr. pp. 27, 28, 30; 7 Ency. U. S. Supreme Court Rep. 592.

In 7 Ency. S. C. R., it is said: "It is believed to be the settled modern practice that in all instances in which irregularities could formerly be corrected upon a writ of error coram vobis or audita querela, the same objects may be effected by motion to the courts as a mode more simple, more expeditious, and less fruitful of difficulty and expense."

In Enc. Pl. & Pr., *supra*, the author says: "The office of the writ of coram nobis is to bring the attention of the court to, and obtain relief from, errors of fact, such as death of either party pending the suit and before judgment therein; or infancy, where the party was not properly represented by guardian; or coverture, where the common-law disability still exists; or insanity, it seems, at the time of the trial; or a valid defense existing in the facts of the case, but which

without negligence on the part of the defendant, was not made, either through duress or fraud or excusable mistake; these facts not appearing on the face of the record, and being such as, if known in season, would have prevented the rendition and entry of the judgment questioned."

And further: "Notwithstanding occasional statements that the writ of *coram nobis* has 'fallen into desuetude,' and that 'redress obtained through its aid is now sought by motion,' it was a part of the common law received from the mother country, and, when not specially abrogated by statute, still remains a factor in modern practice. Proceedings of like nature, under whatever name, partake of the same underlying principles in practice."

In *Oraig v. Wroth*, *supra*, it was held: "That the power to set aside judgments upon motion for fraud, deceit, surprise, or irregularity in obtaining them is a common-law power, incident to courts of record."

And these principles have been upheld and applied in numerous and well-considered decisions: (1) *Tucker v. James*, 59 Tenn. 333; (2) *Crawford v. Williams*, 31 Tenn. 341; (3) *State v. Calhoun*, 50 Kan. 523, 32 Pac. 38, 18 L. R. A. 838, 34 Am. St. Rep. 141; (4) *Marble v. Vanhorn*, 53 Mo. App. 361. See, also, *McIntosh v. Commissioners*, 18 Kan. 171; *Thompson v. Connell*, 31 Or. 231, 48 Pac. 467, 65 Am. St. Rep. 818; *Browning v. Roane*, 9 Ark. 354, 50 Am. Dec. 218; *Binsse v. Barker*, 13 N. J. Law, 263, 23 Am. Dec. 720.

Our own statute on the subject (Revisal 1905, § 513), limiting such application to a period of one year from rendition of the judgment is therefore restrictive on the powers inherent in common-law courts of general jurisdiction.

The case of *Whitney v. Hazzard*, 18 S. D. 490, 101 N. W. 346, while not introduced as evidence of the law of that state, in no wise militates against the position stated. In that case, the allegations in impeachment of the judgment extended both to the judgment itself and the motion to set the same aside, and so is distinguished from the case before us, and this decision in *Whitney v. Hazzard* gives clear intimation that the court had jurisdiction to dispose of the question presented by motion.

This being the doctrine applicable, on the facts as they now appear, the judgment of the Dakota court, as heretofore stated, denying defendant's application to set aside the original judgment on the ground of fraud, will preclude all further inquiry on that question, and render the latter judgment an estoppel of record as to all matters embraced in the pleadings which may be considered as material to its rendition. *Turnage v. Joyner*, 145 N. C. 81, 58 S. E. 757; *Mfg. Co. v. Moore*, 144 N. C. 527, 57 S. E. 213, 10 L. R.

A. (N. S.) 734, 119 Am. St. Rep. 983; *Tuttle v. Harrill*, 85 N. C. 453.

While we thus uphold his honor's ruling in disallowing further inquiry on this issue of fraud, we think there was error in the judgment rendered, for the reason that the answer contains a demand against plaintiff by reason of rents received from property belonging to defendant, and for which plaintiff is alleged to be personally accountable. True, plaintiff replies that this is a matter now being litigated between these parties in the courts of South Dakota, having jurisdiction both of the cause and parties; but no proof was offered on this issue, and, if there had been, the weight of authority is to the effect that the pendency of another action for the same cause in the courts of another state is not a bar to judicial proceedings here (1 Ency. Pl. & Pr. p. 764), and our own court has so held. *Sloan v. McDowell*, 75 N. C. 29.

It may be that on fuller investigation and inquiry the receipt of the rents can be shown to have been under such circumstances that they amount to a payment on plaintiff's note, and may be included in the estoppel of record arising from the judgment; but the facts, as they thus far appear, are not such as to justify the court in holding, as a matter of law, that these rents are necessarily disposed of by the judgment. The demand is set up in a counterclaim and may be available as such under the decision of *Tyler v. Capeheart*, 125 N. C. 64, 34 S. E. 103, in which it was held as follows: "(1) A judgment is decisive of the points raised by the pleadings, or which might be properly predicated upon them; but does not embrace any matters which might have been brought into the litigation, or causes of action which the plaintiff might have joined, but which in fact are neither joined nor embraced by the pleadings. (2) Although the present cause of action might have been set up as a second cause of action in a former suit, but was not, and was not actually litigated, and was not 'such matter as was necessarily implied therein,' the plea of *res judicata* will not avail."

The cause, therefore, must be remanded for further inquiry on defendant's counterclaim, and to that end the judgment is set aside and a new trial ordered.

New trial.

(153 N. C. 935)

BROOKS MFG. CO. v. SOUTHERN RY. CO.
(Supreme Court of North Carolina. May 27, 1910.)

1. CARRIERS (§ 20*)—DELAY IN THE TRANSPORTATION OF FREIGHT — PENALTY — STATUTES.

Neither Revisal 1905, § 2632, providing as originally enacted for a penalty for delay in the transportation of freight, nor as amended by Acts 1907, c. 461, so as to require a delivery

at destination within a time specified, imposes a penalty for delay in delivery to the consignee after transportation ceases, nor compels a carrier to deliver loaded cars off its own right of way onto the private track of the consignee.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

2. CARRIERS (§ 84*)—DELIVERY OF FREIGHT—CONTRACTS.

A carrier cannot be compelled to operate its engine on a private track belonging to a private corporation or individual over which the railroad has no control or supervision; but a delivery of a car load of freight to the consignee on its private track is a matter of agreement between the carrier and the consignee.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 290-298; Dec. Dig. § 84.*]

3. CARRIERS (§ 84*)—DELIVERY OF FREIGHT—CONTRACTS.

A carrier hauling its cars onto the private track of the consignee for unloading must place the car in such a position that it may be accessible for unloading.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 290-298; Dec. Dig. § 84.*]

4. CARRIERS (§ 140*)—DELIVERY OF FREIGHT—CONTRACTS.

Transportation ceases when the duty of the carrier as a warehouseman commences and as to freight transported in car load lots when the car reaches the destination and is placed for unloading.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 609, 609½, 611-616; Dec. Dig. § 140.*]

5. CARRIERS (§ 88*)—DELIVERY OF FREIGHT—CONTRACTS.

A carrier leaving a car in its freightyards for unloading must place the car in such a part of its freightyards as to make it reasonably accessible for delivery before transportation ceases.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 280-289½, 319-321; Dec. Dig. § 88.*]

6. CARRIERS (§ 20*)—DELIVERY OF FREIGHT—CONTRACTS—"INTERMEDIATE POINT."

A station at which a car must be taken out of a local train which comes into the station and then placed into another train leaving the station for the point of destination is not an "intermediate point," within Revisal 1905, § 2632, requiring transportation of freight within a reasonable time, and authorizing a delay at an intermediate point.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

Appeal from Superior Court, Guilford County; Long, Judge.

Action by the Brooks Manufacturing Company against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The jury found the following special verdict:

"This was a shipment of a solid car load of lumber from Pittsboro, N. C., to Greensboro, N. C., consigned to the plaintiff. Shipment was over the Seaboard Air Line and the Southern Railway. The Seaboard Air Line delivered this car to the Southern Railway Company at Cary, N. C., December 13, 1906, at 4 p. m. Said car arrived at Greens-

boro December 16, 1906, and upon its arrival notice was given in writing to the plaintiff by the defendant by mail on December 1, 1906. That said car was placed by the defendant at the siding of the Brooks Manufacturing Company, the plaintiff, on December 18, 1906, at 6 p. m. That the distance from Cary to Greensboro is 73 miles. That a reasonable time for the going of the car from Cary to Greensboro is 1 day of 24 hours. This is not inclusive of any lay-over time that the defendant may be entitled to under the statute at either the initial point, Cary, or any intermediate point, to wit, Durham, if it is an intermediate point. The siding of the plaintiff is within one-quarter mile of the defendant's freightyard at Greensboro, and is connected by means of a switch with defendant's track in its freightyard at Greensboro, and there were physical connections by means of switches between the siding of the plaintiff and the track of the defendant leading from Sanford to Greensboro. The main line from Sanford to Greensboro runs within 30 feet of plaintiff's siding, and the main line is connected by a switch, 175 feet from the usual place of unloading. The shipments of lumber consigned to the plaintiff shipped over defendant's road are usually placed upon this siding; 95 per cent. of the same being so placed for unloading, and the other 5 per cent. being placed at other points in cases where cars have been turned over to other parties by the consignee. The car in question was not placed for unloading elsewhere than on the plaintiff's siding. The main line from Cary to Greensboro connects with the Sanford line by a switch in the Greensboro freightyards of defendant company and about one-quarter of a mile from plaintiff's siding. The schedule of the freight trains from Cary to Greensboro at the time of the shipments referred to was as follows: Train No. 183, through freight, passes Cary at 6:15 p. m.; does not stop; leaves Durham at 8:15 p. m.; arrives at Greensboro at 1:54 p. m. Train No. 163, local freight, leaves Cary at 7:30 p. m.; arrives at Durham at 8:30 a. m. This train does not go farther west than Durham, but returns to Selma from Durham. Train No. 107, local freight, leaves Durham at 10:24 a. m.; and arrives in Greensboro at 5 p. m. Train No. 171, through freight, passes Cary at 10:25 p. m.; but does not stop there; leaves Durham at 11:28 p. m.; and arrives in Greensboro at 2:50 a. m. Train No. 173, through freight, passes Cary at 9:10 a. m.; but does not stop there; leaves Durham at 11:20 a. m.; and arrives in Greensboro at 2:10 p. m. That local freight trains only stopped at Cary. That the local freight ran from Cary to Durham and there that train stopped. This train stopped at Durham and returned to Selma, N. C. The car was left in the yards at Durham until the next

freight was made up going to Greensboro, by which train it was brought to Greensboro. There is no question as to the payment of freight by the plaintiff. This car of lumber was not assigned by plaintiff consignee."

The following ruling and judgment was entered thereon in the superior court:

"Upon the foregoing special verdict of the jury, the question of law is left to the court to decide whether or not the plaintiff is entitled to recover. The court is of the opinion that the defendant should be allowed two days at the initial point and one day as reasonable time to have transported the goods from Cary to Greensboro, N. C. The court is also of opinion that, in view of what the Supreme Court has said in *Hilliard v. Railroad*, 51 N. C. 343, and in *Alexander v. Railroad*, 144 N. C. 95 [56 S. E. 697], and other cases, the duty of the defendant in transporting the car at destination was fulfilled when it brought the car and placed it in a state ready to be delivered to the plaintiff on the siding of the plaintiff in Greensboro, having physical connection with the defendant's tracks.

"It is therefore considered and adjudged by the court, after allowing the defendant two days at the initial point and one day as reasonable for transportation, that the car was detained in its possession for a period of two days before finishing the transportation. It is therefore further considered that the plaintiff recover of the defendant \$30 and the cost of this action to be taxed by the clerk."

Wilson & Ferguson, for appellant. Justice & Broadhurst, for appellee.

BROWN, J. The first assignment of error is that his honor erred in holding that the defendant was required not only to transport the car from Cary to Greensboro within the statutory period, but must within that time place the car upon the plaintiff's side track.

1. We do not construe his honor's judgment to hold exactly that, under the authority of the cases of *Hilliard v. Railroad*, 51 N. C. 343, and *Alexander v. Railroad*, 144 N. C. 95, 56 S. E. 697, cited in his judgment, it was the duty of the defendant to deliver the loaded car to the plaintiff on its private side track. Neither of those cases sustain that position. On the contrary, the *Alexander Case* expressly holds that the carrier is not penalized by section 2632, Revision 1905, for delay in delivering the freight to the consignee after transportation ceases, and that such section does not include a failure to deliver, but only a failure to transport; "delivery necessarily requiring the concurrence of the consignee and having a distinctive meaning." Although this statute was amended by chapter 461, Acts 1907, so as to require a delivery at destination within the time specified, we have held that when the goods arrive, and

the carrier has notified the consignee that it is ready to deliver, it has discharged its duty. *Wall v. Railroad*, 147 N. C. 411, 61 S. E. 277. But this statute as amended does not undertake to compel a railway company to deliver loaded cars off its own right of way and tracks onto the private track of an individual or private corporation. Therefore a delivery of the car load of lumber to plaintiff upon its private track, belonging to it and leading to its mill, must of necessity be a matter of agreement between plaintiff and defendant and cannot come within the purview of section 2632. A railroad company cannot be compelled to operate its engines on a private track belonging to a private corporation or individual over which the railroad company has no control or supervision. But whatever reasons the judge gave for his judgment, the facts set out in the special verdict sustain it. It is found as a fact therein that "the car in question was not placed for unloading elsewhere than on the plaintiff's siding." While the defendant was under no legal obligation to haul this car off its own tracks and onto the private tracks of plaintiff, yet it was its duty to place the car in a position for unloading so that it may be accessible for that purpose. Transportation ceases when the duty of the carrier as a warehouseman commences, and in respect to freight transported in car load lots when the car reaches destination and is placed for unloading. *Wall v. Railroad*, 147 N. C. 408, 61 S. E. 277. What particular parts of the carrier's tracks and freightyards may be used for such purposes must of necessity be left to its discretion; but the car must be reasonably accessible and placed for delivery before transportation is fully ended.

2. The second assignment of error is that his honor did not hold that Durham was an intermediate point and did not allow the defendant any time for necessary delay there. We are unable to find in the special verdict any fact that warrants the contention that Durham is an "intermediate" point between Cary and Greensboro within the meaning of the statute. What constitutes such intermediate point is discussed and decided in *Wall v. Railroad*, supra; *Davis v. Railroad*, 145 N. C. 207, 59 S. E. 53.

Affirmed.

HOKE, J., concurs in result.

(36 S. C. 116)

ARMSTRONG v. A. C. TUXBURY LUMBER CO.

(Supreme Court of South Carolina. June 1, 1910.)

MASTER AND SERVANT (§ 276*)—INJURY TO SERVANT—UNGUARDED MACHINERY—ACTIONS—EVIDENCE.

In an action by a servant against the master for injuries to his arm from catching his

clothing in an unguarded cog gear, plaintiff held not entitled to recover under the evidence. [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952; Dec. Dig. § 278.*]

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of Charleston County; J. W. De Vore, Judge.

Action by Frank T. Armstrong against the A. C. Tuxbury Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed.

Miller, Whaley & Bissell and Smythe, Lee & Frost, for appellant. Legare, Holman & Baker, for respondent.

JONES, C. J. The plaintiff brought this action to recover damages for personal injuries alleged to have resulted from the negligence of defendant in allowing the cog gear to remain unguarded, so that plaintiff's coat was caught in the same thereby pulling his arm in the cog gear and so injuring the same as to necessitate amputation. The jury rendered a verdict in favor of plaintiff for \$7,000. As we are clearly of the opinion that there should be a reversal, we will notice only certain of the exceptions which compel the same.

After the pleadings had been read, plaintiff's counsel stated that he would object to the introduction of any testimony in support of the defense of contributory negligence upon the ground that such defense was not sufficiently set forth in the answer. After argument, the presiding judge announced that in his opinion contributory negligence was not sufficiently pleaded, and that he would exclude all testimony in support thereof. While there is now no specific exception to this ruling, the question is fairly presented in the ninth and eleventh exceptions, which are as follows:

"(9) The presiding judge erred in refusing to charge the fifth instruction submitted by the defendant: 'If the employer is negligent in not providing a safe place in which his employé is to work, and the employé meets with an injury thereby, yet, if a proximate cause of the injury to the employé is the employé's own negligence, concurring and combining with that of the employer, and thus contributing to bring about the injury, he cannot hold the employer responsible'—because, it is submitted, the answer of the defendant had sufficiently pleaded contributory negligence, and no demurrer to the answer or motion to make more definite and certain having been made, the defendant was entitled to have the issue submitted to the jury."

"(11) The presiding judge erred in charging the jury as follows: 'The defense of contributory negligence is not to be considered by you. I charge you that you must conclude from this evidence, or, rather, if

you do conclude from this evidence that the plaintiff was injured and damaged, if you conclude that he was injured and damaged on account of his own negligence, then, under the pleadings in this case, the defendant would not be liable; but if, although the plaintiff was guilty of negligence and the defendant was guilty of negligence, yet if you believe that the defendant's negligence was the direct and proximate cause of the injury, the plaintiff could still recover'—thus again withholding from the jury the issue of contributory negligence."

Under the ruling of the court, the defendant was denied opportunity to offer evidence as to contributory negligence, and under the charge the jury were not allowed to consider the matter of contributory negligence arising under the testimony of the plaintiff. No testimony was offered in the case except that given by plaintiff himself. It seems manifest that this is reversible error, if the defendant interposed the plea of contributory negligence.

The answer, besides a general denial, was as follows:

"(3) Further answering, this defendant alleges that the plaintiff was the engineer of the defendant, in charge of the machinery by which he was injured, and it was his duty to make safe the place at or near the machinery where employes worked, and, if the place at which he was injured was not sufficiently guarded against danger, such condition was due to the plaintiff's negligence in failing to perform his duty.

"(4) And, further answering, this defendant alleges that the plaintiff was fully aware of the character and condition of the machinery and cogs at which he was injured, and of whatever dangers attended upon oiling the box, and that plaintiff voluntarily assumed the risk attendant upon such oiling of the box, and his injury was due to the risk he thus assumed.

"(5) And, further answering, this defendant alleges that even if it were negligent—which it denies—still the accident to the plaintiff was due proximately to his own negligence, in that he conducted himself in a careless manner, and failed to observe caution in keeping his body from coming in contact with said cogs, which he could have done if he had used due care."

Paragraph 5 clearly states, in effect, that, if defendant was negligent, plaintiff's own negligence proximately caused his injury, and the facts are stated from which plaintiff's contributory negligence is sought to be inferred. The insertion of the words "which it denies" ought not to be given any greater force than is involved in the previous general denial of negligence. The omission of the words "contributory negligence" or "negligence of plaintiff concurring and combining with the defendant's negligence" was

not such a fatal defect as to authorize the court at that stage of the case to ignore the attempted plea of contributory negligence, especially when the facts are stated which it is claimed show contributory negligence. This was not such an entire failure to state the defense as to warrant the court in excluding evidence of contributory negligence, but, at most, it was a defective plea which should have been corrected on motion to make more definite and certain by amendment, in harmony with the rule stated. Pom. Code Rem. 548, and in *Wingo v. Inman Mills*, 76 S. C. 563, 57 S. E. 525.

Contributory negligence is entirely distinct from assumption of risk, although in certain phases they approximate each other. The fact that there is a dim twilight marking the close of day and the beginning of night does not destroy the distinction between day and night. Our cases clearly recognize and enforce the distinction. *Bodie v. Railway*, 61 S. C. 468, 39 S. E. 715; *James v. Manufacturing Co.*, 80 S. C. 237, 238, 61 S. E. 391. In *Naramore v. Cleveland, etc., R. R. Co.*, 96 Fed. 298, 37 C. C. A. 490, 48 L. R. A. 68, Circuit Judge Taft, delivering the opinion of the Circuit Court of Appeals, said: "Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence, if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences. One who does not use such care, and who, by reason thereof, suffers injury, is guilty of contributory negligence, and cannot recover because he and not the master causes the injury or because they jointly cause it." In the case of *Schlemmer v. Buffalo, etc., R. R. Co.*, 205 U. S. 12, 27 Sup. Ct. 409, 51 L. Ed. 681, after calling attention to the broad sense in which "assumption of risk" was used in the statute under consideration, viz., as covering "dangerous conditions, as of machinery, premises and the like, which the injured party understood and appreciated when he submitted his person to them," the Supreme Court of the United States said: "Assumption of risk in this broad sense obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of under the circumstances known to the actor that he is held answerable for that result, although it was not certain, intended, or foreseen. He is held to assume the risk upon the same ground. *Choctaw, etc., v. McDade*, 191 U. S. 64-68 [24 Sup. Ct. 24, 48 L.

Ed. 96]. Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of degree rather than of kind." In a dissenting opinion, in which Justices Brewer, Peckham, McKenna, and Day concurred, it is stated: "That there is a vital difference between assumption of risk and contributory negligence is clear. As said by this court in *Choctaw, etc., v. McDade*, 191 U. S. 64, 68 [24 Sup. Ct. 24, 25, 48 L. Ed. 96], 'the question of assumption of risk is quite apart from that of contributory negligence.' See, also, *Union, etc., v. O'Brien*, 161 U. S. 451 [18 Sup. Ct. 618, 40 L. Ed. 766]. This proposition, however, is so familiar and elementary that citation of authorities is superfluous." We do not think the case of *Schlemmer v. Railway*, supra, justifies a conclusion that the difference between the defenses of assumption of risk and contributory negligence is so shadowy that one denied the right to show contributory negligence has no right to complain if he is permitted to show assumption of risk. If, indeed, these defenses are practically the same, then it would follow that defendant, having admittedly pleaded assumption of risk, should not have been deprived of the right to have the jury consider the facts with reference to contributory negligence.

The plaintiff alone testified, and, giving his testimony the most favorable construction, defendant was entitled to a nonsuit. Plaintiff was head engineer of the defendant company, 28 years old, and had been engineer for defendant for about a year before the accident. As engineer he had charge of the machinery with which he came in contact when injured, and, when it was out of order, it was his duty to repair it or see that it was done. On December 2, 1907, the superintendent was near and heard the creaking of the machinery, and directed plaintiff to fix it at once. This was merely telling plaintiff to perform a neglected ordinary duty. The machinery was creaking for want of oil, which the plaintiff and his assistant had failed to apply. This machinery consisted of a small engine on the floor attached by belt to pulley on shaft about eight feet above, near the end of which shaft was a small cogwheel meshing with a much larger cogwheel on another shaft on which was the pulley driving the conveyor chain which carried fuel to the furnace. The machinery had no other connection with the main plant, and could be stopped almost instantly without stopping the operation of the mill. It was the usual duty of the assistant under plaintiff to oil this machinery, but plaintiff had never seen

the assistant attempt to do so with his coat on. The fireman, being otherwise engaged at the moment plaintiff climbed up to where the cogwheels were, ascertained that the boxes holding the shaft were dry, and, in attempting to oil them, his coat sleeve was caught in the meshes of the cogwheels, and his right arm dragged in and crushed. The cogwheels worked inward on the upper side, and it was said that, if the cogwheels had worked outward, the injury would not have happened. The complaint did not allege negligence of defendant in this regard, but it cannot escape attention that, if the cogwheels worked inward above, they necessarily worked outward below, or vice versa, so that a mere change in the revolution of the wheels would merely have changed the point of danger from above to below to a person carelessly working about the cogwheels with coat on. The danger arising from contact with moving cogwheels was manifestly one which any person of ordinary prudence, much more an experienced engineer in charge, should have known called for care. Nevertheless plaintiff failed to stop the gear, which he might have done in a moment and oiled with perfect safety. Choosing to risk the motion of the machinery, he might have removed his coat as his assistant always did, so as not to run the risk of having it drawn into the cogwheels. Concluding to take these hazards, easily avoidable, he worked over the moving cogwheels with his coat on without paying any attention whatever to the danger of having his coat caught in the meshes.

Such is the testimony on cross-examination: "Q. Did you know, if two cogwheels were revolving that way, if any one got in them, he would be dragged in? A. I never gave it any thought. Q. You don't know that? A. I know it now. Q. You don't know it now? A. Of course, I know if you got in there. Q. I ask you if you don't know, if you got in two cogwheels revolving together, it would crush the thing that got in it? A. I know it now. Q. Did you know it before? A. No, sir. Q. You mean to tell me that you are an engineer, head engineer of the Tuxbury Lumber Company, and you don't know that if a piece of cloth or anything else got in two cogwheels revolving in the same direction that it would be dragged between them? A. I know that. Q. Had you not always known that? A. If I had given it a thought and looked at it, I would have known it, but I never paid any attention." On redirect examination: "Q. Mr. Armstrong, Mr. Miller tried to make it appear that you practically did not know that if two gears were working in opposite directions, as a matter of course, you know that a man would get hurt that way? A. Yes, sir." If, therefore, it be concluded that the cogwheels could have been so guarded as to prevent an employé from coming in contact therewith, and that defendant was negligent in not so guarding them, it is clear that plaintiff knew, or should have known, that they were unguarded, and that

he must be held to have assumed the risk of oiling the machinery with a coat on while in motion. There is no element of inexperience or emergency to take the case out of the ordinary rule. The risk assumed was after full knowledge of the conditions, and was one incidental to performance of his work and arising during its progress. *Martin v. Royster Guano Co.*, 72 S. C. 242, 51 S. E. 690; *Wofford v. Cotton Mills*, 72 S. C. 348, 51 S. E. 918; *James v. Fountain Inn Mfg. Co.*, 80 S. C. 232, 61 S. E. 391.

The judgment of the circuit court should be reversed.

HYDRICK, J. I base my concurrence in the result on the ground that there was no evidence of negligence on the part of defendant. The only allegation of negligence is that the cogs which injured plaintiff were not covered. According to the testimony, they were elevated on a frame eight to ten feet above the floor of the engine room, so that there was no danger of any one coming in contact with them, unless he got up on this frame. It appeared that it was not necessary for any one to get up there, except for the purpose of oiling the boxes which held the shafting, or perhaps to adjust or repair the cogs themselves. They could have been instantly stopped by turning a valve at the base of the frame. Under these circumstances, I do not think that ordinary prudence would have suggested to any one that they should be covered. It may be that, if they had been covered, the accident would not have happened, though that is by no means certain. But it is generally easy enough, after an accident has happened, to suggest some means whereby it might have been prevented. It does not follow, however, that we must therefore conclude that ordinary prudence would have suggested the adoption of such means in the first instance. In this view of the case, I deem it unnecessary to consider the defenses set up and attempted to be set up in the answer, for the defenses may properly be considered only after a prima facie case has been made out against the defendant.

This court has stated in several recent decisions how the defense of contributory negligence should be pleaded. While no set form of words is necessary, the facts must be alleged from which a reasonable inference can be drawn that the injury was caused by the joint and concurrent negligence of both parties as proximate causes thereof. No such allegation was made, and therefore the plea was objectionable, but the objection should have been taken by demurrer for insufficiency of the facts alleged to constitute the defense.

GARY, A. J. (dissenting). This is an action for damages alleged to have been sustained by the plaintiff through the negligence of the defendant.

The allegations of the complaint material to the questions presented by the exceptions

are as follows: "That heretofore, on the 2d day of December, A. D. 1907, the plaintiff above named was in the employment of the defendant as an engineer. That while the plaintiff was so employed by the defendant, and while in the discharge of his duties as such engineer, it became necessary to oil a part of the machinery known as the boxes, which held the shaft for the conveyor chain. That, while the plaintiff was so engaged in oiling said machinery, his coat became entangled and was caught in the cog gear, which drives the conveyor chain, and pulls the fuel to the furnace. That the plaintiff was caused to be injured, in the manner and by the means aforesaid, by and through the negligence of the defendant, in providing a dangerous place for the plaintiff to work, and in providing unsecure and unsafe machinery for the plaintiff, in the course of his employment, in that the defendant allowed the cog gear to remain exposed and uncovered, so that the plaintiff's coat was caught in the same, thereby pulling his arm in the cog gear, and inflicting such injuries upon the plaintiff as necessitated the amputation of his right arm." The defendant denied the allegations of negligence, and set up the defense of assumption of risk. It also interposed what it contends was a defense of contributory negligence. Upon the close of the plaintiff's testimony, the defendant made a motion for a nonsuit, which was refused. The jury rendered a verdict in favor of the plaintiff for \$7,000, whereupon the defendant made a motion for a new trial, which was also refused, and it appealed upon exceptions, which will be set out in the report of the case.

The first question that will be considered is whether there was any testimony tending to prove the allegations of negligence on the part of the defendant. The testimony of the plaintiff tended to show that he was the engineer, and that there was also an oiler; that his principal duty as engineer was to look after the boilers, pumps, and engines; that a colored fireman always oiled the machinery; that he had never oiled it before; that he had nothing to do with the cog gear, and had not previously been upon that part of the platform, where it was situated; that the cogs worked inward, instead of outward; that the cog gear was exposed; that he was ordered to go, in a hurry, by the superintendent, who had the right to direct his services; that, although there was danger, he was not aware of it; that the place could have been made safe by covering the cog gear; that there was no other way for him to approach the machinery—thus showing that the exception raising this question cannot be sustained.

The next question that will be considered is whether the testimony showed that the injury to the plaintiff was due to a risk of which he was fully aware, and which he voluntarily assumed. There was testimony

to the effect that there was no duty resting upon the plaintiff to oil the machinery or to perform any act with reference to the cog gear; that there was an emergency; that he went to the place of danger, under the orders of the superintendent, who was present, and who had the right to direct his services; that he was not aware of the danger. In the case of *Wilson v. Railway*, 73 S. C. 481, 53 S. E. 968, error was assigned in charging these two requests of the plaintiff: (1) "That a servant obeying the instructions of the representatives of the master on the spot is not guilty of contributory negligence, in so obeying said master." (2) "That the fact that the servant's work is done in the presence and under the immediate direction of the master's foreman or conductor in this case is equivalent to the assurance by the master that the servant may safely proceed to the work required of him." The assignments of error were overruled under the authority of *Carson v. Railway*, 68 S. C. 55, 46 S. E. 525. "If there is ground for reasonable difference of opinion as to the danger, the servant is not bound to set up his judgment against that of his superior, whose orders he is required to obey, but he may rely upon the judgment of such superior." *Stephens v. Railway*, 82 S. C. 542, 64 S. E. 601. It was for the jury to say whether the conditions amounted to such an emergency as would justify or excuse a man of ordinary prudence and judgment in undertaking to carry out the orders of the superintendent. *Hall v. Railway*, 81 S. C. 522, 62 S. E. 848; *Brown v. Railway*, 82 S. C. 528, 64 S. E. 522. The exception raising this question is overruled.

The next question that will be considered is whether there was error in refusing the motion for nonsuit, on the ground that the plaintiff was guilty of contributory negligence. The defense which the defendant interposed is as follows: "And, further answering, this defendant alleges that, even if it were negligent, which it denies, still the accident to the plaintiff was due proximately to his own negligence, in that he conducted himself in a careless manner, and failed to observe caution in keeping his body from coming in contact with said cogs, which he could have done if he had used due care." The following statement appears in the record: "After the pleadings had been read, plaintiff's counsel stated that he would object to the introduction of any testimony, in support of the defense of contributory negligence, upon the ground that such defense was not sufficiently set forth in the answer. After argument the presiding judge announced that in his opinion contributory negligence was not sufficiently pleaded, and that he would exclude all testimony in support thereof. Defendant's counsel duly excepted to his honor's ruling." There was no appeal from this ruling, and the question whether there was contributory negligence

on the part of the plaintiff is not properly before the court for consideration. But, waiving such objection, the exception cannot be sustained.

The following definition of contributory negligence has been approved by this court in numerous cases: "Contributory negligence is the want of ordinary care upon the part of a person injured by the actionable negligence of another combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred." In Pom. Code Rem. § 548, it is said: "The Codes clearly intend to draw a broad line of distinction between an entire failure to state any cause of action or defense on the one side, which is to be taken advantage of, either by the general demurrer, for want of sufficient facts, or by the exclusion of all evidence at the trial, and the statement of a cause of action or a defense, in an insufficient, imperfect, incomplete, or informal manner, which is to be corrected by a motion to render the pleading more definite and certain by amendment." In *Charging v. Toxaway Mills*, 70 S. C. 470, 50 S. E. 186, the court, after quoting the foregoing definition of contributory negligence, uses this language: "This definition imports that there must be negligence of the defendant operating with that of the plaintiff to produce the injury, and that if the plaintiff is entirely at fault, one of the elements of the definition, the negligence of the defendant, is wanting." The defense alleges, in express terms, that the defendant was not negligent, and, in effect, merely alleges that the plaintiff was entirely at fault. Furthermore, the ruling was not prejudicial to the rights of the defendant, as the facts related to the matter of assumption of risk, as well as contributory negligence, and the defendant received the full benefit thereof under the full and clear instructions as to assumption of risk, the difference between these two defenses being only shadowy. *Schlemmer v. Railway*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681. The ruling of his honor the presiding judge was free from error.

Fifth exception. This exception cannot be sustained, for the reason that the presiding judge ruled out all the testimony, except the bare fact that the plaintiff went to see Mr. Frost, which certainly was not prejudicial error.

Sixth exception. The charge set out in this exception is not susceptible of the inference mentioned therein, especially when considered in connection with the entire charge.

Seventh exception. What was said in considering the sixth exception disposes of this question.

Eighth exception. This exception is overruled for the reason that, even if the proposition was erroneous, there were no facts to

which it was applicable, and therefore it was not prejudicial.

Ninth, tenth, and eleventh exceptions. The only error assigned by these exceptions is that the presiding judge withheld from the jury the consideration of the question of contributory negligence. They are therefore disposed of by what has already been said.

Twelfth exception. We fail to see how the jury could have been misled, unless they simply ignored the plain language of the charge.

Thirteenth exception. What has already been said disposes of subdivisions 1, 2, 4, and 5.

The statement of the circuit judge in settling the case shows that subdivision 3 cannot be sustained.

For these reasons I dissent.

(111 Va. 179)

SPILLING v. HUTCHESON.

(Supreme Court of Appeals of Virginia. June 9, 1910.)

1. COVENANTS (§ 103*) — CONSTRUCTION — BUILDING LINE.

A covenant that the building line of a square shall be not less than 25 feet from the true street line, it being understood that the front wall of the building shall be set back at least 25 feet from the street line, is breached by the erection of a bow window projecting over the line, the foundation of which, in common with the remaining outside walls, rises from the ground, and which extends up two stories.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 169; Dec. Dig. § 103.*]

2. COVENANTS (§ 106*) — CONSTRUCTION — BUILDING LINE.

A front porch, consisting of an open frame structure resting on brick piers, is not a breach of the building line covenant, under the rule that the language of a deed is to be construed liberally in favor of the grantee.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 169; Dec. Dig. § 103.*]

3. INJUNCTION (§ 62*)—MANDATORY INJUNCTION—GROUNDS—REMEDY AT LAW.

A mandatory injunction, prohibiting an encroachment and ordering an abatement of a structure which constitutes a violation of a building line covenant, will not be denied on the ground that it inflicts hardship on the defendant, and that the plaintiff should be left to the remedy at law for damages for breach of the covenant.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 124-129; Dec. Dig. § 62.*]

Appeal from Chancery Court of Richmond. Suit by Lelia G. Hutcheson against William H. Spilling. From the decree, both parties appeal. Affirmed.

Page & Leary, for appellant. A. W. Patterson, for appellee.

WHITTLE, J. The appellee, Lelia G. Hutcheson, sold and conveyed to the appellant, William H. Spilling, a vacant lot in the city of Richmond, fronting 30 feet on Grove avenue and extending back between parallel lines 179 feet. The deed of convey-

ance contains the following covenant: "The parties hereto also, in consideration of the premises, further covenant and agree with each other, for themselves, their heirs and assigns, that the building line of the square shall be not less than twenty-five feet from the true street line, it being understood by them that the front wall of the building shall be set back at least twenty-five feet from the street line, and this covenant is to run with the land."

Shortly after the sale the purchaser erected a three-story brick residence upon the lot with a frontage of 26 feet 2 inches; 12 feet of this space being occupied by a bow front or window, the foundation of which in common with the remaining outside walls, rises from the ground. That part of the structure is two stories high, and is not separated from the space it incloses by an inner wall, and it projects over the building line 4 feet 2 inches. In addition to the bow window, a front porch, extending the entire width of the building, projects 10 feet over the line.

When advised of these encroachments, Mrs. Hutcheson, who claims ownership of the rest of the square, which she has dedicated to residential purposes, filed her bill against Spilling, charging a breach of the covenant in the particulars indicated, and prayed for a mandatory injunction compelling the defendant to conform his building to the established line by removing the bow window and porch.

The defendant denies the alleged breach of covenant, and insists that the term "front wall," as employed in the deed in question, means the front of the main wall, and does not include the appurtenances, the window and the porch. He moreover insists that, even though the covenant were breached, as charged, the plaintiff would have a full, adequate, and complete remedy by action at law for damages, and therefore is not entitled to invoke the extraordinary remedy by mandatory injunction.

The chancery court sustained the building restriction, and found that the defendant had violated his covenant in projecting the bow window beyond the building line; but with respect to the porch it was held that there had been no violation of the restrictive covenant. The court accordingly pronounced the decree under review, disposing of the case in both aspects.

The first contention of the appellant is controlled by the opinion of this court in the recent case of Eubank v. City of Richmond, 67 S. E. 376. In that case the court sustained the validity of a city ordinance which declared that no person coming within its terms should erect a building nearer to the street line than the building line established by its authority. The court there held that it was a violation of the ordinance to project a bow window, such as we are now considering, beyond the building line.

That ordinance having thus been declared reasonable and lawful, the learned chancellor did not err in holding the building restriction in this case valid and enforceable so far as the bow window was concerned.

We shall next consider the question raised by the appellee upon cross-appeal, namely, that the trial court erred in holding that the porch, though extending beyond the building line, did not constitute a breach of the covenant.

The front porch is an open frame structure, resting upon brick piers. Applying, as we must do, the familiar principle that the language of the deed is to be construed liberally in favor of the grantee, we think that the porch does not form part of the "front wall of the building."

Lastly, it is insisted that, even though the court should regard the projection of the bow window beyond the building line a violation of the restriction, still the chancery court erred in awarding a mandatory injunction prohibiting the encroachment and ordering an abatement of the structure. It is said that this ruling inflicts unnecessary hardship upon the defendant, and that the plaintiff should be left to her remedy at law to recover damages for the breach of the covenant.

We do not concur in this contention. The parties have seen proper to embody in their deed a reasonable and usual covenant to establish a building line, beyond which the grantee is forbidden to extend the front wall of his dwelling, and he cannot disregard such covenant (which constitutes part of the consideration for the deed), and in answer to the demand of the plaintiff for a mandatory injunction to abate the obstruction insist, on the theory of hardship (a hardship of his own creation), that the plaintiff be left to her action at law for damages. The correct rule in such case is clearly stated by Lord Cairns in *Doherty v. Allman*, 3 H. L. App. Cas. 720, as follows: "If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say by way of injunction that which the parties have already said by way of covenant—that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the court to that which already is the contract between the parties. It is not, then, a question of convenience or inconvenience, or of the amount of damage or injury. It is the specific performance, by the court, of that negative bargain which the parties have made, with their eyes open, between themselves."

In 4 Pomeroy's Eq. Jur. (3d Ed.) § 1342, the author, in discussing the subject of "Restrictive Covenants Creating Equitable Easements," observes: "It has been shown that restrictive covenants in deeds * * * limiting the use of land in a specified manner,

or prescribing a peculiar use, which create equitable servitudes on the land, will be specifically enforced in equity by means of an injunction, not only between the immediate parties, but also against subsequent purchasers with notice, even when the covenants are not of the kind which technically run with the land. The injunction in this case is granted almost as a matter of course upon a breach of the covenant. The amount of damages, and even the fact that the plaintiff has sustained any pecuniary damages, are wholly immaterial. In the words of one of the ablest modern equity judges (Sir George Jessel, M. R., in note to *Leech v. Schweder*, L. R. 9 Ch. App. 465): 'It is clearly established by authority that there is sufficient to justify the court in interfering, if there has been a breach of the covenant. It is not for the court, but the plaintiffs, to estimate the amount of damages that arises from the injury inflicted upon them. The moment that the court finds that there has been a breach of the covenant, that is an injury; and the court has no right to measure it, and no right to refuse to the plaintiff the specific performance of his contract, although his remedy is that which I have described, namely, an injunction.'

The recent case of *Batchelor v. Hinkle*, 132 App. Div. 620, 117 N. Y. Supp. 542, affords an apt illustration of the application of the remedy by mandatory injunction to restrain the continuance of building encroachments in violation of restrictive covenants. The reports abound with similar decisions, but those to which we have called attention sufficiently exemplify the principle involved.

The foregoing views necessarily lead to an affirmance of the decree.

Affirmed.

GARRISON, J., absent.

(111 Va. 21)

IMPERIAL CO. v. TROTMAN.

(Supreme Court of Appeals of Virginia. June 9, 1910.)

1. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—SAFE PLACE.

It is the duty of a master to exercise ordinary care to provide a reasonably safe place in which its servants are to work; the extent of such care depending on the circumstances of the particular case.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 173, 179; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—NEGLIGENCE—ANTICIPATION OF INJURY.

In an action for injuries to an employé in a fertilizer factory, evidence held to show that such injury was not reasonably to have been anticipated, and that the facts were insufficient

to show that defendant was negligent in failing to provide a safe place in which to work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954-972; Dec. Dig. § 278.*]

Error to Law and Chancery Court of City of Norfolk.

Action by Lazarus Trotman against the Imperial Company. Judgment for plaintiff, and defendant brings error. Reversed.

Hughes & Little and P. H. C. Cabell, for plaintiff in error. W. D. Stoakley and Loyd W. W. Brockenbrough, for defendant in error.

KEITH, P. The plaintiff in error, the Imperial Company, operated a fertilizer plant near the city of Norfolk, and Lazarus Trotman, the defendant in error, was, at the time he received the injury which occasioned this action, and had been for eight years or more, a laborer in its employment. The building in which the work of the company was conducted was constructed with a second story partly floored over, on which were a number of tracks over which trucks ran for moving materials of various kinds. On the day of the accident bales of bags were being moved from trucks on one of these tracks. These bales were made up on the ground floor, and raised to the second floor on a hoist. At the point of delivery on the second floor they were loaded on the trucks and wheeled to that part of the floor where they were being piled. Beneath this portion of the second floor, where the bales of bags were being piled, the plaintiff and other laborers were engaged in patching and mending loose bags, while they were being handled by the laborers before being baled. Whenever a defective bag was discovered by one of the laborers, it was tossed into a pile of bags to be mended. At a point alongside the track on the second story was an opening, 22 inches wide by 5 feet long, running alongside the track. This opening was intended to be used for dumping tankage and other fertilizer material through from the trucks on the second floor to the floor below. The bales of bags which the laborers were handling on the second story measured about 3 feet by 2, and weighed 300 pounds each.

At the time of the injury Trotman was sitting immediately beneath this hole, either on a pile of tankage or a pile of bags. While the truck was being unloaded on the floor above, it tipped up at one end and down at the other, and one of the bales of bags rolled off and was precipitated directly through the hole, falling upon Trotman, and inflicting the injury for which suit was brought. This hole in the floor was sawed there by Wilson, the first witness for the plaintiff, and the plaintiff himself, some seven or eight years previous to the accident. During this time Trotman had been laboring at the plant, performing at one time or another all the va-

rious duties performed by laborers, which sometimes took him upon the ground floor and sometimes upon the floor above. He was one of the old men in the employ of the company, and thoroughly familiar with the work of the plant and with the premises throughout. During the entire previous history of the plant no such accident as this had ever occurred, and it had been supposed that one of the bales of bags could not be gotten through the hole on account of the standard size of the bales; the smallest dimension being 24 inches, while the hole measured in width exactly 22 inches. The witnesses say that a truck load of the tankage, for the dumping of which this hole was cut and used, might fall upon a man without doing him serious injury.

It is certainly true that the hole could have been covered up, or otherwise guarded and protected, so as to render impossible such an accident as that which occurred.

After the evidence was introduced tending to prove the facts we have stated, the Imperial Company demurred to the evidence, the jury found a verdict upon which the court entered judgment for the plaintiff, and the case is before us upon a writ of error.

As was said by Judge Buchanan in *Persinger v. Alleghany Ore Co.*, 102 Va. 350, 48 S. E. 325, the rule is well settled that it is the duty of the master to exercise ordinary care to provide a reasonably safe place in which its servants are to work; and, continuing, he says that "ordinary care depends upon the circumstances of the particular case, and is such care as persons of ordinary prudence would under the circumstances have exercised. * * * If the accident which occurred was one at all likely to happen, if it was a probable consequence that an employé working in the bed would be injured or killed by having his clothing caught upon the little 'jagger' on the end of the revolving shaft, as was the plaintiff's intestate, the trial court erred in sustaining the defendant's demurrer to the evidence. But can the accident be said to be one which ordinarily prudent men would have been likely to anticipate?"

Applying the language of that case to the facts in this, can it be said that it was at all likely that a bale of bags 24 inches in diameter would fall through a hole 22 inches in diameter and injure an employé? Can it be said that an ordinarily prudent man would have been likely to anticipate such an accident? The standard size of the bale was 24 inches. The actual width of the hole was 22 inches. For eight years the structural condition of the building and the methods of operation used at the time of the accident had continued unchanged and without injury to any one, when by a fortuitous combination of circumstances the truck tilts up, and a bale of bags somewhat smaller than

the usual and standard size falls through the hole, just at the moment when an employé is sitting directly beneath it, and he receives the injury.

We think that the facts disclose an accident which could not have been reasonably anticipated by a prudent man, and which does not constitute an actionable wrong; and for these reasons we are of opinion that the judgment of the court of law and chancery should be reversed, and this court will enter such judgment as that court ought to have rendered.

Reversed

HARRISON, J., absent.

(111 Va. 205)

WILLIAMS v. GREEN.

(Supreme Court of Appeals of Virginia. June 9, 1910.)

1. EASEMENTS (§ 5*)—PRIVATE RIGHT OF WAY—PRESCRIPTION.

To establish a private right of way over the lands of another by prescription, it must appear that the use and enjoyment thereof was adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land over which it passes, and that such use has continued for a period of at least 20 years.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 18, 21, 23; Dec. Dig. § 5.*]

2. EASEMENTS (§ 36*)—PRIVATE RIGHT OF WAY—CONTINUOUS USE—PRESUMPTION OF GRANT.

Where an alleged private right of way has been used openly, uninterruptedly, continuously, and exclusively for more than 20 years, there is a prima facie rebuttable presumption, in the absence of proof of the origin of the way, that it arose out of a right or grant of the party on whose land it exists.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 88-93; Dec. Dig. § 36.*]

3. EASEMENTS (§ 36*)—PRIVATE RIGHT OF WAY—PRESCRIPTION.

Where there has been uninterrupted, continuous, and exclusive use of a right of way over another's land for more than 20 years, the bona fides of the claim of right is established, and the owner of the land must rebut the presumption of grant by showing permission or license from him, or those under whom he claims, or denials or objections to such use, made under circumstances that will rebut the presumption.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 88-93; Dec. Dig. § 36.*]

Appeal from Circuit Court, Appomattox County.

Suit by Henrietta E. Williams against Mary Lizzie Green. Decree for defendant, and complainant appeals. Reversed and remanded, with directions.

F. C. Moon and S. L. Ferguson, for appellant. A. H. Clements, for appellee.

BUCHANAN, J. The question involved in this case is whether the appellant is entitled to a private right of way over the lands of the appellee.

It appears that the way claimed by the appellant has been used for more than 40 years by her and her predecessors in title without objection, until about August, 1908, when the appellee built a wire fence across the way, which obstructed its use by the appellant. The long and uninterrupted use of the way by the appellant and those under whom she claims is not denied by the appellee, but her contention is that the said use was a mere license, revocable at pleasure.

In order to establish a private right of way over the lands of another by prescription, it must appear that the use and enjoyment thereof by the claimant was adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land over which it passes, and that such use has continued for a period of at least 20 years. *Gaines v. Merryman*, 95 Va. 680, 29 S. E. 738; *Reid v. Garnett*, 101 Va. 47, 43 S. E. 182, and authorities cited.

While the appellee claims that the appellant's use of the way was permissive, or by license merely, there is no evidence of that fact; nor is there any evidence as to the manner in which the use originated. The appellant's witnesses (the appellee introduced none) all testify to the uninterrupted use of the way by the appellant and her predecessors in title for more than 40 years, and that the appellant and her family have uninterruptedly and continuously (that is, whenever they desired to use it, as they had no other practicable way to a public road) used the way for more than 20 years.

It is also insisted by the appellee that the use of the way was not exclusive. It does not appear that any person other than the owners of the land now owned by the appellant, and perhaps her tenants, used the way prior to the purchase of the land by the appellant. Since its acquisition by her there is no evidence that it was used by persons other than herself and family and their visitors.

Where a way has been thus used openly, uninterruptedly, continuously, and exclusively for a period of more than 20 years, the origin of the way not being shown, there is a presumption of a right or grant from the long acquiescence of the party upon whose land the way is. This presumption of a grant or adverse right is with us *prima facie* merely and may be rebutted. *Nichols v. Aylor*, 7 Leigh, 546; *Field v. Brown*, 24 Grat. 74; *Reid v. Garnett*, 101 Va. 47, 43 S. E. 182.

"In the absence of evidence," as was said by the Supreme Court of the state of Pennsylvania in *Worrall v. Rhoads*, 2 Whart. 427, 30 Am. Dec. 274, "tending to show that such long-continued use of the way may be referred to a license, or special indulgence, that is either revocable or termin-

able, the conclusion is that it has grown out of a grant by the owner of the land and has been exercised under a title thus derived. The law favors this conclusion, because it will not presume any man's act illegal. It is reasonable to suppose that the owner of the land would not have acquiesced in such enjoyment for a long period, when it was to his interest to have interrupted it, unless he felt confident that the party enjoying it had a right and title to it that could not be defeated. And, besides, seeing that it can work no prejudice to any one excepting to him who has been guilty of great negligence, to say the least of it, public policy and convenience require that this presumption should be made, in order to promote the public peace and quiet men in their possession."

When there has been such a use for more than 20 years, the *bona fides* of the claim of right is established, and the owner of the land over which the way passes must rebut the presumption by showing permission or license from him or those under whom he claims, or denials or objections to such use made under circumstances that will rebut the presumption. See *Nichols v. Aylor*, *supra*; *Field v. Brown*, *supra*; *Reid v. Garnett*, *supra*; *Walton v. Knight*, 62 W. Va. 223, 58 S. E. 1025.

The continuous, uninterrupted, and exclusive use of the private way by the appellant over the lands of the appellee having existed for a period of more than 20 years, there is a *prima facie* presumption of a grant, and that such use was under a claim of right and adverse; and, there being no evidence to rebut that presumption, the appellant's right to the private way was established, and the trial court erred in not so holding.

The decree appealed from must be reversed and set aside, and the cause remanded to the circuit court, with directions to grant the injunction prayed for in the bill of appellant, and, if insisted upon, to ascertain the damages, if any, done the appellant by the obstruction of the private way.

Reversed.

HARRISON, J., absent.

(111 Va. 79)

EDMONSON et al. v. POTTS' ADM'RS.†

(Supreme Court of Appeals of Virginia. June 9, 1910.)

1. APPEAL AND ERROR (§ 927*)—DEMURRER TO EVIDENCE—REVIEW.

Where the case is heard as on demurrer to evidence, defendant, obtaining a judgment in the trial court, is entitled to the benefit of the most favorable construction which can be placed on his evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2912; Dec. Dig. § 927.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

† Rehearing denied September

2. PRINCIPAL AND SURETY (§ 126*)—DISCHARGE OF SURETY—FAILURE OF CREDITOR TO SUE PRINCIPAL OBLIGOR—NOTICE.

The notice which will discharge a surety under Code 1904, § 2890, providing that the surety on any matured obligation may require the creditor by notice in writing forthwith to institute suit thereon, must show an unequivocal demand on the creditor to sue on the obligation; and notice by a surety on a note to the holder thereof to take such action as is necessary to get the surety's name off the note, and a request to sue one of the several parties to the note, were not an explicit demand to sue on the note, and the failure of the holder to sue thereon did not release the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 329-351; Dec. Dig. § 126.*]

Error to Circuit Court, Mecklenburg County.

Action by J. W. Edmonson and another, receivers of the Bank of Mecklenburg, against E. H. Potts' administrator. There was a judgment for defendant, and plaintiffs bring error. Reversed and rendered.

W. E. Homes, Abner C. Goode, C. T. Baskerville, Chas. J. Faulkner, Jr., and E. P. Buford, for plaintiffs in error. Wood Bouldin, for defendant in error.

BUCHANAN, J. The material question involved in this case, and the only one that it is necessary to decide, in the view we take of the case, is whether or not the notice to sue, relied on by the defendant as barring the plaintiffs' right of recovery, was sufficient under the provisions of section 2890 of the Code of 1904.

That section, so far as relevant to this case, is as follows: "The surety or guarantor or indorser (or his committee or personal representative) of any person bound by any contract may, if a right of action has accrued thereon, require the creditor, or his committee or personal representative, by notice in writing, forthwith to institute suit thereon. * * *"

The contract sued on in this case is a negotiable note, made by the Mecklenburg Live Stock Company, for \$2,000, payable to and indorsed by E. H. Potts, the defendant's intestate, and C. W. Harris and B. E. Cogbill, and is owned by the Bank of Mecklenburg, of which the plaintiffs are the receivers.

The notice to sue relied on by the defendant was not a formal notice to the bank, but was contained in letters written by the defendant, as the administrator of E. H. Potts, deceased, to the cashier and president of the Bank of Mecklenburg. Neither the letters nor copies thereof, were introduced in evidence, but the writer of the letters and the officers to whom they were written respectively testified to their contents.

The defendant stated that some time after his decedent's death he was informed of the existence of the note sued on, and that it was held by the Bank of Mecklenburg. He about the same time learned that his decedent had

made a settlement with Mr. Cogbill, one of the indorsers on the note, through his attorney, Mr. Faulkner, who was also president of the bank, in which his decedent had paid Mr. Cogbill his share of the note. The defendant thereupon wrote "the cashier of the bank at Boydton, and explained the nature of the settlement and asked that such steps be at once taken by the bank as would release Mr. Potts' name on the note as surety. Subsequently I wrote to Mr. Faulkner as president of the bank and urged that he take such action as would release Mr. Potts' name. I frequently talked with Mr. Faulkner with regard to his bringing suit against Mr. Cogbill in order that the matter might be closed, as I as administrator desired to close the administration of the Potts estate. The notices were in writing to Mr. Faulkner as president of the bank to bring suit or take such action against Cogbill so as to liberate Mr. Potts' name as surety." He further testified that he could not recall "the language of the different notices, but they all urged the bank to take such action as was necessary to get Mr. Potts' name off the note."

Mr. Overby, the cashier of the bank, in testifying to the contents of the letter to him, said that he could not state when he "received notice to bring suit, though it was some time after the maturity of the note. My recollection of the contents of notes [notice], which was in writing, was to the effect that Mr. Gregory, as administrator, wished the bank to take such steps as would relieve Mr. Potts' estate of any responsibility as indorser on note."

The testimony of the president of the bank, Mr. Faulkner, as to the contents of the letters written to him, is as follows: "I remember on one occasion his [the defendant] writing to me in connection with some other matter that he wanted Mr. Potts' name gotten off the paper, and again last fall he not only spoke to me in person about it, but he wrote me a letter especially on the point, in which he stated that he wanted us to bring suit against Cogbill on the note. About the time I received this last letter, Mr. Cogbill had already gotten into his troubles, and I saw Mr. Gregory and asked him if he thought best to bring suit. He replied that he did not think that it was any use in bringing it now; that I had waited until too late." He further stated, in reference to the conversations with the defendant and the contents of the letters received by him, that in every instance they were to the effect that the defendant "wished the bank to get Mr. Potts' name off the paper."

Giving the defendant the benefit of the most favorable construction (as he is entitled to, since the case is heard here as on a demurrer to the evidence) which can be placed upon his letters to the officers of the bank, as their contents are disclosed by the record, did they, or either of them, contain a

clear and explicit requirement for the bank "forthwith to institute suit" on the note?

Unless the letters relied on as giving notice contained such a requirement to sue, the provisions of section 2980 of the Code were not complied with. That section is very stringent in its terms. The effect of failure to 'institute suit against every party to such contract who resides in this state and is not insolvent, after notice, is an absolute forfeiture of all claims against every surety upon the contract. To the surety giving the notice it is an absolute extinguishment of the debt. Code, § 2891; Davis' *Adm'r v. Snead*, 33 Gratt. 705, 708, 709. Before the creditor should be held to have forfeited all his rights under the contract against all the sureties for a failure to forthwith institute suit upon the contract, it ought clearly to appear that the notice relied on to have that effect required suit forthwith to be instituted on the note.

Notice "to take such action as was necessary to get Mr. Potts' name off the note" was not a clear and explicit requirement to sue upon the note, as the surety might be relieved from liability on the note in various other ways. Neither was the direction or request in the letter to bring suit against Cogbill, one of the parties to the note, a clear and explicit requirement to sue upon the note. The cases are numerous which hold that notice to discharge a surety must comply substantially with the statute, and must show a clear, unequivocal, and distinct demand upon or command to the creditor to institute suit upon the contract. See *Savage's Adm'r v. Carleton*, 33 Ala. 443; *Kaufman v. Wilson*, 29 Ind. 504; *Bates v. State Bank*, 7 Ark. 394, 46 Am. Dec. 293; *Parriah v. Gray*, 1 Humph. (Tenn.) 88; *Shimer v. Jones*, 47 Pa. 268; *Warner v. Beardsley*, 8 Wend. (N. Y.) 194; *Moore v. Peterson*, 64 Iowa, 425, 20 N. W. 744.

It follows, from what has been said, that we are of opinion that the notice relied on to bar the plaintiffs' right against the defendant was not sufficient, and that the trial court erred in not so holding. Its judgment must, therefore, be reversed, and, as all matters of law and fact were submitted to the trial court for its decision, this court will enter such judgment in favor of the plaintiffs as the trial court ought to have entered.

Reversed.

HARRISON, J., absent.

(111 Va. 107)

METROPOLITAN LIFE INS. CO. v. HAYSLETT.

(Supreme Court of Appeals of Virginia. June 9, 1910.)

1. EVIDENCE (§ 155*)—ADMISSIBILITY—INTRODUCTION BY ADVERSE PARTY.

The object of Code 1904, § 3249, authorizing the court to order the filing of a state-

ment of the particular ground of defense, etc., is to give the adverse party more definite information of its character than is disclosed by the plea, and to confine the evidence to the particular defense disclosed, and, where certain evidence of plaintiff bearing on the issue of non-assumpsit was introduced without objection, defendant must be allowed to introduce evidence on the same issue though not within the special pleas relied on by defendant when filing its grounds of defense.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 445-458; Dec. Dig. § 155.*]

2. INSURANCE (§ 655*)—ACTIONS—EVIDENCE.

Where, in an action on a life policy, insurer alleged that insured fraudulently stated in the application that he was in sound health, insurer should be allowed to a reasonable extent to accumulate proof on the point that insured was at the time in ill health and his physician should be permitted to answer the question whether a man who has chronic Bright's disease exhibiting symptoms indicated a hypothetical question asked and answered, is in good health.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1677-1685; Dec. Dig. § 655.*]

3. INSURANCE (§ 668*)—REPRESENTATIONS—MATERIALITY—QUESTION FOR COURT AND JURY.

Whether a representation has been made by an applicant for life insurance and the terms thereof are for the jury, but, where proved, the materiality of the representation is for the court.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1782-1770; Dec. Dig. § 668.*]

Error to Circuit Court, Norfolk County.

Action by Mary E. Hayslett against the Metropolitan Life Insurance Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

Jeffries, Wolcott, Wolcott & Lankford, for plaintiff in error. R. Randolph Hicks, for defendant in error.

KEITH, P. The Metropolitan Life Insurance Company on the 26th of February, 1907, received from Joseph Hayslett a written application for insurance, dated on the 20th of that month, and issued its policy to him on the 9th day of the ensuing March for the sum of \$500. On the 27th of February, 1908, Hayslett died, and a suit was brought upon the policy, a verdict rendered, and a judgment recovered which is before us upon a writ of error.

The policy contained the following provisions: "It is further declared and agreed that the foregoing statements and answers, and also the statements and answers on the next page hereof, in answer to the medical examiner, are correct and wholly true, that they shall form the basis of the contract of insurance, if one be issued, and that if they are not thus correct and wholly true, the policy shall be null and void."

"It is further agreed that the company shall incur no liability under this application until it has been received, approved and the policy issued and delivered and the premium has actually been paid to and accepted by the company during the lifetime of the life proposed and while he is in good health.

"To induce the Metropolitan Life Insurance Company to issue policy, and as consideration therefor, I agree on behalf of myself and of any other person who shall have, or claim interest in any policy issued under this application, as follows:

"Wherever nothing is written in the following paragraphs, it is agreed that the declaration is true without exception.

"I have never had any of the following complaints or diseases: * * * Disease of the kidneys.

"I am now in sound health. I am not blind, deaf, or dumb, nor have I any physical or mental defect or infirmity of any kind." Then follows "the name of the physician who last attended me, the date of the attendance, and the name of the complaint for which he attended me: Doctor Wilson, September, malaria."

"I have not been under the care of any physician within two years other than as stated in previous paragraph, except [no exceptions].

"I have never met with any serious personal injury, not ever been seriously ill, except as stated herein, and for the complaints named, and no other, when I was attended by the following named physicians and no other: [No exceptions and no physician's name.]"

To the declaration filed upon this policy the defendant pleaded nonassumpsit and two special pleas, in the first of which the defendant says, leaving out the formal parts, that the applicant did fraudulently and knowingly make a false statement in his application, in this, to wit, that he never had any disease of the kidneys, which statement was false, in that the applicant prior thereto had been and was at that time afflicted with a disease of the kidneys and had been treated therefor; that the statement was material and caused the company to issue the policy sued upon, and but for said answer the policy would not have been issued; and that the defendant had no knowledge of the falsity of said statement. The substance of the second plea is that the applicant fraudulently and knowingly made a false statement in his application by stating that he was then (at the time of signing the application) in sound health, and that he had no physical or mental defect or infirmity of any kind.

The plaintiff having moved that the defendant be required to file its grounds of defense, the defendant stated that they were embraced in the two pleas above given.

During the progress of the trial, the defendant sought to rely upon a third ground of defense based upon the express agreement in the application for the policy that "the company shall incur no liability under this application until it has been received, approved, and the policy issued and delivered, and the premium has been actually paid to and accepted by the company during the lifetime of the life proposed and while he is in

good health." The contention of the defendant upon this point is that the policy was without its knowledge or authority delivered to and accepted by the deceased while he was ill and just rallying from a desperate attack which occurred about the 8th of March, 1907. This fact, it is claimed, was first disclosed by the defendant in error (plaintiff in the court below) in her testimony which was admitted and received without objection, and upon it the plaintiff in error claims that it had a right to rely under the general issue. On the other hand, it is contended by the defendant in error that the insurance company having been called upon for its grounds of defense, and having stated that the two special pleas were relied upon as containing its grounds of defense, none other could be considered by the jury.

Section 3249 of the Code of 1904 provides that: "In an action or motion, the court may order a statement to be filed of the particulars of the claim or of the ground of defence; and, if a party fail to comply with such order, may, when the case is tried or heard, exclude evidence of any matter not described in the notice, declaration or other pleading of such party, so plainly as to give the adverse party notice of its character."

As was said by this court in *Columbia Accident Ass'n v. Rockey*, 93 Va. 679, 25 S. E. 1009, the statement does not constitute the issue to be tried, and need not be as formal and precise as a declaration or plea. If it is not sufficient, the court should require a sufficient statement, and, if it is not furnished, exclude evidence of any matter not described in the notice, declaration, or other pleading so plainly as to give the adverse parties notice of its character. The object of the section is to give the opposing parties more definite information of the character of such claim or defense than is generally disclosed by the declaration, notice, or plea, and to prevent surprise. *City of Richmond v. Lenker*, 99 Va. 6, 37 S. E. 348.

Its whole object and effect is to limit the scope and operation of the general issue, and to confine the introduction of evidence to the particular defense which the defendant has disclosed. *Oeters v. Knights of Honor*, 98 Va. 201, 35 S. E. 356.

If this evidence had been offered by the insurance company, and objection had been made, the court properly would have excluded it; but the case before us is quite otherwise. The plaintiff in the court below introduced the evidence, and it went before the jury without objection. It plainly does not come within the mischief intended to be remedied by section 3249, as the plaintiff could not be surprised by evidence which she herself introduced, and, as it bore directly upon the issue of nonassumpsit, it should have been considered by the jury.

The second bill of exceptions is, we think, without merit, and as it presents no question of interest, we shall not discuss it.

The third bill of exceptions is as follows: Plaintiff in error asked a physician who was testifying the following question: "Is a man in good health who has chronic Bright's disease of the kidneys and exhibiting symptoms such as I have indicated in the hypothetical question?" The hypothetical question had been asked and answered, but counsel for defendant in error objected to the question just stated and the objection was sustained, upon just what ground is not apparent.

It is true that it does not require an expert to prove that a man who is afflicted with chronic Bright's disease of the kidneys is not in good health; and yet it would seem that the party interested in establishing the fact of ill health should have been allowed to a reasonable extent at least to accumulate proof upon that point, which was a very material one. As the case will go back for a new trial, if the same question is asked under similar conditions, we are disposed to think it should be answered.

The fourth bill of exceptions grows out of the court having told the jury in its instructions that the fact that the insured suffered from kidney disease did not bar him from recovering, unless the jury believed from the evidence that the insured willfully and fraudulently represented that he was not suffering from such disease, or unless such representations were material.

Whether a representation is made and the terms in which it is made are questions of fact for the jury; but, when proved, we are of opinion that its materiality is a question for the court.

The fifth bill of exceptions consists in the instruction given to the jury on motion of the plaintiff that the burden of proving that the insured had a chronic disease of the kidneys is upon the defendant. It is insisted by the plaintiff in error that the pleadings do not assert that the insured had a chronic disease of the kidneys, that it was stipulated in the application that he had not had a disease of the kidneys, and the burden of proof was upon the insurance company to show that he had such a disease, but whether or not it was chronic the plaintiff in error insists was entirely immaterial, and to require such proof was highly prejudicial to it.

Throughout the case the witnesses speak indifferently of "disease of the kidneys" and "chronic disease of the kidneys." The line is not sharply drawn between the acute and chronic forms of the disease, and this confusion or disregard of the distinction appears in the instructions asked for by the defendant as well as the plaintiff. Upon another trial, the plaintiff in error may, if it see fit, by appropriate objection present this point more clearly for decision.

The sixth and seventh bills of exceptions are based upon the refusal of the court to permit the jury to consider evidence of de-

livery of the policy while the accused was ill, and has already been sufficiently considered in this opinion.

For the reasons given, the judgment must be reversed and the cause remanded for a new trial not inconsistent with the views expressed in this opinion.

Reversed.

HARRISON, J., absent.

(111 Va. 127)

NIXDORF v. BLOUNT et al.

(Supreme Court of Appeals of Virginia. June 9, 1910.)

1. JUDGMENT (§ 780*)—LIEN—PROPERTY AFFECTED.

Under Code 1904, § 3567, making a money judgment a lien on land held by the debtor at or after the date thereof, a judgment binds improvements made by the debtor's vendee with notice at the date of his purchase of the judgment and a lis pendens to enforce it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1341, 1343-1349; Dec. Dig. § 780.*]

2. IMPROVEMENTS (§ 4*)—COMPENSATION—RIGHT TO.

One can recover for improvements made on lands of another only where they are made under belief that his title is good.

[Ed. Note.—For other cases, see Improvements, Cent. Dig. §§ 4-28; Dec. Dig. § 4.*]

3. IMPROVEMENTS (§ 1*)—EFFECT.

Permanent improvements upon land become part of it, and the owner must take notice that liens affecting the fee attach to such improvements.

[Ed. Note.—For other cases, see Improvements, Cent. Dig. § 1; Dec. Dig. § 1.*]

Appeal from Circuit Court of City of Norfolk.

Suit by D. P. Blount against C. W. Tebault and others. From a judgment for plaintiff, defendant Harry Nixdorf appeals. Affirmed.

J. L. Hubbard and D. Tucker Brooke, for appellant. R. Randolph Hicks, for appellees.

WHITTLE, J. The question presented upon this appeal is whether the lien of a judgment against an alienor binds improvements made on the land by an alienee with constructive and actual notice of the judgment, and a lis pendens to enforce it, against his grantor at the date of purchase.

From a decree of the circuit court of the city of Norfolk, holding both the lot and improvements liable, this appeal was granted.

In Fulkerson v. Taylor, 100 Va. 428, 437, 41 S. E. 863, 867, it is said: "Whether or not a judgment lien binds improvements in the hands of an alienee is a question of much interest and importance, one which has not been directly passed upon by this court, and which we feel should not be decided, except

after full argument and careful consideration."

According to the experience of the writer on circuit, it was the established and unchallenged practice in such case to subject both land and improvements to the lien of the judgment.

The appellant stands on the letter of the statute (Va. Code, 1904, § 3567) that "every judgment for money rendered in this State heretofore or hereafter against any person shall be a lien on all the real estate of or to which such person is or becomes possessed or entitled at or after the date of such judgment," and the line of decisions which hold that the lien attaches to such interest only as the debtor actually has in the property at or after the date of the judgment.

But, as we shall see presently, property affected by the lien cannot be made to serve as a nucleus for the creation and building up of alleged after-acquired equities in behalf of subsequent purchasers with notice of the judgment. Such purchasers hold the property in subordination to the right of the creditor to subject it to his judgment in the condition in which he finds it at the time of such enforcement, without diminution or allowance for betterments placed upon it subsequent to the recovery and docketing of the judgment.

The right to allowance for improvements, under the Virginia statute, which is an innovation on the common law is confined to cases in which the improvement was made under a title believed to be good, and that is not predicable of a purchaser with notice of the incumbrance. Such purchaser has no higher right to protection with respect to money invested in improvements than to the original purchase price paid for the land. Indeed, in its last analysis, the entire contention of the appellant rests upon the fallacious proposition that an equity may be created after, which had no existence before, the rendition of the judgment—a doctrine which would introduce a mischievous change in the law, and that, too, in behalf of a class who voluntarily elect to expend their money in the purchase and improvement of property known to be incumbered.

It is a principle of real estate law that permanent improvements placed upon land become a part of the realty, and the owner must take notice that all liens which rest upon the fee will necessarily attach to such permanent structures as he may choose to erect. 1 Min. Real Prop. §§ 17, 23.

When the case of Fulkerson v. Taylor was before this court the second time (102 Va. 314, 46 S. E. 309), we held that "a purchaser cannot claim that he put improvements upon land in good faith, believing that he had good title, when the records disclose a defective title."

In that case, it is true, the purchaser claim-

ed title under an unrecorded deed; but the principle is the same, and the court subjected both land and improvements to the satisfaction of the judgment.

So, also, in Flanary v. Kane, 102 Va. 547, 46 S. E. 312, it was said: "The provisions of chapters 124 and 125 of the Code * * * on the subject of improvements have no application to a judgment creditor seeking to enforce his lien upon the land upon which the improvements have been made."

It must also be observed that in this instance the appellant was a pendente lite purchaser, with actual and constructive notice of the lis pendens. Consequently, upon well-settled principles, he took the property subject to any decree that might be rendered against his vendor in that suit touching the subject-matter thereof. Hurn v. Keller, 79 Va. 415; Sharitz v. Moyers, 99 Va. 519, 39 S. E. 166; Va. Iron Coal & Coke Co. v. Roberts, 103 Va. 661, 49 S. E. 984.

In every aspect of the case, the decree complained of is plainly right, and must be affirmed.

Affirmed.

HARRISON, J., absent.

(111 Va. 199)

WICKHAM et al. v. GREEN.

(Supreme Court of Appeals of Virginia. June 9, 1910.)

1. DISMISSAL AND NONSUIT (§ 58*)—DECLARATION—FAILURE TO FILE.

Under Code 1904, § 3241, providing that, if one month elapsed after process returned executed without the declaration or bill being filed, the clerk shall enter the suit dismissed, although none of the defendants have appeared, it is the mandatory duty of the clerk under such circumstances to enter the suit dismissed, though his omission to do so is a misprision not materially affecting the rights of the defendants; the court being given control at the succeeding term, by section 3293, to reinstate any cause discontinued during vacation, set aside any of the proceedings, or correct any mistake therein, and make such order concerning the same as may be just.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 134-139; Dec. Dig. § 58.*]

2. DISMISSAL AND NONSUIT (§ 81*)—REINSTATEMENT OF CAUSE.

The reinstatement of a case at the following term which has been dismissed at rules for want of a declaration may be regarded as a matter of course, provided the effect of the reinstatement is to place the cause in the position it would have occupied but for the irregularity of the clerk's conduct, or for good cause shown where there has been no misprision of the clerk.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 182-191; Dec. Dig. § 81.*]

3. DISMISSAL AND NONSUIT (§ 81*)—GROUNDS—DECLARATION—FAILURE TO FILE—REINSTATEMENT—EXCUSABLE NEGLECT.

Where defendant was entitled to a dismissal of a suit by the clerk for plaintiff's failure to file his declaration within 30 days after service,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied September 15, 1910.

as authorized by Code 1904, § 3241, and defendant at the succeeding term insisted on dismissal, that it might plead limitations to any subsequent suit brought, it was error to deny defendant's motion to dismiss, and to permit the filing of the declaration at the succeeding term, under section 3293, in the absence of any showing of excuse for plaintiff's default.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 182-192; Dec. Dig. § 81.*]

Error to Law and Equity Court of City of Richmond.

Action by C. H. Green against H. T. Wickham and William Northrop, as receivers of the Virginia Passenger & Power Company, the Richmond Passenger & Power Company, and the Richmond Traction Company. Judgment for plaintiff, and defendants bring error. Reversed.

H. Taylor, Jr., for plaintiffs in error. O'Flaherty & Fulton and Edgar B. English, for defendant in error.

WHITTLE, J. This is a personal injury action, in which there was a verdict and judgment for the defendant in error, who was plaintiff in the trial court.

We are met at the threshold of the case with a question of statutory construction of more than ordinary interest. The summons was issued May 1, 1908 (only 17 days before the right of action would have been barred by the statute of limitations), and was returnable to second May rules, at which rules the process was returned executed, and the case was continued at that and the succeeding June rules for declaration. When more than one month had elapsed after process returned executed without the declaration having been filed, the clerk called attention of counsel for the plaintiff to that fact and notified them that he would be compelled to dismiss the suit. Thereupon counsel requested that the order of dismissal be not entered, as they wished to obtain consent of opposing counsel to file the declaration. Having failed to get such consent, the court at the next term, on motion of the plaintiff, granted leave to file the declaration. The defendants, at a later day of the term, submitted a motion to set aside the former order, and that the clerk be directed to enter the suit dismissed, on the ground that by allowing the declaration to be filed then and refusing to dismiss the suit the defendants would be denied the right to plead the statute of limitations. But the court adhered to its former ruling, and the defendants excepted.

It was the duty of the clerk, by mandatory requirement of section 3241 of the Code, to have entered the suit dismissed. The rights of the defendants, however, were not materially affected by his failure to discharge that function, since such omission was a misprision over which the court is given con-

trol at the succeeding term by section 3293. So that at last the question to be determined is whether or not the court could, at the next term, under section 3293, relieve the plaintiff from the consequences of his neglect, without excuse, to file his declaration within the time prescribed by section 3241, by granting leave to file the declaration at that term, when the effect of such ruling is to deprive the defendants of an accrued right to plead the statute of limitations.

It is true that the reinstatement of a case at the following term, which has been dismissed at rules for want of declaration, may be regarded as a matter of course, provided the effect of such reinstatement is to place the case in the position it would have occupied but for the irregularity of the clerk's conduct, or for good cause shown where there has been no misprision by the clerk. This we think is the rule fairly deducible from the cases of *Southall v. Exchange Bank*, 12 Grat. 315, *Wall v. Atwell*, 21 Grat. 401, *Alvis v. Johnson*, 1 Va. Dec. 381, and *Southern Exp. Co. v. Jacobs*, 109 Va. 27, 63 S. E. 17.

Thus, in *Southall v. Exchange Bank*, Judge Lee said: "There can be no doubt, then, that the court might properly, as it did, set aside all the proceedings at rules after the cause had been remanded at the previous term, and permit the plaintiff to do then, in court, what he would and should have done at rules—file his declaration and take judgment for the part not answered by the plea. No injustice could be done by this to the defendant, as it only placed the cause exactly where it would have been but for the irregularities which had occurred at the rules."

In *Wall v. Atwell*, supra, the court held that the proceedings in the clerk's office had been so irregular that the cause was not properly on the office judgment docket, and should be remanded to rules for proper proceedings.

In *Alvis v. Johnson*, supra, the plaintiff was in no default. The clerk kept no rule book, and took no rules. At page 383 of 1 Va. Dec., Judge Anderson says: "If it [the amended declaration] was not then filed, it was no fault of the plaintiff."

In *Southern Express Co. v. Jacobs*, 109 Va. 27, 63 S. E. 17, this court said, in reference to section 3293: "This statute was ample authority for the court's action in overruling the motion to remand, and directing the clerk to make the proper entries in the rule book."

* * * It is not pretended that the defendant was misled by any misprision of the clerk, nor is it suggested that any opportunity to file pleas or make any defense was lost by reason of any action on the part of the clerk. It was the duty of the clerk to enter the rules properly as required by the statute. His failure to do so, however, could not, in this case, be prejudicial to the plain-

tiff, who had done all that was required to entitle him to his office judgment."

So, in *Buchanan v. King*, 22 Grat. 414, it was held that, where the defendant appears and files his answer or plea, or consents to a decree, he will be taken to have waived the dismissal of the cause, and will not be allowed to insist on it.

The pretension of the defendant in error leads to this: That if in the present case the clerk had complied with the statute and entered the suit dismissed, still the court could have set aside the act of the clerk, though done in strict compliance with the mandate of the statute, without cause, merely to relieve the plaintiff from the consequences of his own default. We have seen no case that sustains the contention, and such a construction of section 3293 would be out of harmony with the whole course of administration of justice under our system of jurisprudence, and would defeat the purpose of the revisors in incorporating section 6, c. 171 (the corresponding section to section 3241 of the Code of 1904) in the Code of 1849. See Report of Revisors, p. 844.

The case of *Lipscomb's Adm'r v. Winston's Adm'r*, 1 Hen. & M. 453, is cited for the proposition that a cause dismissed at rules for want of a declaration may be reinstated at the next court as a matter of course; but the grounds for the reinstatement in that case do not appear.

These dismissals by the clerk partake of the nature of nonsuits, and the prevailing rule is that motions to set aside a nonsuit, or to reinstate a suit after dismissal, are addressed to the judicial discretion of the court. The suit is dismissed under section 3241, because of apparent neglect of duty upon the part of the plaintiff, and it should be reinstated only upon explanation, showing that the neglect of duty was only apparent, or, if really existing, that there was excuse or extenuation for it. It is not to be reinstated merely upon showing that the plaintiff would suffer inconvenience or loss by reason of its dismissal, as that would as effectually repeal the statute as though its enforcement were left entirely to the arbitrary discretion of the court. In brief, the plaintiff, on moving to reinstate his suit, should be required to show good cause for his motion. Many of the causes which would justify a court in setting aside a nonsuit or in reinstating a dismissed cause are mentioned in 14 Cyc. 423.

The following cases further illustrate the general principle that courts will not relieve against mere neglect of parties in such case: *Clark v. Stevens*, 55 Iowa, 361, 7 N. W. 591; *English v. Wilkins*, 163 Ill. 542, 45 N. E. 287; *People v. Justices*, 1 Barb. (N. Y.) 478; *Morrow v. Malone*, 5 Sneed (Tenn.) 642.

It is always to be regretted when a case has to be disposed of on other grounds than

those that go to the very right and merits of the cause. Courts cannot, however, permit considerations of hardship in particular cases to cause them to disregard and set at naught the plain provisions of a positive statute. To do so would be to usurp legislative functions, and would operate a judicial repeal of the statute.

The view that we have taken of the question raised by the first assignment renders the consideration of the remaining assignments of error unnecessary.

The judgment must be reversed, and this court will make such order as the trial court ought to have made, dismissing the case, with costs.

Reversed.

HARRISON, J., absent.

(111 Va. 227)

VIRGINIA BAKING CO. v. SOUTHERN BISCUIT WORKS.

(Supreme Court of Appeals of Virginia. March 10, 1910. Rehearing Denied, June 9, 1910.)

1. TRADE-MARKS AND TRADE-NAMES (§ 18*)—NAMES SUBJECT TO APPROPRIATION.

The words "Crown" and "Jamestown," as applied to products of a baking company, are mere fanciful words, and, standing alone, do not indicate origin and manufacture; but in association with other words they have that effect, and entitle the user to claim a trade-mark for the combination.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 21; Dec. Dig. § 18.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 61*)—INFRINGEMENT—EXTENT OF RIGHT.

The trade-marks "Crown," used in connection with soda crackers, and "Jamestown," with a kind of cake known as "drops," is not infringed by the use of "Crown" in connection with gingerbreads and of "Jamestown" in connection with "jumbles"; a kind of cake four or five times as large, and having a hole in the center as large as a "drop." The right to claim a trade-mark is coextensive only with the use made thereof.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 76; Dec. Dig. § 61.*]

Appeal from Chancery Court of Richmond.

Suit by the Southern Biscuit Works against the Virginia Baking Company. From a decree in favor of complainant, defendant appeals. Reversed, injunction dissolved, and bill dismissed.

Meredith & Cocke, for appellant. A. W. Patterson, for appellee.

WHITTLE, J. This suit in equity was brought by the appellee, the Southern Biscuit Works, to enjoin the appellant, the Virginia Baking Company, from the alleged infringement of certain trade-marks, the property of the plaintiff, and also to compel an accounting by the defendant for profits and damages

charged to have accrued from such infringement.

The litigants are rival corporations located in the city of Richmond and engaged in the manufacture of biscuit products, such as cakes, crackers, snaps, jumbles and like goods. The gravamen of the bill is that the defendant has been guilty, not of unfair business competition, but that it has infringed upon the rights of the plaintiff in and to the use of two words, namely, "Crown" and "Jamestown." These words, it is claimed, had been adopted and appropriated by the plaintiff as common-law trade-marks and continuously applied "to distinguish and identify its biscuits in certain styles and varieties," and that it has the exclusive right to use them "for the purpose of distinguishing and identifying its said biscuit products." The bill admits that the plaintiff has hitherto only used its "Crown" trade-mark in connection with soda crackers, and the "Jamestown" brand with small cakes, known as "drops"; but the insistence is that the plaintiff's right to the employment of these words is exclusive, and that the defendant may not lawfully use either of them on any kind of cracker or cake whatsoever.

The answer controverts the proposition that the words "Crown" and "Jamestown" were adopted for the purpose of indicating "origin, manufacture, or ownership" of the goods to which they were applied, or for general use, but insists that they were placed upon certain specific articles to denote "class, grade, style, or quality," and, therefore, could not be upheld as technically trade-marks. It concedes the use by it of the word "Crown" in connection with cakes known as "gingersnaps" and "Jamestown" with cakes called "jumbles," but denies that the trade has been deceived, or that any purchaser, either wholesale or retail, could have been misled by such use of these words.

Confining our consideration to the precise issue presented by the pleadings, we are of opinion that the fair result of the evidence shows that the respective businesses of these litigants are conducted under distinct and wholly dissimilar corporate names and general trade-marks, the plaintiff doing business as the Southern Biscuit Works, under a trade-mark consisting of a sheaf of wheat printed on a label in red, white, black, and light blue; that in addition to this, as subsidiary word symbols, the plaintiff has acquired the exclusive right to use the word "Crown" in connection with its soda cracker style of goods, and "Jamestown" with a certain kind of cake known as "drops"; that the defendant is operating under the corporate name of the Virginia Baking Company, and using a trade-mark consisting of the obverse of the great seal of the commonwealth of Virginia on a red, white, and blue label. It likewise employs the word "Crown" as a grade symbol in connection with a small variety of cakes known as "gingersnaps," and

the word "Jamestown" with cakes called "jumbles." A "jumble" is four or five times as large, and is essentially a different cake from a "drop," having a hole in the center as large as the "drop" itself. These several kinds of cakes are recognized in the trade as distinctive classes of goods. The words "Crown" and "Jamestown" are mere fanciful words, and, standing alone, do not indicate "origin and manufacture"; nevertheless, in association with other words, they have that effect, and entitle the plaintiff to claim a trade-mark for the combination. *Manufacturing Co. v. Trainer*, 101 U. S. 51, 25 L. Ed. 993; *Corbin v. Gould*, 133 U. S. 308, 10 Sup. Ct. 312, 33 L. Ed. 611.

Conceding, then, the right of the plaintiff to the exclusive use of these words in the connection in which they occur and to the extent to which they have been appropriated and applied, as against the defendant, the right is coextensive only *with such use*. If there be any foundation for the claim that it was the intention of the plaintiff to apply these trade-marks to other products, it was an undisclosed purpose resting exclusively in the mind of the plaintiff, and could not affect the rights of the defendant, who cannot be expected to anticipate that the plaintiff might in the future conclude to manufacture and place on the market a "Crown" gingersnap, or a "Jamestown" jumble. The record affords no proof of misrepresentation or unfair dealing on the part of the defendant, and the direct testimony adduced to show that the public has been misled by the alleged infringement of the plaintiff's trade-marks in the particulars complained of is extremely meager and inconclusive. Indeed, we think it is apparent that none save the careless and inattentive could reasonably have been misled by the acts complained of.

The doctrine in controversies of this sort is stated in *International Trust Company v. International Loan & Trust Company*, 153 Mass. 271, 278, 26 N. E. 693, 695 (10 L. R. A. 758), as follows: "It is not sufficient that some person might possibly be misled; but the similarity must be such that 'any person, with such reasonable care and observation as the public generally are capable of using and may be expected to exercise, would mistake one for the other.'"

In *White v. Trowbridge*, 216 Pa. 11, 64 Atl. 862, the court held: "The defendant will not be enjoined from using certain trade-marks or labels, when they are not so similar to the ones used by the plaintiff, in appearance or in connection of the words, as to deceive a person of ordinary intelligence, using ordinary care."

In *Wrisley v. Iowa Soap Co.*, 122 Fed. 796, 59 C. O. A. 54, the court said: "But he is not required to so distinguish his articles that careless and indifferent buyers will know by whom they are made or sold. His competitor has no better right to the monopoly of the

trade of the negligent and indifferent than he has."

The rule is stated with equal emphasis by the Supreme Court of the United States in *Coats v. Merrick Thread Co.*, 149 U. S. 562, 572, 573, 13 Sup. Ct. 966, 970, 37 L. Ed. 847, Mr. Justice Brown, in delivering the unanimous opinion of the court in that case, observes: "There is no doubt a general resemblance between the heads of all spools containing a black and gold label, which might induce a careless purchaser to accept one for the other. Defendants, however, were not bound to any such degree of care as would prevent this. * * * In short, they could do little more than place their own name conspicuously upon the label, to rearrange the number by placing it in the border instead of the center of the label, and to omit loops of the plaintiffs' periphery and substitute their own star between the numerals. Having done this, we think they are relieved from further responsibility."

These decisions sufficiently illustrate the controlling principle in the present case, and, as applied to the evidence, are conclusive against the pretensions of the appellee.

The decree of the chancery court must therefore be reversed, the injunction dissolved, and the bill dismissed.

Reversed.

BUCHANAN, J., absent.

(111 Va. 133)

WHITEHEAD v. CAPE HENRY SYNDICATE et al.†

(Supreme Court of Appeals of Virginia. June 9, 1910.)

1. INJUNCTION (§ 252*)—ACTION ON BOND—DAMAGES.

Plaintiff in an action on an injunction bond is entitled to recover such damages as are the natural and proximate result of the wrongful act of which he complained.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 586-598; Dec. Dig. § 252.*]

2. INJUNCTION (§ 252*)—ACTION ON BOND—DAMAGES—PROSPECTIVE PROFITS.

Plaintiff in an action on an injunction bond may recover profits for loss of his business resulting from the injunction, provided the business is an established one, and has been successfully operated for such a length of time that profits are reasonably ascertainable with certainty and definiteness.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 586-598; Dec. Dig. § 252.*]

3. INJUNCTION (§ 252*)—ACTION ON BOND—LOST PROFITS.

Where plaintiff's fishery business had been in operation for only a month, when plaintiff was compelled to discontinue it by reason of a wrongful injunction sued out by defendants, and he had no such trade established as would show with reasonable certainty what his profits, if any, would be, he could not recover for lost prospective profits in an action on the bond.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 586-598; Dec. Dig. § 252.*]

4. APPEAL AND ERROR (§ 1140*)—AFFIRMANCE FOR REDUCED AMOUNT.

Where, in an action on an injunction bond, the cost of plaintiff's fish net poles and pound net, and the cost of erecting the poles and pumping and setting the nets which were rendered useless by the wrongful suing out of the injunction, was clearly proved to amount to \$94.25, a general verdict for a much larger sum, including items which plaintiff was not entitled to recover, would be sustained on a writ of error to the extent of the amount so proved.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4462-4473; Dec. Dig. § 1140.*]

Error to Circuit Court of City of Norfolk.

Action of debt on an injunction bond by C. T. Whitehead against the Cape Henry Syndicate and others. A verdict having been rendered for plaintiff for \$1,100 subject to a demurrer to the evidence, the demurrer was subsequently heard by another judge and sustained, from which relator brings error. Reversed and rendered.

Burroughs & Bro., for plaintiff in error.
Wm. W. Old & Son and J. Edward Cole, for defendants in error.

BUCHANAN, J. This is an action of debt on an injunction bond in which there have been three trials. The verdicts on the first and second trials were in favor of the plaintiff, who is the plaintiff in error, but were set aside upon the motion of the defendants. Upon the third trial there was a demurrer to the evidence, which was sustained, and judgment rendered for the defendants. To that judgment this writ of error was awarded.

Errors are assigned to the action of the court upon each of the trials, but, in the view we take of the case, it is only necessary to consider its rulings on the last trial. The evidence on all material points was substantially the same on each trial, and if the demurrer to the evidence was properly sustained, in whole or in part, upon the last trial, the verdicts upon the first and second trials were properly set aside.

In the year 1904 the plaintiff obtained from the proper authorities a license to fish with a pound net in the waters of the commonwealth about a mile and a quarter east of Lynnhaven river. After the necessary preparations, he commenced fishing in April of that year, and continued his operations until the 26th of May following, about one month, when, upon a bill filed by the defendant, the Cape Henry Syndicate, he was enjoined from carrying on his business until the further order of the court, on the ground that he was trespassing upon the rights of that syndicate. The injunction was subsequently perpetuated by the Circuit Court, but upon an appeal to this court was dissolved. In the meantime, however, the fishing season for which the plaintiff had obtained his license had expired.

In the bill of particulars filed with the declaration four items of damage are claimed:

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied September 15, 1910.

(1) Costs of the suit in which the injunction was granted; (2) cost of poles for pound net; (3) cost of erecting the poles, pumping and setting; and (4) loss of sales of fish from May 23, 1904, to the 31st of January, 1905, by reason of the injunction.

The right of the plaintiff to recover damages for the fourth item, viz., loss of sales of fish whilst the injunction was in force, is the material question upon the merits involved in the case.

To sustain his right to recover that item of damages, the plaintiff was permitted, over the objections of the defendant, to introduce evidence of the net profits made by him in the month preceding the granting of the injunction. The plaintiff also introduced evidence tending to prove that the business of pound fishing was an established business; that he was fully equipped for taking and marketing fish; that the point where his business was located was a good place for taking fish; that there was a market for fish that year; that they sold for fair prices; and that the month of May is generally the most indifferent month during the season for fishing.

A plaintiff is entitled to recover all such damages as are the natural and proximate result of the wrongful act of which he complains. This rule is well settled; but the difficulty is in applying it to a particular case. *Burruss v. Hines*, 94 Va. 416, 26 S. E. 876, and authorities cited. "A plaintiff will not ordinarily," as was said in the case cited, "be allowed to give evidence of or to recover profits or expected gains, for it is generally conjectural whether there will be any profits or gains." Profits are not excluded from recovery because they are profits, but, when excluded, it is because there are no criteria by which their amount can be ascertained with reasonable certainty or definiteness. When prospective profits or gains can be so proved, and their loss is the natural and proximate result of the wrongful act complained of, they may be recovered. Same case; *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28; *Wilson v. Wernwag*, 217 Pa. 82, 66 Atl. 242, 10 Am. & Eng. Ann. Cas. 649.

In *Alleghany Iron Co. v. Teaford*, 96 Va. 372, 31 S. E. 525, profits that the plaintiff would have realized had he been permitted to perform his contract were recovered. But the profits in that case could be ascertained with reasonable certainty. They were the difference between the cost of the ore to the plaintiff at the stipulated price of delivery and the price the defendant had agreed to pay for it.

In *Consumers' Ice Co. v. Jennings*, 100 Va. 720, 42 S. E. 879, it was held in an action to recover damages for breach of a contract to deliver chattels that profits which the purchaser would have made on subcontracts actually made by him were sufficiently certain to be recovered.

In *A. & D. Ry. Co. v. Delaware Construc-*

tion Co., 98 Va. 503, 37 S. E. 13, it was held, in an action to recover damages for failure to complete a pier in a given time, that the estimated gains or profits which the plaintiff might have made on the handling of freight that it was compelled to decline in consequence of the noncompletion of the pier were too remote and conjectural to be recovered.

In *Grubb v. Burford*, 98 Va. 553, 37 S. E. 4, it was said that, while gains prevented by withholding or interfering with property or by breach of contract might be recovered if proved, yet, as a general rule, profits dependent upon future bargains or states of the markets are not subjects of recovery.

It is insisted by the plaintiff, however, that, even if the gains or profits sought to be recovered do depend upon future bargains and states of the market, they can be recovered if the business interfered with or destroyed is an established one.

Even if this were so (as to which we express no opinion), it would not aid the plaintiff, since his business was not an established one. The doctrine in those jurisdictions in which the rule invoked prevails is thus stated in 13 Cyc. 59: "Where an established business is wrongfully injured, destroyed, or interrupted, the owner of such business can recover damages sustained, but in all cases it must be made to appear that the business that is claimed to have been interrupted was an established one, that it had been successfully conducted for such a length of time and had such a trade established that the profits thereof are reasonably ascertainable;" but, "where a new business or enterprise is floated and damages by way of profit are claimed for its interruption or prevention, they will be denied, for the reason that such business is an adventure as distinguished from an established business, and its profits are remote and speculative, existing only in anticipation."

It is clear that the plaintiff's business, under this statement of the rule invoked, was a new and not an established business. He had only been conducting it for about one month. It had not been conducted long enough and had no such trade established as would show with reasonable certainty what its profits, if any, would be. It was a new business, whose profits depended not only upon future bargains and states of the market, but upon other contingencies, such as the run of the fish that season, and the kind and quantity caught. The profits sought to be recovered by the plaintiff seem to us, under the rule invoked as well as under the principle established by our own decisions, to depend upon too many contingencies, and are altogether too uncertain to furnish a safe guide in fixing the measure of the plaintiff's damages.

We are of opinion, therefore, that the trial court did not err in sustaining the demurrer to the evidence, so far as the profits claimed entered into the damages found by the jury.

While there was no separate finding by

the jury as to each item of damages claimed by the plaintiff, their verdict for \$1,100 was necessarily made up of the second, third, and fourth items claimed in the bill of particulars, for it was admitted that the damages in the first item had been paid before this action was brought. The second and third items were clearly proved; indeed, their amount was not controverted, and aggregated \$94.25. To that extent we are of opinion that the demurrer to the evidence should have been overruled.

In the case of *O. A. & M. R. Co. v. Miles*, 78 Va. 773, the jury in their verdict found separately as to each item of damages claimed. The trial court overruled the demurrer to the evidence, and rendered judgment for their aggregate amount. But upon a writ of error this court, being of opinion that the demurrer to all the items of damage except one should have been sustained, reversed the judgment, and entered judgment in favor of the plaintiff for the amount of that item.

Though there was no separate finding in this case as to the several items of damages, it is clear, we think, that the second and third items, aggregating \$94.25, and whose amount was not controverted and was clearly proved, made a part of the sum found by the jury, and to that extent judgment should have been rendered for the plaintiff by the trial court.

The judgment complained of will, therefore, be reversed, and this court will enter such judgment on the demurrer to the evidence as the trial court ought to have entered.

Reversed.

HARRISON, J., absent.

(111 Va. 106)

JONES v. TOWN OF MARTINSVILLE.

(Supreme Court of Appeals of Virginia. June 3, 1910.)

NEW TRIAL (§ 55*)—MISCONDUCT OF JURORS—WAIVER.

A party who learns of the misconduct of a juror before the jury has retired must call the attention of the court thereto at the time, and where he remains silent until a verdict has been read the misconduct is waived, and it does not justify a setting aside of the verdict.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 106-111; Dec. Dig. § 55.*]

Error to Circuit Court, Henry County.

Action by one Jones against the Town of Martinsville. Judgment for defendant was rendered after the setting aside of a verdict for plaintiff, and plaintiff brings error. Verdict reinstated, and judgment rendered thereon.

HARRISON, J. This action was brought by the plaintiff in error to recover of the

town of Martinsville damages for its alleged wrongful act in cutting down a street in front of the plaintiff's premises. There were two trials of the case. On the first there was a verdict in favor of the plaintiff for \$781.79, which, upon motion of the defendant, was rejected by the court, and a new trial granted. At the second trial there was a verdict and judgment in favor of the defendant.

In pursuance of the statute (Code 1904, § 3484) we are asked to set aside and annul all proceedings subsequent to the first verdict, to reverse the action of the circuit court in rejecting that verdict, and to give judgment thereon in favor of the plaintiff.

The record shows that after the first verdict had been brought into court and had been read by the clerk, but before the same had been formally recorded, the defendant, by counsel, stated that since the adjournment the day before counsel had been informed that one or more members of the jury had been guilty of misconduct that ought to vitiate their verdict, and thereupon moved the court to discharge the jury without receiving and recording such verdict. Upon hearing the evidence offered in support of this motion, the court rejected the verdict and discharged the jury. To this ruling a bill of exceptions was duly taken. The next day the plaintiff moved the court to set aside its order of the day before, rejecting the first verdict; the ground of this motion being that the counsel for the defendant were informed of the alleged misconduct of the jury during the progress of the trial, and before the jury had retired to consider of their verdict, and it being insisted that such information should have been brought to the attention of the court before the jury retired. The court refused to hear the evidence offered in support of this motion, and declined to set aside the judgment complained of. The evidence adduced in support of the alleged misconduct of the jury consisted of a casual conversation had by one of the jury with a third person, who was in no way connected with the case, in which the juror indicated that the merits of the case were with the plaintiff, and that a verdict would be found in her favor. There was not a word said by this third person showing any purpose on his part to influence the juror, or having the slightest tendency to prejudice the defendant's case.

In the view, however, that we take of this case, it is unnecessary to consider whether or not the evidence in support of the alleged improper conduct of the juror was sufficient to justify the court in rejecting the first verdict; for it sufficiently appears from the record that the evidence on that subject was known to the counsel for the defendant before the jury had retired to consult of their verdict. This being so, it was too late, after verdict, to make the objection.

In the case of *Atlantic & Danville R. Co.*

v. Peake, 97 Va. 180, 12 S. E. 848, after holding that the objection in such a case comes too late after verdict, Judge Lewis says: "The defendant, if dissatisfied with the remarks of the juror, should have objected, and called the attention of the court to the matter at the time, and not have contented himself with taking the chances of a favorable verdict, and afterwards raising the objection when the decision had been rendered against him. Parties ought not to be allowed to experiment with judicial proceedings in that way. By their silence, under such circumstances, they ought to be and are considered as having waived the objection."

In the case of Dower v. Church, 21 W. Va. 23, Judge Green says "that mere casual conversations with a third person about the case by a juror, without the knowledge or connivance of a party to the case, will not per se be sufficient to induce the court to award a new trial; and that, to justify the court in so doing in such a case, there must be a manifest tendency in what has been said to influence the juror to the prejudice of the party who seeks to set aside the verdict. * * * But even when the conduct of a juror is such that the court would set aside the verdict, if this is known to the party or his counsel, who seek to set aside the verdict, before the jury retired to consider of their verdict, and he fails to disclose it to the court till after the verdict is rendered, he thereby waives all objection on this account to the verdict which may be rendered. And this court will not disturb the verdict for this reason on his motion"—citing a number of authorities.

In the case of Flesher v. Hale, 22 W. Va. 44, Judge Snyder says: "The rule proceeds upon the ground that a party ought not to be permitted, after discovering an act of misconduct which would entitle him to claim a new trial, to remain silent and take his chances of a favorable verdict, and afterwards, if the verdict is against him, bring it forward as a ground for a new trial. A party cannot be permitted to lie by, after having knowledge of a defect of this character, and speculate upon the result, and complain only when the verdict becomes unsatisfactory to him. Selleck v. Sugar H. T. Co., 13 Conn. 453; Orrok v. Com. Ins. Co., 21 Pick. [Mass.] 456 [32 Am. Dec. 271]; Rex v. Sutton, 8 Barn. & Cres. 417. It follows, therefore, that when a party moves for a new trial on the ground of misconduct on the part of the jury, which took place during the trial, he must aver in his motion and show affirmatively that both he and his counsel were ignorant, until after the jury had retired, of the fact of such misconduct"—citing Thomp. & Mer. on Juries, §§ 428, 456.

In the light of these authorities, we are of opinion that the circuit court erred in setting aside or rejecting the first verdict and granting a new trial. Its judgment must therefore

be reversed, and this court, in accordance with the terms of the statute, will enter judgment in favor of the plaintiff for \$781.79, the amount of the first verdict, with interest from its date (October 9, 1908) till paid, and costs, both in the circuit court and in the prosecution here of this writ of error.

Reversed.

(111 Va. 147)

POLLARD & HAW v. AMERICAN STONE CO.

(Supreme Court of Appeals of Virginia. June 9, 1910.)

1. JUDGMENT (§ 114*)—OFFICE JUDGMENT—WAIVER.

Plaintiffs, by agreeing to a setting for trial for a day during the term, and when their office judgment entered at rules would ordinarily have become final, waived such judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 164; Dec. Dig. § 114.*]

2. STIPULATIONS (§ 19*)—NECESSITY FOR ORDER.

An agreement between parties to a suit, to be executed during the term, does not require a contemporaneous order respecting it, since the record being in fieri, the order can be entered at any time before final adjournment.

[Ed. Note.—For other cases, see Stipulations, Dec. Dig. § 18.*]

Error to Circuit Court of City of Richmond.

Action by Pollard & Haw against the American Stone Company. From the judgment, plaintiffs bring error. Affirmed.

Haw & Haw and Hill Carter, for plaintiffs in error. O'Flaherty & Fulton, for defendant in error.

WHITTLE, J. The plaintiffs in error brought assumpsit against the defendant in error to recover \$1,207.75, to January rules, 1909, and caused a copy of the account to be served with the summons. There was no appearance at rules on behalf of the defendant, though counsel addressed a letter to the clerk requesting that they be marked as such. It is the rule of the court, on the first day of each term, to sound the docket, and all cases in which requests are made are set for trial on specified days. Accordingly, on the first day of the February term, when this case was reached (counsel on both sides being present), the plaintiffs, by their attorney, requested a day, and the court, with the consent of the attorney for the defendant, set the case for trial on the 12th of March. That date, it will be observed, was subsequent to the fifteenth judicial day of the term, on which day the office judgment entered at rules would ordinarily have become final.

After the fifteenth day of the term counsel furnished a list of witnesses to the clerk to be summoned for the defendant, but were informed by that officer that, the office judgment having become final, he was without

authority to summon witnesses in the case. Thereupon the defendant moved the court to set aside the office judgment and permit them to plead to issue. The court in the first instance overruled the motion, but subsequently set aside the office judgment and allowed the plea of nonassumpsit to be filed. The case was ultimately tried at the same term, and resulted in a verdict for the plaintiffs for \$519.30. The plaintiffs moved to set aside the verdict, because the court was without jurisdiction to try the case after the office judgment had become final; but the motion was overruled, and judgment entered upon the verdict.

Affidavits were filed in the case by counsel on both sides. On behalf of the defendant it was alleged that on the motion of counsel for the plaintiffs, and by consent of affiant, the case was set for trial on the 12th of March; no question being raised that the issue had not been made up. By counter affidavit, counsel for the plaintiffs, without denying the main facts, asseverated that it was not his intention to waive any right which his clients might have had by reason of the failure of defendant to plead within the required time.

From the foregoing summary of material facts, it is not possible to escape the conclusion that it was understood and agreed, both by the court and counsel, that the case was to be tried, on the merits, and not to go off on office judgment. If counsel for the plaintiffs entertained any other view or purpose, it was undisclosed, and contrary to his conduct and agreement. The bare suggestion that fixing the case for trial on a future day of the term, beyond the time at which the office judgment would regularly have become final, was not intended to carry the case over in the condition in which it stood when the compact was entered into, would necessarily have put counsel on guard, and the pleadings would have been made up at once.

The case must not be confounded with a proceeding under Code Va. 1904, § 3293, where the supervisory power of the court is invoked to correct misprisions of the clerk during the preceding vacation. It stands upon a wholly different footing, and involves an entirely different principle. Here the court, in the interest of the due administration of justice, is asked, during the same term, to enforce the agreement of counsel, made by its approval, with respect to a pending case, the only possible effect of which agreement was to prevent the office judgment from becoming final, and to secure a trial on the merits.

That the defendants had a substantial defense to the action is apparent from the result of the trial. In that connection, also, it appears that the plaintiffs did not except to the verdict of the jury on the ground that it

was contrary to the law and the evidence, nor did they have the evidence certified, but rested their motion for a new trial solely upon the allegation that the court had no power to try the case, as it had already gone to office judgment.

In a recent case, quite similar to this, *James' Sons & Co. v. Gott & Ball*, 55 W. Va. 223, 47 S. E. 649, the court held: "At the term at which an office judgment would become final by operation of the statute, if the plaintiff agrees with the defendant to continue the case until the next term, and such agreement and continuance is entered of record, they will prevent the office judgment becoming final by operation of the statute, and it cannot thereafter become final until it is entered up as the judgment of the court."

That case is entitled to special consideration, because it construes a statute similar to our own, and the reasoning of the court is strikingly applicable to the facts of this case. There the case was by agreement continued for trial to the first day of the next term, while this case was by agreement postponed for trial to a future day of the same term.

The court says: "The object of these provisions of the statute is to allow the plaintiff to have a judgment without unreasonable delay. The plaintiff may waive the benefit thereof, and agree that the judgment shall not become final, in accordance with the statute. Its agreement to a continuance is, in effect, such agreement; for the case is carried over to the next term in the same condition that it was in when the agreement became part of the record by consent of the parties. 9 Cyc. 150. The court could not have, on its own motion, entered a continuance to have such effect; nor could the defendants have had a continuance, without filing their affidavit and pleading to issue. But the plaintiff had the right to grant to the defendants time until the next term to file their affidavit and plead to issue, and thereby the operation of the law is interrupted, and the finality of the office judgment prevented, and such judgment cannot afterwards become final until it is entered as the judgment of the court. *King v. Hicks*, 32 Md. 480."

In the present case, as the agreement was to be carried into effect during the term, a contemporaneous order with respect to it was not necessary. The record was in fieri, and the order could be entered at any time before final adjournment.

Without prolonging this discussion, we are of opinion that the judgment of the circuit court is eminently just and plainly right, and ought to be affirmed.

Affirmed.

HARRISON and CARDWELL, JJ., absent.

(87 W. Va. 530)

STATE v. COLLINS. (Misdemeanor No. 3.)
(Supreme Court of Appeals of West Virginia.
May 17, 1910.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 236*) — ILLEGAL SALE—EVIDENCE—"RAKE-OFF."

Upon an indictment against C. for unlawfully selling spirituous liquor, wine, porter, ale, beer, etc., without a state license, the following facts were proven, viz.: C. kept a room in which he conducted a game with cards, called "stud poker"; chips, valued at 5 cents, 10 cents, and 25 cents each, were used to represent money; at the beginning of each game a player would purchase a number of these chips from C. and pay the money for them; during the progress of the game C. would supply the players with beer, and would take a portion of the chips, which was called a "rake-off"; at the end of the game the remaining chips in the hands of the winner were "cashed in," or redeemed by C.

Held, the jury could infer that the "rake-off" was in consideration of the beer furnished to the players, and that it constituted a sale of the beer.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 313, 314; Dec. Dig. § 236.*]

Error from Circuit Court, Pocahontas County.

W. T. Collins was convicted of an illegal sale of liquor, and brings error. Affirmed.

Cunningham & Stallings and D. E. Cuppett, for plaintiff in error. Wm. G. Conley, Atty. Gen., for the State.

WILLIAMS, J. Defendant was tried and convicted in the circuit court of Pocahontas county on the 25th of January, 1908, for unlawfully selling spirituous liquors without a state license, and was fined \$100 and sentenced to imprisonment for 30 days in the county jail. Conviction was had upon the testimony of Stanley Conover. Defendant offered no testimony, and relies upon the insufficiency of the state's evidence to prove his guilt.

The facts upon which the jury found a verdict are as follows, viz.: Collins occupied a room in the basement of a building at Dunlevie, in Pocahontas county, in which he conducted a game, called by the witness "stud poker." Persons would go into this room, sometimes as many as six or eight in number, and would buy from Collins poker chips, which were used in the game to represent money. The gambling would continue sometimes from two to four hours during the evening, or night. Beer was furnished to those engaged in the play, without any additional cost to the players, except the price which they paid for the poker chips at the beginning of a game. The poker chips were valued at 5 cents, 10 cents and 25 cents each. At the end of each game Collins would take a portion of the chips as a "rake-off." The

chips remaining in the hands of the winners at the end of a game would be "cashed in," or redeemed.

Counsel for Collins contends that the "rake-off" was not for the price of the beer furnished, but was intended as compensation to Collins for maintaining the place of amusement. Conover says that those who were engaged in the game got beer when they called for it; that he did not know for what purpose the "rake-off" was taken; that when the game was finished, if a player had any chips, they were "cashed in"; that sometimes, in one night, they would play as many as 80 or 100 "pots," with probably seven persons engaged in the games, and that Collins would take a "rake-off" at the end of every "pot," or game. He further says that he knew he could get beer by going into this place, but that he did not pay for it, unless it was paid for by means of the "rake-off"; that he does not know why the "rake-off" was taken, but that every one in the game got beer who called for it; and that nothing was paid for the privilege of playing in the room, unless it was paid for by means of the "rake-off."

The jury had the right to infer, from these facts, that the gambling device was a mere trick, or subterfuge, adopted by Collins for the purpose of selling beer in violation of law. They might well have concluded that the "rake-off," taken out of the chips previously purchased by the players, represented the price paid for the beer, because the chips thus taken were not redeemed by Collins. All others were redeemed, or, as witness puts it, were "cashed in." If the "rake-off" was, in fact, taken in consideration of the beer furnished to the players by Collins, it constituted a sale of the beer to them by him, and was paid for in advance, by the purchase of the chips at the beginning of the game.

"In any case where a sale, or gift, of liquors would be contrary to law, the courts will refuse to countenance any trick, artifice, or subterfuge intended to evade the law. However the parties may disguise or conceal the transaction, whatever verbal or circumstantial device they may employ to cloak the real purpose, it is enough to sustain a conviction if liquor was actually sold or given in violation of law, or evasion of its terms." Black on Intoxicating Liquors, § 406. The text is supported by the following decisions: State v. Cutting, 3 Or. 260; Looney v. State, 43 Ark. 389; Archer v. State, 45 Md. 34. See, also, our own case of State v. Doyle, 64 W. Va. 366, 62 S. E. 453.

The positive statement of the witness that he did not pay for any beer is not sufficient to overcome the presumption, arising from the undisputed facts, that a sale was made by some indirect method. The witness' statement that he did not buy the beer, viewed in the light of the facts proven, should be taken as simply an expression of his opinion

of what constituted a sale, and not as the statement of a fact.

The facts established, and not denied, tend strongly to prove that the poker game was a mere device, or subterfuge, to conceal defendant's real business, which was selling spirituous liquors, etc., unlawfully, and without a state license therefor. In such cases as this the jury are almost always the sole judges of the weight of the evidence, and of the importance of every reasonable inference to be deduced from the facts proven. *State v. Bowyer*, 43 W. Va. 180, 27 S. E. 301. The verdict is not without strong circumstantial evidence to support it, and we would not be justified in setting it aside.

The state's instruction, complained of, is based upon the theory that the jury had a right to infer, from the facts proven that the poker game was a mere subterfuge, or device, for the purpose of evading the law, and that they could find the defendant guilty, if they believed the beer was paid for by means of the "take-off." This instruction states the law correctly, and it was not error to give it.

The defendant's instruction is based upon the theory that the jury could not infer, from the facts proven, that an unlawful sale of beer had been made. This is not the law, and it was not error to refuse this instruction.

Collins was at the same term of the circuit court of Pocahontas county convicted of a second offense for unlawful selling, denominated "Misdemeanor No. 5." This case is also here for review. The evidence is similar, and the instructions and the judgment of the court are the same in both cases. The same errors are assigned in each, and the foregoing opinion and syllabus applies to both.

We find no error in the record of either case, and the judgments in both will be affirmed.

(67 W. Va. 534)

STATE v. ARBRUZINO.

(Supreme Court of Appeals of West Virginia.
May 17, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§§ 1058, 1065*)—WRIT OF ERROR—NECESSITY OF EXCEPTION.

If the error complained of be that the final judgment is in excess of the verdict, it is matter of record and may be reviewed on writ of error, without any formal exception being taken to the action of the trial court. In such case it is not necessary that a motion to set aside the verdict should have been overruled, and an exception taken, in order to entitle the party complaining to a writ of error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2669-2685; Dec. Dig. §§ 1058, 1065.*]

2. CRIMINAL LAW (§ 881*)—VERDICT—SUFFICIENCY.

The verdict of a jury in a criminal case should be read in connection with the indictment,

and, if the meaning of the verdict is thus made certain, it is sufficiently definite.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2069; Dec. Dig. § 881.*]

3. HOMICIDE (§ 815*)—"ASSAULT" WITH INTENT TO KILL—VERDICT.

Upon an indictment for feloniously, maliciously, and unlawfully beating and wounding, with a dangerous weapon, called a club, with intent to maim, disfigure, disable, and kill, the jury returned the following verdict: "We, the jury, find the defendant, Tonio Arbruzino, not guilty of the felonious and malicious assault charged in the within indictment with the intent therein charged, but we do find him guilty of the unlawful assault therein charged with the intent therein also charged."

Held, that the word "assault" in the verdict refers to the beating and wounding charged in the indictment, and does not mean the technical and common-law offense of assault.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 679-682; Dec. Dig. § 815.*]

For other definitions, see Words and Phrases, vol. 1, pp. 532-538; vol. 8, p. 7582.]

Error from Circuit Court, Harrison County.

Tonio Arbruzino was convicted of assault with intent to kill, and brings error. Affirmed.

Sperry & Sperry, for plaintiff in error.
Wm. G. Conley, Atty. Gen., for the State.

WILLIAMS, J. Defendant was indicted and tried in the circuit court of Harrison county for "feloniously, maliciously, and unlawfully" beating and wounding one Frank Oliverio with a deadly weapon, called a club, with intent to maim, disfigure, disable, and kill him. The jury returned the following verdict, viz.: "We, the jury, find the defendant, Tonio Arbruzino, not guilty of the felonious and malicious assault charged in the within indictment with the intent therein charged, but we do find him guilty of the unlawful assault therein charged with the intent therein also charged." A motion to set aside the verdict was overruled, but no exception taken, and the court sentenced Arbruzino to confinement in the penitentiary for a term of five years. To this judgment defendant obtained a writ of error.

Two questions are presented: (1) Whether or not the writ should have been awarded, there being no exception taken to the action of the court in overruling the motion to set aside the verdict; and (2) whether the sentence is in excess of the penalty imposed by law for the offense of which defendant was convicted.

In reference to the first point, it is only necessary to say that the rule of practice requiring bills of exceptions to be taken to the action of the court, upon motions made in the progress of the trial, and saving such exceptions by bills of exception to be made a part of the record by the court's order, is for the purpose of putting into the record, for the purpose of review by the appellate court, such matters as would not otherwise appear in the record. This rule does not

apply to a case where the error complained of can be ascertained from the record. In the present case the error, if any, can be seen by a comparison of the final judgment of the court with the verdict. These are always matters of record, and when the judgment is the only thing complained of no motion need be made to set it aside, and no bill of exception is necessary.

The second point depends upon a construction of the verdict. Counsel for plaintiff in error insists that the verdict finds the prisoner guilty of nothing more than a technical, common-law "assault." We do not think so. The word "assault," as used in the verdict, should not be restricted to its technical meaning. What the jury meant by it is to be ascertained by reference to the indictment, because the verdict refers to the "unlawful assault therein [in the indictment] charged with the intent therein also charged." The word "assault," used in this connection, means the particular "beating," etc., charged in the indictment, which the jury found to have been done with the intent as charged, unlawfully, but not maliciously. The jury evidently intended the word "assault" to comprehend the words "hit, beat, and wound," used in the indictment. The verdict should be read in the light of the indictment, especially when the verdict expressly refers to the indictment.

"The verdict of a jury is to be favorably construed," etc. *Lewis v. Childers*, 13 W. Va. 1.

"A verdict of a jury, in a criminal case, must always be read in connection with the indictment; and if it be certain, upon reading them together, what is the meaning of the verdict, it is sufficient." *Henderson v. Commonwealth*, 98 Va. 794, 34 S. E. 881; *Hoback v. Commonwealth*, 28 Grat. (Va.) 922; *State v. Staley*, 45 W. Va. 792, 32 S. E. 198. The defendant was indicted for the higher offense, described in section 9, c. 144, Code 1906, felonious and malicious beating and wounding, with a dangerous weapon, with intent to maim, etc., and the jury found him guilty of a lesser degree of the offense, which was simply unlawfully, but not maliciously, doing the act.

The penalty for unlawfully, but not maliciously, doing the act is confinement in the penitentiary not less than one nor more than five years, or confinement in jail not exceeding twelve months and a fine not exceeding \$500. The trial court has seen fit to impose the maximum penalty. This was in its discretion, and even if it be conceded, which we do not say is so, that we have the right to review the action of the trial court in exercising a discretion given to it in the fixing of penalties within prescribed limits, when it might be made to appear that such discretion has been abused, still we could not do so in the present case, because the evidence on

which the conviction was had is no part of the record. Circumstances may have appeared in the trial which may have justified the court in giving the prisoner the maximum sentence. It does not appear that the court abused its discretion, or that the sentence does not conform to the verdict.

The judgment will be affirmed.

(87 W. Va. 544)

STATE v. MARTIN.

(Supreme Court of Appeals of West Virginia.
May 17, 1910.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1023*)—WRIT OF ERROR—GRANT OF NEW TRIAL.

A writ of error does not lie from this court to the judgment or order of the circuit court in a criminal case setting aside the verdict of the jury and awarding a new trial. Reaffirming *State v. Bluefield Drug Co.*, 41 W. Va. 638, 24 S. E. 649.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2587; Dec. Dig. § 1023.*]

Error from Circuit Court, Braxton County.

James A. Martin was found not guilty of an illegal sale of liquors. From a judgment awarding a new trial, defendant brings error. Affirmed.

Haymond & Fox and Hall Bros., for plaintiff in error. Wm. G. Conley, Atty. Gen., for the State.

MILLER, J. The defendant was indicted in the circuit court of Braxton county, at the November term, 1907, thereof, for selling spirituous liquors without a state license therefor. On February 25, 1908, he was tried before a jury and found not guilty as charged in the indictment. On motion of the state, at a subsequent day of the same term, the court set aside the verdict and awarded the state a new trial. To this judgment defendant obtained a writ of error from this court.

The Attorney General has moved a dismissal of the writ of error as improvidently awarded. The ground of the motion is that no writ of error lies from this court to the judgment of the circuit court setting aside a verdict and awarding a new trial, except in civil cases. We think this motion should prevail. It was decided in *State v. Bluefield Drug Co.*, 41 W. Va. 638, 24 S. E. 649, that a writ of error does not lie to this court from an order of the circuit court reversing the judgment of an inferior court in a criminal case, and remanding the same for further proceedings. If this be the law the same rule would apply to a judgment of a circuit court, as in this case, setting aside a verdict in a criminal case, upon a trial originally had in that court. We think that *State v. Bluefield Drug Co.*, is a proper interpretation of our statutes, and that we have no jurisdic-

*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes

tion to consider the case upon the merits on the present writ of error.

The judgment of the circuit court is therefore affirmed.

(7 Ga. App. 320)

CHAPMAN v. STATE. (No. 2,658.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

WEAPONS (§ 17*)—DISCHARGING ON HIGHWAY.

No error of law appears, and the evidence supports the verdict.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 29; Dec. Dig. § 17.*]

Error from City Court of Hartwell; W. L. Hodges, Judge.

Albert Chapman was convicted of discharging a gun on a highway, and brings error. Affirmed.

A. S. Skelton, for plaintiff in error. J. Rod Skelton, Sol., for the State.

HILL, C. J. Chapman, driving on a public highway at night, collided with a wagon driven by a man. The night was so dark that neither could distinguish the other, nor the character of the vehicle driven by the other. Chapman immediately fired his pistol in the direction of the object against which he had collided; the ball hitting a stove in the wagon driven by the other man. He was indicted for a violation of section 508 of the Penal Code of 1895, which provides that "if any person shall between dark and daylight willfully and wantonly fire off or discharge any loaded gun or pistol on the public highway and within 50 yards of the public highway, except in defense of person or property, or on his own premises, he shall be guilty of a misdemeanor." He contends that his conviction was illegal for three reasons:

First, he contends that, if he was guilty of anything, he was guilty of shooting at another; and this being a felony, the city court had no jurisdiction. Under his own statement, we do not think his offense was that of shooting at another. He says: "Before I was aware of it, without notice, something struck my buggy with tremendous force. Not knowing what it was, or what it meant, I fired at something that seemed to be pulling my wheel off the axle. The wheel crushed down, and I went headlong to the ground. As I was falling, I fired again. I heard no voice, and did not know what had struck me." From this statement it seems that he did not shoot at any "person," but shot at the "something" that collided with him. While he must have thought that human agency had some connection with this "something," and his shooting was reckless and without regard to consequences, yet, under his own statement, we do not think he shot at another person.

He says, in the next place, that there was no legal evidence that the highway on which the shooting occurred was a public highway. On this subject the testimony is undisputed that "it was a public road, used by the public." This would be sufficient to show prima facie that it was a public road or highway. *Cleveland v. State*, 4 Ga. App. 62, 60 S. E. 801.

In the third place, he insists that his act of shooting was done in defense of his person or property, and that it was in no sense willful or wanton. The evidence affirmatively shows that it was not done in defense of his person or property. Even admitting that the wagon driven by the other man collided with his buggy, it cannot be said that this was such an attack as would justify him in shooting in defense of his person or his property. According to his statement he was driving very rapidly, and according to the evidence of the man who was driving the wagon he was not driving fast, but drove slowly; so, if the blame was to be attached to any one for the collision, it would seem that the defendant was more culpable than the driver of the wagon. We think the jury was justified in finding that the act of shooting was not in defense of person or property, but was willful or wanton, and that the conviction was proper.

Judgment affirmed.

(7 Ga. App. 764)

WHITE v. ADAMS et al. (No. 2,297.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

VENDOR AND PURCHASER (§§ 65, 176*)—SALE—CONSTRUCTION OF CONTRACT.

The sale of land involved in the present case was by the tract, and not by the acre. Under the peculiar facts of the case and the stipulations of the parties, the judge should not have held as a matter of law that the abatement of the purchase price should be calculated by mere comparison of the number of acres described in the bond for title with the admitted deficiency.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 98-99, 333-340; Dec. Dig. §§ 65, 176.*]

Error from City Court of Covington; A. S. Thurman, Judge.

Action between Hugh White and E. H. Adams and others. From the judgment, White brings error. Reversed.

Middlebrook, Rogers & Knox, for plaintiff in error. F. C. Foster, for defendants in error.

POWELL, J. 1. The plaintiff sued on certain promissory notes given for the purchase price of land, for which he had executed to the defendants a bond for title in which the land was described in the following language: "All that tract or parcel of land situate, lying, and being in the county of New-

ton, said state, and containing 42 acres, more or less, bounded as follows: Northeast by William Lazenby; west by Robert Jackson; south by the Carmel Land & Improvement Company and H. H. Armstrong's estate; east by J. H. Roquemore, Jr." This was plainly a sale of land by the tract, and not by the acre. *Kendall v. Wells*, 126 Ga. 343, 55 S. E. 41.

2. If the case were not extraordinary, in that the plaintiff's counsel state in their briefs and argument that they conceded at the trial, and now concede, that the plaintiff is willing to allow a fair abatement of the purchase price, it would be easy to control the case by saying that, where the sale of land is by the tract, no apportionment of the purchase price can be had on account of a deficiency, unless both fraud and deficiency are shown. *Finney v. Morris*, 116 Ga. 758, 42 S. E. 1020. It appears that the defendants had not only equal means with the plaintiff of knowing the contents of the tract, but that they actually had superior opportunities to know. But the plaintiff stands willing to make a fair abatement, though the law allows none. The question is: What is fair in such a case? In ordinary cases it would be fair to deduct from the purchase price a sum derived by multiplying the number of acres in the deficiency by the average price per acre. But there are exceptional and extraordinary cases in which this rule does not apply. Compare the concluding statement at the end of the paragraph at the bottom of page 352 in the case of *Kendall v. Wells*, 126 Ga. 343 et seq., 55 S. E. 41, 45.

The present case is extraordinary and exceptional. It is an action at law. Law says there shall be no abatement. The plaintiff says: "I will do more than the law requires. I will concede a fair abatement." It seems fair to determine the matter on equitable principles. The parties supposed that the tract contained 42 acres; in fact it contained only 28.28 acres, creating a deficiency of 13.74 acres. The price paid for the land was \$4,200, an average of \$100 per acre. The land was very irregular in shape. It lay in the town of Mansfield. Four acres of it fronted on Poplar street, and was, on account of its availability for building purposes, worth more than \$200 per acre. The remainder, for the greater part, lay in field and woods to the rear of these front lots,

and to the rear of other building lots which had previously been cut off. Now one can readily see that if a person should own a tract which he represented to contain five acres, on which was situated a country residence worth \$9,000, and should sell the tract, including the house, \$10,000 and it turned out that there were only four acres, it would not ordinarily be fair and equitable to abate the price \$2,000.

As the judge directed a verdict allowing a deduction of \$1,874, thereby holding, as a matter of law, that the abatement on account of the deficiency should be based on the calculation of multiplying the number of acres in the deficiency by the average price per acre, we must decide the case on the theory of the evidence most favorable to the plaintiff. The jury might have found that the defendants got exactly what they expected to get, so far as the four acres fronting on Poplar street are concerned, and that the deficiency lay entirely in the field and woodland, which was the less valuable portion of the tract. If so, the jury should have been allowed to make the abatement of the purchase price on this basis: Assume \$4,200 as representing what the tract would have been worth if it had contained 42 acres in all—if there had been 4 acres of frontage and 38 acres of the remainder—and say how much less valuable proportionately the tract would have been worth as a tract if, instead of 42 acres in all, there were only 28.28 acres, but without any deficiency in the frontage. On the other hand, the jury might have found that the knowledge of the defendants was as imperfect as to one portion of the tract as it was concerning the remainder. If so, they should find in accordance with the rule adopted by the trial judge. As Chief Justice Bleckley said in *Estes v. Odom*, 91 Ga. 600, 609, 18 S. E. 355, 357: "Knowledge of boundaries need not involve knowledge of acreage or superficial area."

We may take occasion to say, before concluding this opinion, that the defendants claim that the sale was by the acre, and not by the tract; that the description in the bond for title was placed therein by mutual mistake. If so, it should be reformed, and we suggest that, if this view of the transaction is to be insisted on, a court of equity, and not a court of law, is the proper forum. It is not yet too late to file a bill in equity. Judgment reversed.

(110 Va. 364)

WHITE v. BONNEY.

(Supreme Court of Appeals of Virginia. March 10, 1910. Rehearing Denied June 15, 1910.)

TROVER AND CONVERSION (§ 16*)—CONVERSION OF CHECK—WHO MAY SUE.

Trover for the wrongful conversion of a check must be brought in the name of the real owner, and not necessarily in the name of the payee.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 126; Dec. Dig. § 16.*]

Error to Law and Chancery Court of City of Norfolk.

Action by F. E. White against H. G. Bonney. Defendant had judgment, and plaintiff brings error. Affirmed.

J. Edward Cole, for plaintiff in error. R. W. Tomlin and J. G. Tilton, for defendant in error.

WHITTLE, J. This was an action of trover, brought by the plaintiff in error, F. E. White, against the defendant in error, H. G. Bonney, to recover damages for the alleged wrongful conversion of two checks. One of these checks was drawn by Huff, Andrews & Thomas Company upon the Flat Top National Bank of Bluefield, W. Va., for \$150. The other was the check of the Flat Top Grocery Company on the same bank for \$175, and both were payable to the order of the plaintiff, White. These checks were indorsed by W. F. Richardson as follows: "F. E. White, by F. E. Richardson, for the White Horse Medicine Company"—and were delivered by Richardson to Bonney, with the request that he would collect them through one of the Norfolk city banks and pay over the proceeds to him, which arrangement was carried out by Bonney without compensation or profit.

The evidence was to the last degree conflicting, but regarding the case, as we must regard it, as upon a demurrer to the evidence by the plaintiff, it appears that the money represented by the two checks was not due to White, but belonged to the White Horse Medicine Company, being the purchase price of goods sold by Richardson, its vice president and general manager. The theory of the plaintiff—which he sought to maintain by objection to the introduction of evidence tending to show ownership of the money represented by the checks in the White Horse Medicine Company, by instructions, and by motion for judgment non obstante veredicto—proceeds upon the assumption that the checks, having been certified by the Flat Top National Bank, constituted a legal assignment to him of the funds upon which they were drawn, by virtue of the negotiable instruments law (Va. Code 1904, § 2841a, subsecs. 187, 189).

The defendant concedes that an action on the checks would have to be brought in the name of the payee, but insists that an action of trover for their wrongful conversion

should be brought in the name of the real owner of the instruments. Such was the opinion of the learned judge of the court of law and chancery of the city of Norfolk, and the case was tried upon that theory.

In 28 Am. & Eng. Enc. L. 656, the general principle is stated as follows: "The owner of evidences of indebtedness, such as bills, notes, bonds, etc., may maintain trover in his own name for their conversion, though he could not have maintained in his name an action on the instrument itself. Thus the owner of a note may maintain trover therefor, though there has been no indorsement of the note to him."

This general statement of the rule is well sustained by authority.

In *Donnell v. Thompson*, 13 Ala. 440, the court said: "It is contended that, as it does not appear that the note was indorsed to the plaintiff, he cannot maintain this action. A question very similar to this arose in the case of *Clowes v. Howley*, 12 Johns. (N. Y.) 484. The plaintiff in that case brought trover for the conversion of a bond conditioned to make titles to land. The bond had been assigned to him, but it was admitted that he could not sue the obligor of the bond in his own name, and if the suit was on the bond itself it must have been brought in the name of the obligee. Yet the plaintiff was permitted in this form of action to recover the value of the bond, which was estimated by the value of the land. This authority shows that the owner of a note or bond may bring trover for its conversion, although, if suit had been brought on the instrument itself, it must have been brought in the name of the payee or obligee. Nor do we see any reason why the owner of a bond, or note may not maintain trover for its conversion upon his possession, although the instrument be not payable to him. It is a mere chattel, and all that is necessary to maintain trover is property in the plaintiff and the right to possession."

So, in *Tilden v. Brown*, 14 Vt. 164, 167, the court says: "It is not the person who last had manual custody of the paper, or he to whom the check or note is made payable, who is to maintain an action for its conversion, but he who was the legal owner or beneficially interested in the check or the money secured by it."

It follows, therefore, from these authorities, that in trover for the conversion of these checks the right of action is in the real beneficial owner, the White Horse Medicine Company, and not in the plaintiff in error, White.

For these reasons, we think the judgment of the lower court is right, and should be affirmed.

Judgment affirmed.

BUCHANAN, J., absent.

(111 Va. 160)

CITY OF RICHMOND v. GENTRY.

(Supreme Court of Appeals of Virginia. June 9, 1910.)

1. MUNICIPAL CORPORATIONS (§ 821*)—OBSTRUCTION OF SIDEWALK—INJURY TO PEDESTRIAN—NEGLIGENCE—QUESTION FOR JURY.

Where, in an action for injuries to a pedestrian from stumbling against a stone step in front of a side entrance to a store, evidence tended to prove that it was not against the building, but was 10 inches therefrom, in a position where it was an obstruction and a menace as to those using the street, the court properly refused a peremptory instruction for defendant city, based on the assumption that the step was not such an obstruction as to render it liable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1750; Dec. Dig. § 821.*]

2. MUNICIPAL CORPORATIONS (§ 821*)—OBSTRUCTION ON SIDEWALK—INJURY TO PEDESTRIAN—ACTION THEREFOR—PEREMPTORY INSTRUCTIONS—PRIMARY LIABILITY.

The Richmond city charter (Act Feb. 3, 1900; Acts 1899-1900, c. 264) provides that, in any action against the city for damages for negligence in the construction and maintenance of its streets, etc., every person liable with the city for such negligence shall also be joined as defendant, and where there is a judgment or verdict against the city, as well as the other defendant, it shall be ascertained by either the court or jury which is primarily liable. *Held*, in an action for injury sustained by falling against a stone step on a sidewalk, that it was for the jury, under the court's proper direction, to ascertain whether the city or its codefendant was primarily liable, as between themselves, in the event of verdict against both, and the court properly refused peremptory instructions in favor of the city as to its primary liability, where there was no evidence that its codefendant placed the step where it was an obstruction, and the evidence did not prove it had occupied that position long enough to justify the jury in imputing to the city knowledge as to its position, though there was evidence that the city did not place the step, or cause it to be placed, in the position where it was.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1747; Dec. Dig. § 821.*]

3. TRIAL (§ 253*)—OBSTRUCTION ON SIDEWALK—INJURY TO PEDESTRIAN—INSTRUCTIONS.

In an action for injury to a pedestrian, who fell against a stone step on the sidewalk, the court refused to instruct that reasonable care is defined as a relative duty, to be determined according to the circumstances of each case, and that a pedestrian passing along or using that portion of the sidewalk immediately adjacent to the property line, where obstructions are likely to be found, must exercise greater care than one passing along the center of the sidewalk, where there is less probability of obstructions. *Held* that, assuming it was proper as an abstract proposition of law, it was properly refused, because it disregarded evidence of the actual position of the step away from the building and in the midst of the sidewalk.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

4. TRIAL (§ 243*)—CONTRADICTORY INSTRUCTIONS.

Two instructions are not contradictory, where both correctly state the law, and its ap-

plication to the particular case depends on the view the jury may take of the proof.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 564-566; Dec. Dig. § 243.*]

Error to Circuit Court of City of Richmond.

Action by Alice Gentry against the City of Richmond and another. There was a judgment for plaintiff, and the defendant city brings error. Affirmed.

H. R. Pollard and Geo. Wayne Anderson, for plaintiff in error. F. T. Sutton, Jr., E. M. Roscher and P. A. L. Smith, for defendant in error.

KEITH, P. This was an action by the defendant in error, Alice Gentry, against the city of Richmond, to recover damages for an injury sustained by a fall caused by the unsafe condition of the sidewalk in said city.

By an act approved February 3, 1900 (Acts 1899-1900, p. 288), it is provided that "in any action against the city to recover damages against it, for any negligence in the construction and maintenance of its streets, alleys or parks, where any person is liable with the city for such negligence, every such person shall be joined as defendant with the city in any action brought to recover damages for such negligence, and where there is a judgment or verdict against the city, as well as the other defendant, it shall be ascertained by either the court or the jury which of the defendants is primarily liable for the damages assessed."

Under this statute one Henry Holzgreffe was joined with the city as defendant. There was a verdict and judgment for the plaintiff. During the trial several bills of exception were taken, and the case is before us upon a writ of error.

At an early period in the trial it appeared that one Mollen was a tenant in actual possession of the premises, which belonged to the defendant Henry Holzgreffe, and the city of Richmond moved the court to dismiss the suit as to it, because the tenant had not been made a party defendant, which the court refused to do, and its refusal constitutes the first assignment of error. This assignment was withdrawn when the case was argued before us, and need not be further considered.

The evidence tends to prove that Mrs. Gentry, a widow, 58 years of age, had lived for many years in the city of Richmond in the immediate vicinity of the scene of the accident, and at the time of its occurrence was a nurse in the family of William Myer. Between 6 and 7 o'clock on the evening of the 28th of April, 1908, while passing along the west side of Munford street, north of Leigh street, going in a northerly direction towards Brook avenue, in company with two little girls, the children of her employer, the youngest of whom was five years old and

the other a few years older, she came in contact with a stone located on the sidewalk, used as a step, in front of a side entrance to a store known as "No. 700 West Leigh street," that being the corner building at the northwest corner of Leigh and Munford streets, which house was owned by Henry Holzgreffe, and occupied by M. Mollen as a store and dwelling. The stone rested upon the surface of the paved sidewalk, and by actual measurement was shown to be 3 feet 6 inches long and 1 foot in width, and on its southern end, against which the plaintiff claimed to have stumbled, was six-tenths of a foot in thickness. The evidence further tended to show that there was located a gas lamp at the southwest corner of Leigh and Munford streets, distant 73 feet from the northern end of said stone, and on the same side of the street, in a northerly direction from the northern end of the stone, there was also located another gas lamp distant about 76 feet, and that there were no intervening objects which could obstruct the light thrown upon the stone from the two lamps mentioned above. It further appears that the lamps had been lighted.

It appears that the plaintiff stumbled over the stone, fell, and seriously hurt her arm; that her eyesight was not good, and for that reason, at the suggestion of the older of the two girls, she was placed on the inside, instead of next to the street line. It seems that she had often passed the point, and knew of the stone on the sidewalk. The older of the two girls also testified that she knew of the stone, and that she herself had used it in going in and out of the house, and that it was generally used for that purpose. There was also evidence tending to show that the stone was 10 inches out from the house, so that the children were accustomed to walk and play between the stone and the house. We do not deem it necessary to refer to the evidence as to the character and extent of the plaintiff's injury, as there can be no question that the evidence upon that point is quite sufficient to sustain the verdict.

The second assignment of error is to the refusal of the court to give the following instruction asked for by the city:

"The court instructs the jury that though they believe from the evidence that the step in the declaration mentioned was an encroachment upon the street, and that the plaintiff received injury by coming in contact therewith as in the declaration alleged, and that the same was the proximate cause of the accident, yet, inasmuch as the evidence in the case as to the nature, size, character, and use of the step is clear, and is without conflict, the court instructs the jury that as a question of law the said step was not such an obstruction in the street as to render the city of Richmond liable for the injury resulting therefrom, and they should

find a verdict for the defendant the city of Richmond."

The doctrine relied upon by the city is that whether one has been guilty of negligence or not is a mixed question of law and fact, to be determined by the court where the facts are undisputed or conclusively proved, but where the facts are disputed or the evidence conflicting to be submitted to the jury, citing a number of authorities from this and other courts.

We need not in this case trouble ourselves with a discussion of the authorities or a determination of the question presented, for the facts take this case entirely out of their influence. If this stone had rested against the side of the house, then the evidence as to its nature, size, character, use, and position, being without conflict, it may be conceded, would have presented a question of law for the court. But the position of the stone is of first importance, and the evidence strongly tends to prove that it was not against the house, but was 10 inches out from the house—in a position where it was an obstruction and a menace to those using the street. We think the court was right in refusing the instruction asked for.

Bill of exceptions No. 3 is to the refusal of the court to give instructions B, C, and E as asked for by the city.

Instruction B is as follows: "The court instructs the jury that inasmuch as there is no evidence in this case to show that the city of Richmond placed the step on the sidewalk, as in the first count of the declaration alleged, they, the jury, should they find on the evidence, under the instructions of the court, that the plaintiff is entitled to recover against the city of Richmond, cannot properly find that the city of Richmond is primarily liable for any damages assessed in favor of the plaintiff."

Instruction C: "The court instructs the jury that if they believe from the evidence, under the instructions of the court, that the city of Richmond, as well as the other defendant, was guilty of the negligence in the declaration charged against them, and that the plaintiff, without fault on her part, was damaged as in the declaration alleged, then, in assessing the damages against the defendants, they should find, and so state in their verdict, that the defendant other than the city of Richmond is primarily liable for the damages so assessed."

Holzgreffe, the owner of the property, was made a defendant with the city by virtue of the provisions of its charter. It was for the jury, under proper directions from the court, to ascertain whether he or the city was primarily liable as between themselves for the injury to the plaintiff, in the event the jury should find a verdict against both of them. We think the court properly refused instructions B and C; for, while there was evidence that the city of Rich-

mond did not place the step or cause it to be placed against the house, there was no evidence that the other defendant placed it or caused it to be placed at a point in the street 10 inches distant from the house, and the evidence does tend to prove that it had occupied that position for a period sufficient to justify the jury in imputing to the city knowledge as to its position, or a neglect of duty in not being informed as to it.

Instruction E is as follows: "The court instructs the jury that reasonable care is defined in the instructions of the court as a relative duty to be determined according to the facts and circumstances of each case, and in this case the court says to the jury that a pedestrian passing along or using that portion of the sidewalk immediately adjacent to the property line, where obstructions are more likely to be found, must exercise greater care than one passing along the center of the sidewalk, where there is less probability of obstructions."

Assuming that it properly states an abstract proposition of law, it was properly refused, because it leaves out of view the evidence as to the actual position of the step away from the house and in the midst of the sidewalk.

Instruction No. 2, asked for by the defendant in error and given by the court, is a correct statement of the general rule upon the subject, while instruction L, asked for by the city and given by the court, is a correct statement of the exception to the rule. It is true that there is evidence tending to show that the defendant in error knew of the existence and position of this obstruction; but it is shown in evidence that her eyesight was bad, and that circumstance doubtless had weight with the jury in determining whether or not they would apply the rule or the exception. It is not a case of contradictory instructions. Both of them correctly state the law, and its application to the particular case depended upon the view the jury might take of the proof.

The remaining objections to instructions are as to the order of liability of the two defendants, and we think that question was fairly submitted to the jury, and upon the whole case that the judgment of the circuit court should be affirmed.

Affirmed.

HARRISON and CARDWELL, JJ., absent.

(111 Va. 174)

CITY OF RICHMOND v. LAMBERT.

(Supreme Court of Appeals of Virginia. June 9, 1910.)

MUNICIPAL CORPORATIONS (§ 777*)—OBSTRUCTION IN STREET—INJURY TO PEDESTRIAN—LIABILITY THEREFOR.

A step $4\frac{1}{2}$ inches high and $10\frac{1}{2}$ inches wide, close up to a building in front of which it

is placed, and used as a means of access to it from the street, does not constitute an unlawful obstruction, and does not interfere to an appreciable or unreasonable extent with the use of the sidewalk, so as to sustain an action by a pedestrian injured by stumbling over it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1631; Dec. Dig. § 777.*]

Error to Circuit Court of City of Richmond.

Action by one Lambert against the City of Richmond and others. There was a judgment for plaintiff, and defendant city brings error. Reversed.

H. R. Pollard and G. W. Anderson, for plaintiff in error. John A. Lamb and S. A. Anderson, for defendant in error.

KEITH, P. This is an action brought by Lambert against the city of Richmond to recover damages for an injury which was received by him from a fall, due as he contends to the negligence of the city of Richmond in failing to keep its streets in a reasonably safe condition. The particular ground of complaint stated in the declaration is that there was a step on Williamsburg avenue, one of the streets of the city, between Louisiana and Graham streets, in front of the building known as "No. 3822," over which the plaintiff stumbled and fell, and received the injury of which he complains. In obedience to a provision of the charter of the city of Richmond, Segar Waters, Orella Waters, and A. Anderson, who were the "owners, users, or lessees of the property" in front of which the step was situated, were made parties defendant, and such proceedings were had as resulted in a verdict and judgment for the plaintiff for \$2,000, and the case is before us upon a writ of error.

During the progress of the trial there were many exceptions taken to the rulings of the court; but in the view which we take of the case we deem it unnecessary to consider but one of them, a decision of which will be conclusive of the controversy.

The court was asked to instruct the jury as follows: "The court instructs the jury that though they believe from the evidence that the step in the declaration mentioned was an encroachment upon the street, and that the plaintiff received injury by coming in contact therewith as in the declaration alleged, and that the same was the proximate cause of the accident, yet, inasmuch as the evidence in the case as to the nature, size, character, and use of the said step is clear, and is without conflict, the court instructs the jury that as a question of law the said step was not such an obstruction in the street as to render the city of Richmond liable for the injury resulting therefrom, and they should find a verdict for the defendant the city of Richmond."

The step in question was $4\frac{1}{2}$ inches high

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and 10½ inches wide, was close up to the building in front of which it was placed, and was used as a means of access to it. We are of opinion that such a step, in such a place, did not constitute an unlawful obstruction in the street, and did not interfere to an appreciable or unreasonable extent with the use of the sidewalk.

In *Parrish v. City of Huntington*, 57 W. Va. 286, 50 S. E. 416, it is said:

"A municipal corporation is not an insurer against accidents upon streets or sidewalks. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient if the street is in a reasonably safe condition for travel in the ordinary modes, with ordinary care, by day or night; and whether so or not is a practical question, to be determined in each case by its particular circumstances.

"Where the evidence is without conflict, and it is clear and conclusive therefrom that a particular obstruction existed upon the sidewalk of the street of a municipal corporation, it is a question of law as to whether or not the obstruction was such as to render the sidewalk not in a reasonably safe condition, and thereby make the corporation liable in damages to a person injured by reason thereof."

In *Robert v. Powell*, 168 N. Y. 411, 61 N. E. 699, 55 L. R. A. 775, 85 Am. St. Rep. 673, it was held that a stepping-stone to facilitate access to carriages, placed near the edge of the sidewalk, which does not interfere in the least with the use of the roadway, or to an appreciable extent with the use of the sidewalk, is not a nuisance, so as to give a foot passenger, injured by stumbling over it in attempting to cross the street at a time when it is plainly visible, a right of action against the owner. In the course of the opinion the court said: "The stepping-stone in this case, located upon the sidewalk in front of a private house, was a reasonable and necessary use of the street, not only for the convenience of the owner of the house, but for other persons who desired to visit or enter the house for business or other lawful purpose. It did not interfere in the least with the use of the roadway or bed of the street, nor did it interfere to any appreciable or unreasonable extent with the use of the sidewalk. There was 8 feet of a clear open space upon the sidewalk for the use of travelers; and the fact that the plaintiff, while hurrying in the nighttime to take a cab, stumbled over the stone, when the place was well lighted and the object plainly visible, does not prove, or tend to prove, that the defendant was guilty of any wrong or breach of duty in maintaining the stepping-stone in front of her house.

It is true that the plaintiff was injured; but that was the result of an accident, due possibly to his own fault, but at all events not to any fault on the part of the defendant, or to any unlawful obstruction by the defendant of the street."

In *Dubois v. Kingston*, 102 N. Y. 219, 6 N. E. 273, 55 Am. Rep. 804, a stepping-stone 3 feet 4 inches in length and 20 inches wide was placed on the edge of the sidewalk. The court observed that the stone was not of unusual size, or located in an improper place, and that it would be extending the liability of cities too far to hold them liable for permitting stepping-stones on the edge of sidewalks.

In *Wolff v. District of Columbia*, 196 U. S. 152, 25 Sup. Ct. 198, 49 L. Ed. 426, the court said: "There are objects which subserve the use of streets, and cannot be considered obstructions to them, although some portion of their space may be occupied."

"It would be adding to the corporate liability beyond reasonable limits," said Mr. Justice Miller in *Dubois v. Kingston*, supra, "to hold that stepping-stones, which are almost a necessity in providing for the interest, comfort, and convenience of the public in the maintenance of walks, avenues, and streets, constitute a nuisance or obstruction, and that corporations are liable for damages by reason of accidents caused thereby."

The cases we have cited have dealt specifically with objects such as hydrants, hitching posts, telegraph poles, awning posts, and stepping-stones in the sidewalk next to the street or curb, and they have been held not to constitute a nuisance, but to be a reasonable and necessary use of the street. In the case before us the stepping-stone was equally useful and equally necessary to the enjoyment of the premises in front of which it was placed; indeed, it subserved the convenience of a greater number of persons than a horse-block would have done. The number of such steps in this city is very great. To compel their removal would be a great hardship, and we think it may safely be left to the city to determine when their removal should be required.

This case is to be differentiated from that of *City of Richmond v. Gentry*, 68 S. E. 274, by the fact that the stone in that case was 10 inches from the building in front of which it was placed, and, therefore, in the midst of the sidewalk.

We are of opinion that the court erred in refusing to grant instruction G, and that for this error its judgment must be reversed.

Reversed.

HARRISON, J., absent.

(111 Va. 34)

HARGRAVE'S ADM'R v. SHAW LAND & TIMBER CO.

(Supreme Court of Appeals of Virginia. June 9, 1910.)

1. RAILROADS (§ 362*)—INJURIES TO PERSONS ON TRACK—NEGLIGENCE—ABSENCE OF HEADLIGHT.

The mere failure of defendant, operating a railroad, to have on its engine a headlight, when not required by statute, did not constitute negligence, other equally efficient means of warning one on the track, such as the blowing of whistles, etc., being used; it appearing that the end of the locomotive was red hot, and could be seen for a long distance.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1249; Dec. Dig. § 362.*]

2. RAILROADS (§ 398*)—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

In an action for death of one run over by a train while walking on the track, evidence held to show that deceased was guilty of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1360; Dec. Dig. § 398.*]

3. RAILROADS (§ 358*)—INJURIES TO LICENSEES ON TRACK—CARE REQUIRED.

Where employes of a sawmill company, which was operating a narrow-gauge logging road, were accustomed to use the track in going to and from work, they were licensees, of whose safety the railroad company was not an insurer, and all that a licensee was entitled to demand is that, while exercising reasonable care for his own safety, the railroad should exercise ordinary care not to expose him to danger.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1236-1237; Dec. Dig. § 358.*]

4. APPEAL AND ERROR (§ 1061*)—HARMLESS ERROR—DIRECTION OF VERDICT.

While directing a verdict is not in accordance with the practice in Virginia, yet, where it appears that no other verdict could have been properly rendered, the error in directing a verdict was harmless, and the judgment will not be reversed on that ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4211; Dec. Dig. § 1061.*]

Error to Circuit Court, Southampton County.

Action by James A. Hamlin, administrator of Willie Hargrave, deceased, against the Shaw Land & Timber Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Jno. N. Sebrell, Jr., and N. T. Green, for plaintiff in error. D. Lawrence Groner, for defendant in error.

BUCHANAN, J. The plaintiff's intestate was run over and killed by a locomotive of the defendant company which was operating a narrow-gauge logging rail, or tram road. This action was brought to recover damages therefor.

The only ground of alleged negligence which the proof tends to sustain is that the defendant company, on the night of the accident, was operating its locomotive without a headlight.

It appears from the record, considered as

on a demurrer to the evidence, that the defendant company operated a sawmill plant in Southampton county, where it owned certain timber which it was converting into lumber. Its mill was located on its own property a few hundred yards from Ivor depot, a station on the Norfolk & Western Railway. From the depot to the sawmill and from the sawmill down into the woods, the defendant owned and operated a narrow-gauge rail, or tram road, which was five or six miles in length. The road was used by the defendant company to bring logs and timber from the woods to the mill, to haul lumber to Ivor depot, and to bring supplies from the depot to the mill and to the logging camp in the woods near the mill. About 12 feet from the defendant's railway track it had built four or five "shacks" or "shanties," which some of its 125 employes working at the sawmill used as dwellings. Of those so using them was the plaintiff's intestate. The usual and customary, if not the only direct and practicable, route from these shanties to Ivor depot, where stores were located at which the defendant's employes purchased supplies, was along and on the railway, and this fact was well known to the defendant company. While it had no schedule for operating its locomotive and cars, the train generally ran between the hours of 7 o'clock a. m. and 6 o'clock p. m.

On the day of the accident the decedent, after working hours, went from the mill to Ivor station, purchased some supplies, and while on his return trip, between 8 and 9 o'clock at night, was struck by the locomotive of the defendant, which inflicted injuries causing his death. When so struck, the locomotive was being operated without a headlight, but its front end, on account of some defect, was red hot. The plaintiff's intestate and the locomotive were approaching each other. The railway was straight and the red hot front of the locomotive could be seen a mile from the shanties, a few feet from where the accident occurred. The whistle of the locomotive was blown four different times within that mile—for the station about a mile away, then for the crossing $\frac{3}{4}$ of a mile off, again when at a distance of 200 yards from the shanties, and again when they were only 50 yards distant. The engineer, who was at his post of duty looking ahead and could see 30 or 40 feet in front of the locomotive by the light of its red hot end, did not see the plaintiff's intestate. One of the men running on the train occupied the seat of the fireman (who was firing at the time), looking ahead, saw the locomotive strike something which at first he thought was an old pair of pants lying on the railway. "The engine struck," he testified, "what I took to be an old pair of pants, and it commenced to roll, and it seemed I discerned the limbs of something, and I turned to the fireman and

said, 'I believe you struck a man'; and he said, 'Get down and look'; and, when I got where I supposed was the rags, I saw a man lying in the form I thought was the rags." The engine was running at that time about four miles an hour, and could have been stopped in 30 feet.

If there had been a headlight, it would have lighted up the track 30 or 40 yards in front of the engine.

The plaintiff's counsel insists that, under the facts disclosed by the record, the plaintiff's intestate was not a mere licensee but an invitee. Conceding, without deciding, that this is true, what degree of care did the defendant company owe to the plaintiff's intestate?

In the recent case of *Clark v. Fehlhaber*, 106 Va. 803, 56 S. E. 817, 13 L. R. A. (N. S.) 442, it was held that it was the duty of the owner of premises to keep them in a reasonably safe condition for those who may enter thereon by his invitation, express or implied. He is not an insurer of their safety, and, in order to hold him liable for any injury occurring on the premises, it must have been the natural and probable result of the condition of the premises, and one which under the circumstances he ought reasonably to have foreseen might probably occur.

It is not claimed that the premises upon which the plaintiff's decedent was traveling was unsafe or dangerous in any respect except from the running of the locomotive and cars upon them. That the locomotive and cars would run upon the rail, or tram road was as well known to the plaintiff's intestate as it was to the defendant company. The fact that the locomotive was running at the time of the accident after night, and that it seldom ran after six o'clock in the evening, was not negligence on the part of the defendant. It had the right to run its locomotive at any time. If in running at an unusual or unexpected hour on the night of the accident it had failed to exercise reasonable care to give the plaintiff's intestate warning of that fact and of its approach, then there might be ground for claiming that it was negligent; but the uncontradicted evidence shows that, while the locomotive had no headlight, its front end was red hot, and could be seen on the straight line of road a mile, and that the whistle of the locomotive was blown at that distance for the station, again a quarter of a mile nearer for the crossing, then within 200 yards, and then within 50 yards of where the accident occurred. This was clearly sufficient to warn the plaintiff's intestate of the approach of the locomotive, and, if there had been a headlight, it could not have been seen by him any farther than the red-hot end of the locomotive. The mere failure to have a headlight, when not required by statute, cannot be considered negligence when other means of warning the plaintiff's intestate of the ap-

proach of the locomotive, equally efficient, were used.

But, if the failure to have a headlight were negligence, the plaintiff's intestate was clearly guilty of contributory negligence. If he was walking on the railroad, as the declaration alleges, he could not have failed in the exercise of due care to see the red-hot end of the locomotive as it approached, neither could he have failed to hear the whistle which was blown, as before stated, four several times as it approached him, once within 200 yards and again within 50 yards of the point where he was injured. If he was lying down on or near the track, as the evidence tends to show, he was plainly guilty of contributory negligence.

But it is insisted that, even if he were guilty of contributory negligence, he was entitled to recover upon the doctrine of "the last clear chance." This contention is based upon the theory that, if the defendant's locomotive had been operated with a headlight, those in charge of the locomotive would, or in the exercise of reasonable care could, have discovered the peril of the plaintiff's intestate, and have avoided the accident.

Conceding that the accident might have been avoided if there had been a headlight, was it the duty of the defendant to operate its locomotive with a headlight, when, as we have seen, the means used to warn the plaintiff's intestate of the approach of its locomotive was sufficient for that purpose?

The owner of premises upon which another is invited, expressly or impliedly, to come, is not an insurer of that other's safety, and all that the invitee is entitled to demand or expect is that, while exercising reasonable care for his own safety, the owner of the premises will likewise use ordinary care not to expose him to danger. In order to hold the owner liable for an injury occurring on the premises, it must have been the natural and probable result of the condition of the premises, and one which, under the circumstances, he ought reasonably to have foreseen might probably occur. *Clark v. Fehlhaber*, *supra*, and authorities cited.

Tested by this rule, the defendant was not liable under the rule of the last clear chance for operating its locomotive without a headlight. The means used to warn the plaintiff's intestate of the approach of the locomotive were ample, as we have seen, if he had been exercising due care or any care whatever on his own part. The injury was not the natural and probable result of the defendant's running its locomotive with the warnings given, nor was the injury one which the defendant, under the circumstances disclosed by the record, ought reasonably to have foreseen might probably occur. It was not its duty to provide means not necessary for the running of its locomotive or for giving the plaintiff's intestate sufficient warning of its approach merely to enable it to protect him from the result of his own negligence while

on the defendant's premises. To hold the owner of premises liable for failing to provide in advance appliances for the purpose of protecting an invitee from the result of his own negligence when his peril could have been discovered by the use of such appliance and the injury avoided would be requiring not ordinary care but extraordinary care for the safety of the invitee. The law does not impose such a duty upon the owner to an invitee upon his premises.

Considered as upon a demurrer to the evidence, we are of opinion that the plaintiff's intestate was not entitled to recover in this case.

The action of the trial court in directing the jury to find a verdict for the defendant is assigned as error. While directing a verdict in this state, yet where it appears, as in this case, that no other verdict could have been properly rendered, the error was harmless, and the judgment will not be reversed on that ground. *Taylor v. B. & O. Ry. Co.*, 108 Va. 817, 62 S. E. 798, and cases cited.

The judgment of the circuit court must be affirmed.

Affirmed.

HARRISON and CARDWELL, JJ., absent

(111 Va. 121)

MONK et al. v. EXPOSITION DEEPWATER PIER CORPORATION et al.

(Supreme Court of Appeals of Virginia. June 9, 1910.)

1. MECHANICS' LIENS (§ 263*)—ENFORCEMENT—PARTIES.

Though proper parties, in the absence of statute requiring it, subsequent incumbrancers are not necessary parties in a suit to enforce a mechanic's lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 476; Dec. Dig. § 263.*]

2. MECHANICS' LIENS (§ 235*)—ENFORCEMENT—LIMITATIONS—BRINGING IN SUBSEQUENT INCUMBRANCERS.

A suit to enforce a mechanic's lien, under Code 1904, §§ 2481, 2484, requiring a suit to be brought within six months, and declaring that the liens may be enforced in equity, and when a suit is brought all persons entitled to any lien may file petitions for the enforcement of their respective interests, etc., must be conducted as other suits in equity to subject property to the payment of liens; and where a suit to enforce a lien is brought against the debtor within the time fixed, the failure to implead within the time a subsequent incumbrancer, within section 2483, does not defeat the lien as against the incumbrancer.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 418; Dec. Dig. § 235.*]

3. MECHANICS' LIENS (§ 264*)—ENFORCEMENT—PARTIES—DETERMINATION OF ENTIRE CONTROVERSY.

The lien claimant, by making the subsequent incumbrancer a party, enables the court to determine the entire controversy.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 482; Dec. Dig. § 264.*]

4. LIENS (§ 22*)—ENFORCEMENT—ACTIONS.

A lien creditor may sue on behalf of himself and other lien creditors to subject the property to the payment of the liens, and such other creditors may come into the suit by petition or under a decree for account, and on the return of the account the court may sell the property and distribute the proceeds among those entitled thereto.

[Ed. Note.—For other cases, see *Liens*, Cent. Dig. § 32; Dec. Dig. § 22.*]

5. LIMITATION OF ACTIONS (§ 172*)—PARTY ENTITLED TO PLEAD LIMITATIONS.

Generally one creditor may set up limitations to defeat the demand of a co-creditor; but, to sustain the plea, it must be shown that the co-creditor's debt is barred as between himself and the debtor.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 657; Dec. Dig. § 172.*]

Appeal from Circuit Court, Norfolk County.

Suit by John Monk and another against the Exposition Deepwater Pier Corporation and others. From a decree of dismissal, plaintiffs appeal. Reversed and remanded.

Jeffries, Wolcott, Wolcott & Lankford, for appellants. W. L. Williams, for appellees.

WHITTLE, J. This is a suit in equity by the appellants, who were general contractors, originally against the appellees, the Exposition Deepwater Pier Corporation and the stockholders, under Code Va. 1904, § 2484, to subject their property, known as "the Deepwater Pier," to a mechanic's lien thereon amounting to \$5,913.94.

This suit was admittedly brought within six months from the time when the whole amount covered by the lien became payable, as prescribed by section 2481.

The second lien on the property in question is a deed of trust executed by the owners to W. L. Williams, trustee, to secure \$40,000 in bonds issued by the corporation. After the expiration of the six months, the plaintiffs in the original bill filed an amended and supplemental bill, making the trustee and holders of the bonds parties.

In the decree appealed from the circuit court dismissed both the original and amended and supplemental bills as to the trustee and holders of the bonds, because the suit against them was not brought within the six months. In other words, the holding amounts to this: That, though a suit to enforce a mechanic's lien is brought within due time against the debtor upon whose property the lien rests, the failure to implead subsequent lienors within six months defeats the lien so far as such incumbrancers are concerned.

This is plainly an erroneous construction of the mechanic's lien act. There is no statutory requirement that subsequent incumbrancers shall be made parties, and, though they are proper parties, they are not necessary parties to such suit.

Section 2481 prescribes the six months' limitation, and section 2484 declares that such liens may be enforced in a court of equity, and that when a suit is brought for that purpose all parties entitled to any such lien against the property bound thereby may file petitions in the main case for the enforcement of their respective liens, to have the same effect as if an independent suit were brought by each claimant, and the only priority among them is in favor of the subcontractor over the general contractor. The statute prescribes no form of procedure, and such suits are to be conducted as other suits in equity to subject property to payment of liens. It is settled practice, in the case of lien creditors of a living person or a corporation, that a suit will lie by one creditor on behalf of himself and other lien creditors; and such other creditors may come into the suit by petition, or under a decree for account, and prove their liens before the master, to whom an account of liens is referred. On the return of the account, the court sells the property of the debtor and distributes the proceeds among those entitled, as their rights appear. 1 Bar. Chy. Pr. (1st Ed.) 270.

Such suit is in no sense a suit against other lien creditors of the common debtor, even when convened as parties defendant. No relief is sought against them; and, where such course is adopted, they are thus impleaded as matter of convenience to enable the court to audit liens, and transfer the charge from the property to the purchase money. In this way the court offers an unincumbered title to intending purchasers, and, in the interest of all concerned, the land is sold to best advantage.

In *Fidelity Loan, etc., Co. v. Dennis*, 93 Va. 504, at page 508, 25 S. E. 546, at page 547, Riely, J., observes: "The statute, besides preserving, in a distribution of the proceeds of sale of the property, the equitable principle of natural justice, which is the basis of the mechanic's lien law, of giving to each lienor the benefit of his particular security, keeps also in view the settled practice in this state, which requires that the liens and incumbrances upon real estate, with their amounts and priorities shall be ascertained and determined before it is sold, in order that the parties interested may know how to act to protect their respective interests." See, also, *Shultz v. Hansbrough*, 33 Grat. 567, 577; *Bailey Const. Co. v. Purcell*, 88 Va. 300, 13 S. E. 456.

These cases and others illustrate the principle that the two classes of litigation are analogous, and controlled by the same considerations, and subject to similar rules of equity practice.

Section 2483 (after declaring that "no lien or incumbrance upon the land created before the work was commenced or materials furnished shall operate upon the building or structure erected thereon, or materials furnished for and used in the same, until the lien in favor of the person doing the work

or furnishing the materials shall have been satisfied") provides: "Nor shall any lien or incumbrance upon the land created after the work was commenced or materials furnished operate on the land or such building or structure until the lien in favor of the parties doing the work or furnishing the materials shall have been satisfied."

Under the plain language of this enactment, it was necessary for the court to hold that the appellants had no mechanic's lien against the Exposition Deepwater Pier Corporation itself (there being no pretense that such lien had not been satisfied), in order to give priority to the subsequent deed of trust; and the fact that the appellants had such a lien, if not a concession in the case, is indisputably established.

It is true that in some cases one creditor may set up the statute of limitations to defeat the demand of another creditor against the common debtor; but to sustain such plea it is essential to show that the co-creditor's debt is barred as between himself and his debtor. *McCartney v. Tyrer*, 94 Va. 198, 26 S. E. 419; *Callaway's Adm'r v. Saunders*, 99 Va. 350, 38 S. E. 182.

In the case of *De La Vergne Refrigerating Mach. Co. v. Montgomery Brewing Co.*, 57 Fed. 111, 6 C. C. A. 272, the United States Circuit Court of Appeals of the Fifth Circuit, in construing the Alabama statute, which is substantially the same as the Virginia act, says: "If suit for the enforcement of the lien be commenced against the owner or proprietor within six months after the maturity of the indebtedness secured by it, the lien is not lost; and our opinion is that incumbrancers may, at any subsequent time, be made parties to the proceeding. The object in making them parties is to ascertain and adjust the priorities in the property charged with the lien, and to make the judgment in the proceeding binding on them. The effect of not making them parties is simply to exempt them from being concluded by the judgment. * * * It seems clear to us that the effect of not making them parties is not to lose the lien."

The cases relied on by counsel for the appellees are controlled by local statutes and have no application to a case arising under the Virginia statute, the provisions of which are essentially dissimilar.

The remaining assignment of error demanding consideration complains of the failure of the trial court to hold that under the facts in the case stockholders of the Exposition Deepwater Pier Corporation are personally liable upon their stock subscriptions to pay a sufficient sum to discharge the appellants' debt.

We do not think it necessary to pass upon that assignment at this time. The lien of the appellants, as we have seen, amounts only to \$5,913.94, and the commissioner ascertains the value of the property upon which the lien rests to be \$10,000. Therefore the necessity for a call upon stockholders for any install-

ment upon their stock is not likely to arise. If, however, the real estate should prove inadequate to satisfy the lien, appellants are not to be concluded by the decree under review from seeking such relief as they may be entitled to, if any, against the stockholders.

For these reasons, the decree of the circuit court is reversed, and the case remanded for further proceedings, to be had therein not in conflict with the views expressed in this opinion.

Reversed.

HARRISON, J., absent.

(111 Va. 114)

MINICK v. WOODS.

(Supreme Court of Appeals of Virginia. June 9, 1910.)

1. PUBLIC LANDS (§ 183*)—DISPOSAL OF LANDS OF STATE—CAVEAT—TITLE OF CAVEATOR.

On a caveat to an application for a grant of public land, founded on the better right of the caveator, he must recover on the strength of his own title, and not on the infirmity of the title of the caveatee.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 183.*]

2. PUBLIC LANDS (§ 183*)—DISPOSAL OF LANDS OF STATE—CAVEAT—ISSUES AND PROOF.

A caveator against an application for a grant of public land must state in his caveat the ground on which he claims the better right to the land in controversy, and will not be permitted to abandon at the trial the right set out in the caveat and prove a different right.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 183.*]

3. PUBLIC LANDS (§ 183*)—DISPOSAL OF LANDS OF STATE—CAVEAT—STATUTORY PROVISIONS.

Under Code 1904, § 2312, providing that if a person not having possession shall locate a warrant on public land in the possession of another under color of title, without giving notice of his intention to the person in possession, as required by section 2311, the person having such possession and claim may locate a warrant on the land and file a caveat at any time before the issuing of a grant to the person failing to give the notice, the person in possession cannot maintain a caveat without himself locating a warrant on the land.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 183.*]

4. PUBLIC LANDS (§ 183*)—DISPOSAL OF LANDS OF STATE—CAVEAT—TITLE OF CAVEATOR—EVIDENCE.

Where a caveator to an application for a grant of public land shows paper title in himself and those under whom he claims, but fails to connect it with the commonwealth, and the caveator's predecessors paid taxes on the land in connection with a large tract said to include the land in dispute, and at one time a cabin had been erected on the land and occupied by one of the claimants, which was torn down by the caveator about four years prior to the survey and entry by the caveatee, and on several occasions timber and tan bark had been cut and sold from the land, but the boundary consisted of wild land, principally in original forest, uninclosed, and uncultivated, there is not

such evidence of title and possession as to sustain the caveat.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 183.*]

5. PUBLIC LANDS (§ 183*)—DISPOSAL OF LANDS OF STATE—CAVEAT—COURT RIGHT PROCEEDINGS.

Code 1904, § 2339, providing that no location of any land office warrant on land which shall have been settled five years previously, on which taxes have been paid at any time within five years by the settler or any person claiming under him, shall be valid, and any title of the commonwealth is relinquished to the person in possession under such settlement or payment, and authorizing any person making such settlement and payment to have the land surveyed and prove the settlement and payment before the court of the county where the land lies, cannot be relied on to sustain a caveat by one who was not in possession of the land at the date of the caveatee's location, and who has never obtained a court right thereto, nor taken any steps to acquire it.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 183.*]

Error to Circuit Court, Patrick County.

Caveat by one Minick to an application by one Woods for a grant of land entered as waste and unappropriated land. From a judgment in favor of the caveatee, the caveator brings error. Affirmed.

S. A. Thompson and R. E. Woolwine, for plaintiff in error. J. M. Hooker, for defendant in error.

WHITTLE, J. The defendant in error, having located a land office warrant on 77½ acres of land on the head waters of Johnson's creek, in Patrick county, as waste and unappropriated land, filed with the register of the land office the requisite papers and made application for a grant. The plaintiff in error, by caveat, resisted the issuing of the grant on the following grounds: First, because at the time the survey was made the caveator was in actual possession of the land, claiming the same under written color of title duly recorded, extending back for many years, and that the caveator failed to give him the notice required by section 2311, Code Va. 1904; second, that the land in question is not vacant and unappropriated land, but is included in a grant of land in 1853 to Samuel Bowman (under whom the caveator claims), lying in Carroll and Patrick counties; and, third, that, if for no other reason, the grant ought not to issue because the caveator and those under whom he claims have held actual possession of the land in controversy under written recorded color of title, exercising rights of ownership over the same and regularly paying the taxes thereon for a sufficient period to raise the presumption of a grant, though it should appear that the whole tract is not embraced in the Bowman patent.

The caveatee appeared in obedience to summons, and, neither party requiring a jury, without formal pleadings in writing, all matters of law and fact were submitted to the

court, which pronounced the judgment under review in favor of the caveatee. The case is, therefore, before us as upon a demurrer to the evidence by the caveator, and will be so treated in applying the principles of law relevant to the case.

In the case of *Trotter v. Newton*, 30 Grat. 582, 588, Christian, J., in delivering the opinion of the court, said: "While cases of this kind are now of rare occurrence in this court, the rules which govern them are well defined * * * as follows: First. In every caveat founded on the alleged better right of the caveator to the land in controversy, the first inquiry is as to his title or interest in the subject. He cannot recover upon the mere infirmity of the title of the caveatee; for, however defective that may be, no one has a right to interpose for the purpose of preventing him from carrying his entry into grant, unless he has a better right, legal or equitable, in himself. Second. The caveator must state in his caveat the grounds on which he claims the better right to the land in controversy, and he will not be permitted to abandon in the trial the right which he has set out in his caveat as that under which he claims and prove a different right. See *Walton v. Hale*, 9 Grat. 194; *Carter v. Ramey*, 15 Grat. 846; *Harper v. Baugh et al.*, 9 Grat. 508."

The first ground assigned against issuing the grant is that the caveator has actual possession under color of title of the land in controversy, and was so in possession when the warrant was located thereon, and that the notice required by section 2311 of the Code of the caveatee's intention to locate a warrant on the land was not given.

Section 2312 prescribes the rights and remedy of one in possession under color of title, when the notice provided by the previous section is not given, as follows: "If any person not having such possession and claim shall locate a warrant on such land without having given such notice, then the person having such possession and claim may, at any time before a grant issues to the person thus failing to give notice, locate a warrant on such land and file with the register of the land office a caveat to prevent the issuing of a grant to the person thus failing to give such notice."

To maintain a caveat under section 2312 for failure to give notice under section 2311, the party having such possession and claim must himself locate a land office warrant on the land. There is no pretense that the caveator pursued that course in this instance, and therefore his caveat cannot be maintained for want of notice.

There is no evidence to sustain the second contention, that the land in controversy is included in a grant issued to Samuel Bowman about the year 1853, so that assignment does not demand further notice.

Lastly, it is contended that the grant ought not to be issued, because the caveator

and those under whom he claims have held actual possession of the land under written recorded color of title, and have exercised rights of ownership over the same, and have regularly paid taxes thereon for a sufficient length of time to raise the presumption of a grant.

The caveator does show a paper title to the land in himself and those under whom he claims as far back as the year 1886; but there is a total failure to connect such title with the commonwealth. It also appears that all or most of these claimants paid taxes on the land—chiefly in Carroll county, in connection with a large tract said to include the land in dispute. The evidence likewise shows that at one time a cabin had been erected on the land and occupied by one of the claimants, which was torn down by the caveator about four years prior to the survey and entry by the caveatee; that on several occasions timber and tan bark had been cut and sold from the land. But it clearly appears that the boundary consisted of wild mountain land, principally in original forest, uninclosed, and uncultivated. There is no evidence of actual possession of any part of the land at the date of the survey and entry, and it was regarded by the people in the vicinity as "unpatented land."

Evidence of title and possession of that kind does not show such better right, legal or equitable, in the caveator as would authorize him under the statute and decisions of this court to intervene and prevent the caveatee from carrying his entry into grant.

In his petition, however, the plaintiff in error relies upon section 2339 of the Code to maintain his caveat. There is no specification in the caveat to justify reliance upon that section; but, if there were, the facts in the case do not bear out the contention.

The section reads: "No location of any land office warrant upon any land which shall have been settled five years previously, upon which taxes shall have been paid at any time within said five years by the person having settled the same, or any person claiming under him, shall be valid, and any title which the commonwealth may have to such land shall be hereby relinquished to the person in possession of the said land claiming the same under such settlement or payment to the extent of the boundary line inclosing the same. But said boundary line shall not include more than fifteen hundred acres, and any person who has made such settlement and paid such taxes, or any one claiming under him, may have the land surveyed, and prove the settlement and payment before the court of the county where the land or a greater part thereof lies, whereupon such court shall order the plat and certificate of survey to be recorded. The said record shall be conclusive evidence in any controversy between the claimant thereunder and any person claiming under a location of the said land made after the date of such order. * * *"

The statute now contained in section 2339 was construed by this court in *Slocum v. Compton*, 93 Va. 374, at page 378, 25 S. E. 8, at page 4, and it was there held that, in order to acquire title by "Court Right Proceedings," the party must be in possession of the land at the time such proceeding is instituted. Judge Buchanan observes: "The object of the statute was to protect actual settlers upon the lands of the commonwealth which were subject to entry, and those in possession of such lands claiming under them. It was never intended that persons should, under its provisions, acquire title to her lands without paying anything therefor, except where they had been actually settled as required by the statute, and where the possession of the original settlers, or those claiming under them, where proceedings were had in the county court under the statute for the purpose of obtaining record evidence of their rights in the land, and in order to protect themselves from the subsequent location of land office warrants thereon. The statute only provides for the relinquishment of the commonwealth's title 'to the person in possession of the land claiming the same under such settlement,'" etc.

So in *Hurley v. Charles*, 110 Va. 27, 65 S. E. 468, it is said: "It expressly limits the use of the court order as evidence to those who have become locators since the date of the order."

The caveator in this case was not in possession of the land at the date of the caveatee's location, and has never obtained a court right thereto, or taken any steps to acquire it.

We find no error in the judgment of the circuit court, and it must be affirmed.

Affirmed.

HARRISON, J., absent.

(111 Va. 168)

CITY OF RICHMOND et al. v. SCHONBERGER.

(Supreme Court of Appeals of Virginia. June 9, 1910.)

1. MUNICIPAL CORPORATIONS (§ 757*)—STREETS—DUTY TO KEEP IN SAFE CONDITION.

It is the duty of a city to keep its streets in a reasonably safe condition.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1591-1597; Dec. Dig. § 757.*]

2. MUNICIPAL CORPORATIONS (§ 803*)—STREETS—DEFECTIVE SIDEWALKS—STREET CROSSING—CARE REQUIRED OF PEDESTRIAN—"SIDEWALKS."

While a street crossing may be considered in a sense as a part of the sidewalk, one passing over such crossing may more reasonably expect obstructions, and should exercise a greater degree of care than when on the sidewalk, strictly so called.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1673, 1682; Dec. Dig. § 806.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6505-6507; vol. 8, p. 7800.]

3. MUNICIPAL CORPORATIONS (§ 768*)—DEFECTS AND OBSTRUCTIONS IN STREETS—CROSSINGS—PERSONAL INJURIES.

A city, which built a street crossing, consisting of two parallel paths of flagstones, laid smooth and level, and separated by a small space filled with pieces of stone, was not liable to one for injuries through striking with her foot one of such pieces of stone, which projected about two inches above the level, and being thereby caused to fall.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1622-1625; Dec. Dig. § 768.*]

Error to Circuit Court of City of Richmond.

Action by Mary E. Schonberger, an infant, by next friend, against the City of Richmond and others. From the judgment, defendant city brings error. Reversed, and remanded for new trial.

H. R. Pollard, Bev. T. Crump, and Emmett Seaton, for plaintiff in error. L. O. Wenderburg, for defendant in error.

KEITH, P. Mary E. Schonberger, an infant under 21 years of age, brought suit by her next friend against the city of Richmond, William E. Fletcher, and Charles Gasser, to recover damages for an injury received by her, due, as she claims, to their negligent conduct.

It is the duty of the city of Richmond to keep its streets in a reasonably safe condition, and in the performance of this duty it employed the defendants Fletcher and Gasser to put in proper order the crossing on the south side of Louisiana street at its intersection with Eighth street. The crossing was made of two parallel lines of stone flagging, separated from each other by a short distance, the intervening space to be filled in with stones. The declaration alleges that it is the duty of the city, in paving and filling in this space, to do the work so as not to cause the same to be a defect in and obstruction upon Eighth street, but that the city and its employes, unmindful of their duty in this behalf, filled in the open space between the lines of flagging with stone blocks, and left them projecting above the level of the flagging about 2½ inches, against which the plaintiff, without negligence on her part, struck her foot while crossing Eighth street in the nighttime, and was thrown and greatly injured.

Fletcher and Gasser were made parties defendant by virtue of a provision of the charter of the city (Acts 1899, p. 288) which provides that "in any action against the city to recover damages against it, for any negligence in the construction and maintenance of its streets, alleys or parks, where any person is liable with the city for such negligence, every such person shall be joined as defendant with the city in any action brought to recover damages for such negligence, and where there is a judgment or verdict against the city, as well as the other defendant, it shall be ascertained by either the court or the jury

which of the defendants is primarily liable for the damages assessed."

The case was tried before a jury, which rendered a verdict in favor of the defendant Gasser, and against the city of Richmond and William H. Fletcher for the sum of \$3,000, and further found that Fletcher was primarily liable therefor. During the progress of the trial numerous exceptions were taken, but in the view that we take of the case it will only be necessary to consider one of them, as its decision will be conclusive of the controversy and render unnecessary the consideration of subordinate questions.

Stating the case of the defendant in error as strongly as is warranted by the evidence, it amounts to this: On the evening of May 16, 1908, she with two other female companions were passing along Louisiana street, going in the direction of Williamsburg avenue. When she reached the crossing of Eighth street the light fell so as to throw a shadow over the crossing. She stepped down from the sidewalk on the crossing, struck her foot against an obstacle, and fell, sustaining the injuries for which she sues. The crossing consists of two parallel paths or courses of flagging stones, laid smooth and level, separated by a small space which was filled in with pieces of stone, one of which projected about 2 inches above the level. The proof is that this work was done in the usual way, and that it was left four days before the accident, by the contractor under whose supervision the work was done, in good condition; that, having laid the paving stones, the intervening space was filled in with loose stones and covered with earth, the custom being to leave the crossing in that condition, to be finished with granite blocks by those employed to do that part of the work.

We are of opinion that the obstruction was not such as to render the city liable in damages.

In *City of Richmond v. Courtney*, 32 Grat. 798, it is said by Judge Christian, in whose opinion Judge Moncure concurred, that: "A municipal corporation is not an insurer against accidents upon its streets and sidewalks. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient if the streets are in a reasonably safe condition for travel in the ordinary modes, by night as well as by day. It is not to be expected, and ought not to be required, that a city should keep its streets at perfectly level and even surface. Slight obstructions, produced by loose bricks in the pavement, or by the roots of trees which may displace the pavement, from the very nature of things cannot be prevented. And so there cannot be perfect uniformity of a level surface, where curbstones and culverts are necessary to be constructed on the streets. In a large city, with many miles of paved streets, it must often happen, from the very nature of the material out of which the pavement is constructed, that the bricks from the

very wear and tear of the use to which they are subjected, will become broken and displaced, so as to cause the fall of a person not careful in walking over them. Certainly, if the obstructions are of such a character as those indicated, and which would not cause the fall of a person exercising ordinary care, the city in such case could not be held liable."

The obstruction in that case consisted of a place in the pavement 3x5 feet, or thereabouts, from which bricks had been removed and loose bricks were lying about in the opening—certainly a more serious obstruction than the one under consideration. In that case the obstruction was upon the sidewalk. In this, the obstruction was upon the crossing of a street, which it is true may be considered, in a sense, as a part of the sidewalk. But it is only reasonable to say that one passing over a street crossing may more reasonably expect obstructions, and should, therefore, exercise a greater degree of care than when upon the sidewalk, strictly so called. To hold the city liable for every slight inequality in its streets would, we think, be altogether unreasonable.

In *Bigelow v. City of Kalamazoo*, 97 Mich. 121, 56 N. W. 339, it is said: "Even in our most prominent thoroughfares, paved in the most approved manner, curbs must be carried, and at the crossings they are from 2 to 6 inches higher than the pavement. The curb must be left bare, and inattentive people be liable to stumble, or, as is frequently done, a plank is placed upon an incline, upon which pedestrians carelessly advancing are liable to slip. In either case there is the minimum of danger. The walk is not absolutely safe, but it cannot be said that it is not in a reasonably safe condition. The same is true of nearly all of our alley crossings. Gutters are necessarily left for the passage of water. These crossings are not absolutely safe, but they may be reasonably so. Neither streets, sidewalks, nor crosswalks can be constructed upon a dead level. People are liable to stumble over a Persian rug upon a parlor floor, and streets cannot be made less dangerous than drawing rooms. * * * Cities are not required to keep streets in a condition absolutely safe for travel. A crosswalk must be reasonably safe—reasonably safe in view of the purpose for which it is constructed, the necessary uses of the street, and all the varying conditions."

In *Weisse v. City of Detroit*, 105 Mich. 482, 63 N. W. 423, it appears that there was a rise in a crosswalk, caused by one end of a plank, lying lengthwise in the walk, being raised 2 inches above the adjoining plank. It was held not a defect in the walk, so that it was not reasonably safe for travel. The court said: "If the plaintiff could recover in this case, every municipality would be compelled to exercise the most vigilant care over its streets to see that no rise of 2 inches occurred along the line of travel on side and cross walks."

We are of opinion that neither the city of Richmond nor Fletcher was guilty of actionable negligence. The judgment of the circuit court must therefore be reversed, the verdict set aside, and the cause remanded for a new trial, to be had not inconsistent with the views expressed in this opinion.

Reversed.

HARRISON, J., absent.

(67 W. Va. 553)

STATE v. STEPHENSON.

(Supreme Court of Appeals of West Virginia.
May 17, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1105*)—BILL OF EXCEPTIONS—IDENTIFICATION.

For identification of a bill of exceptions as one made a part of a record by an order, it is not necessary that it bear any number, letter, or peculiar mark, or that the order refer to it as bearing a number, letter, or mark, if the substance of the bill and the descriptive matter found therein are such as leave no room for reasonable doubt that the paper is the one referred to in the order.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1105.*]

2. CRIMINAL LAW (§ 274*)—PLEA OF GUILTY—LEAVE TO WITHDRAW.

In the absence of any controlling fact or circumstance rendering it manifestly unjust to do so, the trial court may refuse leave to withdraw a plea of guilty of murder of the first degree and enter, in lieu thereof, a plea of not guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 633; Dec. Dig. § 274.*]

3. CRIMINAL LAW (§ 274*)—PLEA OF GUILTY—LEAVE TO WITHDRAW—REFUSAL.

To make the action of the court in doing so an abuse of its discretionary power, it must appear that the plea was entered under some mistake, misapprehension, compulsion, or inducement, or circumstance working injustice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 633; Dec. Dig. § 274.*]

4. CRIMINAL LAW (§ 274*)—TRIAL—PLEA OF GUILTY—WITHDRAWAL—REFUSAL.

That the plea was entered under a mere surmise or conjecture of the prisoner or his attorney, or both, that, owing to the known temperament of a special judge, sitting at the time of the entry thereof, the punishment would be lighter than that anticipated from the regular judge, who returned to the bench to render judgment on the plea and fix the penalty, is not sufficient to deprive the court of its discretionary power to refuse such leave.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 633; Dec. Dig. § 274.*]

5. JUDGES (§ 49*)—DISQUALIFICATION—CRIMINAL LAW.

Such regular judge is not disqualified to render judgment on such plea and determine the penalty, by reason of his having derived impressions, unfavorable to the accused, from conversations had with such special judge and the witnesses, and previously pronounced a sentence of death upon him, erroneous and reversed because of his failure to hear the witnesses regularly in the presence of the prisoner,

for the enlightenment of his conscience and judgment in fixing the punishment.

[Ed. Note.—For other cases, see Judges, Dec. Dig. § 49.*]

6. JUDGES (§ 39*)—DISQUALIFICATION TO SENTENCE PRISONER.

In determining whether to sentence a prisoner to life imprisonment or death, upon his plea of guilty of first degree murder, the court is not limited or bound to an exact finding as upon an issue of fact. It exercises a discretionary power, conferred upon it by a statute. Wherefore the judge need not possess the qualifications of jurors trying the issue upon a plea of not guilty.

[Ed. Note.—For other cases, see Judges, Dec. Dig. § 39.*]

Error from Circuit Court, Mercer County.

Frank Stephenson was convicted of murder, and brings error. Affirmed.

Hugh G. Woods, for plaintiff in error.
Wm. G. Conley, Atty. Gen., and D. E. Matthews, for the State.

POFFENBARGER, J. Frank Stephenson, under sentence of death by the criminal court of Mercer county, on his plea of guilty, had his case in this court once before on a writ of error, and procured a reversal of the judgment, as will appear from the report of the decision found in 64 W. Va. 392, 62 S. E. 688, 19 L. R. A. (N. S.) 713. After the case was remanded, he renewed his motion for permission to withdraw his plea of guilty; but the court, after overruling it, again sentenced him to death, and he obtained a second writ of error.

The order in which the motion was overruled shows no exception to the action of the court, but it appears in what is brought up with the record as a bill of exceptions. The order which is said to make it a part of the record is a vacation order, bearing the style of the case and saying: "This day the prisoner presented to the undersigned judge a bill of exceptions, setting out the proceedings in this case, which, being inspected by the court, was signed, sealed, and is made a part of the record herein this 26th day of July, 1909." It does not, by any number or special mark, identify the bill of exceptions. The paper brought up, as having been referred to in this order, bears the style of the case, is signed as and for a bill of exceptions, mentions the name of the defendant and his attorneys, shows the evidence introduced, motions made and overruled, exceptions, and the sentence pronounced upon the prisoner by name. It also embodies the evidence heard by the judge to enable him to determine whether to sentence the prisoner to confinement in the penitentiary for life or to death. Under principles repeatedly declared by this court, the bill of exceptions is sufficiently identified by its subject-matter and designation in the body thereof. *De Board v. Railway Co.*, 62 W. Va. 41, 57 S. E. 279; *Chadister v. Railway Co.*, 62 W. Va.

566, 59 S. E. 523; *Jackson v. Railway Co.*, 65 W. Va. 415, 64 S. E. 450; *McKendree v. Shelton*, 51 W. Va. 516, 41 S. E. 900.

The error for which the former judgment was reversed, namely, failure of the judge to hear the evidence, for the guidance of his discretion in determining the penalty, was avoided on this second trial, and no complaint of his action in that particular is made.

The only inquiry raised is whether the court erred in refusing to permit the prisoner to withdraw his plea of guilty and re-enter his plea of not guilty for the purpose of obtaining a trial by jury. The application for such leave is based upon no special grounds other than (1) that Special Judge McGrath was sitting in the case when the plea of guilty was entered, and the attorney for the prisoner, knowing the sentiment and feeling of said McGrath respecting the death penalty, had advised the prisoner that, in his judgment, said McGrath would not sentence him to death upon a plea of guilty, but would sentence him to confinement in the penitentiary for life, and that, not knowing the sentiment of the regular judge, who afterwards came upon the bench and actually pronounced the sentence, he would not have pleaded guilty, if he had known said McGrath would not pass sentence upon him, or that the regular judge would do so; and (2) that said regular judge, who rendered said first judgment which was reversed, having interviewed the special judge and witnesses, and so become impressed with the certainty of the prisoner's guilt and the heinousness of his crime, had delivered a lengthy sentence in which he vigorously expressed such convictions and impressions. In resistance of the motion, it was shown that certain witnesses for the state had died and others had left the country, by reason by which the state was not in as good condition to prosecute as it would have been had the prisoner allowed his plea of not guilty, entered in the first instance, to stand, and gone to trial on it at the term at which he withdrew it and pleaded guilty.

That the trial court has discretion to refuse leave to withdraw a plea of guilty in a capital case was declared by this court in the decision upon the former writ of error allowed the prisoner. That such discretion is reviewable was also asserted, but the action of the court in such case is reversible only for abuse of its discretionary power. For the same general principle, see *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247, and *State v. Shanley*, 38 W. Va. 516, 18 S. E. 734. From this it follows that the plea cannot be withdrawn merely because the offense confessed is capital, and that some ground for leave to withdraw must appear, making it unjust and wrong to refuse it. There are express decisions to this effect. *Griffith v. State*, 36 Ind. 406; *Commonwealth v. Winston*, 106 Mass. 485. It only remains, there-

fore, to inquire whether the matters set up as special reasons for a desire to withdraw the plea were sufficient to deprive the court of its discretion in the premises. There is nothing in them to indicate misapprehension on the part of the prisoner as to the nature of the crime he was confessing, at the time he pleaded guilty, or the punishment denounced by the law upon persons found guilty thereof. He knew the penalty would be one of two things, death or life imprisonment. His application for leave to withdraw the plea does not deny his guilt. The whole tenor of his application is the right to a chance of a recommendation by the jury, precluding in law a sentence of death. In pleading guilty, he was not misled as to anything respecting the question of his guilt. He had no intimation from the court as to what the punishment would be. His action, according to his own showing, was based upon a mere surmise as to what punishment the court would inflict. He does not know, and cannot assert, even now, that the special judge, sitting at the time of the entry of the plea, would have given him the lighter sentence. It is all a matter of pure speculation and surmise. It is not enough to deprive the court of its discretion to show that the prisoner expected a milder punishment than was inflicted upon him. *Mastronada v. State*, 60 Miss. 86; *Mounts v. Commonwealth*, 89 Ky. 274, 12 S. W. 311.

The other matter relied upon, as constituting sufficient grounds to control the discretion of the court or render his disregard thereof an abuse of discretion, appeared in the record on the former writ of error. All that could be said of it now could have been said of it then. That record discloses that the judge who pronounced the sentence had interviewed the special judge who had heard the evidence and the witnesses, and subjected himself to certain impressions from their statements, heard out of court. If that were sufficient to disqualify him now, it was sufficient then. Regarding it as insufficient, we said the judgment could not be reversed on that ground, and that the court had committed no error in refusing leave to withdraw it. Hence we might now say this is a matter already adjudicated in the case. But, independently of that, we do not think the trial judge is incapacitated by his knowledge of the facts and impressions formed. His function was not to determine the guilt or innocence of the prisoner. It was only to ascertain and determine the penalty. It was competent for the Legislature to say what disposition should be made of a plea of guilty in a murder case, and it has done so by providing that the court may pronounce a sentence of death or confinement in the penitentiary, as may seem right, in the same manner and with like effect as if the prisoner had been found guilty by the verdict of a jury. Code 1906, c. 159, § 19. This gave the court discretion to inflict either

er penalty, according to its judgment as to what is just and right under the circumstances. We do not think the phrase "in the same manner and with like effect as if he had been found guilty by the verdict of a jury" was intended to affect the discretion of the court. If, under this, the court acts in the same manner as a jury, the power is nevertheless discretionary, because the statute says the jury may, in their discretion, recommend confinement in the penitentiary for life in lieu of punishment by death. Its purpose and intent is to confer upon the court, in the event of a plea of guilty of murder of the first degree, that discretionary power, as to the penalty, which the jury has when it has found the accused guilty of such crime on his plea of not guilty. In exercising this power, the judge does not hear and determine an issue of fact, a question of guilt or innocence. He is empowered to do what he deems just and right, and considers the facts only for the enlightenment of his conscience and judgment. He is not bound to make an exact finding on an issue of fact, as a juror is upon an inquiry as to guilt. Hence impressions and opinions do not disqualify. Fixing the punishment is subsequent and sequential in nature. Having determined the guilt of the accused, the jurors themselves necessarily have adverse impressions, when they enter upon an inquiry as to the penalty.

In order to deprive the court of its discretionary power to refuse leave to withdraw a plea of guilty, it seems to be necessary to show that the prisoner was uninformed or misadvised as to the nature of the charge against him and the effect of his plea, or induced by threats or promises to confess the crime. This mistake, misapprehension, promise, or inducement may relate to the manner and extent of punishment; but it must appear that something of this nature induced the plea. *Mounts v. Commonwealth*, 89 Ky. 274, 12 S. W. 311; *Davis v. State*, 20 Ga. 674; *People v. Scott*, 59 Cal. 341; *DeLoach v. State*, 77 Miss. 691, 27 South. 618; 12 Cyc. 351, 352.

For the reasons stated, the judgment complained of must be affirmed.

Affirmed.

(67 W. Va. 467)

NORVELL v. KANAWHA & M. RY. CO.

(Supreme Court of Appeals of West Virginia.
May 3, 1910. Rehearing Denied
June 11, 1910.)

(Syllabus by the Court.)

1. CARRIERS (§ 331*)—INJURY TO PASSENGER ON PLATFORM—NEGLIGENCE.

It is negligence in a passenger, under ordinary circumstances, to stand upon an open platform of a rapidly moving railroad car. If one voluntarily and unnecessarily takes such

position and is injured in it he cannot recover damages.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1371, 1374-1383; Dec. Dig. § 331.*]

2. CARRIERS (§ 331*)—PASSENGER RIDING ON PLATFORM—NEGLIGENCE.

To ride on a car platform is not always a negligent act. If the train is so crowded that one cannot reasonably enter a car, it is not negligent to ride on the platform when the carrier acquiesces in the use of such accommodations by collecting fare for the same or by some other indicative act.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1371, 1374-1383; Dec. Dig. § 331.*]

3. CARRIERS (§ 280*)—CARRIAGE OF PASSENGERS—DUTY TOWARDS PASSENGER RIDING ON PLATFORM.

The carrier owes to a passenger unvoluntarily, necessarily and rightfully riding on the platform the high degree of care commensurate with the circumstances and its act in undertaking to carry him there.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1099-1101; Dec. Dig. § 280.*]

4. CARRIERS (§ 318*)—INJURY TO PASSENGER ON PLATFORM—NEGLIGENCE.

Injury to a passenger while excusably riding on the platform because of the overcrowding of the train usually constitutes a prima facie case of negligence on the part of the carrier.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1307-1314; Dec. Dig. § 318.*]

5. CARRIERS (§ 280*)—CARRIAGE OF PASSENGERS—DUTY TOWARDS PASSENGER RIDING ON PLATFORM.

The liability of the carrier to one excusably riding on the platform is not absolute. If it used reasonable diligence to provide cars for his safe carriage, and, with fair excuse for failing to provide them, exercised the increased care demanded by the passenger's enforced position on the platform, it is not liable for injury to him.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1099-1101; Dec. Dig. § 280.*]

6. CARRIERS (§ 296*)—CARRIAGE OF PASSENGERS—INJURY TO PASSENGER ON PLATFORM—LIABILITY OF CARRIER.

If a railroad company negligently and unreasonably fails to provide sufficient cars so that passengers are compelled to ride on the platforms and then accepts passengers for carriage in such hazardous places, it is liable for damages to one injured therein, unless he has contributed to the injury by negligence on his part.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1200-1203; Dec. Dig. § 296.*]

7. CARRIERS (§ 283*)—LIABILITY OF CARRIER FOR CONDUCTOR'S ACTS.

The conductor of a train represents the railroad company in relation to the transportation of passengers on his train, and his act in receiving and carrying passengers on the platforms when the train is overcrowded binds the company.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1119-1124, 1140, 1141; Dec. Dig. § 283.*]

8. TRIAL (§§ 141, 143*)—DIRECTION OF VERDICT.

The court cannot properly direct a verdict in a case turning on a conflict of evidence which makes the material facts so doubtful that a verdict for either party would be sustained.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 336, 342, 343; Dec. Dig. §§ 141, 143.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

RELEASE (§ 17*) — RELEASE EXECUTED THROUGH FRAUD.

A written release or acquittance of a claim for personal injury will not sustain a plea of accord and satisfaction in the premises if its execution was obtained by deception and fraud.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 32; Dec. Dig. § 17.*]

(Additional Syllabus by Editorial Staff.)

10. RELEASE (§ 58*) — EXECUTION — FRAUD — QUESTION FOR JURY.

Whether a release of liability for injury was obtained by a carrier from a passenger by fraud, *held*, under the evidence, to be for the jury.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 109-114; Dec. Dig. § 58.*]

Error to Circuit Court, Mason County.

Action by J. C. Norvell against the Kanawha & Michigan Railway Company. Judgment for defendant, and plaintiff brings error. Reversed, and new trial granted.

Charles E. Hogg and Somerville & Somerville, for plaintiff in error. Brown, Jackson & Knight, for defendant in error.

ROBINSON, P. Norvell, the plaintiff, riding on a platform of a crowded train, fell therefrom and was injured. He sued the railroad company for damages. The company defended upon the ground that there was no negligence on its part; that plaintiff's injury was caused by his own negligence; and that, at any rate, full accord and satisfaction for the injury had been made. The case came on for trial and all the evidence was adduced before the jury. The defendant moved the court to direct a verdict in its favor. The motion was granted, verdict for the defendant was returned, and judgment upon the same was entered. The plaintiff asks a reversal of that judgment.

Was the case one for jury determination? It is contended that the evidence was conflicting and that therefore the case should have been submitted to the jury. The pleadings made the case to involve two main inquiries—whether negligence on the part of defendant in the overcrowding of its cars caused plaintiff's injury, and, if so, whether accord and satisfaction therefor had been made. A conflict of evidence as to each of these propositions is claimed.

It is negligence in a passenger, under ordinary circumstances, to stand upon an open platform of a rapidly moving railroad car. If one voluntarily and unnecessarily takes such position and is injured while there he cannot recover damages. His contributory negligence bars recovery. But to ride in such place is not always a negligent act. Whether it is negligent to ride on the platform may depend on circumstances. If the train is so crowded that one cannot reasonably enter a car, and no safer place on the train is reasonably obtainable, it is not negligent to ride on the platform when the circumstances thus force the passenger to do so and the carrier

acquiesces in the use of such accommodations by collecting fare for the same or by some other indicative act. What other choice has a passenger but to ride on the platform when the carrier, negligently or unavoidably, fails to provide safer accommodations for him? Must he forego his journey and the engagements dependent upon it, or his return to home at the expected time? It is not reasonable to say that he is obliged to do so. He may accept such accommodations when they are the best offered to him and rely upon the carrier to take the greater care and diligence in transporting him which are commensurate with the increased dangers of the situation in which it has placed him as a passenger. The carrier's duty to him in such situation is to use the high degree of care which its act in undertaking to carry him on the platform demands. If it fulfills that duty, and is free from negligence in other particulars, it may be absolved from damages if he is injured. Its liability for injury to him in the premises is not absolute. But injury to him in such dangerous situation, if he is obliged to take that place of carriage for want of a safer one, may make a *prima facie* case of liability. The liability will not exist, however, when the carrier shows that it exercised reasonable diligence to provide cars for his safe carriage, and, with a fair excuse for failure to provide them, used the increased care demanded by the lack of a safer place for his transportation. Nor will the liability exist when it appears that the passenger, by not conducting himself with the care and prudence which his position on the platform required, did that which was the proximate cause of his injury. Baldwin on American Railroad Law, 309; Moore on Carriers, 856; Hutchinson on Carriers (3d Ed.) §§ 1197, 1198; 6 Cyc. 623, 653.

If a railroad sees fit to earn a revenue by offering to the public hazardous accommodations on the platform, why should it not assume liability for the dangers incident to its own act in so doing? In justice and reason it must do so, unless it shows that it provided the best accommodations that it could under all the circumstances attending the running of its train and then exercised the degree of care that it owed to those it undertook to carry in those accommodations. This is neither a strict nor an unjust rule. If the carrier is taken unawares by unusual and unexpected demand for passage and has not safe accommodations to offer, it may justly and without liability decline to take on board more than the room within its cars will admit. The conductor in charge of the train may refuse to receive passengers that by reason of unavoidable circumstances cannot be given safe places of carriage. To do this is surely within the line of his authority. He is in charge of the train and must necessarily represent the carrier in the transportation of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

passengers thereon. On the other hand, when he permits passengers to ride on the platform because there is no room for them inside, and recognizes them as passengers and not trespassers by accepting fares for such carriage, or by doing some other act indicative of the fact, he also indeed represents the company. It is within the line of his duty and authority, and he binds the company by the act. Baldwin on American Railroad Law, 311. What weight can be given the notice which is usually posted on the cars that "passengers are not allowed to stand on the platform" if in fact passengers are allowed to stand there for the convenience of the company? Surely none. The company waives this notice and the rule which it recites when, for its own convenience and gain, it receives passengers as such on the platform—uses the platform to earn a revenue. It is nonsensical to give force to such rule when the company does not enforce the same, but violates the rule for its own purposes. Of course the question whether in a particular case the rule is violated for the convenience or gain of the carrier is always an important question to be considered and determined.

A railroad company knows the usual amount of travel on any one of its trains. The sale of tickets and the reports by the conductor or train auditor give it accurate basis of information upon which it can furnish cars to meet all usual demands for passage. And when it is advised of an occasion that will make demand upon any of its trains for more than the usual accommodations, it owes a duty to the public to take reasonable precaution to furnish the same. Particularly is this so when excursion occasions are advertised by the railroad company and excursion tickets sold. If it is made to appear that an overcrowding of cars was so great that passengers were compelled to ride on the platforms, that the lack of sufficient room was due to the negligence of the company itself, that the passengers were accepted for carriage on the platforms, and that such conditions and acts caused injury to a passenger, why should not the company be liable in the premises? Railroad companies seek and demand much from the public. They are entitled to the good will and fair consideration which the people through right views and just laws should always give them. They are the great commercial arteries which indeed feed our prosperity and give life and vitality to our riches and comfort. But they owe a reciprocal relation to the public. They are in duty bound to render good and reasonable service and at all times to refrain from neglect, carelessness and imposition in their operations. They peculiarly owe a duty to provide safe and sanitary accommodations for passengers—to refrain from imposing conditions that cause the inconvenient and dangerous overcrowding of trains and the unhealthy and barbarous use of filthy stations.

Since it depends upon the circumstances

of each particular case whether the act of a passenger in using the platform as a place of carriage is negligence on his part, the question is usually one for jury determination. 6 Cyc. 654. It is always a question for the jury, and is not determinable by the court as a matter of law, when circumstances reasonably excusing the passenger for riding there are not admittedly shown. If the alleged necessity for riding on the platform is based on an overcrowding of the train and evidence supporting the fact of overcrowding is introduced which is met with other evidence tending to disprove the fact, a conflict is presented which it is the province of the jury to settle. Again, if there are conflicting facts and circumstances in relation to the excuse of the carrier for its alleged failure to provide ample places of safe carriage, or in relation to the degree of care which it used for the transportation of one necessarily on the platform, the jury should pass upon them. It is the province of the jury to pass upon conflicting oral testimony of witnesses which is given in their presence, and that province should not be invaded. But when the evidence, though orally given in the presence of the jury, and though conflicting as a whole, embraces uncontradicted facts or circumstances which cause the case admittedly to turn in favor of one of the parties so that a verdict against him would be set aside, the court may properly direct a verdict in his favor. The court cannot properly direct a verdict, however, in a case turning on a conflict of evidence which makes the material facts so doubtful that a verdict in favor of either party would be sustained. *Ketterman v. Railroad Co.*, 48 W. Va. 606, 37 S. E. 683; *White v. Brewing Co.*, 51 W. Va. 259, 41 S. E. 180; *Coalmere v. Barrett*, 61 W. Va. 237, 56 S. E. 385, and other cases.

Now, in the case before us, the first pertinent inquiry in relation to the alleged negligence of the railroad company is whether a safe place of carriage was provided for plaintiff. Was plaintiff, as he claims, compelled by insufficient passenger accommodations to ride on the platform? Or, did he voluntarily and unnecessarily ride there so that his own act in thus doing was the proximate cause of his injury? Then, if the overcrowding was so great that plaintiff was excusable for taking passage on the platform, was that overcrowding the fault of the railroad company in failing to provide ample accommodations? Or, was the overcrowding so unexpected and unusual that provision reasonably could not be made to prevent it? Did the company accept and receive plaintiff as a passenger on the platform of its train for lack of space in the cars? If so, and if it was excusable therein, did it then exercise the degree of care that was due to plaintiff in the hazardous position in which he was permitted to ride? Readily is it to be seen that a charge of

negligence involving so many questions of fact must make, in practically every instance, a case for the jury. The determination of any of these questions would usually and naturally turn upon a mass of conflicting facts and circumstances. So it is in this case. A substantial conflict of testimony is involved. No decisive facts are so admittedly shown as to make the general issue determinable as one of law. Many facts and circumstances tend to prove that plaintiff made a reasonable effort to enter the cars, that he was prevented by the overcrowding from doing so, and that he was thus compelled to ride on the platform. Other facts and circumstances tend to prove that there was ample room in the cars and that he took passage on the platform from choice. If this primary issue should be determined in favor of plaintiff, then conflicting facts and circumstances appear which must be settled in order to determine whether the company was negligent by an inexcusable failure to provide ample cars; and, if not so negligent, whether it then failed to take the degree of care that it owed plaintiff because of the unsafe position in which he was obliged, through unforeseen and unavoidable circumstances, to ride. It is not our purpose to multiply words by a recital of the particular facts pertaining to this case. It suffices to say that witnesses as to controlling facts and circumstances on the proposition of negligence are in direct contradiction.

To support its plea of accord and satisfaction the defendant railroad company introduced a receipt for seventy-five dollars, signed by the plaintiff, which recites in substance that the sum is paid by the company and accepted by plaintiff in full payment of any liability for his injury. Plaintiff admitted that the signature thereto is his own. He, however, introduced evidence tending to prove that he was deceptively induced to sign the receipt by representatives of the company at a time when he was in the hospital suffering from the injury, lying on his back, with his senses deadened by pain and narcotic medicines; that he was made to understand and believe that the company was gratuitously giving him the amount for the purpose of paying the hospital charges and for none other; that the paper which he was asked to sign was falsely represented to him as a check for that purpose; and that the paper was so folded when presented to his reclining position for signature that he was deceived, excusably on his part, as to its real character and purport. The evidence of his witnesses in this behalf is flatly contradicted by the company's physician, in whose hospital he was, and who was present at the time the receipt was obtained. Thus we have a conflict of testimony in this branch

of the case also. If the paper was obtained by deception and fraud it cannot sustain the plea of accord and satisfaction. If the receipt was fraudulently obtained it is no bar to this action. 24 Am. & Eng. Enc. of Law, 308, 309. While it is admitted that plaintiff did not read the paper before signing it, yet there is evidence tending to prove that he used as much prudence and circumspection as a man ordinarily would under the circumstances stated as existing at the time. Whether he did exercise such prudence and circumspection, whether he was incapacitated so that he was thrown off his guard, were questions to be determined by the jury. The disputed questions of fact relating to the validity and binding force of the terms of the paper claimed to be a release should have been submitted to the jury under proper instructions by the court as to the law in the premises.

The case was improperly taken from the consideration of the jury. It involved in its material points such disputed questions of fact that a case was not presented for the court's action in directing a verdict. Jury trial in cases to which it rightly belongs is sacredly guaranteed to all. This fundamental right must not be curtailed. The judgment will be reversed, the verdict set aside, and a new trial granted.

(97 W. Va. 537)

STATE v. ATKINSON.

(Supreme Court of Appeals of West Virginia.
May 17, 1910.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 172*)—ILLEGAL SALES—MANAGER OF SOCIAL CLUB.

The manager of a social club chartered and organized under and pursuant to section 120a, chapter 32, Code Supplement, 1907, with license regularly obtained from the county clerk, and payment of taxes thereon as assessed by such clerk, as provided by said section, is not liable to indictment for selling intoxicating liquors to a member of such club.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 186; Dec. Dig. § 172.*]

2. INTOXICATING LIQUORS (§ 50*)—LICENSE—SOCIAL CLUBS.

Such social club, having obtained such license and paid the taxes assessed thereon, is not required by section 1, chapter 32, Code Supplement, 1907, as a condition precedent to selling or dispensing intoxicating liquors to its members, to also obtain a state license from the county court, or from the council of a municipality, where such club is located.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 51; Dec. Dig. § 50.*]

3. INTOXICATING LIQUORS (§ 80*)—LICENSE—"TO KEEP SAID CLUB."

A certificate of license "to keep said club," regularly issued by a clerk of the county court to such social club, as provided by said section 120a, with assessment and payment of taxes thereon as provided thereby, constitutes a valid license to sell and dispense intoxicating liquors to members of such club, though such certi-

cate does not on its face specifically give right to sell.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 80.*]

4. INTOXICATING LIQUORS (§ 234*)—SOCIAL CLUBS—ILLEGAL SALES—EVIDENCE.

It is error for the court on the trial of an indictment, charging the manager of such a social club, with selling intoxicating liquors without a state license therefor, to exclude from the jury its charter, license, minutes of stockholders and board of directors, and other documents relating to the organization and management of such club, and the application for and membership therein of the person to whom it is alleged illegal sales were made.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 234.*]

5. INTOXICATING LIQUORS (§ 198*)—ILLEGAL SALES—SOCIAL CLUBS—ADJUDICATION OF BONA FIDES OF ORGANIZATION.

The remedy by complaint to the circuit court, or a judge thereof in vacation, and notice thereof to such club, as provided by said section 120a, for obtaining an adjudication that such club is being or has been conducted for the purpose of violating or evading the laws of the state regulating the licensing and sale of intoxicating liquors is exclusive, and the question of the bona fides of such organization can not prior to such adjudication, and on the trial of an indictment of the manager of such club for alleged illegal sales to members thereof without a state license therefor, be determined by the court or submitted to the jury.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 198.*]

Robinson, P., dissenting.

Error to Circuit Court, Logan County.

Everett Atkinson was convicted of an illegal sale of liquor, and brings error. Reversed and remanded.

J. S. Miller and Marcum & Marcum, for plaintiff in error. Wm. G. Conley, Atty. Gen., for the State.

MILLER, J. The defendant was indicted at the October term, 1908, of the circuit court for selling, offering and exposing for sale spirituous, vinous and malt liquors, without having obtained a state license therefor. On the trial the State proved by Simpson Thompson sales to him by defendant of whisky and beer within the county, and within one year next before the finding of the indictment, but that he had at that time joined the Guyan Valley Social Club, had "signed something" to become a member, and had agreed to pay \$2.50 for his membership, and the State then rested.

The defendant, without objection by the State, thereupon introduced the charter of incorporation of the Guyan Valley Social Club, issued by the Secretary of State, July 18, 1908, to Spencer Ison, U. C. Hager, E. H. Atkinson, E. E. Epling and L. C. White, with the certificate of recordation thereof endorsed thereon, it being agreed by counsel that defendant is the E. H. Atkinson mentioned in said charter; also the affidavit of said Atkinson, made August 1, 1908, filed with the clerk of the county court, as pro-

vided by section 1044a, Code Supplement, 1907, at the time he applied for license for said club to sell and distribute to its members spirituous, vinous and malt liquors, "that the number of members of said club for the fraction of the preceding year for which said club was organized was thirty," together with the subscription of membership referred to therein and accompanying said affidavit; also the certificate of license issued by J. R. Henderson, clerk of the county court of said Logan county, August 1, 1908, together with the receipt of the clerk for \$60.00, license tax assessed by him thereon, objection to which by the State was overruled, and whereby said clerk certified, "that the undersigned, in pursuance of the authority vested in him by law, has this day granted to the Guyan Valley Social Club, of City of Logan, Logan County, West Virginia, a license to keep said club at the place known as the G. W. and E. H. Atkinson property in said city, beginning 1st day of August, 1908, and ending June 30, 1909, and has assessed the tax at Sixty dollars;" also the application in writing of said Thompson for membership in said club, objection to which by the State was also overruled, whereby said applicant represents himself as over twenty-one years of age, not of intemperate habits, agrees to conform to the by-laws and regulations of said organization, if permitted to become a member thereof, and to pay an admission fee of \$5.00, also agreeing to introduce no one into the club who is not a member thereof, or until he has filled and signed an application to become a member, and that he would not recommend for membership anyone of intemperate habits. A copy of the rules and regulations was also offered in evidence, and a copy of the by-laws, adopted by the stockholders on the organization of said club; also the minutes of subsequent meetings of the board of directors, which were attended by said Atkinson, a member thereof. The minutes of the board of directors show authority to the manager to hold social sessions of the club. He also offered in evidence the petition of the Guyan Valley Social Club, dated October 13, 1908, verified by L. C. White, president, addressed to the clerk of the county court of Logan County, West Virginia, setting forth at length the organization of said club, the location of its club house, its desire to keep on hand at its club house spirituous liquors to be sold directly or indirectly to its members, and its desire for a license to do so and for no other purpose than that contemplated by law, tendering the amount of the taxes and praying for such license. Said petition endorsed by said clerk was received and filed for record October 13, 1908. Counsel say they do not know why this petition was filed. And we see no reason therefor. The defendant also proved by himself that he was at

the time of the sale in question secretary and general manager of the club, that he had sold no liquor to Thompson until he had become a member of the club, and had made no sales to others than members; that the money derived from all sales was deposited by him in bank to the credit of the club. He also testified to other facts not important in the disposition of the case.

After the defendant had rested, the State called G. R. Armstrong, and proved by him that he was the agent of the C. & O. Railroad at Logan, and the quantity of different kinds of intoxicating liquors received upon consignment to it at Logan, from the time of its organization up to October 26, 1908; and by Atkinson, defendant, recalled by the State, the State proved that on the 26th day of October, 1908, the club had a membership of one hundred and twenty-six. And the State again rested.

Thereupon the court on motion of the prosecuting attorney, over the objection of the defendant, struck out all the defendant's documentary evidence relating to the organization of said club, including the charter, the agreement of membership, the affidavit of Atkinson, the license issued to said club by the clerk, the application for membership by said Thompson, and the minutes and proceedings aforesaid; and upon its own motion also struck out the evidence of the witness G. R. Armstrong, and directed the jury not to consider any of the evidence so excluded.

Upon the evidence admitted the jury returned a verdict of guilty, which verdict the court, upon motion of the defendant, refused to set aside, or to grant him a new trial, and adjudged that he pay a fine of twenty-five dollars and be imprisoned in the county jail for a period of two months. To this judgment a writ of error was obtained from this court.

The errors assigned here are: First, the exclusion from the consideration of the jury of the charter of the club, the license issued by the clerk, and the other documentary evidence offered in defense; second, the refusal of the court to set aside the verdict and grant defendant a new trial.

On the trial below the fact of the sale or sales to Thompson was not controverted, and is not controverted here, but admitted. The sole question presented for our decision, therefore, is, did the court below err in excluding defendant's documentary evidence?

The attorney general justifies the action of the court below upon several grounds. The first is that the license issued by the clerk, without a regular license to vend intoxicating liquors, required by section 1, chapter 32, Code Supplement, 1907, furnished no justification for the sale to Thompson. Prior to the amendment of that chapter, section 120a, serial section 1042a, Code Supplement, 1907, as held in *State v. Shumate*, 44 W. Va. 490, 29 S. E. 1001, such was un-

doubtedly the law. But said section 120a, in force at the time of the offense charged in the indictment, is too plain to call for interpretation. It provides: "Any corporation or association chartered and organized as a social club and paying the tax above prescribed shall be entitled to distribute and dispense wines, ardent spirits, malt liquors or any mixture thereof, alcoholic bitters or bitters containing alcohol, or fruit preserved in ardent spirits, to and among its members, without obtaining any license or paying any further tax, either state, municipal or county, for the said privilege, than is above prescribed; provided, that the said corporation is organized and conducted as a bona fide social club; and provided, further, that no person or corporation shall be entitled by the payment of the tax above prescribed to conduct the business of a wholesale or retail liquor dealer for which a license is required under the existing laws of the state." The second ground is that without authority of the county court, as required by section 10, chapter 32, Code Supplement, 1907, and by virtue of section 22, chapter 3, Acts of Special Session 1907, incorporating the City of Logan, empowering the council of said city to make and enforce ordinances for the regulation and control of the sale of all intoxicating liquors, and providing for the forfeiture, cancellation and annulment of any license for the violation of any condition of the bond given, etc., and providing also "that in no event shall such license be granted to any person without the consent of a majority of the board of control," the license issued to said club by the clerk of said court without authority of said city was invalid, and constituted no defense for the sales made to Thompson. We think this ground also without any merit. Said section 10, by its very terms, has application alone to state licenses issued pursuant to section one of said chapter; and certainly the section of the charter of the City of Logan referred to, neither by its terms, or by implication, repeals the social club law. That provision of the charter relates, and was intended to relate to licenses required by the first section of said chapter 32 of Code. Said section 120a specifically provides that a social club chartered and organized pursuant thereto, upon paying the tax prescribed thereby, shall be entitled to distribute and dispense spirituous liquors to and among its members, without obtaining any license or paying any further tax either state, municipal or county for said privilege. How could language be made plainer? Repeal by implication is never favored; and the repeal of a general law by a special statute must be either express, or the language be so clear as to amount to an express direction. The same answer may be made to the argument based on section 10, chapter 36, Acts of 1905 [Code 1906, § 922], which prohibits a county court from

granting a license to sell intoxicating drinks within two miles of an incorporated town, city or village, without the consent of its council, and that a license granted without such consent is void, and sales made under it violate the law. This provision clearly relates to licenses issued under the provisions of said section 1, chapter 32, and not to a social club license. The Supreme Court of Virginia in *Norfolk v. Board of Trade and Business Men's Association*, 109 Va. 853, 63 S. E. 987, gave similar construction to the social club law of that state. A third ground is that the license issued by said clerk is not in terms a license to sell intoxicating liquors, but "a license to keep said club" at the place designated. We see no force in this contention. No form of license is prescribed. The statute says that any such corporation or association desiring to keep on hand at its club house or other place of meeting, spirituous liquors for sale to its members, shall "make application to the county clerk wherein the club house or other place of meeting of such corporation is located, for a *certificate of license*." The statute does not say the application shall be by petition. It simply says that "the person making application for such license shall file with the clerk of the county court an affidavit showing the number of persons who have been members of such corporation during the preceding year, and the clerk of the county court shall file such affidavit in his office which shall be open to the examination and inspection of the prosecuting attorney or the state tax commissioner, and assess the taxes against such corporation or association at two dollars for every person who has been a member thereof during the preceding year, and the applicant shall pay the license tax as other license taxes are paid." So far as the record shows the applicant did everything required of it. The clerk issued his certificate of license, assessed the taxes thereon, and the taxes were paid. We think that this was substantial compliance with the law, both by the applicant and by the clerk. The certificate of license, with the assessment of taxes thereon, and the payment of the taxes by the applicant together constituted a good license under the statute. True the certificate might have specifically recited authority to sell spirituous liquors, but without that the certificate, as issued, with the assessment and collection of the license tax, in legal effect authorized the licensee to do the business which the statute authorized. The fourth and last ground relied on is that the evidence shows that the said club was not a bona fide organization, and that this must have been clearly apparent to the trial court, from the amount of liquor shown to have been bought and sold, the size of the membership never having exceeded one hundred and fifty-four, and that the court was justified on this ground in excluding

the documentary evidence. Conceding the court may have inferred from this evidence that this club was not a bona fide social organization, was it justified on the trial of this indictment, on that ground, in excluding the defendant's documentary evidence? or could the court have lawfully submitted that question of fact to the jury? We think not. The law may have been a bad one. The legislature in 1909, in amending it, evidently thought so; but the issue of the charter to defendant's club, the organization thereunder, and the obtaining of license from the clerk, seem to have been regular, and the statute in every way complied with. Therefore, until it had been judicially determined, as provided, that said corporation was being conducted, or had been conducted for the purpose of violating or evading the laws of the state, regulating the sale of liquors, the rights and franchises of the corporation did not cease. The same statute provides that upon complaint of any person that such corporation so chartered as a social club is being conducted for the purposes of violating or evading the laws in the way indicated, and the service of such complaint on such corporation at least ten days before the hearing of such complaint, the circuit court of the county wherein is located the place of business or meeting, or the judge thereof in vacation, shall inquire into the truth of said complaint, and if such court or judge in vacation shall adjudge that said corporation is being or has been conducted for such illegal purposes "the chartered rights and franchises of said corporation shall cease and be void without any further proceedings, and the said corporation and all persons concerned in the violation or evasion of said law shall be subject to the penalties prescribed by section 3 of this chapter for the sale of intoxicating liquors without a state license therefor." Was it competent, therefore, in the face of this statute for the circuit court on the trial of an indictment to prejudice this question of bona fides without notice to the corporation and an opportunity for a hearing? We think not. We think the remedy prescribed by law exclusive, and until the question was thus judicially determined no prosecutions for violations of the law against illicit sales of spirituous liquors by such club or any one acting for it were justified.

We are therefore of opinion that the court erred in excluding defendant's evidence and directing the jury not to consider the same, and that it also erred in overruling defendant's motion for a new trial, and entering judgment against him of fine and imprisonment. The judgment below will therefore be reversed, the verdict set aside, and a new trial awarded.

ROBINSON, P., dissents.

(67 W. Va. 548)

STATE v. GIBSON.(Supreme Court of Appeals of West Virginia.
May 17, 1910.)*(Syllabus by the Court.)***1. HOMICIDE (§ 141*)—ASSAULT WITH INTENT TO KILL—INDICTMENT.**

An indictment for malicious cutting and wounding, with intent to maim, disfigure, and kill, need not specify the instrument with which the injury was inflicted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 247; Dec. Dig. § 141.*]

2. HOMICIDE (§ 90*)—ASSAULT WITH INTENT TO KILL—"WOUND."

To constitute a "wound," within the meaning of section 9, c. 144, Code 1906, an injury must have been inflicted with a weapon other than any of those with which the human body is provided by nature, and must include a complete parting or solution of the external or internal skin.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 119; Dec. Dig. § 90.*]

For other definitions, see Words and Phrases, vol. 8, p. 7528.]

3. HOMICIDE (§ 142*)—ASSAULT WITH INTENT TO KILL—INDICTMENT.

Though said statute makes it a felony for a person maliciously to cause another bodily injury by any means, with intent to maim, disfigure, or kill him, an indictment, charging only malicious cutting and wounding with such intent, is not broad enough to let in proof of such injury, inflicted otherwise than by cutting or wounding.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 256; Dec. Dig. § 142.*]

4. HOMICIDE (§ 135*)—ASSAULT WITH INTENT TO KILL—INDICTMENT.

An indictment for maliciously or unlawfully causing bodily injury otherwise than by shooting, stabbing, cutting, or wounding should specify the means by which the injury was caused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 215; Dec. Dig. § 135.*]

5. CRIMINAL LAW (§ 315*)—TRIAL—PRESENCE OF ACCUSED—PRESUMPTIONS.

The presumption of the continuance of a fact or state of things, shown to exist, applies to a record, showing the presence of a prisoner in court at the commencement of each day's proceedings in the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 748; Dec. Dig. § 315.*]

6. CRIMINAL LAW (§§ 1036, 1054*)—APPEAL—OBJECTIONS TO EVIDENCE.

Admission of hearsay evidence, without objection and exception, affords no ground for complaint in the appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2639, 2662; Dec. Dig. §§ 1036, 1054.*]

7. CRIMINAL LAW (§ 1170*)—APPEAL AND ERROR—HARMLESS ERROR.

Error in sustaining an objection to a proper question is cured by admitting an answer to another question covering the same subject-matter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3148; Dec. Dig. § 1170.*]

Error to Circuit Court, Pocahontas County.

William Gibson was convicted of unlawful wounding, and brings error. Reversed and remanded.

N. C. McNeill and Price, Osenton & McPeak, for plaintiff in error. Wm. G. Conley, Atty. Gen., and D. E. Matthews, for the State.

POFFENBARGER, J. Upon an indictment for feloniously and maliciously wounding one Cleveland Slavin, the plaintiff in error, William Gibson, was convicted of the milder offense of unlawful wounding, and sentenced to confinement in the penitentiary for a period of five years. On the writ of error allowed him, he makes a number of assignments of error.

Gibson and several others were employed in a mill at Dunlevie, W. Va. Practical joking was a custom among these men. Slavin, without the knowledge of Gibson, put oil on the handle of the latter's oil can, so that, in picking it up, his hand became greasy. He also oiled an iron bar used by Gibson. Having ascertained from the other men who had played the prank on him, Gibson began to throw oil on Slavin's back, and, when he turned around, threw it in his face. Thereupon Slavin threw a stick at Gibson, who responded with another, which broke in two. Slavin returned a piece of this stick. Then Gibson threw an iron bar at him, which struck him on the right side of the back over the kidney, injuring him to such an extent that he was confined to his bed for two weeks or more, and his bladder had to be relieved, by artificial means, of the urine, which, when extracted, was found to be bloody.

The sufficiency of the indictment is challenged because it omits designation of the instrument with which the wound was inflicted. This assignment of error is not well taken. The indictment need not set forth or describe the instrument. Crookham v. State, 5 W. Va. 510; Canada's Case, 22 Gratt. (Va.) 899; Jackson's Case, 96 Va. 107, 30 S. E. 452; Erle's Case, 2 Lew. 133; State v. Ladd, 2 Swan (Tenn.) 226.

As the evidence fails to show any solution or breaking of the skin of the prosecuting witness, lack of an essential element of the offense charged in the indictment is asserted, under the technical rule that there can be no wound, within the meaning of the maiming statute, without a solution or fracture of the skin. This position seems to be well sustained by authority. There must be a complete breaking of the skin, external or internal. Our statute (section 9, c. 144, Code 1906), in so far as it uses the terms "stab, cut or wound," is the same as the English statute of 9 Geo. IV, and the term "wound," in that connection, has been limited in its meaning to the extent above stated. Rex v. Wood, 4 O. & P. 381. In order to inflict a wound, within the meaning of that statute, it was necessary to use an instrument of some sort, wherefore it was not effected by biting

off a finger, nose or ear or causing any other injury with the teeth or hands. *Jenning's Case*, 2 Lew. 130; *Elmsly's Case*, 2 Lew. 128; *Rex v. Stevens*, 1 Moody, 409; *Rex v. Harris*, 7 C. & P. 446. But the instrument need not be a sharp or pointed one. Anything with which the skin is broken is sufficient, though blunt, provided it is a weapon other than those with which the human body is naturally provided. *Reg. v. Smith*, 8 C. & P. 173; *Rex v. Withers*, 1 Moody, 294; *Rex v. Hughes*, 2 C. & P. 420; *Rex v. Sheard*, 2 Moody, 13, 7 C. & P. 846; *Rex v. Payne*, 4 C. & P. 558; *Rex v. Griggs*, 1 Moody, 318. But a fluid, working injury, not by the force of its contact but only by its effect, when applied to the body, was not regarded as a weapon, wherefore a wound inflicted by throwing oil of vitriol in the face was not within the statute. *Rex v. Morrow*, 1 Moody, 456; *Henshall's Case*, 2 Lew. 135. For these principles, see the following additional authority; 1 *Russell, Crimes* (3d Eng. Ed.) 731; *Bish. Stat. Crimes*, 314; *State v. Leonard*, 22 Mo. 449, 450; *Commonwealth v. Gallagher*, 6 Metc. (Mass.) 563, 568.

Our statute has been broadened somewhat by the use of the term "or by any means cause him bodily injury with intent," etc. Under a proper indictment, any sort of bodily injury, inflicted by any means, with intent to maim, disfigure, or kill, is an offense under this statute, punishable as a malicious or unlawful wounding; but it is not a technical wounding, and an indictment merely for cutting and wounding does not cover it. This addition to the statute does not alter the meaning of its original terms. It simply introduces a new offense, made up of new elements. The indictment in this case charges that the prisoner cut and wounded the prosecuting witness, with the intent to maim, disfigure, and kill, thereby causing him great bodily injury. There is no averment of any bodily injury caused otherwise than by cutting and wounding. Under it, therefore, no other sort of injury can be proved. The indictment gives no notice of intent to charge any other malicious or unlawful act.

Admitting lack of proof of any fracture of the external skin, the Attorney General is forced to the contention that the presence of blood in the urine justifies an inference of fracture of the covering or skin of the kidney; there being some authority for the position that the solution of an inner lining of any portion of the body constitutes a wound. In *Reg. v. Smith*, 8 C. & P. 173, it was held that a blow on the face with a hammer, breaking the lower jaw and parting the internal skin, was sufficient. Two cases, *Reg. v. Waltham*, 3 Cox, C. C. 442, and *Reg. v. Jones*, 3 Cox, C. C. 441, are cited, in *Bishop on Stat. Crimes*, § 314, as holding that the parting of the membrane lining of the urethra constitutes an offense; but these two reports are not in our library, for which reason we are unable to see what the evidence was. The fracture may have been shown by posi-

tive and direct evidence. It was susceptible of proof in that way in the case of the broken jaw, and may have been in the other two cases. Here we have nothing but a mere uncertain inference, arising from the presence of blood in the urine. We think this is too remote and uncertain to sustain a verdict.

The next important assignment of error is the omission from the record of any plea and joinder of issue. After the writ of error was allowed by this court an attempt was made to cure this by the entry of a nunc pro tunc order, showing that, before the jury was impaneled and sworn, the defendant had entered his plea of not guilty, and placing the same upon the record as of the 7th day of October, 1909, the date of the trial. Upon what evidence the entry of such plea before the trial was ascertained, the record does not show. The defendant objected to the entry of the order, but did not take any bill of exceptions, showing the character of evidence upon which it was made, nor in any way place such evidence upon the record. Hence the action of the court, in entering the order, does not seem to have been objected to on account of the insufficiency of the evidence. The court having had jurisdiction of the parties and the subject-matter, there is a presumption in favor of the correctness of the judgment. *McClure-Mable, etc., Co. v. Brooks*, 46 W. Va. 732, 34 S. E. 921; *Griffith v. Corrothers*, 42 W. Va. 59, 24 S. E. 569; *Reed v. Nixon*, 36 W. Va. 681, 15 S. E. 416; *Ramsburg v. Erb*, 16 W. Va. 787; *Harris v. Lewis*, 5 W. Va. 575. For aught that appears in the record here, there may have been a formal plea of not guilty in the file of papers or a minute of its entry upon the clerk's docket. The only inquiry, therefore, is whether the court had power, after the end of the term at which the judgment was rendered and after the allowance of a writ of error by this court, to enter such an order. It was a mere interlocutory order, placing upon the record what had actually transpired, by way of amendment, to sustain the judgment. Both reason and authority sustain the action of the court in making such amendment at a subsequent term. In *re Wight*, 134 U. S. 136, 10 Sup. Ct. 487, 33 L. Ed. 865; *Galloway v. McKelthen*, 27 N. C. 12, 42 Am. Dec. 153; *Hyde v. Curling*, 10 Mo. 374; *State v. Clark*, 18 Mo. 432; *Nelson v. Barker*, 3 McLean, 379, Fed. Cas. No. 10,101; *Bilansky v. State*, 3 Minn. 427 (Gil. 313); *Weatherman v. Commonwealth*, 91 Va. 793, 22 S. E. 349; 10 Am. Cr. Rep. 93; *Black on Judg.* § 128; *Freem. on Judg.* § 156; 18 A. & E. Enc. Law, 1005; 1 *Bish. Cr. Proced.* § 1343. That it was done after the allowance of a writ of error is also immaterial. It is an amendment, made by the trial court and certified here, to sustain its judgment, and comes fully within the reasoning of our decisions. *Gauley Coal Land Ass'n v. Spies*, 61 W. Va. 19, 55 S. E. 903; *McClure-Mable, etc., Co. v. Brooks*, 46 W. Va. 732, 34 S. E. 921; *Hopkins*

v. Railroad Co., 42 W. Va. 535, 26 S. E. 187; Capehart v. Cunningham, 12 W. Va. 750.

In response to the complaint that the record does not show the prisoner was in court when the verdict was rendered, it suffices to say the order shows he was there when the jury was impaneled and after the verdict was rendered, from which the presumption of his presence during the intervening period arises. The continuance of a fact or state of things once shown to exist is presumed, in the absence of evidence to the contrary. *State v. Nethken*, 60 W. Va. 673, 55 S. E. 742; *State v. Goodrich*, 14 W. Va. 834, 846; *Moore v. Gilliam*, 5 Munt. 346.

The hearsay evidence of the witness Slavín was not excepted to. Hence the court did not err in admitting it.

While the court sustained an objection to a question, propounded to the witness Copeland, concerning the attitude of Arbrogast and Jennings, and the prisoner excepted, the evidence, desired and sought by the question, was admitted in response to another question. Hence the error, if any, was cured.

As it does not appear what it was expected the witness Bodin would say, in response to the question propounded to him, concerning a weapon in the hands of Arbrogast, the action of the court in sustaining the objection to the question is not shown to have been prejudicial, even if erroneous.

It is said the court abused its discretion in sentencing the prisoner to five years' imprisonment; but, as the judgment will have to be reversed for insufficiency of the evidence, we do not deem it necessary to pass upon this question.

For the reasons stated, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(124 Ga. 577)

HEATON v. HOOPER, Justice of the Peace. (Supreme Court of Georgia. June 15, 1910.)

(Syllabus by the Court.)

PROHIBITION (§ 3*)—RIGHT TO REMEDY.

The writ of prohibition will not be granted in a case where the applicant is afforded any other legal remedy.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.*]

Error from Superior Court, Stephens County; J. J. Kimsly, Judge.

Prohibition by C. F. Heaton against J. W. Hooper, as Justice of the Peace. From a judgment denying the writ, applicant brings error. Affirmed.

A case pending in a justice's court was dismissed for want of prosecution. An appeal was entered to a jury in the same court. At a subsequent term, before a jury was impaneled, the justice of the peace, on motion of defendant's counsel, again dismissed the case for want of prosecution. At a later term, af-

ter notice to the defendant, a motion to reinstate was granted over defendant's objection, and the case ordered to stand for trial at the ensuing term. After the order reinstating the case, the justice of the peace passed another order transferring the case for trial to the justice's court of another district, reciting in the order that it would be more convenient to all the parties interested to try the case in the other district, and that all the parties were consenting to the transfer. After the order last mentioned, counsel agreed, in writing, that the case be tried at a subsequent term of the court to which the case had been transferred, without further notice or service. Upon the call for trial in the court to which the case had been transferred, it was again dismissed, upon motion of defendant's counsel, for want of jurisdiction. Subsequently the justice of the peace of the district from which the case had been transferred issued an order, upon motion of plaintiff's counsel, calling upon the defendant to show cause "why said case should not be tried, for the reasons, as claimed by movant's counsel, that said case was never legally dismissed or legally transferred from this court." After service of the order on the defendant, he applied to the superior court for a writ of prohibition to prevent the justice of the peace who issued the order from further interfering with the case. The grounds relied upon for obtaining the writ of prohibition were: (a) That the justice of the peace had no right to set aside his own judgment or to reinstate a case which had been dismissed; (b) that the case had been transferred to another court by consent of all the parties, and the justice of the peace had lost jurisdiction, and the case had already been adjudicated, and the plaintiff had lost his right of certiorari and "of resuing" the case. A rule nisi was granted on the writ of prohibition, but on the hearing the writ was denied, and the applicant excepted, on the ground that the judgment was contrary to law.

N. R. C. Ramey, for plaintiff in error. J. B. Jones and Claude Bored, for defendant in error.

ATKINSON, J. The notice issued by the justice of the peace required that the defendant show cause why the trial of the case should not proceed in the court where it was originally instituted. In response to that notice the defendant, who was subsequently the plaintiff in the application for writ of prohibition, could have set up any matter which he regarded as sufficient to prevent the further trial of the case, and the writ of certiorari would have been available to correct any error in the judgment rendered by the justice of the peace. The writ of prohibition will not lie where the applicant

is afforded any other legal remedy. *Hudson v. Preston*, 134 Ga. —, 87 S. E. 800; Civ. Code, § 4885.

Judgment affirmed. All the Justices concur.

(134 Ga. 551)

HENDRICKS v. ALLEN et al.
(Supreme Court of Georgia. June 14, 1910.)

(*Syllabus by the Court.*)

1. PLEADING (§ 248*)—AMENDMENT—NEW CAUSE OF ACTION.

There was no error in allowing the amendment to the equitable petition, or in overruling the demurrer to the petition as amended.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.*]

2. GROUNDS OF NEW TRIAL.

Upon a consideration of all of the grounds of the motion for new trial, none of them presents any reason for a reversal.

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by Henry Allen and others against A. H. Hendricks. Judgment for plaintiffs, and defendant brings error. Affirmed.

Jno. R. L. Smith, for plaintiff in error. Martin & Morcock and Akerman & Akerman, for defendants in error.

ATKINSON, J. This case was before the Supreme Court on a former occasion. *Hendricks v. Allen*, 128 Ga. 181, 57 S. E. 224. A reversal was had because the court submitted the case to the jury on a theory or theories not authorized by the pleadings or the evidence. In the opinion it was shown that the pleadings and evidence did not raise an issue as to an agreement or understanding for the conveyance of the land by Locke to Allen; but it was said that it must not be concluded that the plaintiff might not have relief upon proper pleadings. When the case was returned to the superior court, the plaintiff amended his pleadings so as to raise the issue which the former decision held he had not in the first instance made. This amendment did not add a new cause of action, or change an action of tort into one of contract. The original proceeding was not an action of tort, but an equitable suit praying for specific performance, for the cancellation of a mortgage, and for general relief. The amendment varied somewhat the grounds on which it was claimed that he was entitled to these remedies, but there was no valid objection to its allowance. Nor was the petition, as amended, subject to the demurrer on the ground that it failed to set out any cause of action, or for want of proper parties.

A number of the grounds of the motion for new trial revolve about the question of whether or not the evidence measured up to the necessary standard to obtain relief under the pleadings, and whether there was enough

evidence of a contract or understanding between Locke and Allen in regard to the manner in which the former held a deed to the land. Without taking up each of the grounds of the motion in detail, we have carefully examined them all, and are of the opinion that there was no error in any of the rulings complained of, either in regard to the evidence or certain portions of the charge, or the refusal to charge as requested: certainly nothing that requires the grant of a new trial. The evidence was necessarily somewhat general and inferential. Locke was dead, and the plaintiff could not testify; but upon the whole we think that the case was made out. As against Hendricks, the mortgagee, there was enough to show that he was affected with notice, and there was no error in refusing the motion for new trial.

Judgment affirmed. All the Justices concur.

(134 Ga. 583)

JOHNSON v. CURRY & SEALY.
(Supreme Court of Georgia. June 16, 1910.)

(*Syllabus by the Court.*)

LOGS AND LOGGING (§ 3*)—TIMBER CONTRACT—CONSTRUCTION—IMPLIED WARRANTY.

In a written contract, one party, for a named consideration, "granted, leased, and conveyed" all the pine timber upon a described tract of land to others, "for the purpose of boxing, working, and otherwise using such timber for turpentine purposes" within four years from the time such use of the timber began, the former unto the latter and their assigns warranting the "timber, with the right to box, work, and otherwise use the same for turpentine purposes." The contract provided that the obligees therein might assign "this lease," and that all the rights and privileges thereunder should "vest in whomsoever may succeed to the interests hereby conveyed" to such obligees. On the back of the contract was a writing signed by the obligees, reciting that "for value received we hereby transfer to W. A. Johnson the within lease." The obligor in the original contract only had a life estate in the timber and land, and after Johnson, the assignee, began to cut boxes in the timber, he was enjoined from further using the timber by the real owners thereof. Whereupon the assignee brought suit against the assignors to recover the consideration paid them for the assignment, alleging in his petition the death of the obligor in the original contract and the insolvency of her estate. *Held*, that the assignor in such assignment did not impliedly warrant that the obligor in the original contract had the right to confer the privileges undertaken to be conveyed therein, and the court committed no error in dismissing the petition upon demurrer thereto.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

Error from Superior Court, Randolph County; W. C. Worrill, Judge.

Action by W. A. Johnson against Curry & Sealy. Judgment of dismissal, and plaintiff brings error. Affirmed.

W. I. Gear, for plaintiff in error. M. O. Edwards, for defendants in error.

HOLDEN, J. The defendants in error, who were also the defendants in the court below, held an agreement executed to them on October 25, 1905, by Mrs. L. J. Avera, wherein the former were granted a right to box and work the pine timber on certain lands for turpentine purposes for a period of four years after beginning operations. This contract was by the defendants, on November 8, 1905, assigned to the plaintiff by a transfer indorsed thereon and signed by the defendants, reading as follows: "For value received we hereby transfer to W. A. Johnson the within lease, with the understanding that he cancels one lease previously given him by Mrs. L. J. Avera." (In his petition in the present case, the plaintiff alleged a compliance with the condition named in the transfer.) After the plaintiff had boxed the trees on the land referred to in the contract, he was restrained by an order of the court, granted on November 19, 1906, from further operations thereon at the instance of the heirs of Arthur D. Avera, who claimed to own the fee-simple title to the property covered by the contract, and that Mrs. L. J. Avera, who executed it, had only a life estate, which had then determined by her death. Thereupon the plaintiff, after ascertaining the correctness of this contention of the heirs, acting upon legal advice, relinquished any further attempt to enforce the assigned contract as against the Avera heirs, and brought suit against the defendants to recover the consideration paid them for a transfer of the contract, alleging the insolvency of Mrs. Avera, the original obligor. There was no allegation that either the plaintiff or the defendants knew that Mrs. Avera had only a life estate, nor was there any allegation concerning any express warranty by the defendants. The petition was dismissed by the court upon demurrers filed thereto, and the plaintiff excepted.

We think the court committed no error in sustaining the demurrer to the petition and dismissing the same. In the case of *Thompson v. First State Bank*, 102 Ga. 696, 698, 29 S. E. 610, 611, the court uses this language: "It is true that in the assignment of a judgment the assignor impliedly warrants that the judgment is unsatisfied, that he has a legal title, and that it is a valid and subsisting obligation for the sum for which it purports to be, but there is no implied warranty of the solvency of the judgment debtor." In the case of *Giffert v. West*, 33 Wis. 617, it was ruled: "The doctrine of this court in *Hurd v. Hall*, 12 Wis. 112, 135, and subsequent cases, that in the assignment of an instrument or contract in writing, though not negotiable, for a full and fair price, the assignor impliedly warrants that it is valid, and that the obligor is liable upon it, unless it clearly appears that the parties intended otherwise, approved and followed. Such implied warranty is limited to the validity of the contract or chose in action sold, or the

liability of the persons appearing as parties to it, and does not include their ability to discharge its obligation or to furnish satisfaction out of their property." We do not think in the present case the assignor is liable to the assignee because the maker of the original contract only had a life estate in the timber about which the contract was made, and died before the rights of the assignee afforded by the contract had been exercised. It is true that the assignor, in assigning the contract, impliedly warranted, among other things, that the contract was genuine and that the assignee had a right to demand of the obligor therein, or the representatives of her estate in case of her death, what the contract called for; but this implied warranty did not include a guaranty of the ability of the obligor to carry out her part of the contract by affording the assignee a valid and enforceable right to exercise the rights accorded him thereunder with reference to the timber, or of her ability to respond in damages if she was unable to give to the assignee the privilege of exercising such rights. The fact that the assignee was unable to avail himself of the privileges sought to be afforded by the obligor in the contract gave the former a right of action against the latter if living, and against the representatives of her estate in case of her death; and the assignor, when he transferred the contract to the assignee, did have the right to demand of the obligor the right to exercise such privileges, which right was transferred to the assignee. The contract provided in terms that the defendants could assign it, and that the assignee, under the assignment, should acquire all of the rights which they had by virtue of the contract, and the assignment simply placed the assignee in the shoes of the assignors, with all of the rights and privileges which the latter had under and by virtue of the contract.

The original contract provided that the obligor therein, "her heirs, executors, and administrators, the said granted and leased timber, with the right to box, work, and otherwise use the same for turpentine purposes, unto the said parties of the second part, their heirs and assigns, will forever warrant and defend." Under the contract, the assignee of the obligees therein succeeded to all the rights and remedies of the assignor in case of any breach of this warranty. If the assignee wanted to hold the assignors liable on a similar warranty, he should have had a contract providing for such warranty. There was no implied warranty on the part of the assignors that the obligor would survive until the privileges referred to in the contract were exercised by the assignee, or that such privileges could be exercised after her death. In such an assignment it was not implied that the assignor warranted the obligor had a right to confer the privileges referred to in the contract, though the assignor did impliedly warrant that the obligor was, by virtue of

such contract at the time of the assignment, under a valid obligation to accord to the assignee a valid right to the exercise of such privileges. In such an assignment there is no more an implied warranty that the obligor in the original contract had such a title as permitted her to allow the exercises of the privileges referred to in the contract than there is in an assignment by the holder of a judgment an implied warranty that the party against whom the judgment exists is able to pay it. In both instances, in the absence of any stipulation to the contrary, there is simply an implied warranty that the assignee will have a valid right to demand that the third party respond and fulfill his obligations, and no implied warranty that such obligor is able to respond and fulfill the obligation imposed upon him.

In the assignment we are considering, the assignor impliedly warranted that the obligor in the contract assigned was under a legal obligation to perform it and accord to the assignee a legal and enforceable right to the exercise of the privileges undertaken to be conferred by it; but there was no implied warranty on the part of the assignor that the obligor in the original contract could or would faithfully perform it, or could or would permit the exercise of the privileges undertaken to be conferred by it. In this connection, see 1 Jones on Mortgages, § 884.

Judgment affirmed. All the Justices concur.

(134 Ga. 597)

PAYTON v. FORD.

(Supreme Court of Georgia. June 16, 1910.)

(Syllabus by the Court.)

1. INJUNCTION AUTHORIZED.

The allegations of the petition and the evidence submitted in support of the same authorized the grant of an interlocutory injunction against the plaintiff in error.

2. INJUNCTION (§§ 157, 158*)—GRANT OF INTERLOCUTORY INJUNCTION — EFFECT OF GRANTING PERMANENT INJUNCTION ON APPLICATION FOR INTERLOCUTORY WRIT.

Upon the hearing of an application for an interlocutory injunction, if the prayer be granted, it operates to grant the injunction until the final hearing. While it is improper to grant a permanent injunction at such a hearing, the error in granting such an injunction will not require a reversal, but only a direction that the order be so modified as to render the injunction granted interlocutory, instead of permanent. Bleyer v. Blum & Co., 70 Ga. 558; Mayor, etc., of Brunswick v. Williams, 131 Ga. 429 (2), 62 S. E. 230; Unity Cotton Mills v. Dunson, 131 Ga. 258 (2), 62 S. E. 179.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 340, 341; Dec. Dig. §§ 157, 158.*]

Error from Superior Court, Worth County; Frank Park, Judge.

Action by S. D. Ford against Claude Payton. Judgment for plaintiff, and defendant brings error. Affirmed, with directions.

C. E. Hay, for plaintiff in error. J. J. Forehand and L. D. Passmore, for defendant in error.

FISH, C. J. Judgment affirmed, with direction. All the Justices concur.

(134 Ga. 567)

DICKENSON v. GEORGIA SUPPLY CO.

(Supreme Court of Georgia. June 16, 1910.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

There was evidence to authorize the charge excepted to, and sufficient evidence to support the verdict.

Error from Superior Court, Decatur County; Frank Park, Judge.

Action between J. L. Dickenson and the Georgia Supply Company. From the judgment, Dickenson brings error. Affirmed.

Albert H. Russell and T. S. Hawes, for plaintiff in error. Jno. R. Wilson and O'Byrne, Hartridge & Wright, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(134 Ga. 571)

COVINGTON v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO.

(Supreme Court of Georgia. June 15, 1910.)

(Syllabus by the Court.)

1. MOTION TO DISMISS OVERRULED.

The objection to the affidavits in forma pauperis having been removed by the payment of costs, under permission of this court, and, upon a suggestion of a diminution of the record, a certified transcript sent to this court by the clerk of the trial court showing an acknowledgment of service upon the motion for a new trial, the motion to dismiss the writ of error is overruled.

2. DIRECTED VERDICT UNAUTHORIZED.

Upon a careful consideration of the evidence in the case, it did not authorize the direction of a verdict in favor of the defendant.

(a) In the case of Atlantic & Birmingham Railway Co. v. Reynolds, 117 Ga. 47, 43 S. E. 456, the decision made was in reference to a charge of the court in regard to the rule of diligence incumbent upon a master who has purchased a permanent structure and continues to use it. It did not involve the direction of a verdict, and the evidence in the present case in regard to the construction of the telephone line in question presented some features for consideration by the jury which were not present in that case.

Error from Superior Court, Stewart County; S. P. Gilbert, Judge.

Action by H. H. Covington, by next friend, against the Southern Bell Telephone & Telegraph Company. There was a directed verdict for defendant, and plaintiff brings error. Reversed.

S. B. Hatcher and T. T. James, for plaintiff in error. C. E. Battle and Howell Hollis, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(134 Ga. 572)

GLENNVILLE INV. CO. v. GRACE.

(Supreme Court of Georgia. June 15, 1910.)

(Syllabus by the Court.)

LOTTERIES (§ 3*)—SPECIFIC PERFORMANCE (§ 55*)—PROMISE TO PAY PRIZE IN LOTTERY ENTERPRISE — TRANSACTION CONSTITUTING LOTTERY.

Where an owner of land divided it into a considerable number of lots, varying widely in value, and made contracts purporting to sell a certain number of lots to various parties, without reference to what lots were to be sold to any particular person, this being left for determination later, and after a certain number of "applications" had been sold, at an appointed time the names of purchasers were by a committee of such purchasers put into one box and the numbers of the lots placed in another, under rules prescribed by and at the direction of the seller, and names and numbers were drawn, the agreement being that the lots drawn in connection with the name of a purchaser should be conveyed to him by the seller, this was a lottery scheme, and illegal; and such an agreement was not enforceable by an equitable proceeding for specific performance, brought by one who drew certain lots.

[Ed. Note.—For other cases, see Lotteries, Cent. Dig. § 3; Dec. Dig. § 3;* Specific Performance, Cent. Dig. § 173; Dec. Dig. § 55.*]

Error from Superior Court, Tattnall County; B. T. Rawlings, Judge.

Action by B. H. Grace against the Glennville Investment Company. Judgment for plaintiff, and defendant brings error. Reversed.

B. H. Grace brought his equitable petition against the Glennville Investment Company, alleging as follows: On June 15, 1907, plaintiff bought from the defendant 10 lots of land in the city of Glennville, Ga., as evidenced by a written contract containing the following terms: "This is to certify that the Glennville Investment Company has received of B. H. Grace, county Toombs, state Ga., one hundred dollars, the first installment deposit on application of ten lots, stores, dwellings, or other buildings in Glennville, Tattnall county, Ga. The deferred payment on same to be paid to the Glennville Bank either by registered letter, post office money order, express money order, or Savannah, Atlanta, or New York exchange, as follows: \$900.00 six months after this date. Said Glennville Bank will give receipts for all deferred payments by crediting the accepted drafts drawn on the applicant by this company; and when all deferred payments are made, said bank will deliver draft as paid in full, entitling applicant to warranty deed to ten lots, stores, dwellings, or other buildings on the day of

opening without further expense. The contract on the back hereof is to constitute a part of this receipt. Salesman #1 and name J. A. Wheeler. #10 lots." On back of contract: "It is hereby mutually agreed between Glennville Investment Company, the undersigned, and the other holders in this enterprise, as follows: First. You will have no taxes to pay until after 1907. Second. Each applicant holder certificate on final payment shall be entitled to a warranty deed to the lot or lots or parcels of land of which he may be the purchaser, immediately after the opening. Third. Where ten applications are sold in one town, the applicant must select one man to attend the opening, and all purchasers must be represented either in person or by proxy. Fourth. The opening and distribution of these lots and land will be conducted on a plan entirely in keeping with the law, and fair to all, and shall be agreed upon by a majority of the purchasers present. The company will furnish warranty deeds for them to distribute, divide, or dispose of their lots and lands in common in any lawful manner they may elect. Each application paid for in full will represent one unit interest in the whole number of lots, stores, dwellings, or other property until the distribution and division. Should any applicant make first deposit and fail or refuse to make final settlements, he will forfeit former deposits after ten days' grace, without notice, and the money paid by him shall be retained by the company as liquidated damages, time being of the essence of the within instrument in respect to said payments, and such payments shall be considered as payments for the option of buying said property, and therefore forfeited. Sixth. The Glennville Investment Company will not be responsible for any representation made by any salesman other [than] that found in their printed literature. Seventh. You will not be required to build on lots. Eighth. No application will be sold to negroes. No negroes now own any land in the corporate limits of Glennville. Ninth. Should any applicant die after having purchased four or less applications in this enterprise, and having paid 50% or more of his deferred payments, then this company will denote the remaining part of his indebtedness to his family or legal representatives. Tenth. The opening day will not be later than Feb. 1, 1908, but will be as much sooner as it is possible to make it." Signed by the company and the applicant.

The plaintiff paid the sum of \$100, and agreed to pay \$900 more in six months. The defendant drew a draft on him for that amount, which he accepted. The defendant deposited the draft in the Toombs County Bank, and drew upon it the full face value less discount. At the maturity of the draft, by reason of a panic, he was unable to meet it, and arranged with the bank to "carry him

over for a short time." On February 4, 1908, he started to the town where the bank was located, in order to take up the draft, according to an arrangement which he had made with one of the directors of the bank for that purpose. On his way he learned that on that morning the defendant had paid the draft to the bank and taken possession of it. On December 12, 1907, he had requested the defendant to meet the draft for him, and the latter refused to do so. He then "arranged said draft with the said bank as above set out." On the day the draft fell due he inquired at the Glennville Bank, the place designated for payment, for the draft. It was not there, and had not been since it was sold to the Toombs County Bank. "Your petitioner shows that the drawing of the lots of land under and by virtue of said contract, as shown by Exhibit A, was not to be later than February 1, 1908, for the opening day. Your petitioner shows that on the 3d day of February, 1908, the proper committee met and considered all applications for drawings as provided by said contracts and rules of the said company, your petitioner holding and owning said contract, marked Exhibit A. * * * Your petitioner shows that the said committee of five, at the direction of the proper officer of the said defendant, placed the name of your petitioner in the box for drawing his said ten lots so purchased and paid for. Your petitioner shows that he drew by said arrangement the following lots of land, to wit: [Naming by number and block eight lots.] Your petitioner shows that he drew the above-named eight lots at said drawing; that he endeavored to ascertain the other two lots he drew, and the said defendant refused to tell him the number of the other two lots he so drew. Your petitioner shows that he was eligible to draw lots until he drew lot No. 14 in block 104, on which lot of land there is located a first-class brick store worth, together with the said land, the sum of \$3,000; and after the drawing was completed, and it cropped out that your petitioner had good luck [and] incidentally ascertained the number of the above lot he so drew, the said defendant refused to tell the number of the other two lots, and also declared that your petitioner had no right to the lots he had drawn. * * * Your petitioner shows that one other lot he drew is now valuable, in that he is to receive in cash \$250, or buildings erected thereon to that value. But your petitioner does not know which lot it is. Your petitioner further shows that he verily believes that the other two lots, the numbers not known to your petitioner, are valuable indeed, their value and location not known to your petitioner." On the day following the drawing the defendant employed a lawyer, and caused him to hasten to the town where the bank which held the draft was located, and pay it off. This attorney arrived

at the bank about 2½ hours before the plaintiff did. On February 8, 1908, the plaintiff's attorney tendered to the attorney of the defendant the sum of \$911.20, and also tendered to the secretary and treasurer of the defendant company the same amount to pay the draft which the defendant had caused to be taken up. Both tenders were refused. The tender is continuous. The plaintiff prayed "that said defendant be required to disclose to your petitioner the numbers of the other two lots of land so drawn by your petitioner, and not known to your petitioner, which lots of land he is entitled to, and their location"; that the defendant be required to convey to plaintiff all the lots of land drawn by him (giving certain numbers), and also the other two lots at present not known to him; that defendant be required to pay to plaintiff reasonable rent for the lots, including improvements thereon, "with interest on the said \$250 to improve one of the said lots of land; also whatever the amount of rent may be due on the two lots of land not known to your petitioner"; that the defendant be enjoined from selling or disposing of the lots, and for process. The plaintiff amended his petition by striking out from one of the paragraphs, which gave the numbers of the lots drawn by him, all of the numbers except that of one lot, described as having a brick store located upon it. The amendment then proceeded as follows: "Plaintiff further amends his petition so as to ask specific performance from the defendant as to lot 14 in block 104, being the brick store and lot; and plaintiff strikes from his petition all reference to all other lots mentioned in said petition. Plaintiff so amends his petition without prejudice as to his rights and title to said lots so stricken." The defendant demurred to the petition. The demurrer was overruled, and this was assigned as error.

Kelley & Smith and E. C. Collins, for plaintiff in error. Jas. K. Hines and W. T. Burkhalter, for defendant in error.

LUMPKIN, J. (after stating the facts as above). The arrangement sought to be enforced was plainly a lottery scheme. The seller did not convey or contract to convey any particular lots or land to any certain purchasers. It received from proposed purchasers arbitrarily fixed amounts, without reference to the relative value of the lots into which it had divided its property. These varied very much in value. Whether a purchaser received lots of greater or less value for his money was not determined by contract but by chance. A drawing was had, by which names were put in one box and numbers in another, and upon the hazard of drawing out names and numbers depended the determination of what lots a proposed purchaser should get for his money. The drawing was conducted by a committee of the proposed pur-

chasers under rules and regulations of the proposed seller. The plaintiff in the present case appears to have drawn the capital prize. He alleged that under his contract he was to pay \$1,000, for which he was to receive 10 lots, and that one of them drawn by him was of the value of \$3,000, while others were of considerable, though less, value. The mere use in the written contract of such euphonic expressions as that the "opening and distribution of these lots and land will be conducted on a plan entirely in keeping with the law, and fair to all, and shall be agreed upon by a majority of the purchasers present," will not serve to conceal the real illegality of the scheme. The seller did not sell a tract of land to tenants in common and leave them to divide it among themselves. It was to participate in the "opening," and did so. It was only to convey such lots as were drawn. The "opening" was to take place when 10 applications were sold in one town. Disregarding any mere device of words, what was actually contracted for by each so-called purchaser was evidently a right to have a certain number of lots conveyed to him by the seller, to be determined by chance; the various lots being widely different in value. A lucky draw would result in obtaining valuable lots for the amount paid by the purchaser. An unlucky draw would give him lots of much less value for his payments. The plaintiff alleges that "after the drawing was completed, and it cropped out that your petitioner had good luck," the defendant refused to convey to him the lots drawn on his behalf; that he was absent at the time the drawing took place, and the defendant would not even disclose to him what lots were drawn in his favor, but that he had ascertained several of them, one of them being a store lot valued at \$3,000.

In his original petition he prayed discovery in order to find some of the lots he claimed to be entitled to, and also specific performance in regard to them. By amendment he confined his prayer for specific performance to the particular lot mentioned. The plaintiff's own allegations show how far this was from a bona fide sale of the land to him. Such schemes as this are illegal and will not be enforced. A court of equity will not decree specific performance of a promise to pay a capital prize in a lottery or gift enterprise. Pen. Code 1895, § 406; *Whitley v. McConnell*, 133 Ga. 738, 66 S. E. 933; *Lynch v. Rosenthal*, 144 Ind. 86, 42 N. E. 1103, 31 L. R. A. 835, 55 Am. St. Rep. 168; *Guenther v. Dewlen*, 11 Iowa, 133; *Wooden v. Shotwell*, 24 N. J. Law, 789; *Allebach v. Godshalk*, 116 Pa. 329, 9 Atl. 444; 19 Am. & Eng. Enc. Law, 591. The court erred in overruling the demurrer to the petition.

Judgment reversed. All the Justices concur.

(134 Ga. 606)

RADFORD v. BEALL et al.

(Supreme Court of Georgia. June 18, 1910.)

(Syllabus by the Court.)

INJUNCTION PROPERLY GRANTED.

The evidence was of such character as to show no abuse of discretion in granting the injunction in this case.

Error from Superior Court, Laurens County; J. H. Martin, Judge.

Action between F. R. Radford and L. L. Beall and others. From a judgment, Radford brings error. Affirmed.

Minter Wimberly and Jesse Harris, for plaintiff in error. S. W. Sturgis and Blackshear & Flynt, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(124 Ga. 563)

JONES et al. v. E. B. EZELL & CO. et al.

(Supreme Court of Georgia. June 14, 1910.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 556*)—APPOINTMENT OF RECEIVER—RIGHTS OF MINORITY STOCKHOLDERS.

Where creditors of an insolvent corporation file a petition praying the appointment of a receiver and a sale of the corporate assets, and that from the proceeds of the sale the debts of the corporation be paid, and the balance, if any, distributed among the stockholders, and the corporation answers, admitting its insolvency and the indebtedness of the complaining creditors as alleged, and a receiver is appointed, minority stockholders, who allege that the claims of the principal creditors are based on ultra vires acts of the corporation and its officers, in fraud of the stockholders' rights, and that they have been unable to obtain relief from the corporation, may intervene for the purpose of contesting the claims of such creditors.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2224; Dec. Dig. § 556.*]

2. CORPORATIONS (§ 557*)—APPOINTMENT OF RECEIVER—INTERVENTION OF MINORITY STOCKHOLDERS—DUTY TO PLEAD.

As the stockholder's right to intervene in suits against a corporation brought by its creditors springs from the refusal of the corporation to assert a meritorious defense which the corporation has to the action, such defense must be pleaded with the same particularity as if made by the corporation.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 557.*]

3. CORPORATIONS (§ 477*)—MORTGAGES.

A mortgage deed, reciting that it was executed by virtue of the charter of the corporation, as well as under a resolution of the stockholders, copied in the mortgage, authorizing the board of directors, through its president and secretary, to issue, sell, or hypothecate first mortgage bonds on the property and franchises of the corporation, for a certain amount, in certain denominations, and maturing at stated intervals, and purporting to be the mortgage of the corporation, and signed: "B. W. H. [L. S.], President. E. B. E. [L. S.], Secretary"—though no corporate seal be impressed thereon,

is nevertheless prima facie the mortgage of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1857–1869; Dec. Dig. § 477.*]

4. CORPORATIONS (§ 557*)—ULTRA VIRES ACTS—SUFFICIENCY OF ALLEGATIONS.

Allegations by intervening stockholders in a creditors' petition against the corporation that the officers of the corporation were without authority to execute a mortgage upon which the corporate seal is not impressed, but which recites that it is executed under authority of a resolution of the stockholders, and allegations that neither the corporation nor its officers had authority to create the indebtedness of complaining creditors, are sufficient, as against a general demurrer, to raise the issue that such acts are ultra vires.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 557.*]

5. PLEADING (§ 8*)—SUFFICIENCY OF ALLEGATIONS—CONCLUSIONS.

General and loose allegations, consisting merely of the statement of conclusions, without averring the facts upon which the conclusions are based, are too indefinite to raise an issue.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

Error from Superior Court, Putnam County; H. G. Lewis, Judge.

Proceedings for the appointment of a receiver for the Middle Georgia Cotton Mills, in which S. E. Jones and others, minority stockholders, intervene, and E. B. Ezell & Co. and others, petitioning creditors, demur to the intervention. The intervention was dismissed, and interveners bring error. Reversed.

A. E. Wilson, Robt. McMillan, and Robt. B. Blackburn, for plaintiffs in error. W. B. Wingfield and W. F. Jenkins & Son, for defendants in error.

EVANS, P. J. Certain creditors of the Middle Georgia Cotton Mills filed a petition in the nature of an insolvency proceeding against that corporation, praying the appointment of a receiver, a sale of its assets, and a distribution of the proceeds. It was alleged that the corporation was insolvent; that it had shut down its factory, and was unable further to operate, for lack of finances; that the manufacturing plant was rapidly deteriorating in value; that petitioning creditors represented substantially nine-tenths of its liabilities, nearly half of which were past due; and that the corporation had failed to pay the past-due indebtedness on demand. The corporation in its answer admitted its insolvency and its indebtedness to the petitioning creditors. A receiver was appointed. Certain minority stockholders filed an intervention, to which the petitioning creditors interposed demurrers, general and special. The court dismissed the intervention on general demurrer, without passing upon the various special demurrers, and the interveners except to this judgment.

One of the petitioning creditors was the trustee for the first mortgage bondholders, in whose behalf it was alleged that the cor-

poration had issued 80 bonds, in denominations of \$500, bearing interest at the rate of 6 per cent. per annum, payable semiannually, on January 1st and July 1st, and secured them by a mortgage on all of the property, real and personal, of the corporation, executed to the trustee on August 1, 1901. A copy of the mortgage was attached, and it recites that at a meeting of the stockholders of the Middle Georgia Cotton Mills, held on July 10, 1901, the following resolution was adopted: "Resolved, that the board of directors, through its president and secretary, be and they are hereby authorized to issue and sell or hypothecate, from time to time, first mortgage bonds on the property and franchises of the Middle Georgia Cotton Mills, for a sum not exceeding the sum of \$40,000, to bear interest at the rate of 6 per cent. per annum, payable semiannually, and in amount of \$500 each, and payable as herein set forth, viz.: \$5,000 payable July 1, 1906; \$10,000 payable July 1, 1911; \$15,000 payable July 1, 1916; and \$10,000 payable July 1, 1921." It was further recited in the mortgage that under this resolution the directors of the corporation had issued bonds as therein provided, and, in order to secure their payment according to their tenor and effect, B. W. Hunt and E. B. Ezell, secretary of the said Middle Georgia Cotton Mills, by virtue of the authority contained in the charter of the corporation, as well as the authority of this resolution, created in favor of the trustee a mortgage lien upon all the property, both real and personal, of the corporation, specifically described. The mortgage concluded with the clause: "In testimony whereof, we hereby set our hand and the seal of the corporation, this 1st day of August, 1901. Benl. W. Hunt [L. S.], President. E. B. Ezell [L. S.], Secretary." It purports to have been signed, sealed, and delivered in the presence of two witnesses, one of whom was a magistrate. It was further alleged that the trustee had actually sold and delivered 61 of the bonds, amounting to \$30,500, to certain named persons, and that the remaining 19 bonds, of the face value of \$9,500, were held as collateral security by five of the complaining creditors. All of the interest due on the bonds to January 1, 1903, except \$330, had been paid. It was further alleged that others of the complaining creditors, whose debts were evidenced by notes, were secured by hypothecation of the 19 unsold bonds, that one of the creditors was secured by a bill of sale to some of the manufactured product of the corporation, and still another creditor was secured by the personal indorsement of the president and secretary of the corporation. It was also set out in the petition that the corporation had outstanding preferred stock to the extent of \$24,000, by the terms of which a holder had no voting power as a shareholder, but was entitled, upon final dis-

solution of the corporation, to be paid, after the payment of the creditors, in preference to the common stockholders, and that the corporation had an outstanding issue of common stock to the extent of \$65,329.56.

In their intervention the stockholders alleged that they were the owners of 76 shares of the common stock and 6 shares of the preferred stock, each of the par value of \$100; that prior to the filing of the creditors' bill they had filed suit against the corporation, praying for the appointment of a receiver and the repudiation of the bonds and a part of the stock, and for the winding up of the business of the corporation and a distribution of its assets, based upon allegations of want of authority on the part of the officers to issue the bonds and stock; that they had complained to the proper officers of the corporation, prior to filing their intervention, of the illegalities in the issuance of the bonds and stock as set up in their intervention, and requested them to take proper steps for the protection of their interests as stockholders; that the corporation had wholly failed to do this, and in its answer had admitted substantially all of the allegations of the complaining creditors, and had refused to set up any defense having for its purpose the cancellation of the bonds and the mortgage to secure same, and all of the common stock in excess of the original issue of \$40,000; that "Exhibit A, attached to said petition, which plaintiffs term a 'mortgage,' is not in fact a mortgage, is barred by the statute of limitations, it has no consideration, no authority was given the officers to execute the same, and said paper, whatever it may be, is simply the individual undertaking of B. W. Hunt and E. B. Ezell, and is not binding on said defendant, nor its legal stockholders; * * * that neither said defendant nor its officers have any authority to create the indebtedness specified in the petition, nor to execute said notes, nor to give the securities and collateral therein set out."

Inasmuch as the court did not pass upon the various special demurrers to this and other allegations in the intervention, the only point for determination is whether they are sufficient to withstand a general demurrer. The stockholder's right to intervene in suits against a corporation brought by its creditors springs from the refusal of the corporation to assert a meritorious defense which the corporation has to the action, and such defense must be pleaded with the same particularity as if made by the corporation. *Helliwell on Stocks and Stockholders*, § 417; *Cornell v. Sims*, 111 Ga. 828, 86 S. E. 627. It is contended that, if the corporation should undertake to defend against the trustee's suit to recover on the mortgage, it would be necessary for the corporation to allege in its pleadings that it had not received the proceeds of the bonds secured by the mortgage, or that the same had not been applied to legitimate corporate uses. We do not think it incum-

bent upon the corporation, in making its defense of lack of authority of its officers to execute the contract, to plead that the corporation had received no benefit from the contract. A recovery is not sought upon the original consideration, but upon the form of the contract; and the corporation may plead that its officers did not have authority to execute the contract. We are discussing a question of pleading, and not the effect of evidence showing that the proceeds of the contract was received by the corporation and applied to legitimate corporate use. If on the trial of the case it should appear that the officers were without authority to execute the various contracts, but did in fact execute them, and the fruits thereof were applied to proper corporate use, the corporation will still be liable, notwithstanding its officers may have been without specific authority to execute the particular form of contract. The corporation cannot retain the property or money of the creditor, and successfully defend because it was obtained by an ultra vires act of its officers. *Towers Excelsior Co. v. Inman*, 96 Ga. 506, 23 S. E. 418. A plea by the corporation that the act is ultra vires is one thing. Evidence which holds the corporation responsible for the consideration of the contract in spite of its ultra vires character is quite a different matter. The stockholder, in the absence of specific acts of fraud and collusion between the corporation and the creditor, has no greater right than the corporation itself in this regard.

We will now inquire if the mortgage is in such form as to show it prima facie to be the act of the corporation. It shows upon its face that the agents of the corporation were acting in its behalf, and not for their personal benefit. It is stated that the corporate seal is to be affixed; yet, so far as the record discloses, the original mortgage was never impressed with the corporate seal. If the corporate seal had been impressed, the law would have raised a presumption that it was within the power of the agents of the corporation to execute the mortgage, and it would be clearly a corporate act. Nevertheless, if agents of the corporation have authority to execute a mortgage and affix thereto anything which the law recognizes as a seal, when affixed by an actual person, it will presumptively be a good execution by the corporation. Inasmuch as the mortgage deed recited that it was executed by virtue of the charter of the corporation, as well as by resolution of its stockholders authorizing its board of directors, through its president and secretary, to issue, sell, and hypothecate first mortgage bonds on the property and franchises of the corporation for a certain amount and in certain denominations, and maturing at stated intervals, and purporting to be the mortgage of the corporation, and signed by "B. W. H. [L. S.], President," and "E. B. E. [L. S.], Secretary," though there be no impression of the corporate seal, nevertheless it is presumptive-

ly the mortgage of the corporation. *Johnston v. Crawley*, 25 Ga. 316, 71 Am. Dec. 173. It being executed under seal, it is not barred on its face by the statute of limitations, and its expressed consideration is for the securing of the bonds issued by the authority of the stockholders themselves.

Interveners allege that no authority was given the officers to execute the mortgage and create the indebtedness. As already stated, we are not called upon to pass upon the sufficiency of this allegation, as against appropriate special demurrers—as to whether the act of the officers in executing the bonds and mortgages was ultra vires the corporation or ultra vires the officers, or whether it was a denial that the officers had kept within the limitations of their power under the resolution passed by the stockholders in the execution of the instrument complained of. Where the officers' authority to execute a mortgage or note not impressed with a corporate seal is contested, we think that a general denial of authority is sufficient to form an issue, in the absence of a special demurrer calling for particularity in specification as to such lack of authority.

Interveners undertake to contest the claims of the creditors by general allegations asking proof of their claims, without alleging any specific matter tending to deny that they are the debts of the corporation. These allegations go for naught, because, as we have pointed out, where minority stockholders undertake to set up a defense which the corporation refuses to make, they must allege the facts constituting the defense, in order that the courts may determine whether such defense is a meritorious one, or one which the officers of the corporation, having due regard to the interest of the complaining stockholders, were bound to make.

It is also alleged in the intervention, in general terms, that all the common stock issued in excess of \$40,000 was null and void. In the absence of any express provision or agreement to the contrary, persons who have become stockholders in a corporation by subscribing or purchasing shares have a right to presume that other stockholders have come in on the same terms; and if the corporation has issued stock in violation of its charter or the law, or in violation of the rights of its stockholders, a dissentient stockholder may maintain an independent action in order to cancel the illegal stock. 2 Clark & Marshall on Private Corporations, § 397. The dissentient stockholder in an insolvency proceeding instituted by creditors, having for its purpose to sell the entire assets of the corporation for distribution, may likewise intervene in that proceeding, for the purpose of objecting to the holders of illegally issued stock participating in the corporation's surplus, if any, after the payment of the corporation debts. However, in his intervention the dissentient stockholder must allege the facts relied on to establish the illegality of the

stock, and a general allegation that all stock issued over a certain amount is null and void is but the statement of a legal conclusion, and is insufficient, even against a general demurrer. General allegations of this sort are analogous to a general charge of fraud, without stating any specific fact upon which the charge is based, which has always been held too loose and indefinite to withstand a general demurrer. *Orr v. Brown*, 5 Ga. 400.

It is also alleged in the intervention that the president and treasurer have neglected to collect a part of the amount subscribed for the original issue of stock, which amount could have been collected. Manifestly an allegation so general as this presents no issue.

Interveners further "deny the authority of the defendant or its officers to execute said notes and to give any security, and thereby obtain a preference and advantage to themselves, they being also officers and directors of said defendant." This complaint is made of the indebtedness held by E. B. Ezell and B. W. Hunt, the Middle Georgia Bank, of which they are both directors, and the firm of Ezell & Co., which is a partnership composed of these individuals. It is true that officers of a corporation are trustees, and a sound public policy forbids the assignment to them of any of the corporate assets while the corporation is insolvent, with a view to prefer them as creditors for antecedent debts. *Atlas Tack Co. v. Macon Hardware Co.*, 101 Ga. 391, 29 S. E. 27. It does not appear from the record whether the security claimed by these creditors was given at the time of the creation of the debt, or was assigned to secure an existing debt, with the intent of giving them preference as creditors.

We have presented in our discussion of the pleadings substantially all of the contentions made by the interveners from the standpoint of their sufficiency as against a general demurrer; and the judgment of the court below is reversed, because the allegations respecting the authority of the officers of the corporation to contract certain debts and secure the same by mortgage and other collateral security were sufficient to withstand a general demurrer.

Judgment reversed. All the Justices concur.

(7 Ga. App. 781)

HINDMAN v. RAINES. (No. 2,378.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The judge of the superior court was right in overruling the certiorari on the merits, irrespective of the correctness of the reasons given for his judgment.

Error from Superior Court, Floyd County: Moses Wright, Judge.

Action between S. J. Hindman and Taylor

Raines. From a judgment overruling a certiorari, Hindman brings error. Affirmed.

M. B. Eubanks, for plaintiff in error. Geo. A. H. Harris & Son, for defendant in error.

HILL, C. J. Judgment affirmed.

(7 Ga. App. 808)

SANDERS v. STATE. (No. 2,606.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 560*)—SUFFICIENCY OF EVIDENCE.

In this case the evidence for the state is hardly sufficient to raise a bare suspicion of defendant's guilt. The verdict was wholly unauthorized.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1266; Dec. Dig. § 560.*]

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Eli Sanders was convicted of crime, and brings error. Reversed.

Clay & Morris, for plaintiff in error. J. P. Brooke, Sol. Gen., for the State.

HILL, C. J. Judgment reversed.

(7 Ga. App. 795)

TATUM v. U. T. HUNGERFORD BRASS & COPPER CO. (No. 2,565.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1001*)—REVIEW—SUFFICIENCY OF EVIDENCE.

The case rests solely upon issues of fact, which the jury settled in favor of the defendant in error; and not only some evidence, but apparently the preponderance of the evidence, supports the verdict. The judgment is affirmed, and the motion of the defendant in error to add damages for delay is granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

Error from City Court of Sylvester; J. B. Williamson, Judge.

Action by J. W. Tatum against the U. T. Hungerford Brass & Copper Company. Judgment for defendant, and plaintiff brings error. Affirmed.

J. J. Forehand, for plaintiff in error. Claude Payton and C. E. Hay, for defendant in error.

POWELL, J. Judgment affirmed, with damages.

(7 Ga. App. 755)

CENTRAL OF GEORGIA RY. CO. v. DUTTON. (No. 2,027.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

1. CARRIERS (§ 262*)—STOPPING TRAINS AT FLAG STATION.

"A railway company is bound to stop its trains in response to proper signals at a flag

station at which it is in the habit of stopping trains of that character." Southern Ry. Co. v. Wallis, 133 Ga. 553, 66 S. E. 370.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 262.*]

2. EVIDENCE OF DAMAGES.

There was evidence from which the jury might reasonably have inferred that the failure of the engineer to stop the train at the flag station was due to willfulness, wantonness, or an entire indifference to consequences, and therefore we cannot say that the verdict is excessive. Central of Georgia Ry. Co. v. Sowell, 3 Ga. App. 142, 59 S. E. 323.

Error from City Court of Sylvania; H. A. Boykin, Judge.

Action by G. C. Dutton against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. L. Gamble, for plaintiff in error. J. C. Hollingsworth, Jr., and E. K. Overstreet, for defendant in error.

HILL, C. J. Judgment affirmed.

(7 Ga. App. 815)

MCDONALD v. STATE. (No. 2,652.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The excerpts from the charge objected to, when considered in connection with the entire charge, contain no error. The law applicable to the issues was clearly, fairly, and correctly given in charge, the assignments of error are without any substantial merit, and the verdict is supported by evidence.

Error from Superior Court, Turner County; Frank Park, Judge.

Tom McDonald was convicted of crime, and brings error. Affirmed.

See, also, 6 Ga. App. 339, 64 S. E. 1108.

Claude Payton and C. E. Hay, for plaintiff in error. W. E. Wooten, Sol. Gen., and J. H. Tipton, for the State.

HILL, C. J. Judgment affirmed.

(7 Ga. App. 816)

WIMPEE v. STATE. (No. 2,635.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

REVIEW OF EVIDENCE.

No error of law is complained of, and there is some evidence to support the verdict.

Error from Superior Court, Haralson County; Price Edwards, Judge.

Randolph Wimpee was convicted of crime, and brings error. Affirmed.

Griffith, Weatherly & Mathews, for plaintiff in error. W. K. Fielder, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

7 Ga. App. 796)

SLAPPEY v. CHARLES. (No. 2,567.)
(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

1. LOGS AND LOGGING (§ 33*)—SAWMILL LIEN—FORECLOSURE—AFFIDAVIT BY DEFENDANT.
In the foreclosure of a sawmill lien, a counter affidavit by the defendant, which states that he owes the plaintiff no "sum whatever for which plaintiff has a lien," is, especially in the absence of special demurrer, adequate to raise the issue that the items claimed to have been furnished by the plaintiff to the defendant do not fall within the class as to which the law allows a lien.

[Ed. Note.—For other cases, see *Logs and Logging*, Dec. Dig. § 33.*]

2. LOGS AND LOGGING (§ 26*) — SAWMILL LIEN.

No lien arises against a sawmill from furnishing to the owner of the mill standing timber, money, or family supplies.

[Ed. Note.—For other cases, see *Logs and Logging*, Dec. Dig. § 26.*]

3. APPEAL AND ERROR (§ 588*)—BRIEF OF EVIDENCE—CONTENTS.

Documentary evidence, set out in the pleadings or attached thereto as an exhibit, should not be included in the brief of the evidence otherwise than by reference.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 588.*]

Error from City Court of Sylvester; J. B. Williamson, Judge.

Action by D. A. Slappey against J. B. Charles. Judgment for plaintiff, and defendant brings error. Reversed.

J. J. Forehand, for plaintiff in error.
Claude Payton and C. E. Hay, for defendant in error.

POWELL, J. Charles foreclosed an alleged lien for supplies furnished to Slappey's sawmill. Attached to the affidavit of foreclosure is an account showing total charges of \$935.77 and total credits of \$534.51, leaving a balance due of \$401.26. The defendant filed a counter affidavit on the ground that he was "not indebted to the plaintiff in the sum claimed, nor in any sum whatever for which the plaintiff has a lien." Some point is made as to the sufficiency of this affidavit as a basis for the defendant's contesting the existence of the lien. The defendant in error treats it as merely challenging the amount due. We construe it as asserting, first, that Slappey did not owe Charles as much as the latter claims, and, further, that while he may owe him some amount, on open account or otherwise, he does not owe him any sum whatever for which the law gives a lien; and this, we think, put the existence of the lien in issue, and placed upon the plaintiff the burden of showing that the items enumerated on his account fell within the class of articles for which the law allows a lien.

2. The jury found in favor of the plaintiff for the full amount claimed. The account confessedly included the price of standing timber, money, and household supplies for

the family of the mill owner. The plaintiff made no effort to show what part of the account consisted of supplies furnished to the sawmill and what part fell within the classes just mentioned. There is no law allowing a sawmill lien for standing timber, for money, or for family supplies. *Balkcom v. Empire Lumber Co.*, 91 Ga. 651, 17 S. E. 1020, 44 Am. St. Rep. 58; *Giles v. Gano*, 102 Ga. 593, 27 S. E. 730; *Dart v. Mayhew*, 60 Ga. 104; *Loud v. Pritchett*, 104 Ga. 649 (3), 30 S. E. 870; *Ray v. Schmidt & Co.*, 66 S. E. 1035. The jury had no legitimate basis for calculation wherefrom they might have found any particular sum in the plaintiff's favor. From an examination of the account itself it is easy to see that the plaintiff was not entitled to a lien for the full amount. The justice of the defendant's paying the account, the moral obligation resting upon him to pay an honest debt, seems to have overpersuaded the jury; and if this were a suit on account, instead of a lien foreclosure, we would take great pleasure in sustaining their verdict, based, as it seems to be, on so commendable a sentiment. However, the plaintiff was not entitled to the lien he claimed. He may still sue on his open account in a common-law action.

3. The defendant in error in his brief makes some point as to the fact that in the brief of evidence there is a statement that the account "thereto attached, marked 'Exhibit A,'" was introduced in evidence, and that no account or exhibit was in fact attached. He argued that the brief of evidence is, therefore, not to be considered at all. It is plain, however, that the account referred to is the account sued on, and, as it is attached to the affidavit of foreclosure in the record, it would have been improper to have set it out again in the brief of evidence—either in the body of the brief or in an exhibit.

Judgment reversed.

(3 Ga. App. 17)

BRACEWELL v. SOUTHERN RY. CO.
(No. 2,282.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

RAILROADS (§ 33*) — ACTIONS AGAINST — VENUE.

The decision in this case is controlled by the answer of the Supreme Court to the certified question (see 68 S. E. 98), and therefore there was no error in sustaining the demurrer and dismissing the petition.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 70, 71; Dec. Dig. § 33; * *Corporations*, Cent. Dig. §§ 2603-2627.]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by H. A. Bracewell against the Southern Railway Company. From a judgment sustaining a demurrer to the petition, plaintiff brings error. Affirmed.

Guerry, Hall & Roberts and H. L. Grice, for plaintiff in error. Harris & Harris, for defendant in error.

RUSSELL, J. Judgment affirmed.

(7 Ga. App. 814)

PUGH v. STATE. (No. 2,643.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 959*)—NEW TRIAL—TIME OF HEARING.

There was no error in dismissing the motion for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2406-2411; Dec. Dig. § 959.*]

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

William J. Pugh was convicted of crime, and brings error. Affirmed.

Herbert L. Grice, for plaintiff in error. E. D. Graham, Sol. Gen., for the State.

POWELL, J. The defendant was convicted at the August term, 1910, of Pulaski superior court. A motion for a new trial was duly filed, and was set to be heard on October 2d, in vacation. On that date the movant asked for a continuance until October 8th. The continuance was granted, and noted on the docket, but no written order was taken. On October 8th the movant applied for and obtained a written order continuing the motion until October 18th. On October 18th the movant having failed to appear and prosecute the motion, it was dismissed.

The only point made was that, as no written order of continuance was taken on October 2d, the case went over to the next regular session, and that the subsequent orders were coram non judice. Even if this point were otherwise valid, in the light of the movant's own participation in procuring the orders, still it is not well taken, for the very sufficient reason that under Civ. Code 1896, §§ 4323, 4324, the judges of the superior and city courts have the power to hear and determine motions for new trial in vacation, without any order having been passed in term to that effect, provided the party or his counsel has 10 days' notice of the time and place of the hearing.

Judgment affirmed.

(7 Ga. App. 815)

O'NEAL v. STATE. (No. 2,653.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

GROUND FOR NEW TRIAL.

Though the evidence strongly indicates that the defendant was insane at the time he committed the crime for which he was convicted, yet the jury was legally authorized to find him

sane. The charge of the court was fair, lucid, and free from error. No legal reason appears for the granting of a new trial.

Error from Superior Court, Laurens County; J. H. Martin, Judge.

W. H. O'Neal was convicted of crime, and he brings error. Affirmed.

H. P. Howard and Jno. R. Cooper, for plaintiff in error. E. D. Graham, Sol. Gen., for the State.

POWELL, J. Judgment affirmed.

(7 Ga. App. 816)

BAYNES v. STATE. (No. 2,654.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

HOMICIDE (§ 257*)—EVIDENCE—ASSAULT WITH INTENT TO KILL.

No error of law appears, and the evidence, with inferences fairly deducible therefrom, supports the verdict.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 547, 548; Dec. Dig. § 257.*]

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Tom Baynes was convicted of assault with intent to murder, and brings error. Affirmed.

Eugene M. Baynes, for plaintiff in error. Jos. E. Pottle, Sol. Gen., for the State.

HILL, C. J. Tom Baynes was indicted jointly with his brother, Bob Baynes, for the crime of murder, and on a separate trial was convicted of an assault with intent to murder. He made a motion for a new trial, based on the general grounds and on several special grounds contained in the amended motion. The trial judge overruled the motion, and he excepted.

The evidence makes substantially the following case: Bob Baynes and one Ned Dudley were engaged in a fight with the deceased, Taylor Branch. The evidence does not disclose the origin of the difficulty; but it appears that the deceased was endeavoring to shoot Ned Dudley, and Ned Dudley shot him with a pistol, and Bob Baynes hit the deceased over the head with a scantling. Just before the deceased was shot by Dudley and hit over the head by Bob Baynes he was cursing and threatening to shoot. The sister of the defendant was standing near Ned Dudley, and cried out, "Don't shoot! Don't shoot!" Following immediately this exclamation, the defendant grabbed a single-barrel shotgun and shot the deceased in the back. This was the first and only time the defendant participated in the difficulty, and his defense was that he shot because he believed the deceased was about to shoot his sister, and he shot to prevent a felony about to be perpetrated by the deceased upon her. The physician who made

the autopsy testified that neither one of the gunshot wounds were necessarily fatal, but the probability was that the fatal wound was the one on the head caused by the blow from the scantling in the hands of Bob Baynes. The learned trial judge did not present to the jury at all the theory of joint action on the part of the defendant, his brother, and Ned Dudley, but treated the act of the defendant as independent of the acts of the others and having no connection therewith. He did present to the jury very clearly, fully, and accurately the theory of the defense relied upon by the defendant, that he shot in order to protect his sister from one who was manifestly endeavoring to kill or to commit a serious personal injury upon her.

The jury did not accept this view, and found the defendant guilty of assault with intent to murder, on the theory that he shot at the deceased with the specific intent to kill him, with a deadly weapon and without justification; but as the wound was not necessarily fatal, and he was actually killed by the blow from the scantling in the hands of Bob Baynes, he was only guilty of assault with intent to murder. It was the sole province of the jury to solve any uncertainty in the facts, and to accept as the truth any reasonable theory deducible therefrom. Exercising their right, they refused to believe the defendant's statement, but believed that he shot the deceased without mitigation or justification, using a deadly weapon in a manner likely to cause death. They could infer from these facts the specific intent to kill. While not entirely satisfied with the correctness of this conclusion, it is supported by evidence, and reasonable inferences from the evidence, and we cannot interfere.

The special assignments of error are without merit.

Judgment affirmed.

(7 Ga. App. 787)

QUEEN INS. CO. OF AMERICA v. HARTWELL ICE & LAUNDRY CO.
(No. 2,484.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

1. INSURANCE (§§ 132, 506*)—TEMPORARY CONTRACT—AMOUNT OF RECOVERY.

A. made a verbal application to a local agent of an insurance company for a policy of insurance on certain described property, then offering to pay the premium to the agent. The agent stated that he could not at that time issue the regular standard policy of the company, nor accept the tender of the premium, because he did not know the rate on that class of property. The agent agreed, however, to enter upon the books of the company a written memorandum in the nature of a "binder," which he stated would be effective as a contract of insurance until the regular policy was issued by the company, and that, on receipt of this regu-

lar policy, A. could pay the premium. This was satisfactory to A., and the agent, in compliance with his agreement, did write, sign, and place in the book of policies issued by the company at his agency a statement or "binder," containing all the essential elements of a contract of insurance between A. and the company, and made a written report to the company of this memorandum or "binder," and of his action relating to the same, all of which was affirmed and ratified by the company. Held: (a) A complete temporary contract of insurance existed between A. and the insurance company during the period set out in the memorandum or binder. (b) For a loss which occurred during the existence of the temporary contract, and before the rate of premium had been fixed on the property covered thereby, A. could recover the amount stipulated as indemnity in the binder, less the rate of premium fixed by the company subsequently to the loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 210, 1294; Dec. Dig. §§ 132, 508.*]

2. INSURANCE (§ 371*)—APPEAL AND ERROR (§ 1001*)—TEMPORARY CONTRACT—ACTION—QUESTIONS OF FACT—WAIVER OF BREACH OF POLICY.

The property described in the memorandum or binder was insured during the term specified therein upon the terms and conditions of the regular standard policy of the company, and a breach of any of these terms and conditions that would render void the regular policy would also make void the temporary contract, and any waiver of such breaches would apply to the latter. Whether there was a waiver by the insurance company of breaches of the terms of the policy relating to other concurrent insurance, as to incumbrance on the property, and proofs of loss, and what would be a reasonable time within which to submit proofs of loss, were issues of fact for the jury, under the evidence; and where the law pertinent to the issues has been fully and correctly charged, as in this case, this court cannot, as to them, interfere with a verdict supported by any evidence.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 371; Appeal and Error, Dec. Dig. § 1001.*]

Error from City Court of Hartwell; J. T. Pendleton, Judge.

Action by the Hartwell Ice & Laundry Company against the Queen Insurance Company of America. Judgment for plaintiff, and defendant brings error. Affirmed.

On August 27, 1908, Linder, as president of the Hartwell Ice & Laundry Company, made a verbal application to Matheson, agent of the Queen Insurance Company, located at Hartwell, for a policy of insurance of \$2,000 on the plant and machinery of the company. Matheson then informed Linder that he could not at that time issue a regular policy, because he did not know the proper rate of premium, but that he would make a memorandum on the books of the insurance company kept by him of a "binder," and that the insurance would go into effect from that date. Linder then offered to pay the premium, but Matheson refused to accept it, stating that he did not know the rate, but that immediately upon receipt of the rate he would notify him when the regular standard policy would be issued. In pursuance of his agreement

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

and promise, Matheson on the same day made the following pencil memorandum on a sheet of paper: "Queen, \$2,000, on Hartwell Ice Plant Machinery from August 27th, 1908, to August 27th, 1909. R. E. Matheson, agent. Policy to be issued when new rate is received." The sheet on which this memorandum was written was put in the book of the Queen Insurance Company's policies kept by Matheson as agent. Subsequently Matheson pinned this sheet on page 95 of this book, numbering it 123, in a place in the book reserved for the regular standard policy when issued, the regular policy to be numbered 123. On the day when the "binder" was made and put in his book of the Queen Insurance Company's policies, he wrote to the manager of the insurance company in Atlanta, Ga., as follows: "I have accepted a \$2,000 risk on the Hartwell Ice Plant, and will send daily report as soon as rate is fixed on same, which I think will be within a few days." Matheson testified that it was his custom as agent of the Queen Insurance Company, where applications were made to him for policies of insurance, to make memoranda similar to that made in the present case, and that these memoranda or "slips" were known among insurance companies as "binders"; that he did not know what the rate on this policy was until after the fire. The standard policy of the company was not issued, and on September 10th the property covered by the alleged contract was entirely consumed by fire. On September 11th Linder notified the manager of the company in Atlanta of the loss, and on the same day Matheson wired the manager as follows: "Hartwell Ice Plant totally destroyed by fire. \$2,000 loss for the Queen." On the same day, in reply, the assistant manager of the company wrote to Matheson: "We have your telegram advising of total loss of \$2,000 under binder issued August 27th on this risk. I now beg to confirm our conversation over the phone this morning requesting you to reserve policy 121 to be issued covering this risk on arrival of our special agent or adjuster." In reply, on the next day, Matheson wrote to the assistant manager: "Your letter acknowledging receipt of my telegram in regard to the loss by fire of Hartwell Ice Plant received. You request me to reserve policy number 121 for the above, but I issued this number to Liquid Carbonate Company; so have reserved number 122 instead. I inclose daily report of same." The daily report referred to was on the regular form used by the agents of the company; the following being the material parts: "Queen Insurance Company of America: Name of the insured, Hartwell Ice & Laundry Company. Amount of insurance, \$2,000. Present rate, 5%, premium, \$100. Commencement of risk, August 27th, 1908; term, 1 year. Expiration of risk, August 27th, 1909. [Signed] Hartwell Georgia Agency." On September 18th Matheson again wrote to the manager in Atlanta: "I wrote you that I had reserved number 122

for the Hartwell Ice Company, but I unfortunately issued this to another party. So have reserved number 123 for the Hartwell Company." Matheson represented the Queen Insurance Company at Hartwell, Ga., under this commission: "Power to receive proposals for insurance against loss and damage by fire at Hartwell, Georgia, and vicinity, to fix rates of premiums, to receive moneys, counter-sign, issue, renew, and consent to transfer of policies of insurance signed by the manager at Atlanta, Georgia, of the Queen Insurance Company of America, subject to the rules and regulations of the said company, and to such instructions as might from time to time be given by said manager, which authority may be revoked at any time." It was admitted that at the time when the application for insurance was made by Linder to Matheson, and when the property was destroyed by fire, there was other insurance of \$1,000 on the property, and that there was an outstanding mortgage of \$500 on the property. Linder testified that he specifically informed Matheson of the existence of the other insurance and of the existence of the mortgage, when he made the application for the policy. Matheson testified that, when he wrote the pencil memorandum or "binder" and "slipped it in the book of the Queen Insurance Company," he knew nothing of the existence of the other insurance or the mortgage; that Linder did not disclose their existence to him when he made the application for the insurance, and did not tell him of their existence until several days after he made the application, and after the alleged binding memoranda had been made by him. The regular standard form of policy which was to be issued by the company contains a condition that the policy will be void if there is other concurrent insurance without the written consent of the company, or if the insured is not the sole and unconditional owner of the property insured, or if there is any outstanding incumbrance on the property. It is also admitted that no proofs of loss were ever submitted to the company, as required by the standard policy. The plaintiff claimed that this condition of the policy had been waived by an unconditional and absolute denial of liability by the company and a refusal to pay the loss. This denial was contained in a letter to the plaintiff, written by King & Spalding, attorneys for the company, dated March 6, 1908. The foregoing is a statement of all the material and pertinent evidence illustrative of the issues in the case.

Plaintiff based its suit on the written memorandum and binder, alleging that they constituted a valid contract of insurance. Defendant denied the existence of a valid contract of insurance, and contended that, even if the evidence proved a binding contract, it had been breached by the plaintiff, because of the concealment of the fact of other concurrent insurance and the incumbrance on the property, and because of a failure to submit due proof of loss. Plaintiff in reply set up a

waiver of all these conditions and terms of the policy. The trial judge construed the writings as constituting a valid contract of insurance, and submitted to the jury the issues made by the evidence as to the alleged waivers by the defendant of the admitted breaches of the terms of the contract above mentioned. The jury found a verdict for the plaintiff for \$1,900, the amount of the contract, less \$100 as premium, and the defendant's motion for a new trial was overruled. The contentions of the parties indicated by the above statement will be more specifically set out and discussed in the course of the opinion.

King & Spalding, E. Marvin Underwood, and Julian B. McCurry, for plaintiff in error. T. W. Rucker and A. G. McCurry, for defendant in error.

HILL, C. J. (after stating the facts as above). 1. It is manifest that Linder, as president of the Hartwell Ice & Laundry Company, and Matheson, as agent of the Queen Insurance Company, intended to make a binding contract of insurance. It was in the contemplation of both parties that the memorandum made by Matheson, in accordance with his custom, called a "binder," should constitute an effective and complete contract of insurance between the insurer and the insured, and that the duration of the contract thus created, first by the temporary binder, and continued by the regular policy, should be for one year from August 27, 1908. It is equally manifest that the insurance company, with full knowledge of all the facts, confirmed and approved the temporary contract, as evidenced by the binder made by its agent, and both prior and subsequent to the fire treated it as valid. If the temporary contract lacked any of the essential elements of a valid contract of insurance, it was due entirely to the agent of the insurance company, and if, in fact, any incompleteness existed in this temporary contract, it was fully known to the insurance company which, nevertheless, recognized the binding effect of the temporary contract. These facts clearly appearing, the contract should be upheld, unless it contravenes some law of this state, or is too imperfect and incomplete to be enforced. It is insisted that the statute of this state requires that the whole contract of insurance shall be in writing, and shall be signed by the insurer, and that the written memorandum or "binder," relied upon as a contract, is incomplete, in that several elements necessary to make a contract of insurance are omitted therefrom. The memorandum in question, it is contended, does not sufficiently describe the parties thereto, it not showing, (1) who the insured is; (2) nor the insurer, unless the insurer is R. E. Matheson, individually, the word "agent" being merely descriptive personæ; (3) nor is the premium to be paid agreed upon, nor any promise moving from either party disclosed. Of course, there

can be no contract without parties, and the contract should identify the parties. It should not be lost sight of in this case that the plaintiff, while setting up the memorandum made by the agent as creating the contract relies upon other contemporaneous and subsequent writings as evidence of the contract. The evidence shows "a series of writings internally connected one with another, executed contemporaneously with or subsequently" to the written memorandum, which are intelligible without parol, and which clearly prove the contract relied upon. *Capital City Brick Co. v. Atlanta Ice & Coal Co.*, 5 Ga. App. 436, 63 S. E. 562. Construing together all the writings on the same subject-matter, every essential element of a complete contract of insurance appears; and the written report of the temporary contract made by the agent to the manager of the company omits no essential element of a complete contract of insurance. *Todd v. German-American Insurance Company of New York*, 2 Ga. App. 789, 59 S. E. 94. But, even if the memorandum made by the agent and called in insurance parlance a "binder" stood alone, we do not think it lacks any essential element of a contract of insurance. According to Mr. Joyce in his work on Insurance (1 Joyce on Insurance, § 46), temporary insurance contracts evidenced by "binders" need not contain all the terms and conditions of a permanent contract, as where the terms of the usual policy are presumed to be intended, or where the usual rate of premium is presumed to be meant; and this statement of the law is expressly approved by this court in the *Todd Case*, supra. But the binder now under discussion left nothing uncertain, except the amount of the rate of premium, and it shows an agreement to pay the rate of premium as fixed by the company, and when the regular policy should issue and be received by the insured. Any uncertainty as to the rate of premium was due solely to the action of the agent of the defendant and of the defendant itself. While the binder does not show any specific premium to be paid, it does show by necessary implication an agreement to pay whatever rate of premium might be fixed by the company, and when the permanent policy was issued and delivered to the insured. The insurer in this case, by the very terms of the binder, postponed the payment of the premium by the insured until the temporary contract was ended by the substitution of the regular standard policy. The fact that credit is given for the payment of a premium in no wise invalidates the contract of insurance. 1 Cooley's *Briefs on the Law of Insurance*, 375. Suppose in this case the memorandum or binder had been delivered to the insured, instead of having been kept by the agent, and made a part of the records of the company in his office, would not the insured have been legally liable, in accepting the "binder," to pay whatever rate of premium was subsequently fixed on the property covered by the

contract? And, if the insurance company had failed to fix the rate of premium before the loss occurred, would not the insured have been bound to pay a reasonable rate for the protection which he received by the temporary contract, or under the facts of this case, the rate as subsequently fixed on similar property? But in this case the insured, when he made the application for the insurance, offered to pay the premium which was refused by the agent of the company, because the rate had not at that time been fixed. It seems to us that to hold that this contract was invalid or incomplete because there was no specific rate of premium mentioned in the "binder" under the uncontroverted evidence would be a gross injustice to the insured. A case very much in point is that of *Smith & Wallace v. Prussian Insurance Co.*, 68 N. J. Law, 676, 54 Atl. 458. In that case an insurance company, by its agent, issued and delivered to the insured a "binder," or "binding slip," whereby it assumed and bound itself for \$2,000 of insurance upon certain property of the insured, the "binding slip" to be void on the delivery of the policy. No rate of insurance was mentioned in the "binder," because the insured requested the agent to obtain from the company some concession, which the agent consented to do, and, before the rate was agreed on, the property covered by the "binder" was destroyed by fire, and the court held that a complete temporary contract of insurance existed between the insurer and the insured from the date of the delivery of the "binder," and the insured was bound to pay a reasonable rate of premium for the protection which he had received by the temporary contract.

While some of the earlier cases proceed on the theory that these "binding slips" or memoranda merely constitute agreements to issue policies, yet it is now universally held that these "binding slips," memoranda, or receipts have all the force and effect of insurance contracts, and are as binding as the policies themselves. The cases on this subject are collected by Mr. Cooley in his work *Briefs on the Law of Insurance* (volume 1), beginning on page 535. The case of *Todd v. German-American Insurance Company*, supra, in principle fully controls the point now under discussion, and we conclude this branch of the case by the statement that in our opinion the trial judge very properly construed the writing in question as constituting a valid contract of insurance, and very properly refused to submit this question to the determination of the jury; it being the duty of the judge, and not of the jury, to decide whether the memorandum or "binder" constituted a valid contract of insurance.

It is contended by the plaintiff in error, in

the next place, that the agent had no authority to make such a contract of insurance. There are three reasons shown by the evidence why this position is unsound: (1) The agent who made the binding memorandum or temporary contract was fully authorized by his written commission to take applications for insurance, and to countersign and issue policies, and the making by him of a temporary contract was clearly within the limits of his authority as agent. (2) The temporary contract was in accordance with his general custom as agent in connection with his agency. (3) His act in making the temporary contract was fully approved and confirmed by the company. The company accepted the temporary contract, and treated it as valid.

2. The breaches of the terms and conditions of the contract of insurance relating to other insurance, incumbrances on the property, and failure to furnish proofs of loss within a reasonable time were each claimed to have been waived by the company. These issues were solely questions of fact, to be decided by the jury, and there was both positive and circumstantial evidence in support of the waivers claimed by the plaintiff, and in denial of such waivers by the defendant. The law applicable to these questions was fully submitted to the jury in the charge of the judge, in accordance with the repeated decisions of this court and the Supreme Court. *Insurance Company of North America v. De Loach & Co.*, 3 Ga. App. 807, 61 S. E. 406; *American Insurance Company v. Peebles*, 5 Ga. App. 736, 64 S. E. 304; *Southern Fire Insurance Co. v. Knight*, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216, and cases there cited. We are clearly of the opinion that the verdict is fully supported by the evidence and the law applicable thereto. Judgment affirmed.

POWELL, J. (concurring specially). I do not think that the so-called "binder" in this case, standing alone, would comply with our statute requiring all contracts of insurance to be in writing. It fails to show at least one essential element of a contract of insurance—the name of the person to be insured. But what was lacking in the "binder" was supplied by the daily report subsequently made out by the agent and accepted by the company. While a contract of insurance must be in writing, the writing need not be delivered to the insured. And under the principle announced in *Capital City Brick Co. v. Atlanta Ice & Coal Co.*, 5 Ga. App. 436, 63 S. E. 562, though the contract may rest wholly or in part in parol, if it becomes evidenced by writing at any time before the suit is filed, the statute requiring the writing becomes satisfied.

(7 Ga. App. 817)

MINOR v. CITY OF ATLANTA. (No. 2,857.)

(Court of Appeals of Georgia. June 14, 1910.)

*(Syllabus by the Court.)***1. CRIMINAL LAW (§ 398*)—EVIDENCE—UNLAWFUL SEIZURE OF PROPERTY.**

Although officers, whether with or without lawful warrant or other authority, have entered a person's place of business, and, by a violent and forceful search of the premises and seizure of property found therein, have obtained, over the protest of the owner, possession of articles tending to show his guilt of an offense, the evidence so obtained is admissible against him in a prosecution for the offense, as against the objection that it was obtained by an unlawful search and seizure, and that through the transaction the defendant was compelled to furnish testimony tending to incriminate himself.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 877; Dec. Dig. § 393.*]

2. COURTS (§ 91*)—DECISIONS OF SUPREME COURT—BINDING EFFECT.

While the Court of Appeals is a court of final review, yet the decisions of the Supreme Court are binding upon it as precedent. Whatever may be the personal views of the judges of this court upon any question, they are to be yielded, so far as they conflict with the decisions of the Supreme Court in letter or in principle.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 325; Dec. Dig. § 91.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

C. A. Minor was convicted of violating an ordinance of the City of Atlanta, and brings error. Affirmed.

Jno. A. Boykin, for plaintiff in error. Jas. L. Mayson and W. D. Ellis, Jr., for defendant in error.

POWELL, J. Certain police officers of the city of Atlanta went to the defendant's near-beer saloon and compelled him to allow them to enter an adjacent back room, in which they found hidden a quantity of intoxicating liquors; he being present and protesting. They had what they called a search warrant; but whether the instrument had any legal efficacy as a search warrant it is not necessary for us to decide. For present purposes, we will consider the case just as if the so-called search warrant were wholly invalid. When the evidence thus obtained was offered against the defendant in the police court in the prosecution for a violation of the municipal ordinance prohibiting the keeping on hand of intoxicating liquors for the purpose of unlawful sale, he objected to it, on the ground that it had been obtained by unlawful search and seizure, and that the result of the transaction was to compel him involuntarily to give evidence tending to incriminate himself, in violation of the constitutional guaranties against unlawful search and seizure and against any person being compelled to furnish testimony tending to incriminate himself. The objection was overruled, and this action of the court is the

basis of the exception relied on in the record before us.

If this point came before us as an original proposition, we would have but little hesitancy in pronouncing it well taken. We do not think that the unlawful search and seizure clause of the Constitution protects the defendant against the use of this evidence; but it would seem, as an original proposition, that he was compelled involuntarily to produce evidence against himself. Even if our previous reflections upon this question had not induced this view, which we personally hold, the very strong and able brief and argument of counsel for plaintiff in error would probably convince us. But the question is not an open one. The case is on all fours with *Duren v. City of Thomasville*, 125 Ga. 1, 53 S. E. 814—a case resting on a long line of similar precedents. In that case the city marshal went to Duren's store with two policemen, and "searched Mr. Duren's store, over his protest, and found a quantity of intoxicants." In that case the point was made that the evidence was inadmissible, because to admit it would be to violate that clause of the Constitution which provides that no man shall be compelled to furnish testimony upon which to convict himself. The Supreme Court held that the testimony was admissible, and that to admit it was not a violation of this constitutional guaranty.

The duty of this court, in the light of the constitutional provision making the Supreme Court decisions binding upon it as precedents, may be analogized to the duty of processions making a survey under Civ. Code, § 3243 et seq. Under that statute the processions are not charged primarily with the duty of making any new lines. They are merely to trace and find, if possible, the ancient landmarks. "If the corners are established, and the lines not marked, a straight line, as required by the plat, shall be run; but an established marked line, though crooked, shall not be overruled." So it is our duty to follow the precedents and the ancient landmarks of the law as declared by the Supreme Court. If the line leading from precedent to a particular point has not been marked, we are authorized to use the compass of our own judgment, and establish what we find to be the straight line; but wherever the Supreme Court has set up "an established marked line, though crooked," we have no power to overrule it. This is a necessary and salutary provision found in the organization of the two courts—a provision that relieves the litigants of this state from that uncertainty which comes about from having two courts of final review, with the consequent possibility of conflicting decisions, where the decisions of neither court are paramount as against the decisions of the other.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Judicial work has always been and will always be necessarily somewhat affected by the personal equation of the individual judges. The conflict in the application of precedent is to be expected, and is found in the decisions of every court—the court thus in a sense conflicting with itself; and in like manner it is to be expected that this same element of the personal equation of the judge will bring about conflict in the application of precedent to a particular case, as between this court and the Supreme Court. But the beauty of our system is this: If any conflict exists between this court and the Supreme Court, the people, and especially the lawyers and the trial judges who have to use the decisions, are put upon advance information that the decision of the Supreme Court is to be followed, and is the paramount decision, binding upon this court, even in preference to its own opinion. This court will never intentionally disregard the Supreme Court decision as precedent. Therefore the harmony desirable in the body of our decisions as a whole is the natural result of the system; for as the individual judges of the two benches die or otherwise leave the bench, and what is called the personal equation expires, the coming on of new judges, uninfluenced by the same bent of mind that tended to bring about the conflict in the construction of precedent, will restore harmony in application as well as in principle. The path in this case has been plainly marked. There is no room for construction. The question has been settled. The Supreme Court has blazed the way. This court follows.

Judgment affirmed.

(7 Ga. App. 805)

MIXON v. STATE. (No. 2,617.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 75*)—DEMURRER—GROUNDS.

Though, by reason of verbal inaccuracies, an indictment may be in part unintelligible, yet where, either by disregarding the unintelligible portion as surplusage, or by considering it along with the rest of what is said, the language of the indictment plainly, clearly, definitely, and accurately charges a particular offense, it is not subject to be quashed on demurrer.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 202-204; Dec. Dig. § 75.*]

2. SUFFICIENCY OF EVIDENCE.

Under the evidence the jury were fully authorized to find the defendant guilty of voluntary manslaughter.

3. CRIMINAL LAW (§ 786*)—INSTRUCTIONS—STATEMENT OF ACCUSED.

Though it is the best practice for a trial judge, in charging the jury upon the subject of the defendant's statement, to follow the language of the statute on that subject literally, yet it is not reversible error for him to fail to do so, if in fact the instruction given substan-

tially covers the material elements of the statute and is otherwise fair to the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1895-1901, 1960, 1984; Dec. Dig. § 786.*]

4. HOMICIDE (§ 31*)—"MANSLAUGHTER"—"VOLUNTARY MANSLAUGHTER."

Wherever a homicide is neither justifiable nor malicious, it is "manslaughter"; and, if intentional, is "voluntary manslaughter."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 52; Dec. Dig. § 31.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4338-4342; vol. 8, p. 7715; vol. 8, pp. 7350, 7351.]

5. HOMICIDE (§ 217*)—DYING DECLARATIONS—EVIDENCE—COMPETENCY.

Neither the parol evidence rule, nor any rule forbidding oral testimony as to the contents of court records, renders a witness incompetent to testify as to a dying declaration though the words of the dead man may have been taken down in writing by some one present at the time the alleged statement was made.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 462; Dec. Dig. § 217.*]

6. CRIMINAL LAW (§ 1168*)—NEW TRIAL—RULINGS ON EVIDENCE.

Slight or immaterial error in the admission or exclusion of testimony will not work a reversal of the judgment of the lower court refusing a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3136, 3144; Dec. Dig. § 1168.*]

7. CRIMINAL LAW (§ 834*)—INSTRUCTIONS.

It is not necessarily reversible error for a trial judge to refuse to give the exact language of a written request to charge, if he substantially covers the same matter in his general charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2013, 2014; Dec. Dig. § 834.*]

8. CRIMINAL LAW (§ 945*)—EVIDENCE—NEW TRIAL.

The alleged newly discovered evidence was not sufficient to require the grant of a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327, 2336; Dec. Dig. § 945.*]

9. HOMICIDE (§ 295*)—INSTRUCTIONS—PROVOCATION.

It is not unconditionally erroneous for a judge to instruct the jury that provocation by words, threats, menaces, and contemptuous gestures can in no case be sufficient to free the person killing from guilt of the crime of murder. Whether such a charge is erroneous or not depends on the facts of the case, and on what else is said in the charge on the same subject.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 606-609; Dec. Dig. § 295.*]

Error from Superior Court, Johnson County; B. T. Rawlings, Judge.

George W. Mixon was convicted of murder, and brings error. Affirmed.

Jas. K. Hines and E. L. Stephens, for plaintiff in error. Alfred Herrington, Sol. Gen., W. W. Larsen, and Wm. Faircloth, for the State.

POWELL, J. 1. The indictment charged the defendant with the offense of murder, "for

that the said George W. Mixon, on the 13th day of March, in the year of our Lord 1909, in the county aforesaid, with force and arms one pistol in the peace of God and said state then and there being, then and there unlawfully, feloniously, willfully, and of his malice aforethought, did kill and murder, by shooting the said Henry Claxton with a certain pistol which the said George W. Mixon then and there held, and giving to the said Henry Claxton then and there a mortal wound, of which wound the said Henry Claxton died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said George W. Mixon him, the said Henry Claxton, in manner and form aforesaid, unlawfully, feloniously, willfully, and of his malice aforethought, did kill and murder, contrary to the laws of said state, the good order, peace, and dignity thereof." The defendant demurred to the indictment, on the general grounds and on several special grounds; the substance of the objections being that the indictment charged the killing and murdering of a pistol, and not of a human being. There is a manifest verbal inaccuracy in the indictment, but it requires no straining of the ordinary rules of construction to hold that the language, taken altogether, clearly, definitely, and accurately conveys no other meaning than that George W. Mixon killed and murdered Henry Claxton by shooting him with a pistol. This intelligent meaning can be gained from the language used; and the language is not subject to any other intelligent construction. The indictment is therefore held to be sufficient against the demurrer. Verbal absurdities will not render an indictment or other pleadings subject to demurrer, where the language, taken as a whole, nevertheless clearly, accurately, and definitely charges a crime. The maxim, "*Utile per inutile non vitiatur*" (Broom, Legal Maxims [7th Ed.] 468), is applicable to indictments as well as to other pleadings.

2. The indictment charged murder. The defendant was convicted of voluntary manslaughter. The evidence, probably the preponderance of the evidence, authorized this verdict.

3. Complaint is made as to an instruction of the court on the subject of the defendant's statement. The charge of the court did not follow the language of the statute, but did inform the jury, in substance, as to the same things mentioned in the statute. The Supreme Court and this court have time and again suggested to the trial bench that in charging upon the defendant's statement the better practice is to follow the language of the statute literally; but it is not held to be reversible error for the judge to fail to do so, where he nevertheless covers the same ground in his charge. The language of the trial judge in the present case is not as perspicuous as the language of the statute itself (indeed, it is hard to improve upon the

statute itself for the quality of being luminous); but we do not think that the instruction complained of was materially misleading to the jury.

4. Complaint is made that the court erred in charging the jury as follows: "So in this case, if you find from the facts and circumstances of the case that the accused took the life of the deceased, and find at the time he was not justified, that the killing was done in a sudden heat of passion, generated and caused, so far as the deceased is concerned, by an endeavor on the part of the deceased to commit a serious personal injury upon his person, or other equivalent circumstances to justify the excitement of passion and exclude all idea of deliberation or malice, either express or implied, and the provocation was not by words, threats, menaces, and contemptuous gestures, but amounted to more, and you find that the killing occurred under such circumstances, and believe that to be the truth of it, then you would be authorized to find the defendant guilty of voluntary manslaughter." This charge is not subject to the exceptions made against it. It is not an incorrect statement of the law. Taken in connection with the remainder of the charge, it is not misleading, nor was it likely to confuse the jury, or to deprive the defendant of the defense of reasonable fear. It was not calculated to impress upon the jury that provocation by words, threats, menaces, and contemptuous gestures could in no case be sufficient to generate a reasonable fear in the mind of the defendant. While it might have been more emphatic for the judge to have qualified the expression, "serious personal injury," by adding parenthetically, "not amounting to a felony," yet as the judge had prefaced this instruction with the qualification that it was applicable only in the event that they find that the defendant was not justifiable, and as he had explained to them fully the circumstances under which the defendant would have been justifiable, the instruction was not inaccurate. There are other exceptions to the judge's charge on the subject of manslaughter, all of them based on grounds similar to those mentioned above; but, considering the charge as a whole, there was no material inaccuracy.

5. A witness for the state detailed a dying declaration made by the deceased. On cross-examination he admitted that some one present at the time the statement was made probably took down the statement in writing, though he was unwilling to swear positively that the statement was committed to writing. However, it is fairly inferable from what the witness testified that some one present made a memorandum of what the deceased stated. The court overruled a motion to exclude this testimony, on the ground that the writing would be the best evidence of what the statement was. There was no merit in this objection. It was competent for

the witness to testify as to his recollection of what the dying man said, notwithstanding some one else present might have undertaken to commit the statement to writing. Neither the parol evidence rule, nor the rule which forbids oral testimony as to the contents of public records without accounting for the original, applies in such a case.

8. There was some testimony on behalf of the defendant to the effect that the deceased had cursed him; and thereafter certain witnesses for the state were allowed to testify that the deceased was not a "cursing man," that he was a member of the church, and that those who knew him well had never heard him curse. The exception to this ruling may be disposed of by the statement that, even if the ruling were erroneous, the error was of too little materiality to require a reversal.

7. The defendant requested the court to charge the jury as follows: "Defendant will be justified if there be a reasonable doubt as to whether he acted under such fears, or had reason to feel that it was necessary to kill in order to save his own life, or to prevent a felony from being committed upon his person." Perhaps this request to charge is subject to the criticism that it is not theoretically accurate. A defendant would not necessarily be justified because the jury might have reasonable doubts as to whether he acted under the fears of a reasonable man, though, if the jury had a reasonable doubt as to whether he had such fears as would have justified him, it is the fears that justify, and not the doubt, and they ought to acquit. But if this criticism be hypercritical, it is enough, to dispose of the exception, to say that the judge in his general charge fully covered the question as to reasonable doubt and as to reasonable fears. Indeed, at the conclusion of the charge he gave in substance the exact principle requested, and gave it in almost the exact language requested. Therefore the refusal to give the special request was not reversible error. *Smith v. State*, 63 Ga. 168; *Carr v. State*, 84 Ga. 251 (4), 10 S. E. 626; *McDuffie v. State*, 90 Ga. 786 (1), 17 S. E. 105; *Perdue v. State*, 126 Ga. 112, 54 S. E. 820. It is true that in *Mitchell v. State*, 71 Ga. 128 (7), 157 (relied on by plaintiff in error), a ruling apparently to the contrary was made. However, the decision in the *Mitchell* Case was by two judges only, and, as to this point, is in conflict with both prior and subsequent decisions of the Supreme Court.

8. The motion for a new trial contains several grounds based on alleged newly discovered testimony. One ground set up the fact that the dying declaration referred to above was in fact committed to writing, and that the witness who testified on the subject knew, as a matter of fact, that the writing was then in the courtroom in the possession of one of the witnesses. What has been

said already on this subject seems to dispose of this ground. Even if the writing had been in existence, it would not have been the highest evidence of what the dying man had said, though it might, in a sense, have been the most reliable evidence (see *Perry v. State*, 102 Ga. 365, 374, 30 S. E. 908); so, for all practical purposes, the testimony of this alleged newly discovered witness would merely tend to impeach the testimony of the witness who expressed some doubt as to whether the statement had been committed to writing. There was further presented the alleged newly discovered testimony of an 11 year old boy who claimed to have been a witness to the transaction. As the affidavit of this witness tended to show a case of voluntary manslaughter, and as the defendant was convicted of that offense, it would hardly afford a reason for granting a new trial, even if it were otherwise sufficient to bring about such a result. There was alleged newly discovered testimony of still another witness; but the matter to which he referred was of such small materiality as not to authorize the granting of a new trial on that account. The judge did not err in refusing to grant a new trial on account of the newly discovered testimony.

9. The complaint is made that the judge charged the jury that provocation by words, threats, menaces, and contemptuous gestures can in no case be sufficient to free the person killing from the guilt and crime of murder; and it is true that the judge read to the jury section 65 of the Penal Code of 1895, which contains (among other things) this language. It is also true that this court has on several occasions cautioned the trial judges against the use of this broad statement; but we have never said that it did not state a correct principle of law, as applied to certain classes of cases. Wherever the question of justification, from apparent self-defense, is not involved, the court, for the purpose of distinguishing between murder and manslaughter, may without error instruct the jury in the language of the excerpt referred to. The sum and substance of the previous rulings of this court on the question is that, wherever this language is employed without explanation in such a context as to mislead the jury under the facts of the particular case, it will be error, and generally reversible error. But in the present case the judge was very careful to limit the language to its proper purpose. He plainly charged the jury that they had "the right to consider words, threats, menaces, or contemptuous gestures, in deciding whether the defendant was acting under the fears of a reasonable man," and reiterated the statement. He further told them that the Legislature had not undertaken to say that any given state of facts or circumstances should or should not be sufficient to constitute grounds of reasonable fears, and that the matter was for the sole

determination of the jury. The charge as a whole was a very fair and able presentation of the issues involved in the trial. The defendant seems to have been fairly tried and legally convicted.

Judgment affirmed.

(7 Ga. App. 806)

GREEN v. STATE. (No. 2,613.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 761*)—HOMICIDE (§ 142*)—INCONSISTENT DEFENSES—INSTRUCTIONS.

It is permissible in a homicide case for the defendant to rely upon both defenses, that he did not kill the deceased, and that, if he did kill him, it was justifiable; and in such a case, when the defendant has not admitted that he was the person who did the killing, it is error for the court to charge the jury that the defendant contended that "he shot and killed the deceased, acting under the fears of a reasonable man." The evidence of the defendant's guilt being very slight, the error is of sufficient importance to justify a reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 250-259, 1754-1764; Dec. Dig. § 761.* Homicide, Cent. Dig. §§ 582, 599, 607, 621; Dec. Dig. § 142.*]

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Lee Green was convicted of voluntary manslaughter, and brings error. Reversed.

Park & Park, for plaintiff in error. Jos. E. Pottle, Sol. Gen., for the State.

POWELL, J. The defendant was indicted for murder, and convicted of voluntary manslaughter. By what is the apparently strong preponderance of the evidence, both for the state and for the accused, the homicide, if committed by the defendant at all, was justifiable, and yet by straining the testimony of one of the dead man's brothers, who testified for the state, it was legally possible for the jury to have rendered the verdict of manslaughter, on the theory that the defendant and the deceased were at the time of the killing possessed of a mutual intention to fight with deadly weapons. The defendant in his statement admitted that he had shot, but he did not admit that it was his shot that killed the deceased; and there was evidence indicating that there were several persons shooting, and the jury might have inferred from the testimony that not the defendant, but some other person, not acting in concert with him, killed the deceased. The killing occurred at a negro frolic, and those of us who live in this section of the country readily understand that, when a homicide occurs at a negro frolic, it is often difficult to tell who did the killing—that so soon as the fight begins, it generally becomes a free-for-all combat, in which not only the original participants, but others, are likely to become engaged. There is nothing unreasonable,

from a practical standpoint, in the defendant's insistence that, although the immediate row was between him and the deceased, others were shooting also. The case is directly controlled by *Phillips v. State*, 131 Ga. 426 (1), 62 S. E. 239.

As the case goes back for a new trial, it is well enough for us to call attention to the fact that there is also an inaccuracy in the charge of the court on the subject of mutual combat, or mutual intention to fight. The court instructed the jury that "an assault may sometimes be evidenced by a mutual intention to fight with deadly weapons, and acts indicating a purpose on the part of the parties to carry out such mutual intention, and to use such weapons to kill each other. If both the defendant and the deceased form an intention to kill each other, and arm themselves for that purpose, or have pistols for that purpose, and in furtherance of such mutual intention to kill they use such weapons, the slayer would be guilty of voluntary manslaughter under the law." It is true that under the circumstances enumerated the slayer might be guilty of voluntary manslaughter, but not necessarily so. Section 73 of the Penal Code of 1895 allows for a margin of justification in such cases, and there is evidence in the case at bar that the person killed was the assailant, and that the defendant was endeavoring to decline any further struggle before the mortal blow was given. The judge should also have made it clear that though the defendant may have armed himself, and though he may have expressed the intention of shooting the deceased with a deadly weapon, he would not necessarily be guilty of manslaughter if he stood purely on defensive ground throughout the transaction. There was evidence from which the jury might have inferred that for some minutes prior to the killing the deceased was endeavoring to get to the defendant and kill him. If so, the defendant would have had the right to arm himself and to express the intention of killing the deceased, if he came upon him in this hostile and murderous attitude. A fully defensive killing, under these circumstances, would not be manslaughter.

Judgment reversed.

(7 Ga. App. 512)

JOHNSON v. STATE. (No. 2,638.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 67*)—LABOR CONTRACT LAW—VIOLATION—EVIDENCE.

To sustain a conviction of a violation of the "labor contract act" of 1903 (Acts 1903, p. 90), the evidence must show that there was a fraudulent intent at the time when the money or other thing of value was obtained from the employer, and that the laborer failed to perform his contract or repay his advances without good and sufficient cause. None of these facts were

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

shown in this case. The evidence does not in any essential particular support the verdict.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. § 67.*]

Error from City Court of Calhoun; H. M. Calhoun, Judge.

Alfred Johnson was convicted of violating the labor contract law, and brings error. Reversed.

W. A. Jordan, for plaintiff in error. E. L. Smith, Sol., for the State.

HILL, C. J. Johnson was convicted for a violation of the act of 1903 (Acts 1903, p. 90) commonly known as the "labor contract law," and, his motion for a new trial being overruled, he excepted.

The prosecutor, who was the only material witness for the state, testified in substance as follows: On January 21, 1908, he made a written contract with the defendant, Johnson, to work for him as a laborer from that day for 12 months, to be paid wages at the rate of \$9 per month; that at the time when the contract was made he advanced Johnson the sum of \$60 thereon; that Johnson, on January 22, 1908, commenced work under the contract, and continued to work until December 19, 1908, "and he did good and faithful service until that time." The contract further provided that if, at the expiration of the first 12 months, Johnson should owe the prosecutor for any advances made thereon, he (Johnson) agreed to work for the prosecutor an additional 12 months for the same amount of wages per month, and that any advances made to him on the first 12 months should be carried over and charged against him for the second 12 months. The prosecutor testified that on December 19, 1908, he advanced Johnson \$5 on the contract, and that at that time Johnson owed him \$15 or \$20 more than his wages amounted to for the 12 months. The accusation contains two counts, the first charging Johnson with fraudulently obtaining from the prosecutor the \$60, and the second count charging him with fraudulently obtaining the \$5. The prosecutor testified that on December 19, 1908, Johnson quit work and went to the house of his mother, and he (the prosecutor) went to hunt for him, and found him at her house, and he then told the prosecutor he was sick and unable then to resume work. Under this evidence the solicitor abandoned the first count. We think justice would not have been seriously wounded if he had also abandoned the second count.

The state's testimony shows several reasons indicating that the prosecution was without probable cause, and that the conviction was manifestly unwarranted. In the first place, the prosecutor states that the laborer had done "good and faithful service" for him under the contract for a full period of 11 months, and during this entire time he had

advanced \$65, and owed him under the contract \$99. It is true that the prosecutor states in an indefinite and general way that the defendant owed him \$15 or \$20, when he quit work, more than his wages for the year amounted to; but it is significant that he does not state the time when he advanced him an additional sum, or the amount of the advance, if any, and failed to include these advances in his accusation against him. In his anxiety to prosecute this "good and faithful servant," it would seem remarkable that he omitted anything. We are clear that the evidence by the prosecutor himself fully rebuts the existence of a fraudulent intent on the part of the defendant when he procured the \$5, as well as when he procured the \$60. *Mulkey v. State*, 1 Ga. App. 521, 57 S. E. 1022. In the second place, if the defendant was sick when he quit work, that was a good reason for his quitting; and there is no evidence that he was not sick, as he stated. The prosecutor found him at his mother's house, and he then told the prosecutor that he was sick and was not able to resume work. The defendant's sickness constituted a good and sufficient reason for his not working under his contract. *Mobley v. State*, 4 Ga. App. 78, 60 S. E. 803.

Altogether we are clearly of the opinion that the conviction in this case was without evidence to support it, and therefore was contrary to law.

Judgment reversed.

(7 Ga. App. 822)

DAVIS v. STATE. (No. 2,660.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 236*)—VIOLATION OF PROHIBITION LAW—EVIDENCE.

No error of law is complained of, and there is some evidence to support the verdict.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 309; Dec. Dig. § 236.*]

Error from City Court of Columbus; G. Y. Tigner, Judge.

J. T. Davis was convicted of a violation of the prohibition law, and brings error. Affirmed.

Ed. Wohlwender, for plaintiff in error. T. H. Fort, Sol., for the State.

HILL, C. J. Davis was tried on an accusation charging him in two counts with a violation of the prohibition law. In the first count he is charged with keeping on hand at his place of business alcoholic, malt, spirituous, and intoxicating liquors, to wit, whisky, and in the second count he is charged with selling intoxicating liquors. The jury convicted him on the first count. His motion for a new trial, based on the general grounds only, was overruled, and he excepted.

The evidence for the state shows in sub-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

stance that two detectives, pursuing their vocation in ferreting out offenses against the prohibition law in Columbus, Ga., induced a boy 14 years of age to go into the place of business, "a near beer" saloon, of the defendant, and see if he could purchase any whisky, and they gave him the money for the purpose. Before he was sent into the saloon these detectives searched him to see if he had any whisky on his person, and found none. They followed the boy until he entered the saloon, and saw him enter and talk to the defendant. He was in the saloon about five minutes. When he came out he pulled out of his pocket a half pint of whisky. It was "Supreme Court whisky." He stated that he had gotten the whisky in the saloon. The boy testified that he did not remember buying any whisky from the defendant on the night in question, as he was drinking that night and did not remember where he had gotten his whisky, though he did remember that he got some whisky that afternoon "across the river." About an hour after the detectives had gotten the whisky from the boy, they secured a warrant for the arrest of the defendant, and went to his place of business and made a search for intoxicating liquors, but found none there. They searched his person and found a half pint of "Kentucky Tavern" whisky in his pocket. It may be proper to state that both of the detectives swore that the boy was not drinking when they got him to go into the saloon. The defendant, in his statement to the jury said that he had not sold any whisky to the boy; that when the boy came into his place he refused to sell him whisky and ordered him out, telling him that he did not want "any kids" about his place; and that the boy took from the front of his waist a half-pint bottle and said, "Well, I have some anyhow," placed it in his inside coat pocket, turned around, and left the place. As to the half pint of whisky found in his pocket, he stated that he had had his porter to go out and buy it for him just a half hour before he was arrested; that he had gotten the whisky to take home to his wife, who was sick with the gripe.

It is contended that this evidence is wholly insufficient to show that the defendant was keeping on hand at his place of business

intoxicating liquors. Our attention is called to the fact that the jury found the defendant not guilty on the second count, which shows that they did not think the boy bought the half pint of "Supreme Court whisky" from the defendant in his saloon. Even conceding this, it would not follow that the verdict was not supported by the evidence. This high grade of whisky, judging from its name, the jury probably inferred had been bought by the boy from across the river in the state of Alabama, and the evidence also shows that the half pint of whisky which the defendant had on his person when arrested was a much lower grade of whisky than "Supreme Court whisky," being "Kentucky Tavern whisky." It seems from the evidence to have been a very low grade of intoxicating liquor. The conclusion as to the defendant's guilt might be placed upon the evidence as to the finding of the half pint of whisky on his person while at his place of business. The trial judge instructed the jury that "if they believed from the testimony that Davis, the defendant, had kept no whisky in his place of business other than that in his pocket, and if they believed his explanation of his possession of that, and if there was no degree of permanence attached to its presence there, and if he had it there merely in process of conveyance to his wife at home, then they should find him not guilty as to the first count." This certainly charged the law applicable to that issue as favorably to the defendant as he could have desired. *Cohen v. State*, 7 Ga. App. 5, 65 S. E. 1096. It was exclusively the province of the jury to solve this issue, and they did solve it by discrediting the statement made by the defendant. The jury had the right, under the law, to discard the defendant's statement entirely, and to believe that the defendant got this pint of whisky from his place of business. While the evidence was not strong, this court cannot say that it had no probative value whatever, and the strength of the evidence was for the jury. As repeatedly held, this court cannot, under the Constitution, set aside a verdict on the general grounds, where there is any evidence whatever in support of it under the law applicable thereto.

Judgment affirmed.

(134 Ga. 608)

McBRIDE v. GOODHUE.

(Supreme Court of Georgia. June 18, 1910.)

*(Syllabus by the Court.)***1. INNKEEPERS (§ 11*)—LOSS OF PROPERTY OF GUEST—ACTIONS—ADMISSIBILITY OF EVIDENCE.**

In a suit by a guest against an innkeeper for the loss of jewelry and valuable articles alleged to have been taken from the room occupied by the guest, the issue being whether the innkeeper had made a rule requiring valuable articles to be deposited in a safe provided by him, and had duly posted such rule in accordance with Civ. Code 1895, § 2937, it was not admissible to ask the plaintiff, on cross-examination, if the wife of the innkeeper did not warn her, on a certain occasion, to leave her jewelry in a safe of the hotel provided for the safe-keeping of the valuables of guests.

[Ed. Note.—For other cases, see *Innkeepers*, Dec. Dig. § 11.*]

2. REVIEW ON APPEAL.

While the evidence was conflicting, it was sufficient to sustain the verdict.

Error from Superior Court, Thomas County; R. G. Mitchell, Judge.

Action by Mrs. Wells Goodhue against A. N. McBride. Judgment for plaintiff, and defendant brings error. Affirmed.

J. F. Mitchell and Roddenbery & Luke, for plaintiff in error. T. N. Hopkins and Theo. Titus, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(124 Ga. 602)

YOUNG v. GERMANIA SAVINGS BANK.

(Supreme Court of Georgia. June 17, 1910.)

*(Syllabus by the Court.)***1. STATUTORY PROVISIONS.**

Appearance and pleading shall be a waiver of all irregularities of the process, or of the absence of process, and the service thereof. Civ. Code, § 4981.

2. EXECUTION (§ 182*)—CLAIM BY THIRD PERSON—OBJECTION TO PROCESS.

Upon the trial of a claim case, the claimant cannot complain that the process in the suit in which was rendered the judgment levied upon the property claimed was not served by one authorized to make such service, where the defendant in such suit, by appearance and pleading to the merits, waived such process.

[Ed. Note.—For other cases, see *Execution*, Dec. Dig. § 182.*]

3. APPEAL AND ERROR (§ 255*) — RESERVATION OF GROUNDS—EXCEPTIONS.

A ruling of the court disallowing an amendment offered by the claimant to the claim affidavit in a claim case cannot be made the ground of a motion for a new trial; but direct exceptions should be filed to such ruling, if a review of it is to be had. *Hawkins v. Studdard*, 132 Ga. 265, 63 S. E. 852.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 255.*]

4. APPEAL AND ERROR (§ 302*)—RESERVATION OF GROUNDS—MOTION FOR NEW TRIAL.

An assignment of error in a motion for a new trial, in which complaint is made that the court allowed oral evidence in regard to

certain writings, cannot be considered, when the motion does not disclose what was the evidence it is claimed the court illegally admitted, although the assignment of error sets out questions asked the witness and the grounds of objection thereto.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 302.*]

5. REVIEW ON APPEAL.

Many of the questions made in this case were adjudicated adversely to the plaintiff in error when the case was formerly before this court. *Young v. Germania Savings Bank*, 132 Ga. 490, 64 S. E. 552. The evidence supported the verdict, and no error of law requiring a reversal was committed upon the trial of the case, or upon the hearing of the motion for a new trial.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Claim case between Jemie Young and the Germania Savings Bank. From the judgment, Young brings error. Affirmed.

Robt. L. Rodgers, for plaintiff in error. Westmoreland Bros., for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(124 Ga. 588)

CENTRAL OF GEORGIA RY. CO. v. DUKES.

(Supreme Court of Georgia. June 16, 1910.)

*(Syllabus by the Court.)***1. RAILROADS (§ 351*)—CROSSING ACCIDENTS—ACTIONS—INSTRUCTIONS.**

A widow brought suit against a railroad company for the pecuniary value of the life of her deceased husband, alleged to have been negligently killed by the defendant at a public crossing in an incorporated city. The evidence showed that the deceased, while undertaking in a wagon to pass over such crossing, was killed by a freight train, consisting of an engine and two cars, running backwards. There was evidence tending to show that the bell on the locomotive was not tolled in approaching the crossing. *Held*, the following charge: "Railroad companies are required by law to fix along the line of their road, and at a distance of 400 [yards] from the center of such public road crossings, on each side thereof, a post; and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until he arrives at the public road, and to check and keep checking the speed of his train, so as to stop in time, should any person or thing be crossing said track on said road. In cities the railroad is required by another provision of the law to toll the bell, instead of blowing the whistle. I charge you that this is required by law, and if the railroad should fail to comply with this statute it would be negligence on the part of the railroad company"—was not error requiring a new trial, because of any of the reasons assigned, which were as follows: "This charge was error because inapplicable to the facts of this case and is an incorrect statement of the law; the injury having been inflicted at a street crossing in a city, and this statute does not apply to street crossings in a city. In a city, railroad companies are not required to erect blow posts at a distance of 400 yards from the center of the street, nor are they required to toll a bell for 400 yards before reaching the street. The charge is objectionable because it

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

led the jury to believe that the defendant was required to both blow the whistle and toll the bell. This charge was error, because the injury was caused, as defendant contends, by an engine, a switch engine, backing cars in the defendant's yards at Millen, and was therefore inapplicable to the facts in the case; there being no duty upon the company in such a case to observe such a statute."

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1197; Dec. Dig. § 351.*]

2. CORRECT CHARGE.

The charge that the plaintiff contended that the deceased was a man of good health and vigorous, and was earning from \$1 to \$5 per day, was not subject to the criticism that it was not authorized by the pleadings or the evidence.

3. APPEAL AND ERROR (§ 969*)—CONDUCT OF TRIAL—VIEW OF PREMISES BY JURY—DISCRETION OF COURT.

One assignment of error in the motion for a new trial is as follows: "The court erred in refusing, at the request of defendant's counsel, at the conclusion of the evidence in said case, to permit the jury to view the premises under proper precautions; said request being made by defendant's counsel, and there being no objection by the plaintiff or her counsel to said request. When said request was made, the court promptly [denied] it, not waiting to hear from plaintiff or her counsel upon the subject. This refusal by the court was error, because it was the only way by which the jury could properly understand and intelligently apply the testimony to the occurrence." If the court in any case of this character is authorized, without the express consent of both parties, or their counsel, to permit the jury to view the premises where the injury or homicide occurred, it is a matter in his discretion, and his refusal to do so will not be adjudged error. *Johnson v. Winship Mach. Co.*, 108 Ga. 564, 33 S. E. 1013; *County of Bibb v. Reese*, 115 Ga. 346, 349, 41 S. E. 636.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3845; Dec. Dig. § 969.*]

4. REVIEW ON APPEAL.

A verdict in favor of the plaintiff, and a recovery by her of the amount found by the jury, were authorized by the evidence, and the court did not abuse his discretion in refusing a new trial.

Error from Superior Court, Jenkins County; B. T. Rawlings, Judge.

Action by Lizzie Dukes against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. L. Gamble, for plaintiff in error. E. K. Overstreet and R. P. Jones, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(134 Ga. 601)

HOLTON v. BENE et al.

(Supreme Court of Georgia. June 17, 1910.)

(Syllabus by the Court.)

ACTION (§§ 57, 69*)—CONSOLIDATION—REFERENCE TO AUDITOR—STAY.

The court did not commit error by ordering the consolidation of the case pending in the superior court on appeal from the court of

ordinary (being a case founded upon an application by a widow on behalf of herself and minor child for a year's support, to which objections were interposed by creditors) with another case, pending in the superior court, instituted by the widow as administratrix upon the estate of her deceased husband, in which she prayed that the court of equity marshal the assets of the estate, etc., and that the case be referred to an auditor. Nor was it error to include, in the order of consolidation, direction that the whole case be referred for decision to an auditor, and to enjoin the widow from separately proceeding for a judgment in the superior court in the suit for a year's support while the consolidated case was pending before the auditor.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 632-675, 744; Dec. Dig. §§ 57, 69.*]

Error from Superior Court, Wilcox County; U. V. Whipple, Judge.

Action between I. H. Holton, administratrix, against J. F. Bene and others. From the judgment, Holton brings error. Affirmed.

Haygood & Cutts, for plaintiff in error. N. M. Patten, Hal Lawson, Bankston & Buckley, M. B. Cannon, and J. T. Hill, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(124 Ga. 600)

PEEPLS et al. v. WILSON.

(Supreme Court of Georgia. June 16, 1910.)

(Syllabus by the Court.)

1. ADVERSE POSSESSION (§ 116*) — INSTRUCTIONS.

In a suit for land, where the plaintiff relied for recovery on prescriptive title, based on actual adverse possession without color of title for a period of 20 years, as provided in Civ. Code 1895, § 3588, and there was evidence tending to show such possession of some part of the land less than the whole, in charging the law of prescription the jury should have been so instructed as to restrict a recovery under such claim of prescription to such part of the land as was in actual possession of the prescriber for the requisite period; and the more especially should the judge not have refused to so charge upon timely and appropriate written request.

(a) The evidence tending to establish a prescription by 7 years' adverse possession under color of title was not without conflict, and was not of such character as to have rendered harmless the error committed by refusing to charge in accordance with the ruling announced in the above note.

[Ed. Note.—For other cases, see *Adverse Possession*, Dec. Dig. § 116.*]

2. GROUNDS FOR NEW TRIAL INSUFFICIENT.

On oral argument before this court the assignments of error referred to in the first, second, and third grounds of the amended motion for new trial were expressly abandoned. Except as indicated in the first headnote, other grounds are insufficient to require the grant of a new trial.

Error from Superior Court, Murray County; A. W. Flite, Judge.

Action between William Peebles and others

and W. B. Wilson. From the judgment, Peeples and others bring error. Reversed.

W. W. Samples, W. E. Mann, and C. N. King, for plaintiffs in error. C. L. Henry and Maddox, McCamy & Shumate, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(134 Ga. 551)

RHODES v. ROGERS.

(Supreme Court of Georgia. June 14, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1005*)—REVIEW—VERDICT ON CONFLICTING EVIDENCE.

While the evidence was conflicting, it was sufficient to support the verdict; and, the presiding judge having approved it by overruling a motion for a new trial, this court will not reverse his judgment in so doing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3948-3950; Dec. Dig. § 1005.*]

2. APPEAL AND ERROR (§ 207*)—REVIEW—IMPROPER ARGUMENT.

Where counsel for one side, in the course of his argument, used certain language which was calculated to excite prejudice against the adverse party, but it does not appear that the attention of the court was called thereto, or any ruling was invoked on the subject, either by way of reprimanding counsel, or of instructing the jury, or of declaring a mistrial, such impropriety in argument will not furnish ground for a reversal by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1500; Dec. Dig. § 207.*]

Error from Superior Court, Burke County; H. C. Hammond, Judge.

Action between M. A. Rhodes and T. W. Rogers, administrator. From the judgment, Rhodes brings error. Affirmed.

Lamar & Callaway, for plaintiff in error. E. L. Brinson, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(134 Ga. 601)

STUDSTILL v. MAISBY & CO.

(Supreme Court of Georgia. June 17, 1910.)

(Syllabus by the Court.)

NEW TRIAL (§ 71*)—CONFLICTING EVIDENCE.

While the evidence was conflicting, the court did not err in overruling the motion to open and vacate the judgment.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 144, 145; Dec. Dig. § 71.*]

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action between A. C. Studstill against Maisby & Co. From the judgment, Studstill brings error. Affirmed.

Alexander & Gary, for plaintiff in error. Hendricks & Christian, for defendant in error.

FISH, O. J. Judgment affirmed. All the Justices concur.

(134 Ga. 602)

HUTCHESON v. SOUTHERN RY. CO. et al.
(Supreme Court of Georgia. June 17, 1910.)

(Syllabus by the Court.)

RAILROADS (§ 400*)—FRIGHTENING ANIMALS—QUESTION FOR JURY.

The plaintiff having brought suit for the recovery of damages for personal injuries sustained in consequence of being thrown violently to the earth and dragged some distance, when his mule ran away because of becoming frightened at a noise which was alleged to have been unusual and unnecessary, and to have been made because of the defective stopping or plugging up of a broken cylinder cock, the court erred in granting a nonsuit at the conclusion of the plaintiff's evidence; it being, under the evidence introduced, a question for the jury to decide whether the noise complained of was made as alleged, and whether it was unusual and unnecessary. *Morgan v. Central R., 77 Ga. 798; Hill v. Rome Railroad Co., 101 Ga. 66, 28 S. E. 631; Coleman v. Wrightsville & Tennille Railroad Co., 114 Ga. 386, 40 S. E. 247.*

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1368; Dec. Dig. § 400.*]

Error from Superior Court, Clayton County; L. S. Roan, Judge.

Action by L. C. Hutcheson against the Southern Railway Company and others. Judgment for defendants, and plaintiff brings error. Reversed.

Geo. Westmoreland and Howard & Bolding, for plaintiff in error. C. E. Battle, Howell Hollis, and McDaniel, Alston & Black, for defendants in error.

BECK, J. Judgment reversed. All the Justices concur.

(134 Ga. 606)

THOMAS v. YOUNGBLOOD et al.

(Supreme Court of Georgia. June 17, 1910.)

(Syllabus by the Court.)

1. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict.

2. QUIETING TITLE (§ 43*)—PLEADING AND PROOF.

The plaintiff sought to cancel, as a cloud upon her title, a deed made by her mother to her son conveying a lot of land assigned to her in the partition of her father's estate. The defendant pleaded that the plaintiff and her mother orally agreed to exchange lands, which exchange had been mutually recognized for more than 30 years by various acts, such as paying taxes, renting the land, and the like. In trying this issue, the circumstances under which the defendant procured the deed from the plaintiff's mother were irrelevant, as the plaintiff based her right to maintain her action as a devisee

of her father, and not as heir at law of her mother.

[Ed. Note.—For other cases, see Quietting Title, Cent. Dig. §§ 84-87; Dec. Dig. § 43.*]

Error from Superior Court, Baldwin County; H. G. Lewis, Judge.

Action by Laura Thomas against J. M. Youngblood and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Kenan & Crawford, for plaintiff in error.
Allen & Pottle, for defendants in error.

EVANS, P. J. Jackson Rice devised a lot of land to be equally divided between his wife, Hannah, and his four children, one of whom was named Laura. The division was made by commissioners appointed by the court of ordinary. The commissioners divided the land by lot, and Hannah drew lot No. 3, and Laura lot No. 5. The commissioners made their return, which was made the judgment of the court, in 1876. Laura Rice, who had intermarried with one Thomas, brought suit against her son, Tom Thomas, and J. M. Youngblood, alleging that after the division her mother, Hannah Rice, was disappointed that she failed to draw lot No. 5, which contained the residence of her late husband, and, prompted by filial affection, she agreed to let her mother live thereon, and as her mother increased in years she became very feeble, and Laura lived with her and assisted in taking care of her. She alleges that on Sunday, January 25, 1906, while she and the others were away from home, her son Tom Thomas procured her mother to make him a deed to her land, known as lot No. 5, which he afterwards sold to his codefendant, Youngblood; that at the time of the making of the deed her mother's mental and physical condition were such that she did not have sufficient capacity to make a binding contract; and that Youngblood had knowledge of the facts at the time of his purchase. She prayed a cancellation of the deed from her mother to her son, and the latter's deed to Youngblood as a cloud upon her title. The defendants in their answer averred that immediately after the division of the estate of Jackson Rice, in which lot No. 5 was assigned to Laura and lot No. 3 to Hannah, Laura and Hannah agreed orally to exchange the lots; that since that time both have recognized such interchange, Laura returning lot No. 3 for taxation, and Hannah No. 5 for taxation, and in all their subsequent dealings with the land each recognized that the title to No. 5 was in Hannah and to No. 3 in Laura. They admitted that Hannah conveyed the land to Tom Thomas by deed executed at the time alleged, but denied that Hannah was incapable of making a valid contract at the time. The trial resulted in a verdict for the defendants. The court

refused a new trial to the plaintiff, and she excepts.

1. The controlling point in the case, as made by the pleadings and evidence, was whether there had been an interchange of the property in 1876, upon which both of the parties had acted since that time. Upon this subject the evidence was conflicting, but was sufficient to support a finding that Laura and Hannah, after the division of the property of Jackson Rice in 1876, exchanged the lands assigned to them in the division, and had mutually recognized each other's title in the property exchanged by various acts, such as paying the taxes, renting the land, and the like.

2. The court refused to allow the plaintiff to show by witnesses that at the time her mother executed her deed to plaintiff's son she was non compos mentis and without capacity to make the deed, and also refused to allow witnesses to testify that the deed from her mother to her son was executed on Sunday. The plaintiff's contention, as presented by her petition, was that the title to lot No. 5, which she obtained in the division of her father's estate, had never passed out of her, and her right to have the deed canceled as a cloud upon her title was based upon her ownership of the land as devisee of her father. She did not sue as heir at law of her mother, but based her cause of action upon her title derived from her father's will. The evidence rejected was irrelevant to the issue as made by the pleadings.

Judgment affirmed. All the Justices concur.

(124 Ga. 579)

MCCRAW et al. v. WEBB et al.

(Supreme Court of Georgia. June 15, 1910.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 335*)—
— PROCEEDINGS TO SELL LAND — CLAIMS —
AMENDMENT OF CLAIM AFFIDAVIT.

Where executors are proceeding to sell land as the property of their testator under an order from the court of ordinary, and four persons filed a joint claim to an undivided interest in the land, it is not error to allow, at the instance of the claimants, an amendment striking the names of three of them from the claim affidavit.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 335.*]

2. HUSBAND AND WIFE (§ 120*)—CONVEYANCES—INTERESTS CONVEYED.

A deed was executed in 1859, between Luco M. Moore, of the one part, and James M. D. Webb and his wife, of the other part, for and in consideration of \$3,800, wherein the grantor conveyed to James M. D. Webb and Elizabeth F. Webb a certain tract of land, "to have and to hold the said tract or parcel of land unto the said James M. D. Webb and his wife, Elizabeth F. Webb, her heirs and issue by the said James M. D. Webb, she, the said Elizabeth F. Webb, furnishing two-thirds of the purchase money, and the said James M.

D. Webb conveying and by these presents do convey unto his wife the said Elizabeth F. Webb and her issue by the said James M. D. Webb his interest in said land," with warranty of title to James M. D. Webb and Elizabeth F. Webb, and signed only by the grantor. *Held:* (1) That the acceptance of the deed by James M. D. Webb, containing the stipulation that by the deed he was conveying his interest in the land to Elizabeth Webb and her issue, was the equivalent of a covenant of conveyance by him, and that he took no beneficial interest in the land. (2) That the whole beneficial interest in the land passed to Elizabeth F. Webb, and that the words "her heirs and issue by the said James M. D. Webb," are words of limitation, and not of purchase. (3) That, if James M. D. Webb took any estate, it was that of a naked trustee, which trust would have been executed under the married woman's act of 1866 (Laws 1866, p. 146).

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 430-434; Dec. Dig. § 120.*]

8. QUESTION UNNECESSARY TO DETERMINE.

Under the most favorable view of the evidence, the claimant did not have title to so much of the land as was allowed by the verdict. As there must be another trial, it becomes unnecessary to determine whether there was evidence justifying the charge complained of.

Error from Superior Court, Baldwin County; H. G. Lewis, Judge.

Proceeding by M. A. McCraw and others, executors of Samuel Evans, to sell land, in which W. A. Webb and others interposed a claim. Judgment for the mentioned claimant, the others having withdrawn, and the executors bring error. Reversed.

Allen & Pottle, for plaintiffs in error. D. B. & D. S. Sanford, for defendants in error.

EVANS, P. J. The executors of Samuel Evans were proceeding to sell a certain tract of land as the property of their testator under an order granted by the ordinary, when W. A. Webb and his sisters interposed a claim to a one-third undivided interest in the land. The claim affidavit was returned to the superior court of Baldwin county, agreeably to the statute in such cases made and provided. On the trial the court allowed the claim affidavit to be amended by striking therefrom all of the claimants except W. A. Webb, and exceptions pendente lite were taken to the allowance of this amendment. It appeared that the executors and the claimant traced their title from Lueco M. Moore. The executors also set up title by prescription.

The deed upon which the claimant relied to establish his title is as follows: "Georgia, Baldwin County. This indenture, made this the fifteenth day of August in the year of our Lord one thousand eight hundred and fifty-nine, between Lueco M. Moore, of the state aforesaid and Baldwin county, on the one part, and James M. D. Webb and his wife, Elizabeth F. Webb, of the state aforesaid and Jones county, of the other part, witnesseth: That the said Lueco M. Moore, for and in consideration of the sum of three

thousand eight hundred dollars to him in hand paid at and before the sealing of and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, and conveyed, and doth by these presents grant, bargain, sell, and convey, to the said James M. D. Webb and Elizabeth F. Webb, their heirs and assigns, that tract and parcel of land situate, lying, and being in the county and state aforesaid [fully described]. To have and to hold the said tract or parcel of land unto the said James M. D. Webb and his wife, Elizabeth F. Webb, for her, his wife, Elizabeth F. Webb, her heirs and issue by the said James M. D. Webb; she, the said Elizabeth F. Webb, furnishing two-thirds of the purchase money, and the said James M. D. Webb conveying and by these presents do convey unto his wife, the said Elizabeth F. Webb, and her issue by the said James M. D. Webb, his interest in said land, together with all and singular the rights, members, and appurtenances thereof to the same in any manner to his, her, and their own proper use, benefit, and behoof forever in fee simple. And the said Lueco M. Moore, for himself, his heirs, executors, and administrators, the said bargained premises unto the said James M. D. Webb and Elizabeth F. Webb, their heirs and assigns, will warrant and forever defend the right and title thereof against themselves and against the claims of all other persons whatsoever."

The title set up by the executors was a deed from C. W. Ennis, sheriff, to Samuel Walker, dated October 7, 1884, conveying two-thirds undivided interest in the land described in the deed from Lueco M. Moore, this deed reciting that it was sold by virtue of an execution in favor of Thomas Johnson against Elizabeth Webb; and a deed from Samuel Walker to Samuel Evans, dated November 7, 1885, conveying the two-thirds undivided interest in the same land; and a deed from C. W. Ennis, sheriff, to Samuel Evans, dated December 2, 1884, conveying one-third undivided interest in the property described in the deed from Lueco M. Moore, reciting that the land was sold under an execution in favor of Samuel Evans against J. M. D. Webb. A verdict was rendered by the jury in favor of the claimant. A motion for new trial was made by the executors, and refused by the court, and they excepted.

1. There is no merit in the exception to the allowance of the amendment striking three of the claimants from the case. Four claimants were asserting title to an interest in the land. Three of these voluntarily dismissed themselves from the case. No reason appears why they should remain in the case for the settlement of the respective rights of the executors and the remaining claimant. It was the filing of the claim which made the issue with the executors, and the voluntary with-

drawal of three of the claimants from the case was not to the prejudice of the executors. They cannot complain of the amendment striking them as parties. Civ. Code, § 5104.

2. The deed from Lueco M. Moore to the Webbs is not drawn with technical precision. However unskillfully a deed may be prepared, it is the duty of the courts to discover and give effect, if possible, to the intent of the parties. This deed was executed in 1859, before the married woman's act (Laws 1866, p. 146), and at a time when the husband's marital rights attached to the wife's property reduced to possession by him, and when a trust could be created for a married woman. The husband and wife jointly furnished the money to pay for the land, and the provision that the husband conveyed his interest to the wife and her issue by him, though he was one of the grantees, was manifestly inserted therein at his instance, and clearly shows that he did not intend to claim any beneficial interest in the land conveyed by the deed. A grantee who accepts a deed is deemed to have expressly agreed to what it is stipulated in the deed that he shall do. *Ga. So. R. Co. v. Reeves*, 64 Ga. 492. For the same reason, when Webb and his wife purchased the land from Moore and took a deed from Moore, stipulating that by that deed Webb conveyed to his wife all his interest in the land, the acceptance of the deed by Webb would have the effect of renouncing in favor of his wife and her issue by him all his interest in the land, and the most that he could claim would be as the holder of the naked legal title in trust for such person or persons as took thereunder the beneficial interest.

The next question in the construction of the deed is to ascertain whether W. A. Webb, the claimant, who was the only child of J. M. D. Webb and Elizabeth Webb in life at the time of its execution, was a joint beneficiary with his mother. The words of a deed will always be construed to have their legal significance, in the absence of a contrary intent plainly manifest in the instrument. The habendum and tenendum clause in this deed is: "To have and to hold the said tract or parcel of land unto the said James M. D. Webb and his wife, Elizabeth F. Webb, her heirs and issue by the said James M. D. Webb." In cases where there is a limitation over to heirs or issue, the words "heirs or issue" shall be held to mean children. Civ. Code, § 3084. But grants to one and "her heirs by a particular person," or "her issue," convey an absolute estate, to the exclusion of any children which may be in life at the time of the conveyance. Civ. Code, § 3085; *Whatley v. Barker*, 70 Ga. 790, 4 S. E. 387; *Johnson v. Sirmans*, 69 Ga. 617; *Ewing v. Shropshire*, 80 Ga. 374, 7 S. E. 554. If the grant had been to Elizabeth Webb and "her heirs by the said James M. D. Webb," clearly she would have taken a fee-simple estate,

under the above authorities. Likewise she would have taken a fee-simple estate had the grant been to her and "her issue." The grant is to her, "her heirs and issue by the said James M. D. Webb," and the combination of two sets of words of limitation cannot by any sort of legal alchemy convert them into words of purchase. We therefore conclude that Elizabeth F. Webb took the full beneficial title; and, even if any part of the legal title ever vested in James M. D. Webb, he held it as trustee, and the trust became executed by virtue of the married woman's act of 1866. Two-thirds of the tract of land was sold by the sheriff as the property of Elizabeth Webb under process against her, and purchased by Walker, who conveyed it to Samuel Evans. So far as appears in the present record, James M. D. Webb had no leviable interest in the land at the time one-third undivided interest in it was sold by the sheriff as his property, and purchased by Samuel Evans. Therefore Samuel Evans obtained title, by virtue of the sales, to only an undivided two-thirds interest in the land.

3. But the executors of Samuel Evans set up that, under the two deeds to their testator, his possession until his death and their possession since then had been adverse, and for such a length of time as to ripen into a good prescriptive title. There was evidence to prove this contention. The court charged on this subject: "To constitute such a possession on the part of Samuel Evans as would ripen into a prescriptive title, it must appear that it was an exclusive possession; that is, it must be a possession in his own right and exclusive. If he knew of the interest of another party in the land, and the party occupied the land at the time he bought the land, his possession or acts of ownership would not be an exclusive possession, if that party was also exercising acts of ownership on the land. The occupancy and possession in that event would be the joint occupancy on the part of joint tenants, persons who were jointly interested in the land." The plaintiffs in error contend that there was no evidence to authorize a charge on the theory that Samuel Evans knew of the claim of title to any part of the land by the claimant. Under our construction of the deed, after the sheriff's sale to Walker and Walker's deed to Samuel Evans, he and Mrs. Elizabeth Webb became tenants in common; the former owning a two-thirds interest and the latter a one-third interest in the land. Elizabeth Webb died a year or two ago, leaving the claimant and his three sisters as her heirs at law. As there is to be a new trial, it is unnecessary to sift the evidence to ascertain the correctness of this contention. Under the present record, if the claimant has any title, it is only that of an heir at law of his mother. If the Samuel Evans title by adverse possession had ripened into a prescriptive title before the death of Elizabeth Webb, or after her death, the claimant would

have no interest in the land. In any event he could not rightfully claim more than a twelfth interest in the whole, and a verdict finding that he was vested with title to a one-third interest is contrary to law and evidence.

Judgment reversed. All the Justices concur.

(124 Ga. 534)

DUKE et al. v. NEISLER & NEWSOM.
(Supreme Court of Georgia. June 16, 1910.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§ 48*)—DESCRIPTION—UNCERTAINTY.

A mortgage containing a description of the property mortgaged in the following language: "Our crop planted this year, and on which said fertilizer is used"—is not void for uncertainty in the description of the property upon which a lien is created.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 93-95; Dec. Dig. § 48.*]

2. HUSBAND AND WIFE (§ 232*)—FORECLOSURE OF MORTGAGE—AFFIDAVIT OF ILLEGALITY.

Where a mortgage *fi. fa.*, issued upon the foreclosure of a chattel mortgage, is being enforced by a levy upon property of a husband, as appears from statements in the affidavit of illegality filed by the husband and by the wife, the question as to whether the wife signed the mortgage note as principal or as surety is not material, inasmuch as the mortgage, if valid in other respects, is being enforced solely against the property of the husband.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 232.*]

3. REVIEW.

The other assignments of error presented in the record are without merit and require no discussion.

Error from Superior Court, Crawford County; W. H. Felton, Judge.

Action by Neisler & Newsom against Mittle A. Duke and E. C. Duke. Judgment for plaintiffs. E. C. Duke filed affidavit of illegality. Judgment against claimants, and they bring error. Affirmed.

R. H. Culverhouse and L. D. Moore, for plaintiffs in error. H. A. Mathews, for defendants in error.

BECK, J. Neisler & Newsom foreclosed a chattel mortgage against Mittle A. Duke and E. C. Duke. The property specified in the mortgage as that upon which a lien was created is described as follows: "Our crop planted this year, and on which said fertilizer is used." The mortgage *fi. fa.* was duly issued and levied on the following property: "Two hundred bushels of cotton seed more or less, in the house; also 1,400 lbs. seed cotton in house; also 15 bushels of corn in house, more or less; 2 bales of seed cotton in field, more or less." E. C. Duke and his wife, Mittle A. Duke, filed separate affidavits of illegality. The affidavit of illegality filed by E. C. Duke was, in substance, that he had

never given to the plaintiff a mortgage which they would have the legal right to foreclose; that the description of the property upon which it is claimed that a lien was created was so vague and uncertain that the instrument was ineffectual to operate as a mortgage. The other grounds contained in his affidavit of illegality it is unnecessary to set out, as none of the grounds of the motion for a new trial which we have under review refer to them. The affidavit of illegality filed by Mrs. Duke alleged that the mortgage *fi. fa.* was proceeding illegally on the following grounds: "(1) Deponent is the wife of E. C. Duke, and has no interest in the property levied on. (2) Deponent's husband, E. C. Duke, is a renter from said deponent. (3) Deponent never signed any mortgage with deponent's said husband, but did sign a note with him to plaintiff, and she signed said note as security for her husband, E. C. Duke. (4) Deponent says that her signature to said note is void in law, for the reason that a married woman cannot be security for her husband." The jury returned a verdict finding "against the affidavit of illegality." A motion for a new trial was made and overruled.

1. The mortgage sought to be foreclosed and enforced was not void because of insufficiency in the description of the property upon which a lien was created. "It is only when a description of premises is manifestly too meager, imperfect, or uncertain to serve as adequate means of identification that the court can adjudge the description insufficient as matter of law." *Broach v. O'Neal*, 94 Ga. 474, 20 S. E. 113. See, in this connection, the case of *Patterson v. Evans & Turner*, 91 Ga. 790, 18 S. E. 31. In the case of *Boulware's Adm'r v. Pendleton*, 6 Ky. Law Rep. 727, it was held that description of property in the following words occurring in a mortgage: "My present crop of tobacco and other crops with other property to me belonging"—was too indefinite a description as to any of the property except the tobacco crop. In the case of *Crine v. Tifts & Co.*, 65 Ga. 644, it appears that the question was raised as to whether a mortgage was invalid as such because of the insufficiency of the description of the property mortgaged, and it was urged that the description was "too vague, uncertain, and contradictory"—the description being in these words: "As an advance on my crops of cotton, corn, oats, etc., growing and to be grown in the year 1879, the same being now planted, to enable me to make my said crops; and I do hereby give them a mortgage on all my said crops to take effect as soon as my said crops are planted." But this court held: "The purpose was to create a lien by mortgage on all crops already growing or to be grown, and on that to be grown to fix the lien when planted. It is a little confused, but such is the meaning, and the description is sufficient, as it covers all the

crops of that year. The crops levied on must have been all planted, as the earliest mortgage is dated the 19th day of April, and the other two in May. From the evidence, it is barely possible that a little cotton was planted afterwards. Certainly the execution should not have been quashed and the levy dismissed on this ground." In the instant case it is evident that the mortgagor intended that the lien sought to be created should cover his entire crop, and the property mortgaged is further identified as being the crop planted in the year in which the mortgage was given and "on which said fertilizer is used." We are of the opinion that the court correctly held that the mortgage could not be declared as a matter of law void for uncertainty in the description of the property mortgaged.

2. Inasmuch as Mrs. Mittle A. Duke disclaimed any title to the property levied upon by the mortgage *fi. fa.*, it is unnecessary to decide whether the charges of the court relative to the contention upon her part that she signed the mortgage note, not as principal, but as surety, correctly submitted that issue or not. The mortgage *fi. fa.* is not being enforced against her or any of her property, and, even if she is not liable under the instrument foreclosed as a mortgage, that fact affords no reason why the mortgage execution, which the plaintiffs are seeking to enforce at present solely against property which she says belongs to her husband, should not proceed, unless he can show some valid reason for not enforcing the *fi. fa.* against his property.

3. The other assignments of error presented in the record are without merit and require no discussion.

Judgment affirmed. All the Justices concur.

(134 Ga. 596)

STEWART v. HILL et al.

(Supreme Court of Georgia. June 16, 1910.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 8*)—CONSTRUCTION.

The act approved December 17, 1901 (Acts 1901, p. 63), as amended by the act approved August 7, 1903 (Acts 1903, p. 91), relating to the employment of tenants and croppers, and making it unlawful for any person to employ or contract with, as tenant or cropper, any person under contract with another, is penal in its nature, and is to be strictly construed.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 3.*]

2. TRIAL (§ 252*)—INSTRUCTIONS—FAILURE TO CHARGE ON ISSUES.

This suit having been brought to recover damages of the defendant under the provisions of the acts referred to in the foregoing headnote, and the distinct issue having been raised by the allegations of the petition and the answer of the defendant as to whether the renting of certain lands by the defendant was to a party between whom and the plaintiffs the relation of landlord and cropper existed, or to the

wife of such party, the failure of the court, in the course of his instructions to the jury, to charge them upon this issue, was error; there being some evidence to support the contentions of the defendant in reference thereto.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

Error from Superior Court, Taliaferro County; D. W. Meadow, Judge.

Action by C. A. Hill and W. H. Burwell against D. S. Stewart. Judgment for plaintiffs, and defendant brings error. Reversed.

C. A. Hill and W. H. Burwell, as landlords of B. F. Rogers, brought suit against D. S. Stewart, alleging that the latter rented lands for the year 1907 to said Rogers with knowledge of a similar subsisting contract between plaintiffs and Rogers for that year; that while the contract made by Stewart with their tenants was, on its face, taken in the name of Rogers' wife, this was a mere subterfuge to evade the provisions of the statute in such cases provided; that the real intent and purpose of renting said lands to Mrs. Rogers was to secure the services of her husband; and that the effect of the same was to disturb the relation existing between petitioners and said B. F. Rogers. Rogers had rented a two-horse crop from petitioners; and it was alleged that by reason of the unlawful interference by defendant with petitioners' tenant their lands had lain idle and unproductive. Petitioners sued for the value of 4,000 pounds of lint cotton, double the rental of a two-horse farm. The defendant denied the allegations of the petition, and averred that he did not rent lands that year to B. F. Rogers, but that he did in good faith rent a crop to Rogers' wife. He further averred that, even if he had contracted with Rogers himself, and furnished him lands as alleged, it would not have been in violation of law, so as to subject defendant to damages or to prosecution by the plaintiffs, for the reason that no valid and binding contract was ever made between the plaintiffs and Rogers for that year; but, whether valid or not, that there had been such a breach of the alleged contract on the part of plaintiffs as to leave defendant free to treat it as rescinded and at liberty to contract with Rogers, independently of such prior contract and without regard to it. The jury returned a verdict in favor of plaintiffs for 2,000 pounds of lint cotton at a stated price per pound. The defendant's motion for a new trial was overruled, and he excepted.

Hawes Cloud, for plaintiff in error. Samuel H. Sibley, for defendants in error.

BECK, J. (after stating the facts as above). The act approved December 17, 1901 (Acts 1901, p. 63), as amended by the act approved August 7, 1903 (Acts 1903, p. 91), relating to the employment of tenants and croppers, and making it unlawful for any person to

employ or contract with, as tenant or cropper, any person under contract with another, is penal in its nature, and is to be strictly construed, where suit is brought against one alleged to have violated the provisions of the first section of the act. That section provides: "That when the relation of employer and employé, or of landlord and tenant of agricultural lands, or of landowner and cropper, has been created by written contract or by parol contract partly performed, made in the presence of one or more witnesses, it shall be unlawful for any person during the life of said contract, made and entered into in the manner above prescribed, to employ, or to rent lands to, or to furnish lands to be cropped by said employé, tenant or cropper, or to disturb in any way said relation, without first obtaining the written consent of said employer, landlord or landowner, as the case may be." In the present case petitioners alleged that the defendant had violated the provisions of this section by employing one Rogers, while the relation of landlord and cropper existed between them and Rogers, under a parol contract which was still in life, by renting lands to Rogers and furnishing him lands to be cropped. And in another paragraph of the petition it was charged that the defendant, with intent to obtain the services of Rogers in making a crop upon defendant's lands, "did rent and furnish lands to Mrs. Rogers, the wife of the said B. F. Rogers, without the written consent of petitioners." And it was also charged in the petition that "the real intent and purpose of the defendant in renting said lands to said Mrs. Rogers was to secure the services of her husband in making a crop as aforesaid, and that the taking of the rent note from the wife was a subterfuge to evade the provisions of the statute in such cases provided." The defendant in his plea, while he admitted that B. F. Rogers and his family were residing on his lands, denied that he had rented land to B. F. Rogers, and alleged that the premises upon which B. F. Rogers and family lived had been rented by him to the wife of B. F. Rogers in good faith and "without any intention or idea of interfering in any way with any relation that may have existed between B. F. Rogers and plaintiffs." From the allegations in the petition and those contained in the answer it will be seen that there was a distinct issue raised in the pleadings as to whether defendant rented his lands to B. F. Rogers, or to the wife of the latter. And if the defendant did rent the lands to the wife, and not to her husband, between whom and the plaintiffs there existed the relation of landlord and cropper, such renting or furnishing of lands cannot have been a violation of the provisions of the statute which we have quoted above, unless, instead of giving a strict construction of the statute, a broad and liberal construction

should be given to it, which would render it so comprehensive that, if one should rent lands to the wife of another between whom and other parties there existed the relation of landlord and cropper, this would constitute an infraction of the terms of the statute. We do not think that the provision against disturbing in any other way the relation between landlord and tenant, or landlord and cropper, should be given a construction which would render an act other than one of the same nature as those expressly inhibited a violation of this highly penal statute.

The jury received no instructions from the court, in the course of his charge, touching the material issue raised by the pleadings and the evidence as to whether the defendant rented the lands, to which B. F. Rogers and his wife removed from the lands of the plaintiffs, to Mrs. Rogers or to her husband. Under the evidence in the case it was clearly a question for the jury as to whether the renting of the lands by Stewart was to the wife or the husband; and it was also for them to decide whether, if the wife was nominally the contracting party, the contract between her and Stewart with reference to the rent was merely colorable, while the real understanding was that Mr. Rogers, and not his wife, was to be the tenant or cropper of the owner of the lands. The defendant was entitled to have the issue which we have stated above submitted to the jury with appropriate instructions; and, the court having failed to charge the jury concerning this issue, the defendant in the case should have his cause retried before another jury.

No other error of sufficient materiality to require the grant of a new trial is shown in the grounds of the motion, though portions of the charge excepted to contain language which is not an altogether accurate statement of the law applicable to the issues dealt with. Such minor inaccuracies will no doubt be corrected by the court in charging the jury on the next trial.

Judgment reversed. All the Justices concur.

(124 Ga. 600)

ATHENS MFG. CO. v. MALCOLM et al.
(Supreme Court of Georgia. June 18, 1910.)

(Syllabus by the Court.)

1. EVIDENCE (§ 355*)—MEMORANDA.

Where, on the trial of a case, it was material for the jury to determine whether the period of time within which the privilege of exercising a certain option was extended to the date as testified to by one party, or to a later date as given in the testimony of the other party, and the latter having testified that at the time of making the agreement for the extension of the time he made a written entry in a memorandum book of the agreement in the presence of the other party, such memorandum was competent evidence to corroborate the testi-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

mony of the party offering it, and it was error for the court to exclude it. *Reviere v. Powell & Murphy*, 61 Ga. 30, 34 Am. Rep. 94.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1484-1491; Dec. Dig. § 355.*]

2. TRIAL (§ 45*)—OFFER OF PROOF.

The memorandum book should have been admitted in evidence, although at the time it was tendered counsel failed to state in explicit terms what he proposed to prove by it; it appearing from a colloquy between counsel for both parties and the court, in reference to the admissibility of the memorandum, and from the testimony of the witness who had made the memorandum, that court and counsel must have known what entry in the book was offered in evidence and what were the contents of that entry.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 110-114; Dec. Dig. § 45.*]

Error from Superior Court, Clarke County; C. H. Brand, Judge.

Action between the Athens Manufacturing Company and J. W. and J. M. Malcolm. From the judgment, the Athens Manufacturing Company brings error. Reversed.

Cobb & Erwin, for plaintiff in error. W. M. Smith and Henry O. Tuck, for defendants in error.

BECK, J. Judgment reversed. All the Justices concur.

(134 Ga. 669)

ARNETT v. TULLER.

(Supreme Court of Georgia. June 18, 1910.)

(Syllabus by the Court.)

VENDOR AND PURCHASER (§ 16*)—CONTRACTS—OFFER—ACCEPTANCE.

A resident of Bloomfield, Conn., owning a tract of land in Screven county, Ga., wrote to a party at Sylvania, Ga., that he would sell the land for \$1,800 cash, and in such letter also wrote: "I am now sole owner, and can furnish good warranty deed, with perfect title. Kindly advise me at your earliest convenience if you are prepared to accept same. This same price will be stated to others. If I do not get this amount of money soon, will raise the price nearer to its cash value." *Held*:

(a) The offer in the letter meant that a cash payment of the purchase money was to be made in Bloomfield, Conn. *Robinson v. Weller*, 81 Ga. 704, 8 S. E. 447.

(b) When the party to whom such offer was made wrote the owner a letter, stating that the former had decided to accept the offer, that a deed to the land was inclosed and should be executed in a specified manner, and that "I shall be glad if you will execute this deed and send it to Citizens' Bank of Sylvania and draft on me for the \$1,800," *held*, that there was not such an acceptance of the offer as made a contract between the parties; no tender of the \$1,800 cash at Bloomfield, Conn., accompanying the alleged acceptance. *Robinson v. Weller*, 81 Ga. 704, 8 S. E. 447.

(c) It not appearing that any tender of the purchase money was made to the owner in Bloomfield, Conn., and there being no acceptance by the owner of the terms proposed by the other party, an action against the owner for specific performance of the alleged contract would not lie in behalf of the other party, and was rightfully dismissed on demurrer. *Robinson*

v. Weller, 81 Ga. 704, 8 S. E. 447; *Jarman v. Westbrook*, 134 Ga. —, 67 S. E. 403.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 16.*]

Error from Superior Court, Screven County; B. T. Rawlings, Judge.

Action by J. W. Arnett against E. J. Tuller. Judgment of dismissal, and plaintiff brings error. Affirmed.

E. K. Overstreet, for plaintiff in error. J. W. Overstreet and T. J. Evans, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(134 Ga. 650)

CITY OF ROME v. RHODES et al.

(Supreme Court of Georgia. June 22, 1910.)

(Syllabus by the Court.)

1. DAMAGES (§ 64*)—CHANGE OF GRADE OF STREET—LIABILITY FOR DAMAGE TO ABUTTING PROPERTY—INSURANCE.

The owner of a lot and a two-story brick storehouse thereon in an incorporated city sustained damages thereto, resulting from the raising by the city of the grade of the streets and sidewalks, causing a depreciation in the value of the storehouse and making it necessary, for it to be available and of the same value it was prior to the change in grade, that the lower and upper floors, roof, and walls be raised. Subsequently a fire so damaged the building as to render it of but little, if any, value, except the walls. The owner received from an insurance company on account of such fire an amount nearly sufficient to rebuild such house, with its floors, roof, and walls raised to such an extent as was necessary for the purposes above stated. *Held*, that neither such fire, nor the receipt by the owner of insurance money on account thereof, will relieve the city from liability for the full amount of damages which it occasioned. 1 *Sutherland on Damages*, p. 406, § 158; Dec. Digest, *Damages*, § 64; 13 *Cyc.* 70, 71; *Western & Atlantic R. Co. v. Meigs*, 74 Ga. 857. And see *Nashville Ry. Co. v. Miller*, 120 Ga. 453, 47 S. E. 959, 67 L. R. A. 87.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 118; Dec. Dig. § 64.*]

2. NEW TRIAL (§ 108*)—NEWLY DISCOVERED EVIDENCE.

The court committed no error in refusing a new trial on the ground of newly discovered evidence to the effect that the plaintiffs agreed with the insurance company that \$1,945 was sufficient to rebuild the storehouse anew, as the verdict was for only \$700, and was for a less amount than the evidence showed the damage to be.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 223, 227; Dec. Dig. § 108.*]

3. REVIEW ON APPEAL.

It was not complained that any error of law was committed upon the trial of the case. The evidence supported the verdict, and the court did not abuse its discretion in refusing a new trial.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by L. M. Rhodes and others against the City of Rome. Judgment for plaintiffs, and defendant brings error. Affirmed.

W. J. Nunnally, for plaintiff in error. M. B. Eubanks and McHenry & Porter, for defendants in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(7 Ga. App. 784)

MCCLENDON v. STATE (No. 2,439.)
(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§§ 472, 475*)—EVIDENCE—EXPERT EVIDENCE.

The testimony of an expert as to his opinion as such is admissible upon any matter, if the opinion given relates to scientific or technical knowledge. The weight of such testimony, and whether its application to the proved facts is illustrative of the particular transaction under investigation, is a question for the jury. There being an issue in this case as to whether the prosecuting witness could see his assailant under a culvert at the time of the assault, as he claimed to have done, and the condition of the culvert, so far as appears from the record, not having been changed up to the time of the trial, it was not error for the court to permit the witness to testify that he went to the same culvert, at the request of the solicitor general, and that "the light extended angling under it for a distance of eight steps." It was for the jury to say whether there had been any change in the condition of the culvert, as to whether that change would have affected the result, and, indeed, as to whether they would attach importance to the testimony of the expert upon the subject of the distance to which the light extended, as illustrating the distance to which the light extended at the time of the alleged assault. The witness in question having stated the facts as to the distance of the electric light from the culvert, and the time of the night at which he made his observations, it was likewise for the jury to determine whether, in their opinion, the opinion of the witness was of any value, when applied to the testimony as to the nature of the culvert and its surroundings at the time of the assault. The condition of the culvert and the light at the time of the assault would necessarily be controlling; but the opinion evidence might be helpful to the jury, if conditions were the same at the time of his observations as they were at the time of the assault.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1059, 1063; Dec. Dig. §§ 472, 475.*]

2. CRIMINAL LAW (§§ 461, 494, 1153*)—EVIDENCE—EXPERIMENTS—OPINION EVIDENCE—SPEED.

The admission of testimony as to experiments must largely rest in the discretion of the trial judge; and the exercise of this discretion will not be controlled, unless manifestly abused. The weight to be attached to such testimony is for the jury, and varies according to the circumstances of similarity which the jury may find to exist between the experiment made or observations taken and the actual occurrence whose facts and features are under investigation. The opinions of witnesses as to speed and distance are admissible in evidence. *Augusta Railway & Electric Co. v. Arthur*, 3 Ga. App. 513, 60 S. E. 213.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1051, 1081, 3061; Dec. Dig. §§ 461, 494, 1153.*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

B. B. McClendon was convicted of crime, and brings error. Affirmed.

W. D. McNeil, for plaintiff in error. Walter J. Grace, Sol. Gen., for the State.

RUSSELL, J. Judgment affirmed.

(7 Ga. App. 777)

BLUE v. FIDELITY DEPOSIT CO.
(No. 2,324.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 206*)—REVIEW.

Though the justice of the peace may have erred in refusing to allow the defendant in mortgage foreclosure to amend his bond, yet it does not appear that he erred in dismissing the affidavit of illegality; it not being disclosed that the affidavit contained any meritorious legal defense. The action of the judge of the superior court in dismissing the certiorari, brought to review the action of the justice of the peace, is therefore affirmed.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 800-806; Dec. Dig. § 206.*]

Error from Superior Court, Montgomery County; J. H. Martin, Judge.

Action by the Fidelity Deposit Company against J. M. Blue. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. B. Kent, for plaintiff in error. W. L. Wilson and A. C. Saffold, for defendant in error.

POWELL, J. Judgment affirmed.

(7 Ga. App. 777)

BUTLER, STEVENS & CO. v. HALL
(No. 2,318.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 750*)—ASSIGNMENT OF ERROR—SUFFICIENCY.

It is too well settled to question or to require any citation of authority that a general assignment of error, excepting to a judgment overruling and denying a motion for a new trial, is sufficiently specific to bring under review all the grounds of error properly made in the motion for a new trial. The motion to dismiss the writ of error is without merit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3081; Dec. Dig. § 750.*]

2. EXECUTION (§ 166*)—RELIEF—AFFIDAVIT OF ILLEGALITY.

Two defendants were sued jointly as the makers of a promissory note. The defendant first named in the suit filed a plea of non est factum, which, by consent of plaintiff, was sustained. The other defendant was duly served, but did not appear and defend, and a judgment was rendered against him by default. An execution was issued and levied, and the defendant filed an affidavit of illegality on the ground that he was surety on the note and that the consent verdict in favor of the plea of non est factum as to the principal maker of the note discharged him from all liability thereon as surety. Held, that a motion to dismiss the af-

affidavit of illegality, because "it contained no allegation that could not have been pleaded as a defense in the original suit out of which the execution was issued," should have been sustained. The court that rendered the judgment having jurisdiction of the person and subject-matter, the defendant could not, by affidavit of illegality, attack the judgment for any cause that he could have set out as a defense in the original suit. Civ. Code, § 4742; *Bedingfield v. First National Bank*, 4 Ga. App. 205 (3), 61 S. E. 30; *Miller v. Albritton*, 43 Ga. 274; *Lewis v. Armstrong*, 45 Ga. 131; *Greene v. Oliphant*, 64 Ga. 566.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 485-486; Dec. Dig. § 168.*]

Error from City Court of Nashville; *W. D. Bule*, Judge.

Action between *Butler, Stevens & Co.* and *F. H. Hall*. From the judgment, *Butler, Stevens & Co.* bring error. Reversed.

W. R. Smith, for plaintiffs in error. *Hendricks & Christian*, for defendant in error.

HILL, C. J. Judgment reversed.

(7 Ga. App. 778)

McMICHAEL v. MACKAY. (No. 2,806.)
(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

1. MORTGAGES (§ 458*)—FORECLOSURE—AFFIDAVIT OF ILLEGALITY—AMENDMENT.

While the affidavit which the defendant is allowed to file in a mortgage foreclosure for the purpose of making his defense is spoken of as an affidavit of illegality, it is not governed by the ordinary rules as to affidavits of illegality. It is amendable to the same extent as ordinary pleas. See Civ. Code 1895, § 5122; *Ragan v. Coley & Co.*, 4 Ga. App. 421, 426, 61 S. E. 862, and authorities cited.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 458.*]

2. PARTNERSHIP (§ 311*)—DISSOLUTION AGREEMENT—RIGHTS OF PARTY.

Where one partner is indebted to another by promissory note, and dissolution of the partnership is agreed upon, and the statement of the bills payable and bills receivable of the firm is made up, and it is stipulated that the purchasing partner will accept the assets and assume the liabilities of the firm, and surrender the note which he holds against the selling partner, provided that the statement is correct as to the liabilities of the firm, but that he will hold the note until it can be further ascertained whether the liabilities have been correctly stated or not, and it is subsequently ascertained that there are other debts owing by the partnership, the partner holding the note may proceed to enforce it against the other, at least to such an extent as will indemnify him against his losses resulting from the excess of the liabilities over the sum at which they were stated. In such a case it would not be necessary for the purchasing partner, upon discovery of the fact that the liabilities of the firm had been understated, to offer to rescind and to restore the status before he could hold the other partner to liability on the note. The doctrine of restoration as a condition of rescission for fraud is not involved. The case turns on the agreement between the parties. See, however, *Oliver v. House*, 125 Ga. 637 (3), 54 S. E. 732.

[Ed. Note.—For other cases, see *Partnership*, Dec. Dig. § 311.*]

Error from City Court of Americus; *C. R. Crisp*, Judge.

Action between *M. H. McMichael* and *W. T. Mackey*. From the judgment, *McMichael* brings error. Reversed.

Geo. P. Munro and *W. B. Short*, for plaintiff in error. *W. W. Dykes* and *W. D. Crawford*, for defendant in error.

POWELL, J. Judgment reversed.

(7 Ga. App. 780)

CENTRAL OF GEORGIA RY. CO. v. HENRY. (No. 2,352.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1094*)—REVIEW—VERDICT.

The only issue in this case was whether the cow sued for was killed by "the running of the locomotive or cars of the railroad company," or died from some natural cause. There were slight circumstances from which the jury were authorized to infer that she was killed by the former, and there was no evidence to rebut the statutory presumption of negligence arising against the railroad company upon proof of that fact. The judge of the superior court on certiorari approved the verdict. This court will not disturb it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4324; Dec. Dig. § 1094.*]

Error from Superior Court, Floyd County; *Moses Wright*, Judge.

Action by *John Henry* against the *Central of Georgia Railway Company*. Judgment for plaintiff, and defendant brings error. Affirmed.

J. Branham and *Maddox & Doyal*, for plaintiff in error. *C. H. Porter*, for defendant in error.

HILL, C. J. Judgment affirmed.

(7 Ga. App. 784)

SOUTHERN RY. CO. v. DUKES. (No. 2,401.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

REMOVAL OF CAUSES (§§ 95, 97*)—EFFECT OF FILING PETITION AND BOND.

Where the right of removal exists, and the petition and bond have been filed in the state court in conformity with the statutes of the United States, the jurisdiction of the state court comes to an end. The filing of the petition and bond in such case ipso facto removes the case, and no order of the state court is necessary to make the removal effectual. Thereafter the state court can take no action in the case, even to the extent of allowing a dismissal by the plaintiff. After the case has been thus removed, the plaintiff should apply to the federal court, if he desires to dismiss his suit. 4 Fed. St. Ann. pp. 265, 266 (U. S. Comp. St. 1901, p. 508); *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; *Kern v. Huidekoper*, 103 U. S. 485, 26 L. Ed. 354; *L.*

& N. R. Co. v. Newman, 132 Ga. 523, 64 S. E. 541.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 204-211; Dec. Dig. §§ 95, 97.*]

Error from City Court of Zebulon; E. F. Dupree, Judge.

Action between the Southern Railway Company and Mrs. W. E. Dukes. From the judgment, the Southern Railway Company brings error. Reversed.

C. E. Battle, Howell Hollis, and E. M. Owen, for plaintiff in error. Howell & Hatcher, for defendant in error.

HILL, C. J. Judgment reversed.

(7 Ga. App. 810)

HENDERSON v. STATE. (No. 2,626.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1064½*)—APPEAL—MOTION FOR NEW TRIAL—GROUNDS.

The grounds added by amendment to the motion for a new trial are not verified or approved, and will not be considered. The indorsement on the amendment that it is "allowed" is not equivalent to an approval or verification of the grounds therein. Wilson v. Cobb, 4 Ga. App. 272, 61 S. E. 133, and cases cited.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676, 2887, 2948; Dec. Dig. § 1064½.*]

2. CRIMINAL LAW (§ 1159*)—APPEAL—SUFFICIENCY OF EVIDENCE.

The evidence indicating guilt is exceedingly weak and of slight probative value; but this court cannot hold that the verdict is entirely unsupported, and therefore cannot grant another trial on the general grounds.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

Error from Superior Court, Pierce County; Price Edwards, Judge.

Moye Henderson was convicted of crime, and brings error. Affirmed.

Walter A. Milton, for plaintiff in error. J. H. Thomas, Sol. Gen., and John W. Bennett, for the State.

HILL, C. J. Judgment affirmed.

(7 Ga. App. 780)

HUGULEY v. STATE. (No. 2,354.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

LARCENY (§ 55*)—EVIDENCE—SUFFICIENCY.

No error of law appears, and the verdict is supported by incriminatory admissions, recent possession of the stolen property, proof of the corpus delicti, and the testimony of an accomplice.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 152; Dec. Dig. § 55.*]

Error from Superior Court, Fulton County; L. S. Roan, Judge.

Alf Huguley was convicted of larceny, and brings error. Affirmed.

S. C. Crane and J. E. & L. F. McClelland, for plaintiff in error. C. D. Hill, Sol. Gen., and D. K. Johnston, for the State.

RUSSELL, J. Judgment affirmed.

(7 Ga. App. 781)

DAY v. J. C. STEELE & SONS. (No. 2,385.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

TRIAL (§ 170*)—DIRECTING VERDICT.

The evidence introduced by the defendant in support of his plea of failure of consideration resulting from a breach of implied warranty was sufficient to carry the issue to the jury, and the trial court erred in directing a verdict for the plaintiff. Davis v. Kirkland, 1 Ga. App. 5, 58 S. E. 209.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 391; Dec. Dig. § 170.*]

Error from City Court of Douglas; C. T. Roan, Judge.

Action by J. C. Steele & Sons against R. V. L. Day. Judgment for plaintiffs, and defendant brings error. Reversed.

Levi O'Steen, for plaintiff in error. Lankford & Dickerson, for defendants in error.

HILL, C. J. Judgment reversed.

(7 Ga. App. 811)

TOWNSEND v. STATE. (No. 2,632.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 335*)—EVIDENCE—BURDEN OF PROOF.

It not being affirmatively shown that the offense was committed prior to the finding of the indictment, the conviction was unauthorized by law. Tharpe v. State, 2 Ga. App. 649, 58 S. E. 1070; Askew v. State, 3 Ga. App. 72 (2), 59 S. E. 311; Minhinnett v. State, 106 Ga. 141 (1), 32 S. E. 19.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 725; Dec. Dig. § 335.*]

Error from Superior Court, Walker County; Jno. W. Maddox, Judge.

Tom Townsend was convicted of crime, and brings error. Reversed.

P. D. Wright and W. M. Henry, for plaintiff in error. John W. Bale, Sol. Gen., for the State.

HILL, C. J. Judgment reversed.

(7 Ga. App. 811)

PORTER v. STATE. (No. 2,627.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

SUFFICIENCY OF EVIDENCE.

The evidence was legally sufficient to authorize the verdict.

Hill, C. J., dissenting.

Error from City Court of Athens; H. S. West, Judge.

Frank Porter was convicted of violating the labor contract law, and brings error. Affirmed.

Gordon Knox, for plaintiff in error. Stephen C. Upson, Sol., and Carlisle Cobb, for the State.

POWELL, J. This was a prosecution for cheating and swindling under the "labor contract" law of 1903. Acts 1903, p. 90. The evidence, though very weak as to some of the salient elements of the offense, is not legally insufficient to support the verdict. Judgment affirmed.

HILL, C. J. (dissenting). I believe the defendant's testimony rebuts the statutory presumption of fraudulent intent.

(7 Ga. App. 802)

SMITH v. STATE. (No. 2,605.)
(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

1. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict.

2. GROUNDS FOR NEW TRIAL.

The other grounds of the motion for new trial, so far as approved and as corrected by the trial judge, present no sufficient reasons for reversal.

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Minnie Smith was convicted of crime, and brings error. Affirmed.

See, also, 66 S. E. 556.

Gober & Griffin, for plaintiff in error. J. P. Brooke, Sol. Gen., for the State.

POWELL, J. Judgment affirmed.

(7 Ga. App. 841)

CRUMPTON v. STATE. (No. 2,637.)
(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1103*)—BRIEF OF EVIDENCE.

There being no legal brief of the evidence, and the errors assigned being dependent upon the evidence, the judgment is affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2881-2884; Dec. Dig. § 1103.*]

Error from Superior Court, Paulding County; Price Edwards, Judge.

Ton Crumpton, alias Compton, was convicted of crime, and brings error. Affirmed.

W. E. Spinks and A. L. Bartlett, for plaintiff in error. W. K. Fielder, Sol. Gen., for the State.

POWELL, J. The failure to comply with the provisions of section 5488 of the Civil

Code as to the preparation of the brief of the evidence is so flagrant and palpable as to forbid this court's examining the facts. See Lanham v. Presley (No. 2,314, this day decided) 68 S. E. 448, and cases there cited. However, we may say, in passing, that the defendant was lawfully convicted of the very heinous crime with which he was charged.

Judgment affirmed.

(7 Ga. App. 780)

ROME RY. & LIGHT CO. v. BARRETT.
(No. 2,374.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The questions of law made by the assignments of error are neither novel nor of general interest. The verdict is strongly supported by the evidence, and no error of law appears of sufficient gravity to justify the grant of another trial.

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by Milton Barrett against the Rome Railway & Light Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Dean & Dean, for plaintiff in error. C. T. Clements and Maddox & Doyal, for defendant in error.

HILL, C. J. Judgment affirmed.

(7 Ga. App. 812)

BANKS v. STATE. (No. 2,634.)
(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 552*)—CIRCUMSTANTIAL EVIDENCE.

The case is controlled by Cummings v. State, 110 Ga. 293, 35 S. E. 117.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1250; Dec. Dig. § 552.*]

Error from City Court of Hartwell; W. L. Hodges, Judge.

Will Banks was convicted of crime, and brings error. Reversed.

A. S. Skelton, for plaintiff in error. J. Rod Skelton, Sol., for the State.

POWELL, J. The decision in Cummings v. State, 110 Ga. 293, 35 S. E. 117, is in the following language: "Though the state's evidence very strongly and conclusively tended to establish the fact that tracks seen near the place of the crime, and which must have been made on the night it was committed, corresponded in minute particulars with shoes belonging to the accused, this, without more, was not sufficient to show, to the exclusion of every other reasonable hypothesis, that he committed the crime."

This language could not correspond more closely with the only proposition involved in the present case, if it had been written upon the record now before us, instead of having been written on the record in the Cummings Case. In obedience to this authority, the judgment is reversed.

Judgment reversed.

(7 Ga. App. 781)

SMITH et al. v. STATE. (No. 2,391.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 511*)—EVIDENCE OF ACCOMPLICE—CORROBORATION—SUFFICIENCY.

The circumstances corroborative of the testimony of an accomplice were insufficient to authorize the conviction of the defendant of the offense of burglary. While the law cannot lay down a rule to measure the extent of corroboration necessary, still where the only witness in a felony case is confessedly an accomplice the corroborating circumstances are not sufficient to dispense with another witness, unless they are such as to connect the defendant with the crime. It is not sufficient for a witness to corroborate as to the time, place, and circumstances of a transaction, if there is nothing except the statement of the accomplice to show any connection of the prisoners therewith.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1128; Dec. Dig. § 511.*]

Error from Superior Court, Tallapoosa County; D. W. Meadow, Judge.

Paul Smith and others were convicted of burglary, and bring error. Reversed.

Hawes Cloud and J. A. Beazley, for plaintiffs in error. Thos. J. Brown, Sol. Gen., for the State.

RUSSELL, J. The defendants were convicted of burglary. One Ad O'Rear had been convicted of burglarizing a certain storehouse and of taking therefrom a certain pistol and some money. At a subsequent term of the court the present plaintiffs in error were indicted, and at the trial O'Rear testified that they entered the store while he watched. Naturally the case turned upon whether there was a sufficiency of corroborating circumstances to dispense with another witness. We are of the opinion that the circumstances relied upon by the state are insufficient, when taken by themselves, to lead to the inference that the defendants were implicated in its commission. That must be the true test, because primarily an accomplice must be corroborated by another witness, and the corroborating circumstances necessary to take the place of this second witness, being only in the nature of a substitute for other witnesses, must (as the testimony of such witnesses would be required to do) connect the accused with the commission of the crime. Pen. Code 1895, § 991, declares that: "The testimony of a single witness is generally sufficient to establish a fact. Exceptions to this rule are made in specified cases,

such as to convict of treason or perjury, and in any case of felony where the only witness is an accomplice; in these cases (except in treason) corroborating circumstances may dispense with another witness." It is plain that the testimony of a corroborating witness, if one can be had, must in some way connect the defendant with the crime, and the same requirement must be applied to corroborating circumstances, if such (instead of another witness to the direct fact of the felony) are relied upon.

While slight evidence that the crime was committed by the defendants and identifying them with it may sufficiently corroborate the accomplice and authorize a verdict of guilty, and while the law cannot fix an exact rule by which to measure the amount of corroboration necessary, the nature of the corroborative evidence is well defined. The testimony must be such as, independently of the testimony of the accomplice, to lead to the inference that the defendant is guilty. It must in some way connect the defendant with the criminal act. As this court held in *Altman v. State*, 5 Ga. App. 833, 68 S. E. 928: "The rule is well settled that the testimony of an accomplice in a felony case must be corroborated by some independent fact or circumstance which, taken by itself, leads to the inference, not only that a crime has been committed, but that the defendant is implicated in its commission. Proof of the corpus delicti, independently of the evidence of the accomplice, is corroborative of the guilt of the accomplice, but does not at all corroborate his testimony as to the guilt of another." In the present case the accomplice was corroborated by the fact that the tracks of more than one man were seen near the window through which the store was opened. But there was no marks of identity indicating that the tracks were made by either of these defendants; indeed, no evidence by whom they were made. For this reason the tracks failed to connect the defendants with the crime.

In the next place, while it is a suspicious circumstance that the defendants stayed out all night in the woods, and did not go home the night the burglary was committed, this does not in any way connect them with the burglary, and is not inconsistent with the innocence of the accused. The fact that these defendants stayed out all night, and that a portion of the time Ad O'Rear was with them, does not prove, or even necessarily lead to the inference, that the defendants were with him at the time of the burglary, because the evidence shows that the defendants left him at Genie's house before they went to the woods, and it is probable that time enough elapsed for him to have committed the burglary before he returned to them in the woods. Nor does the fact that certain cans were found in the path which the de-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fendants took in going to the woods, which had probably been contained in the store burglarized, necessarily raise the inference that the defendants participated in the burglary, or even that they were guilty of the offense of receiving stolen goods, by reason of the fact that they knew they had been taken out of the store. The case at bar is quite similar to that of *Childers v. State*, 52 Ga. 106, in which it was held that in a case of felony, where the only witness implicating the prisoners is himself avowedly guilty, the corroborating circumstances necessary to dispense with another witness must be such as go to connect the prisoner with the offense.

We are of the opinion, therefore, that the corroborating circumstances in this case were insufficient in their nature to authorize the conviction of the defendants. The law does not fix the amount of corroboration necessary in such a case, but it does require that the nature of the corroborative evidence shall be such as to connect the accused with the criminal act, and such as necessarily to lead to that inference.

Judgment reversed.

(7 Ga. App. 735)

HUDGINS v. STATE. (No. 2,461.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1159*)—WEIGHT OF EVIDENCE—QUESTION FOR JURY.

While a witness may be impeached by disproving the facts testified to by him, the attempted impeachment is a failure, no matter how many witnesses may deny the facts testified to by such witnesses, if the jury at last believes the witness sought to be impeached. Although only one witness testified in behalf of the state, and two witnesses gave testimony in behalf of the defendant directly contrary to the testimony of the state's single witness, yet, the credibility of the witnesses being exclusively with the jury, the inference that the state's witness was not impeached is conclusive, and there was no error in refusing to disturb the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Mrs. Richard Hudgins was convicted of an illegal sale of liquor, and brings error. Affirmed.

B. P. Gaillard, Jr., for plaintiff in error. W. A. Charters, Sol. Gen., and F. M. Johnson, for the State.

RUSSELL, J. The defendant was convicted of a violation of the prohibition law; one witness testifying that he bought whisky from her upon a designated occasion and paid 60 cents for it. He named several persons who were present at the time. Two witnesses testified for the defendant, identifying the same time and place and the same

persons as being present, and swore positively that the witness did not purchase any whisky from her. The jury found the defendant guilty, and it is now insisted by her counsel that the presumption of law is that these witnesses were worthy of belief, and therefore their evidence had the effect of impeaching Cain, the only witness for the state, who swore to the sale of liquor.

It is insisted (we assume, seriously) that Cain is impeached, because, under the provisions of section 1025 of the Penal Code, the facts testified to by him were disproved. The only trouble with the argument is that the whole question of impeachment in all of its phases is exclusively for the jury; and while the disproving of facts testified to by the witness is one of the methods of impeachment provided by law, still, inasmuch as the jury are the sole judges of the credibility of every witness, under this method one witness might impeach 25 who swore directly to the contrary of the testimony of the single witness. It is not a question of numbers, but a question of which witness or which testimony the jury believes. The fact that in this case the jury found the defendant guilty on the testimony of Cain alone, although two witnesses swore that what he testified was not true, is proof conclusive, from a legal standpoint, that the jury did not consider that what he had testified had been disproved. Measured by the rule of impeachment and the right and duty of the jury in the premises, the verdict, under the circumstances, affords conclusive evidence that the attempt to impeach was a failure, if the testimony of the witnesses for the defendant is considered as being used only for that purpose.

There is a wide difference between impeachment and an effort to impeach. The credibility of witnesses is a matter so exclusively within the province of the jury that an attempt to impeach (no matter which of the three statutory methods of impeachment is attempted) does not amount to an actual impeachment, unless the result shows that the faith of the jury in the testimony of the witness sought to be impeached was destroyed. There is no unusual feature about this case. It is but an exemplification of the general rule, which wisely permits the jury to pass upon the credibility of witnesses. We held in *Jolly's Case*, 5 Ga. App. 454, 63 S. E. 520: "The determination of the credibility of the witnesses is so exclusively within the province of the jury that the verdict finding a defendant guilty is not affected by the fact that that verdict is supported by the testimony of only one witness, whose testimony is directly in conflict with a large number of witnesses, who had equal opportunity of knowing the facts, and who, so far as appears from the record, are worthy of credit. In the absence of any error on the part of

the court, or any irregularity which may have prejudiced the defendant, such a verdict, approved by the trial judge, is absolutely conclusive, because this court is without jurisdiction to review a finding upon the facts, which is supported by sufficient evidence."

Judgment affirmed.

(7 Ga. App. 774)

WASHINGTON POST CO. v. SORRELLS.
(No. 2,312.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

SALES (§ 38*)—RESCISSION OF CONTRACT—FRAUD.

The law applicable to the undisputed facts demanded the verdict.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 77; Dec. Dig. § 38.*]

Error from Superior Court, Clarke County; C. H. Brand, Judge.

Action by the Washington Post Company against R. P. Sorrells. Judgment for defendant, and plaintiff brings error. Affirmed.

Washington Post Company sued Sorrells in a justice's court on a written contract, by which the defendant agreed to pay \$58 for a copy of the "Executive Edition of the White House Gallery of Official Portraits of the Presidents." The judgment in the justice's court was adverse to the plaintiff, and it sued out a writ of certiorari to the superior court. The certiorari was overruled, and to this judgment plaintiff excepted. The undisputed facts are as follows:

The defendant entered into a contract to buy the portraits in question, induced to do so by a statement of the agent of the plaintiff that he had shown the work to the defendant's wife and daughter, and that they were well pleased with the portraits and had authorized the agent to tell him to purchase them. Relying upon the truth of this statement, he signed the contract. Upon his return home on the night of the day on which he signed the contract, he discovered that the agent had not had a conversation with any member of his family on the subject of purchasing the portraits, and the agent admitted to him next morning that the entire statement was untrue. The defendant immediately demanded a surrender of the contract or order, which was still in the possession of the agent. The agent refused to surrender it, and thereupon the defendant stated to him that, the contract having been procured by falsehood and fraud, he was not bound by it, and that he would under no circumstances accept the portraits if they were shipped; and he immediately wrote to the plaintiff, insisting on a rescission of the contract, and stating as his reasons the fraud that had been practiced upon him, that neither his wife nor daughter wanted the work,

that it was absolutely worthless to him, and that he had been induced to order the portraits solely by the false statements made to him by the agent. The plaintiff, however, refused to consent to a rescission.

As stated, the foregoing facts were not disputed. The plaintiff contended that the defendant was bound, because the contract provided that it was "not subject to cancellation," and that the motive with which the defendant made the contract was no part of the consideration, and that, even admitting the fraud, the defendant was not damaged or injured thereby, and the case was one of *damnum absque injuria*.

Stephen C. Upson, for plaintiff in error.
Henry C. Tuck, for defendant in error.

HILL, C. J. (after stating the facts as above). It is not to be doubted that there is a clear distinction sometimes between the motive that may induce one to enter into a contract and the consideration of the contract, and ordinarily the motive with which one party enters into a contract is no part of the consideration, and, as Judge Nisbet expresses it, in *Austell v. Rice*, 5 Ga. 472, "a disappointment of the motive by the fraudulent misrepresentations of the plaintiff, is not a fraud upon the contract, and is not available as a defense." Motive "does not enter into the contract at all. The contract is to be viewed as it would be had there been no such motive. The conclusion is therefore irresistible that, if there was a fraud upon that motive, it is not a fraud upon the contract, and cannot be set up in avoidance of it." We do not think, however, that this principle controls this case. Here it was admitted that the contract was procured by a deliberate falsehood. The plaintiff, through its agent, was therefore guilty of moral as well as legal fraud. It is a universal principle of law that fraud voids all contracts. As happily expressed: "Fraud is a cause of nullity of the agreement, when the stratagems practiced by one of the parties are such that it is evident that without such stratagems the other party would not have contracted." 2 Chitty on Contracts, p. 1043, note "i." The defendant, in making the contract, did so relying upon the truth of the statement made by the agent to him that his wife and daughter had seen the work and desired him to make the purchase. The agent of the plaintiff adopted this stratagem of deception to induce the defendant to make the contract. Surely the law will not compel one to keep a contract which has been induced by both moral and legal fraud, evidenced by admittedly false representations made for the sole purpose of accomplishing the fraud, because belief in the truth of such false representations was the motive for the making of the contract. Of course, it is well

settled that both fraud and injury must co-exist to invalidate a written contract. But, if the fraud produces any injury at all as a result, it will be sufficient.

In this case it is not controverted that the portraits of the Presidents were entirely useless to the defendant. If they were useless to him, this affected the consideration of the contract. It was not shown by the evidence that they were useful to anybody, or had any market value. If they had a market value, and the defendant could have sold them for what he paid for them, he would still have been put to some trouble and inconvenience in making a sale. It is probable that the portraits did not have any market value; for the assumption that they did is somewhat inconsistent with the extreme and unreasonable conduct of the plaintiff in attempting to hold the defendant to the contract which was admittedly induced by false representations. It seems to us that the defendant, under the admitted facts of the case, was entitled, in equity and good conscience, to a rescission of the contract. Before the contract had been forwarded by the agent to the principal, the agent was charged with his fraud and admitted it, and was requested to rescind. Upon his refusal to do so he was notified that the defendant would not pay for the portraits. Before any expense had been incurred by the plaintiff, or any steps taken for the performance by it of the contract, it was also notified by the defendant, in writing, of the fraud perpetrated on him by the agent. While the contract provided that it was not subject to cancellation, yet we think, for the reasons stated, it was subject to rescission at the instance of the party defrauded.

Judgment affirmed.

(7 Ga. App. 799)

ISAACS v. STATE. (No. 2,583.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 202*)—
WAIVER OF DEFECTS—INSUFFICIENCY OF ACCUSATION.

The accusation was sufficient to withstand a general demurrer. Even if a further amendment had been required, a special demurrer, pointing out the defect insisted upon should have been filed. One who waives his right to be tried upon an accusation perfect in form as well as in substance, and takes his chances of acquittal, will not be heard, after conviction, to urge defects in the accusation unless those defects are so great that the accusation, by reason of its failure to charge any offense, is absolutely void.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 640, 645; Dec. Dig. § 202.*]

2. FALSE PRETENSES (§§ 5, 27*)—ACCUSATION—
SUFFICIENCY—"FRAUDULENTLY."

While it is essential that an accusation charging a violation of section 870 of the Penal Code shall state that the representations by

means of which another was defrauded or cheated were made with intent to defraud, an averment that the representations were fraudulently made meets the requirement in this particular. A representation "fraudulently" made is one made both with intent to deceive and to defraud. To defraud necessarily includes to deceive. One cannot be defrauded, unless he is deceived in some respect.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 3, 32; Dec. Dig. §§ 5, 27.*]

For other definitions see Words and Phrases, vol. 3, pp. 2955-2957.]

3. FALSE PRETENSES (§ 49*)—EVIDENCE—SUFFICIENCY.

The evidence authorized the verdict, and there was no error in refusing a new trial.

[Ed. Note.—For other cases, see False Pretenses, Dec. Dig. § 49.*]

Error from City Court of Ashburn; R. L. Tipton, Judge.

A. Isaacs was convicted of cheating and swindling, and brings error. Affirmed.

W. T. Williams and Jno. B. Hutcheson, for plaintiff in error. J. A. Comer, Sol., for the State.

RUSSELL, J. The defendant in the court below was convicted of the offense of cheating and swindling. According to the allegations of the accusation he "did then and there commit the offense of cheating and swindling by means of certain false and fraudulent representations then and there knowingly made by the said A. Isaacs to the said G. R. Luke, to wit, by knowingly, falsely, and fraudulently representing to the said G. R. Luke that a certain imitation diamond stud, then and there in the possession of the said A. Isaacs, was in point of fact a genuine diamond stud, and did then and there by said false and fraudulent representation, then and there knowingly made by the said A. Isaacs, defraud and cheat the said G. R. Luke, and damage the said G. R. Luke in the sum of \$135, for that, by said false and fraudulent representation then and there knowingly made by the said A. Isaacs to the said G. R. Luke, the said G. R. Luke was then and there induced and persuaded to exchange and trade to the said A. Isaacs, for the said imitation diamond stud, one certain genuine diamond ring, then and there the property of the said G. R. Luke, and of the value of \$135." The defendant demurred generally to this accusation upon the ground that it charged no offense against the laws of the state of Georgia, and because the facts charged constitute no violation of any penal law of the state. The trial judge overruled this demurrer, after the accusation had been amended so as to charge the offense in the language above quoted, and the accused, by exceptions preserved pendente lite, complains that the judge erred in not quashing the accusation.

1. The special point now insisted upon is that the court erred in overruling the demurrer, because the accusation did not con-

tain a statement of all the facts essential to charge the offense of cheating and swindling by false representations, as penalized by section 670 of the Penal Code, and especially because the accusation fails to charge that the statements made by the defendant were made with intent to deceive and defraud. The cases of *Goddard v. State*, 2 Ga. App. 154, 58 S. E. 304, and *Jacobs v. State*, 4 Ga. App. 509 (2), 61 S. E. 924, are cited in support of this proposition. We are of the opinion that there was no merit in the demurrer, and that the cases cited above are not apposite. The statement in regard to the representation is also qualified by the allegation that the representation was made for the purpose of cheating and swindling the prosecutor, because it is averred that the representation charged to have been made by the defendant was all false and fraudulent, and was made for the purpose of defrauding said G. R. Luke.

2. There is no merit in the point that the accusation fails to charge that the statements made by the defendant were made with intent to deceive and defraud. As appears from the wording of the accusation, it is expressly alleged that the representations made by Isaacs were knowingly, falsely, and fraudulently made, that the cheating was accomplished by the fraudulent representations referred to, and that the damage which Luke sustained was due to these fraudulent representations, in that by reason thereof the prosecutor was induced to make the exchange by which he gave a diamond worth \$135 for a glass stud pin worth \$1.50 at wholesale. It is essential, in any case of cheating and swindling which comes under the provisions of section 670 of the Penal Code, that it shall be alleged that the statements by which another was defrauded were made with intent to deceive. But it is not at all necessary that any particular verbiage shall be used, provided the idea is clearly and definitely conveyed by the language which is employed. In the accusation now before us it is distinctly stated more than once that the representations made by the defendant were knowingly false and fraudulent. If the statements made were fraudulent, they must have been made with intent to deceive and defraud. Any statement made fraudulently is made with the intention that it shall both deceive and defraud. One cannot be defrauded who acts with absolutely perfect knowledge of all the facts relating to the transaction, even though he may happen to sustain loss. In such a case he may use bad judgment, but he acts upon a knowledge of the truth. One must be deceived in order to be defrauded. "To defraud" includes to deceive. While the accusation in the present case does not in terms charge that the representations were made by the defendant with intent to deceive, it states it even more

strongly by alleging that the representations made by the defendant were fraudulent. In the case of *Wood v. State*, 48 Ga. 192, on page 297 of the opinion, 15 Am. Rep. 664, "fraudulent" is defined as something that will deceive, cheat, and mislead; inducing belief in what is not true and causing one to act upon such belief. In *West v. Wright*, 98 Ind. 339, it was held that the allegation that lands were knowingly, falsely, and fraudulently represented to be clear of incumbrance was equivalent to the charge that the representations were made with intent to deceive. Inasmuch as accusations in the several city courts are amendable, the defendant, if he thought best to have the accusation fuller in any respect, should have specially demurred, and called the attention of the lower court, as he has called the attention of this court, to the specific defect insisted upon. Even if the accusation had not been full enough in some of the essentials pointed out in the *Goddard* and *Jacobs* Cases, *supra*, it was full enough to withstand a general demurrer, and the ruling in the case of *Lanier v. State*, 5 Ga. App. 472, 63 S. E. 586, applies. There was no error in overruling the general demurrer.

3. The evidence authorized the conviction of the defendant. The case turned upon whether the defendant knowingly represented that an imitation stud pin of very insignificant value was a diamond. He stated it was an heirloom in his family. Its size indicated that, if it was a diamond, it was very valuable. Another question in the case fairly submitted by the judge was whether or not the prosecutor had such opportunity for investigating the spurious diamond, before the exchange, as that his loss could not be attributed to representations. Both these issues the jury settled adversely to the contentions of the defendant. It cannot be said that the judge erred in refusing a new trial. Judgment affirmed.

(7 Ga. App. 766)

CENTRAL OF GEORGIA RY. CO. v.
BLACKMAN. (No. 2,303.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

1. QUESTION NOT DECIDED.

It is a close and doubtful question as to whether a losing party in a jury trial can by direct bill of exceptions (and without the intervention of a motion for a new trial) bring up for review alleged errors committed on the trial, where it does not appear that the verdict was necessarily controlled by the alleged errors. The point is not decided.

2. TRIAL (§ 260*)—REFUSAL OF INSTRUCTIONS.

A reversal will not be granted because the trial judge refused certain requests to charge, where the same matters are fully and fairly presented in the general charge.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 651; Dec. Dig. § 260.*]

3. TRIAL (§ 251*)—INSTRUCTIONS—GENERAL LEGAL PRINCIPLE.

Though the issue in the trial may present only a particular phase of a general legal principle which involves some things not directly pertinent to the case on trial, it is not improper for the court to state the general principle to the jury, provided he instructs them as to its particular application and limits their investigation accordingly.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 587; Dec. Dig. § 251.*]

4. MASTER AND SERVANT (§ 291*)—INJURIES TO SERVANT—INSTRUCTIONS.

In an action by a railroad employé for injuries received through the alleged negligent act of a fellow servant, while it is true that the plaintiff must recover upon the particular negligence alleged, it is not error for the judge to charge the jury, in accordance with the statutes of this state as construed by the courts, that if the plaintiff shows that he was free from fault, and that he was injured by the alleged act of the fellow servant, it is to be presumed, until the contrary appears, that the defendant was negligent, and that upon such a state of facts the plaintiff is prima facie entitled to recover.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1136, 1137, 1140; Dec. Dig. § 291.*]

5. NEGLIGENCE (§ 121*)—RES IPSA LOQUITUR.

It is not error, in a negligence case, to instruct the jury (if the facts make the instruction appropriate) that the plaintiff may show the defendant's negligence from the very happening of the injurious act in question, provided that the most reasonable inference to be drawn from the fact of the thing's having happened as it did is that, if the defendant had not been negligent in the particulars alleged in the declaration, the thing would not so have happened.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 218, 225; Dec. Dig. § 121.*]

6. NEGLIGENCE (§ 119*)—PROXIMATE CAUSE—PLEADING AND PROOF.

If a plaintiff in a negligence case alleges a single specific act of negligence as the cause of his injury, he cannot recover without showing that that act was negligent and proximately contributed to the injury; but if he shows that act, and shows that it was not only negligent, but also that it materially and proximately contributed to his injury, he is not precluded from a recovery because other unalleged acts of the defendant (whether negligent or not) may have concurred with the act alleged in bringing about the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by R. C. Blackman against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Lawton & Cunningham, for plaintiff in error. Osborne & Lawrence, for defendant in error.

POWELL, J. Blackman sued the railroad company for personal injuries. He was a boiler maker in the defendant's shops. A Pintsch gas tank, such as is used to supply gas on passenger cars, had become dented in

a wreck. The foreman ordered Blackman to repair it by a process which he prescribed, and recommended as being safe, though it was a new process so far as the shop in question was concerned. Blackman had no special information on the subject. He had never had any previous experience in the repair of such tanks. The process he was directed to use was that he should couple the tank to the compressed air pipes in use in the shops, and then heat the dented portion, with the view that, as the heat softened the metal in the dent, the pressure of the air would cause this part of the tank to come back into symmetry with the rest of its contour. The plaintiff coupled the tank to the air hose, built his fire under the dent, and turned on the compressed air till the gauge which he had placed in the pipe line showed a pressure of 20 pounds. The foreman came up, and, seeing that the plaintiff was using only 20 pounds' pressure, opened wider the valve, which turned on the air, telling the plaintiff not to be afraid, that the tank would stand a pressure of 250 pounds. When the foreman thus opened the valve, the pressure, as shown on the gauge, rose rapidly to 60 pounds. The indicator showed about this figure when the plaintiff last looked at the gauge, and a moment later the tank burst with a violent explosion. The plaintiff was injured; but the extent of his injuries need not be set forth, as there is no complaint as to the amount of the verdict.

The petition charged that the defendant knew (actually or constructively) that the tank was likely to explode when a high pressure of air was put upon it; that the plaintiff was free from fault, was inexperienced in the particular kind of work, was excusably ignorant of the dangers attendant on doing the work, and was relying upon the express assurances and directions of the foreman that the work could be safely done; and that he could not have avoided the injury by any reasonable degree of care. He made four allegations of negligence: "(a) In putting plaintiff to work on said gas tank without giving him proper warning and instruction as to the danger of said work and the proper means of carrying it on; (b) in misinforming him as to the amount of pressure said gas tank would bear; (c) in turning on said compressed air, and thereby increasing the pressure to a highly dangerous point, thereby causing said explosion; (d) in causing the explosion of said tank without warning or notifying plaintiff that it was likely to explode." The defendant brings the case to this court by direct bill of exceptions, having filed no motion for new trial. No point is made as to the legal sufficiency of the evidence to sustain the verdict. There is a general exception to the final judgment, but no assignment of error thereon. The plaintiff in error relies solely on seven exceptions to

the charge of the court, which will be discussed in order.

The defendant in error has moved to dismiss the writ of error, on the ground that a direct bill of exceptions will not lie in such a case, that the alleged errors were not such as necessarily to have controlled the verdict, and that a motion for new trial was essential to the raising of the points complained of. The plaintiff in error says that the alleged errors are properly for consideration, though they do not control the verdict, and that there should be a reversal if the errors were prejudicial, though not necessarily controlling within the purview of the act of 1898 (Acts 1898, p. 92). Logically speaking, this point ought to be decided at the outset, and if we were at all sure that we knew how to decide it correctly, we would shape this opinion accordingly; but we have decided not to decide it, for, upon looking at the exceptions, we find that, though they present several right difficult questions, it is easier to decide them than it is to decide the point of practice, and the result we are reaching makes a decision on the practice question immaterial from a practical standpoint. The profession will probably be willing to pardon this confessed judicial "dodging," if they will only undertake to form an opinion on the question of practice involved, in the light of the following decisions: *Ocean Steamship Co. v. Hamilton*, 112 Ga. 901, 38 S. E. 204; *Smith v. Smith*, 112 Ga. 351, 37 S. E. 407; *Ray v. Morgan*, 112 Ga. 923, 38 S. E. 335; *Darien Bank v. Clarke L. Co.*, 112 Ga. 947, 38 S. E. 363; *Cable Co. v. Parantha*, 118 Ga. 913, 45 S. E. 787; *Henderson v. State*, 123 Ga. 739, 51 S. E. 764; *Anderson v. Wyche*, 126 Ga. 398, 55 S. E. 19; *Cox v. Macon Ry. Co.*, 126 Ga. 398, 55 S. E. 232; *Cawthon v. State*, 119 Ga. 395, 48 S. E. 897; *Lyndon v. Ga. Ry. & Elec. Co.*, 129 Ga. 353, 58 S. E. 1047; *Taylor v. Reese*, 108 Ga. 379, 33 S. E. 917; *Taylor v. State*, 108 Ga. 384, 34 S. E. 2. The statement just made is not intended as a reflection on the Supreme Court, and involves no such reflection. The general question involved is one upon which the judges of that court have, from time to time, honestly differed, and it is out of these differences that the doubt arises. The *Lyndon Case*, supra, has effected a partial reconciliation of the conflicting views; but a study of the question makes it palpable that the reconciliation is still yet partial only.

2. The first exception is to the effect that the court erred in not giving to the jury certain requested charges, instructing them that the petition did not allege certain acts as negligence, and that no verdict in the plaintiff's favor could be rendered on account of these unalleged things. The judge stated to the jury the four acts of negligence relied on by the plaintiff, and explicitly informed them that the plaintiff could not recover for any other acts. Indeed, throughout the whole charge the judge was extremely careful in

reiterating to the jury from time to time that the plaintiff was to be strictly confined to the acts of negligence he had alleged. Instead of excluding the few things mentioned in the requests to charge, he excluded everything not included in the petition. We have no hesitancy in saying that the requested instructions were fully covered by the general charge.

3. The next exception is that the court erred in charging the jury as follows: "The defendant is not an insurer against injury to its employes. Its duty is to exercise ordinary and reasonable care with reference to places to work and things upon which the servant was required to work, and to furnish reasonably safe appliances for the use of its employes. If you find from the evidence that the defendant did this *in respect to the matters involved in this case*, you will find in favor of the defendant. If there was a failure on its part to use that sort of care, and if an injury occurred *by reason of any negligence alleged and relied upon in the declaration*, and if you should further find that the plaintiff in the case is free from fault, he would be entitled to recover." (The italics are ours.) This and the fifth exception, in which complaint is made that the judge stated to the jury, in the language of section 2611 of the Civil Code of 1895, the reciprocal duties and liabilities of masters and servants, may be considered together. The point made is that the judge should have confined the jury strictly to the particular theory charged in the petition, and that all reference to general duties and liabilities was immaterial and prejudicial surplusage. We cannot concur in this view. Not only do the general doctrines constitute the foundations upon which the specific instance rests, but a statement of them also tends to illustrate and to make clearer the conditions upon which a liability would attach in relation to the particular matter alleged. There is certainly no prejudicial error in the court's stating the general doctrine to the jury, where, by his further instructions, he so carefully limits their investigation to the particular delinquency in issue as did the judge in the present case.

4. The next exception is to the following charge: "In this case, if you find that the plaintiff was without fault on his part, and was injured by an explosion caused by the act of the defendant's foreman in turning on or directing the plaintiff to turn on an air pressure of 60 or 65 pounds into the tank under the conditions then existing, defendant would be presumed to be negligent, and would be liable to the plaintiff for such injury, unless you should find that the presumption has been removed in the manner hereinbefore set forth." The complaint is that this instruction authorized the jury to hold the company liable for negligence generally, and did not confine them to the particular acts alleged. The instruction was not erroneous. It related to the subject of burden of proof.

The act in question was that of a fellow servant. Under the statutes in this state, where a plaintiff employed by a railroad company is injured by the alleged negligent act of a fellow servant, he raises a presumption of negligence, adequate (unless rebutted) to sustain a recovery, where he shows that he was injured by an act of a fellow servant, and that he himself was free from fault.

5. The next exception is to the following charge: "Negligence may be shown by circumstances, as well as by direct testimony, and a jury may in some instances presume negligence from the mere happening of the event. In such a case, all of the circumstances and surroundings accompanying the event, or the happening of the event, should be considered by them; and, if it is such an event as in ordinary course of things would not have occurred if the defendant company had used ordinary care, they would be authorized to presume that the company was negligent, and to place upon it the burden of explaining the cause of the occurrence; and, in the absence of such explanation by it, they would be authorized to presume that the occurrence was caused by the negligence of the defendant or its agents. That applies, of course, gentlemen of the jury (as everything I shall say with reference to what constitutes negligence or not), to the allegations of negligence set up in the declaration, because you cannot go out of the borders of the declaration for negligence upon which to find the defendant liable. If it is to be found liable at all, it is because it was negligent in some one or more of the ways in which the declaration declares it was negligent. Now, this rule I have just given you must be applied with caution, and the jury should consider all the surrounding circumstances of the case, and then determine whether the rule applies in view of those circumstances." The instruction, fairly construed, means that, if the circumstances surrounding the happening of the thing that caused the injury were such as to make the inference that the occurrence was proximately brought about by one or more of the particular acts of negligence alleged more reasonable than any other inference that could be drawn under the circumstances, the jury would be authorized to conclude that the defendant was negligent in the respects alleged. We understand this to be the rule of circumstantial evidence applicable in civil actions. It is sometimes called by the sonorous designation of "*res ipsa loquitur*"; but the name is not material. It is only the principle that is important.

6. What has been said above practically controls the remaining exceptions; but, to cover all the points raised, we will say a little more on the subject. Carefully analyzed, the burden of the complaint presented by all the other exceptions is that, while the plaintiff was probably injured by an act for which the defendant was responsible, he ought not to hold his recovery, because he did not

name that act in his petition. To make this plainer: The state of the evidence was such that the jury might have found that the explosion resulted from one of several causes: That some gas had been left in the tank, and that upon its becoming mixed with the air it exploded under the influence of the heat; or that by some chemical process the Pintsch gas had turned back into the original oil from which it is manufactured, and that, from the application of the air and heat, this oil had been vaporized into gas and had exploded; or that the compressed air, which is moister than the ordinary air, being forced against the hot metal under pressure, was converted into free hydrogen and oxygen, which, in combination with air, makes a dangerous explosive; or that the pressure of the air itself caused the explosion. The plaintiff's allegation was that the negligent cause of the injury consisted in the defendant's agent's "turning on said compressed air, and thereby increasing the pressure to a highly dangerous point." Under this allegation, if the turning on of the compressed air was a negligent and materially contributing cause of the explosion, the plaintiff would have been entitled to recover under his petition, though other negligent acts not alleged, such as leaving the gas or the gas-forming oil in the tank, may also have concurred in bringing about the result. In other words, if the tank would not have exploded, notwithstanding there was some of the gas or of the oil in it, if the compressed air had not been negligently forced into it, the plaintiff had the right to treat the act of turning in the air as the proximate cause of the injury, especially when the defendant had not, by special demurrer or otherwise, caused the plaintiff to make his allegation more specific as to details. Hence the insistence of the defendant that the court should have taken up the theories as to there having been gas in the tank, and as to there having been gas-forming oil in it, and should have told the jury that, if they found one of these theories to be true, the plaintiff could not recover, is not well founded. Whether it was negligent to turn on the compressed air depended on the surrounding circumstances. We think, therefore, that the trial judge gave the jury the proper legal aspect of the case, as made by the pleadings and the evidence, when he instructed them in substance that the plaintiff would be confined to the allegations of his petition, but that, if the thing alleged was a proximate cause of the injury, and was negligent, the plaintiff, if without fault, could recover. By shaping his instructions thus, he avoided the judicial quicksands which would have beset him if he had undertaken to explain to the jury how far the presence of gas or oil in the tank might or might not have affected the plaintiff's right to recover. He chose the simpler route—that of telling the jury directly on what sole theory the plaintiff might

recover, instead of attempting to define this same theory by a process of exclusion—and, when it comes to charging a jury, simplicity, coupled with accuracy, is a thing much to be commended.

Judgment affirmed.

(7 Ga. App. 848)

CAUDLE v. STATE (No. 2,614.)

(Court of Appeals of Georgia. June 14, 1910.
Rehearing Denied July 5, 1910.)

(Syllabus by the Court.)

1. HOMICIDE (§ 292*)—ASSAULT WITH INTENT TO KILL—INSTRUCTIONS.

On the trial of an indictment for assault with intent to murder, the court charged the jury in effect that to make out the crime, all the ingredients of murder must exist except the killing, but failed to define the crime of murder. *Held* no error, where in the same connection the court charged that, to make a case of assault with intent to murder the evidence must show the use of a deadly weapon in a manner likely to produce death, with the specific intent to kill, and also fully charged the law of shooting at another, and of justification.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 607-608; Dec. Dig. § 292.*]

2. ASSAULT WITH INTENT TO KILL.

The evidence for the state demanded the verdict, and neither the evidence for the defendant nor his statement to the jury showed any fact or circumstance of legal mitigation or justification, and the errors of law, if any were committed, were immaterial. *Fallon v. State*, 5 Ga. App. 659, 63 S. E. 806; *Malone v. State*, 49 Ga. 217; *Spence v. State* (decided May 14, 1910) 7 Ga. App. 825, 68 S. E. 443.

Error from Superior Court, Fulton County; L. S. Roan, Judge.

J. T. Caudle was convicted of assault with intent to murder, and brings error. Affirmed.

Thos. L. Bishop and W. C. Munday, for plaintiff in error. C. D. Hill, Sol. Gen., and D. K. Johnston, for the State.

HILL, C. J. Judgment affirmed.

(7 Ga. App. 324)

MITCHELL v. GREAT ATLANTIC & PACIFIC TEA CO. (No. 2,388.)

(Court of Appeals of Georgia. April 6, 1910.
Rehearing Denied July 5, 1910.)

(Syllabus by the Court.)

1. NEW TRIAL PROPERLY GRANTED.

The court did not err in sustaining the certiorari and in granting a new trial. *Fagan v. Jackson*, 1 Ga. App. 24, 57 S. E. 1052.

2. GARNISHMENT (§ 164*)—EVIDENCE—ALLEGATIONS IN PLEADING.

Allegations in a party's pleadings are not ordinarily evidence in his favor. Although the suit between the plaintiff and the garnishee is described in the garnishment proceedings as being based on a judgment against the main defendant, and although the parties in a statement of facts agree that this is so—that is, although they agree that the plaintiff's claim was a proceeding upon a judgment rather than a proceeding upon an open indebtedness—this does

not dispense with the necessity of the plaintiff's introducing the judgment in evidence before the final judgment can be lawfully entered against the garnishee; it being manifest that the agreement related to what the plaintiff claimed, and not to the truthfulness or untruthfulness of these contentions.

[Ed. Note.—For other cases, see Garnishment, Dec. Dig. § 164.*]

3. CERTIORARI (§ 37*)—PROPER PARTIES.

The defendant is usually not a proper party to a petition for certiorari brought by the garnishee to review a judgment against him (the garnishee) in favor of the plaintiff, and the joinder of the defendant in the application for certiorari is to be regarded as mere surplusage. While, in such a case, perhaps it is technically irregular for the judge upon the hearing of the certiorari to cause the petition to be amended by striking the name of the defendant as a party (as petitions for certiorari are not amendable), yet it is a matter in no wise affecting the merits of the case.

[Ed. Note.—For other cases, see Certiorari, Dec. Dig. § 37.*]

4. JUSTICES OF THE PEACE (§ 196*)—CERTIORARI—RIGHT TO REMEDY.

Under *Toole v. Edmondson*, 104 Ga. 783, 31 S. E. 25, certiorari lay from the judgment of the magistrate; the evidence being undisputed.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 196.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between W. B. Mitchell and the Great Atlantic & Pacific Tea Company. From the judgment, Mitchell brings error. Affirmed.

Emile Breitenbucher, for plaintiff in error.
Alex W. Stephens, for defendant in error.

POWELL, J. Judgment affirmed.

(36 S. C. 154)

STATE v. RODMAN.

(Supreme Court of South Carolina. June 13, 1910.)

1. INDICTMENT AND INFORMATION (§ 159*)—OBSTRUCTION OF HIGHWAY—INDICTMENT—AMENDMENT.

Cr. Code 1902, § 56, makes indictments sufficient which, in addition to allegations as to time and place, now required, charge the crime substantially in the language of the common law or statute, or so plainly that the nature of the offense may be easily understood. Section 58 permits amendment before trial in case of a defect in form and amendments for variance between allegations and proof, if the amendment does not change the nature of the offense. The indictment in a prosecution for obstructing a public highway alleged that accused unlawfully closed up and obstructed a certain highway and public road leading from the [public highway by the] plantation of R. into the main public road from a certain church to another place, the bracketed words having been added by amendment after the state had closed. *Held*, that the amendment was properly allowed, since it was merely a detailed description of the offense, and the amended indictment charged the same offense as the original.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 505-514; Dec. Dig. § 159.*]

2. INDICTMENT AND INFORMATION (§ 133*)—OBJECTIONS—MODE OF OBJECTIONS.

The defect was apparent upon the face of the original indictment so that any objection thereto should have been taken by demurrer or motion to quash before the jury was sworn; Cr. Code 1902, § 57, requiring every objection to any indictment for any defect apparent on its face to be taken by demurrer or on motion to quash before the jury shall be sworn.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 454-468; Dec. Dig. § 133.*]

3. HIGHWAYS (§ 164*)—EVIDENCE—OBSTRUCTION—PROSECUTION—JURY QUESTION—DEDICATION OF HIGHWAY.

In a prosecution for obstructing an alleged public highway over uninclosed wood land belonging to defendant, evidence *held* to make it a jury question whether the public had acquired a right of way through defendant's land by continuous and adverse user for 20 years.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 453; Dec. Dig. § 164.*]

4. HIGHWAYS (§ 7*)—ESTABLISHMENT—PRESCRIPTION—ADVERSE USER—NECESSITY.

A prescriptive right arises in favor of the public after the continuous use of a way for 20 years if it runs through cultivated land, but it must also be shown that the user was adverse to the owner if the way is over uninclosed wood land.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 10-18; Dec. Dig. § 7.*]

5. HIGHWAYS (§ 17*)—ESTABLISHMENT—ADVERSE POSSESSION—EVIDENCE.

Where the same person owns both arable and wood land, that the public has acquired a prescriptive right over the cultivated land as a public highway is a circumstance to be considered by the jury in determining whether the use of the way over the wood land was adverse so as to make it a public highway by prescription.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 24; Dec. Dig. § 17.*]

6. HIGHWAYS (§ 164*)—OFFENSES—PROSECUTION—ADMISSION OF EVIDENCE.

In a prosecution for obstructing a highway, in which it was claimed that the road obstructed had never been established as a public highway, a question whether the road, if open, would be of use to any one except persons of a certain farm and as to which road it would be best for such persons to take, was properly excluded; it being immaterial which road was the most convenient if the road obstructed was a public highway.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 451; Dec. Dig. § 164.*]

Appeal from General Sessions Circuit Court of Chester County; Ernest Moore, Special Judge.

John Rodman was convicted of obstructing a public highway, and he appeals. Affirmed.

Gaston & Hamilton, for appellant. J. K. Henry, Sol., for the State.

GARY, A. J. This is an appeal from the sentence imposed upon the defendant for obstructing a public highway. The indictment under which the defendant was tried charged that he did willfully and unlawfully close up and obstruct a certain highway and public road, leading from the (public highway by the) plantation of James F. Reid into the

main public road from Fishing Creek Church, to market at Smith's Turnout. The record contains the following statement: "It is hereby agreed that the words in the indictment inclosed in parenthesis, 'public highway by the,' were added to the indictment, as an amendment thereto, by the state, after it had closed, under order of the presiding judge permitting the amendment, over defendant's objection."

The first question that will be considered is whether there was error on the part of his honor, the presiding judge, in permitting the said amendment. Section 56 of the Criminal Code contains this provision: "Every indictment shall be deemed and judged sufficient in law which, in addition to allegations as to time and place, as now required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the same, or so plainly that the nature of the offense charged, may be easily understood." Section 57 is as follows: "Every objection to any indictment, for any defect apparent on the face thereof, shall be taken by demurrer, or on motion to quash such indictment, before the jury shall be sworn, and not afterwards." Section 58 is as follows: "That if there be any defect in form, in any indictment, it shall be competent for the court, before which the case is tried, to amend the said indictment: Provided, such amendment does not change the nature of the offense charged; that if on the trial of any case, there shall appear to be any variance, between the allegations of the indictment, and the evidence offered in proof thereof, it shall be competent for the court, before which the trial shall be had, to amend the said indictment according to the proof: Provided, such amendment, does not change the nature of the offense charged; and after such amendment the trial shall proceed in all respects and with the same consequences, as if no variance had occurred, unless such amendment shall operate as a surprise to the defendant, in which case the defendant shall be entitled, upon demand, to a continuance of the cause." The exceptions raising this question cannot be sustained for the following reasons: (1) The indictment as originally drawn charged the obstruction of a highway or public road by building a wire fence across the same, and the offense was set out so plainly that the nature thereof might be easily understood. The amendment related to the detailed description of the offense, and, after the indictment was amended, it still charged the same offense, to wit, the obstruction of a highway or public road. (2) The defect was apparent upon the face of the indictment, and the objection should have been taken by demurrer or on motion to quash before the jury was sworn. State v. Gilchrist, 54 S. C. 159, 31 S. E. 866; State v. Phillips, 73 S. C. 236, 53 S. E. 370; State v. Weaver, 74 S. C. 417.

54 S. E. 615; *State v. Hamilton*, 77 S. C. 333, 57 S. E. 1098; *State v. Means*, 80 S. C. 401, 61 S. E. 898. (3) It was competent for the court to amend the indictment so as to conform to the proof when there was a variance between the allegations and the evidence offered in proof thereof, as it was not made to appear that the amendment changed the nature of the offense, or that it operated as a surprise to the defendant.

The next question that will be considered is whether the circuit judge erred in refusing to direct a verdict in favor of the defendant on the ground that there was no testimony whatever tending to prove that the public had acquired a right of way through the defendant's uninclosed wood land by continuous and adverse user for the period of 20 years.

We quote from the testimony of the following witnesses:

J. F. Reid: "Q. When Mr. Rodman bought that land, all this land in here was in original forest? A. Most of it. Q. And he has cleared it up, and put it in cultivation since he got hold of it? A. Yes, sir. Q. And the roadway where people traveled in there, before he bought the land, was not inclosed by any fence or anything of that kind? A. I don't think so. Part of it was, and part of it was not. Q. How much? A. I can't remember. I remember there was a big fence through there when I was a boy. Q. When he bought it, was it all in woods? A. I think so. The biggest part of it. Q. And there was no fence there then? A. No, sir. Q. Which one of these roads was it, you say, had been shifted after Mr. Rodman bought the place? A. This road has been shifted (indicating). The whole travel used to go down here, somewhere (indicating), and went through the woods; and he has cut that out and moved it over."

Hugh Jennings: "Q. You say you didn't know anything about this situation until seven years ago? You were a stranger in that community until then? A. Yes, sir. Seven years this fall. Q. Was this land cleared up or was it still in woods (indicating)? A. Yes, sir; it was cleared up. On the road it was cleared up."

I. C. McFadden: "Q. It has been 14 or 15 years since you went through that road? A. Yes, sir. It used to be in woods, but it is cleared up now. Q. It was in woods, almost all of it, up to the time Mr. Rodman bought it? A. Yes, sir."

W. H. Simpson: "Mr. Glenn: You traveled principally that one (indicating)? A. Yes, sir. Q. And this one here went through the woods? A. Well, both were principally through the woods."

John Rodman (defendant): "Q. Mr. Rodman, you live on this place, where they claim you stopped up a public road? A. Yes, sir. Q. Will you state now when you first saw that road? That place where they say this

road is going down towards Mr. Reid's place? A. It was in the spring of 1902, I think it was. Q. Well, what was the condition of it, or was there any road there, or what was there? A. Well, it seemed like a path that they worked on each side of, about half as wide as a wagon road. Q. You say worked on either side. You mean they cultivated the land? A. Yes, sir."

There was also testimony to the effect that the road had been used by the public for 70 years, and that Crawford, a former owner of the land, had placed a causeway over the road at a point where it was necessary.

The rule in this state is that a prescriptive right arises in favor of the public after the continuous use of a road for 20 years, when it runs through cultivated land, but that, when it passes over uninclosed wood land, it must also be shown that the user was adverse. *State v. Sartor*, 2 Stro. 60; *State v. Floyd*, 39 S. C. 23, 17 S. E. 505; *State v. Tyler*, 54 S. C. 294, 32 S. E. 422; *Earle v. Poat*, 63 S. C. 439, 41 S. E. 525; *Kirby v. Railway*, 63 S. C. 494, 41 S. E. 765; *State v. Toale*, 74 S. C. 425, 54 S. E. 608; *Commonwealth v. Mfg. Co.*, 76 S. C. 382, 57 S. E. 201; *Moragne v. Railway*, 77 S. C. 437, 58 S. E. 150; *State v. Washington*, 80 S. C. 376, 61 S. E. 896. When, however, the same person is owner, both of the arable land and the wood land, and the public has acquired a prescriptive right over the cultivated land, this is a circumstance to be considered by the jury in determining whether the use of the road through the wood land was adverse.

There is another reason why the exceptions raising this question cannot be sustained. Even if there is not a single circumstance standing alone tending to prove adverse user, nevertheless, when the facts and circumstances are considered in connection with each other, it might reasonably be inferred by the jury that the user was adverse. *Dantzler v. Cox*, 75 S. C. 334, 55 S. E. 774; *Wertz v. Railway*, 76 S. C. 388, 57 S. E. 194.

We will consider lastly whether there was error in refusing to allow the defendant's witness J. M. Saye to testify in answer to the following questions: "Q. Now, this disputed road, Mr. Saye, would that, if open, be of any use to anybody, except those on Mr. Reid's place? Q. Which road would they naturally follow? Which road would be the best for them to take?" The exception raising this question is disposed of by the case of *State v. Harden*, 11 S. C. 360, in which it was held that the refusal of the circuit judge to charge the jury that the defendant should be acquitted of obstructing a public road, if he had opened a new road, and one equally as convenient, in place of the old road, was not erroneous.

These views practically dispose of all other exceptions.

Judgment affirmed.

(111 Va. 121)

NORFOLK & O. V. RY. CO. v. CONSOLIDATED TURNPIKE CO. et al.†

(Supreme Court of Appeals of Virginia. June 9, 1910.)

1. ESTOPPEL (§ 68*)—CHANGE OF POSITION IN SUBSEQUENT JUDICIAL PROCEEDINGS.

A litigant cannot in a subsequent proceeding take a position in conflict with that taken by him in a former proceeding, which latter position is to the prejudice of the adverse party, where the parties are the same and the same questions are involved; and hence, where the purchaser at a receivers' sale of land subject to a trust deed, which lands the receivers had sought to condemn, claimed under the condemnation proceedings brought by the receivers, and enjoined the trustee and another from enforcing the trust deed until there was a decision in such proceedings, such purchaser could not subsequently, in the condemnation suit, deny that the receivers who brought such proceeding had authority to institute it, or that their petition therein was sufficient.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.*]

2. APPEARANCE (§ 9*)—"GENERAL APPEARANCE."

An appearance for any other purpose than questioning jurisdiction for want of process, defect of process, defective service thereof, or because the action was commenced in the wrong county, etc., is general, and not special, though accompanied by the claim that the appearance is special; and hence an appearance to move to vacate a cause, or to dismiss or discontinue it, because plaintiffs' pleading does not state a cause of action, which is equivalent or analogous to a demurrer, amounts to a general appearance.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42-52; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3061, 3062.]

3. ESTOPPEL (§ 68*)—CHANGE OF POSITION IN SUBSEQUENT JUDICIAL PROCEEDING.

Where the purchaser at a receivers' sale of land subject to a trust deed, which land the receivers had sought to condemn, claimed under the condemnation proceedings brought by the receivers, and by alleging the pendency thereof long after the expiration of three months from the date of filing of the commissioners' report obtained an injunction restraining the trustee and another from subjecting the property sought to be condemned to the trust deed, such purchaser was estopped from subsequently contending that the condemnation suit should ipso facto be vacated and dismissed on the ground that the report of the condemnation commissioners had been filed more than three months without payment of the damages either to the owner or into court, as expressly required by Code 1904, § 1105f, subsec. 27.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.*]

4. EMINENT DOMAIN (§ 133*)—CONDEMNATION—COMPENSATION—IMPROVEMENTS BY CONDEMNING PARTY.

Where a corporation, with power of eminent domain, takes possession of land for its purposes under a warranty deed, and makes improvements, and afterwards institutes condemnation proceedings to extinguish a trust deed, the value of the improvements should not be considered in ascertaining compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 361½; Dec. Dig. § 133.*]

5. EMINENT DOMAIN (§ 241*)—CONDEMNATION PROCEEDINGS—PERSONAL JUDGMENT.

Under Code 1904, § 1105f, subsecs. 9-13, relating to the method of payment for land taken, if the condemning company is not in possession when the report of commissioners is confirmed, it can acquire title and right of possession only by paying such sum into court, or to the party entitled; and if such company is in possession at such time, as it may be where there has been a prior report not confirmed, and the confirmed report increases the compensation, the condemning company has no right to possession until full payment into court, or to the party entitled, and the statute confers no authority to enter a personal judgment. *Held*, that a personal judgment is improper and hence a judgment requiring the condemning company to pay the sum ascertained into some national bank in a specified city within three months was erroneous.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 621, 624; Dec. Dig. § 241.*]

6. EMINENT DOMAIN (§ 167*)—CONDEMNATION PROCEEDINGS—CONSTRUCTION OF STATUTE.

Though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must be construed as applicable only to cases that may thereafter arise, unless a contrary intention is unequivocally expressed therein; and there being nothing in Code 1904, § 1105f, subsec. 27, as amended by Acts 1906, c. 257, providing that if, in a condemnation proceeding, the amount ascertained by the commissioners be not paid either to the party entitled or into court within three months from the filing of the report, the proceedings shall, on defendant's motion, be vacated as to him, and not otherwise, to show that it was intended to have a retroactive effect, it cannot be deemed to have such effect.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 451; Dec. Dig. § 167.*]

7. EMINENT DOMAIN (§ 255*)—WRIT OF ERROR—NECESSITY FOR OBJECTIONS IN LOWER COURT.

Where no objection was made in the lower court in condemnation proceedings that the commissioners' report was not in accord with the order appointing them, the question cannot be raised on writ of error.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 666; Dec. Dig. § 255.*]

Error to Circuit Court, Norfolk County.

Condemnation proceedings by the Norfolk & Ocean View Railway Company against the Consolidated Turnpike Company and others. From an order allowing compensation for the land taken, including the value of improvements placed thereon, and directing plaintiff to deposit the same, plaintiff brings error. Reversed and rendered.

Groner & Taylor and Munford, Hunton, Williams & Anderson, for plaintiff in error. N. T. Green and C. H. Burr, for defendants in error.

BUCHANAN, J. This is a condemnation proceeding instituted in the circuit court of Norfolk county by the receivers of the Circuit Court of the United States for the Eastern District of Virginia in the cause of Fink v. Bay Shore Terminal Company and Others. Before a consummation of the proceedings

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied September 15, 1910.

for condemnation, the property sought to be condemned, together with other property, was sold under a decree in the cause in which the receivers were appointed, the sale confirmed, and the purchaser, the Norfolk & Ocean View Railway Company, the plaintiff in error, received a conveyance of the property purchased, "with the benefit of and subject to all suits or proceedings which have been or may be instituted by the said receivers."

At the time of the institution of the proceedings to condemn, the predecessor in title of the plaintiff in error was in possession of the property sought to be condemned, under a conveyance from the Consolidated Turnpike Company which purported to convey, with covenants of general warranty, the land sought to be condemned, but which at that time was subject to a lien created by a deed of trust properly recorded.

When the report of the commissioners appointed in this proceeding to ascertain the compensation and damages for the property to be condemned was filed, it was excepted to by appellee Arthur W. Depue, one of the holders of the bonds secured by the said deed of trust. Before any action by the court upon the said report and the exceptions thereto, the grantor company in the deed of trust having defaulted in the payment of interest on the bonds secured by it, a judgment was rendered against that company, and a bill filed to subject the trust property to the payment of the debts secured upon it. Thereupon the appellant filed a pleading in the Circuit Court of the United States in the cause in which the property had been sold, for the purpose, among others, of enjoining and prohibiting Walter H. Taylor, the trustee in the said deed of trust, and Depue, one of the beneficiaries therein, from enforcing the same against the property sought to be condemned until there had been a decision of the state court in this condemnation proceeding. That court granted the relief, and the Circuit Court of Appeals of the United States, upon appeal, affirmed the lower court.

After Taylor, trustee, and Depue, appellees, had been enjoined from enforcing the lien of the said deed of trust until there had been a decision of the state court in the condemnation proceeding, Depue abandoned certain of his exceptions to the report of the commissioners of condemnation, in which abandonment Taylor, trustee, united, and they moved the court to confirm said report in so far as it ascertained compensation, etc., for the land taken, including the improvements placed thereon by the appellant or its predecessor in title. At the same time the appellant, which had never been made a party to the condemnation proceeding, appeared specially, as it claimed, and moved the court to dismiss and vacate the proceedings had in the cause, and to discontinue it. The court overruled the appellant's motion, held that its appearance was general, entered an order sustaining the motion of the appellees allowing compensa-

tion for the land taken, including the value of the improvements placed thereon by the appellant or its predecessor in title, directed that the appellant within three months deposit that sum, with interest, in some national bank of the city of Norfolk, to the credit of the court, and subject to its further order. To that order this writ of error was awarded.

The first error assigned is to the action of the trial court in appointing commissioners in the cause, based upon the following grounds:

(1) The petition was filed and the motion made by receivers of the Circuit Court of the United States, who had no authority under the statute law of Virginia to institute such proceedings.

(2) The property sought to be acquired by condemnation was the property of a public service corporation—the Consolidated Turnpike Company—and such property could not be taken by another company unless, after hearing all parties interested, the State Corporation Commission shall certify that a public necessity or that an essential public convenience shall so require, and shall give its permission thereto, and that there was no such hearing or permission.

(3) The petition did not allege that the land sought to be condemned was necessary for the corporation which the receivers were operating, nor did it allege that they were unable to agree with the owners.

(4) There was no plat or survey of the property sought to be acquired filed with the petition, as required by statute.

(5) The notice served and published did not describe the same property referred to in the petition of the receivers.

We think that the appellant is estopped from relying upon any of the grounds named for a reversal of the order complained of. It not only claims under the proceedings in which the receivers who instituted this proceeding were authorized to institute it, but after its purchase in that case, in order to prevent the appellees from subjecting the deed of trust property in the state court, as they clearly had the right to do, but for the condemnation proceedings, it relied upon those proceedings, and by means thereof procured the said injunction from the federal court. To permit the appellant afterwards, when the appellees were asserting their rights in the condemnation case, to deny that the receivers who brought that proceeding had authority to institute it, or that their petition instituting it was sufficient, would be in violation of the well-settled rule of law that a litigant will not be allowed in a subsequent judicial proceeding to take a position in conflict with a position taken by him in a former judicial proceeding, which latter position is to the prejudice of the adverse party, where the parties are the same and the same questions are involved. *Tatum v. Ballard*, 94 Va. 370, 28 S. E. 871; *C. & O. Ry.*

Co. v. Rison, 99 Va. 18, 32, 37 S. E. 320, and authorities cited; 16 Cyc. 799, 800.

After the injunction was granted restraining Taylor, trustee, and Depue from prosecuting their suit to subject the trust property to the payment of the debt secured by the trust deed, Depue notified the plaintiff in error that he would move for a confirmation of the commissioners' report in the condemnation proceeding, or so much thereof as fixed the compensation, etc., for the property at \$57,200. In response to this notice the plaintiff in error appeared and moved the court to vacate and dismiss the condemnation proceeding. This motion was overruled by the court, and its action is the second error assigned.

This assignment of error is based upon the same grounds as is the first assignment of error, and for the same reasons the action of the trial court must be sustained.

The third error assigned is to the action of the court in holding that the appearance of the plaintiff in error was general, and not special.

An appearance for any other purpose than questioning the jurisdiction of the court—because there was no service of process, or the process was defective, or the service thereof was defective, or the action was commenced in the wrong county, or the like—is general, and not special, although accompanied by the claim that the appearance is only special. 3 Cyc. 502; 2 Am. & Eng. Ency. Pl. & Pr. 620, 625, 626.

When the plaintiff in error appeared and moved the court to vacate the proceedings had in the cause, and to dismiss it, it did so upon grounds which went to the sufficiency of the petition of the receivers. A motion to vacate proceedings in a cause, or to dismiss or discontinue it, because the plaintiff's pleading does not state a cause of action, is equivalent to or analogous to a demurrer, and amounts to a general appearance. See 3 Cyc. 506, 507; 2 Am. & Eng. Ency. Pl. & Pr. 635, 636; *Albert v. Clarendon, etc., Co.*, 53 N. J. Eq. 623, 23 Atl. 8.

We are of opinion that the plaintiff's appearance was general, and that the trial court properly so decided.

One of the grounds upon which the plaintiff in error sought to have the cause dismissed was that the report of the commissioners assessing the compensation, etc., for the property had been filed more than three months without the amount of damages ascertained thereby having been paid to the party entitled to or into court.

By subsection 27, § 1105f, Code Va. 1904, it is provided that, "if in any such proceeding [condemnation] the amount or amounts ascertained by the commissioners as aforesaid be not paid to the party entitled thereto, or into court, within three months from the date of the filing of the report of the commissioners, the proceedings shall ipso facto be vacated and dismissed."

More than three months—indeed, nearly three years—had elapsed between the filing of the report of the commissioners and the motion of the plaintiff in error to vacate and dismiss, and the amount ascertained by the report had not been paid to the party entitled to or into court. Subsec. 27, § 1105f, Code Va. 1904, had been amended by an act approved March 15, 1906 (Acts 1906, pp. 452, 455), and was in force when said report was filed, though not in effect when this proceeding was instituted or the commissioners appointed. The act as amended is as follows: "If in any such proceeding the amount or amounts ascertained by the commissioners as aforesaid be not paid either to the party entitled thereto or into court, within three months from the date of the filing of the report of the commissioners, the proceedings shall, on motion of the defendant, be vacated and dismissed as to him, but not otherwise."

Whether or not the amendment was retroactive, and applied to condemnation proceedings commenced before the amendment was made, it is unnecessary to decide in determining this question; for it is clear, we think, that the plaintiff in error is estopped from claiming that the condemnation proceeding was ipso facto vacated and dismissed because the amount ascertained by the commissioners' report was not paid to the party entitled thereto or into court within three months after the report of the commissioners was filed, after alleging the pendency of the condemnation proceeding long after the expiration of the said three months and obtaining an injunction upon the ground of its pendency, restraining the defendants in error from subjecting the property sought to be condemned to the satisfaction of the debts secured by the deed of trust. The reasons why the plaintiff in error is estopped from denying the pendency of the proceeding are the same as those given in disposing of the first assignment of error, and need not be repeated.

By the order appointing the commissioners, they were directed, among other things, to ascertain and report the present value of the land to be taken with the present improvements thereon, and also its present value without such improvements. Their report on these questions for the property to be taken is as follows:

"If valued as of the date of this report, without improvements, \$6,200 will be a just compensation.

For the land with improvements...	\$ 7,200 00
For the steel rails.....	15,000 00
For the railroad ties.....	1,250 00
For the overhead construction....	2,500 00
For the machinery in the power house	25,000 00
For the buildings on tract No. 2..	5,000 00

Making a total of..... \$57,200 00

—will be a just compensation."

The defendants in error moved the court to confirm that portion of the report which

ascertained that \$57,200 would be a just compensation for the land to be taken, and the court sustained that motion and entered an order requiring the plaintiff in error to deposit within three months the said sum of \$57,200, with interest from the date of the order, in some national bank in the city of Norfolk, to the credit of the court, subject to its future order.

To this action of the court there are two assignments of error: First, that the court erred in confirming that portion of the report which took into consideration the value of the improvements placed upon the property by the plaintiff in error or its predecessor in title, instead of that portion of the report which ascertained the value of the property to be taken without considering the value of the improvements; and, second, in requiring the sum ascertained as just compensation to be deposited in bank to the credit of the court.

It is insisted by the appellees that the question involved in the first of these grounds of error has been settled in their favor by the cases of *Newport News, etc., Co. v. Lake*, 106 Va. 311, 54 S. E. 328, and *Flanary v. Kane*, 102 Va. 547, 46 S. E. 312, 681.

Neither of those cases present precisely the same question involved in this case. In *Newport News, etc., Co. v. Lake* the premises had been sold under the deed of trust, and the purchaser, who was the defendant in the condemnation proceedings, had recovered the premises in an action of ejectment after the improvements had been placed upon the premises by the railway company under authority of the grantor in the deed of trust. It was held that, the purchaser having recovered in the action of ejectment the premises in fee upon which the railway was laid in its then condition, and all the improvements upon it as a part thereof, the improvements, as well as the land, being his property, his compensation was not limited to the value of the land as it was before the improvements were placed upon it. The other case relied on was not a condemnation proceeding, but a suit to subject the premises upon which the improvements had been placed to the payment of judgments docketed at the time the railway company purchased the land and placed its improvements thereon. But, while it was a case in equity, it was held that the principle invoked, that he who asks equity must do equity, did not apply, since the plaintiffs in that case, in coming into equity to enforce their liens, were not asserting an equitable right or seeking equitable relief, and could not be put upon terms. They were asserting legal rights, and under the well-settled rules of the common law it was held that they were entitled to subject to the payment of their liens the land with the improvements thereon of which they were a part.

Lewis, in his work on *Eminent Domain* (volume 2, § 507, 2d Ed.), in discussing this

question, says: "The question now to be considered is whether in proceedings [condemnation] for this purpose the owner of the land is entitled to the value of the improvements which have been put upon it by the condemning party. If the entry has been made by the consent of the owner, express or implied, it is clear that the owner should not have the value of what has been put upon the land. He has let the condemning party in for the very purpose of making these improvements, and with the expectation that the right permanently to enjoy the land with the improvements would be acquired by agreement or otherwise. The cases all concur upon this point without much discussion of principles. * * * Such consent may be given by the life tenant, so as to bind the reversioner, or the mortgagor in possession, so as to bind the mortgagee."

In discussing the question, where the entry has been without the consent of the owner, he asserts that the same rule as to compensation obtains in most jurisdictions, and where it is held otherwise the decisions are placed upon the strict rules of the common law, that a structure placed upon land by a trespasser becomes a "part" of the realty and cannot be removed. But, he says, "the proceeding to ascertain a just compensation to be paid for property taken for public use is not a common-law proceeding. The principles to be applied are broad and liberal, and such as are just to both parties. It is a just compensation, no more and no less, which the Constitution requires to be paid. In determining what is just, the courts are not hampered by any hard and fast rules of the common law. As we have already shown, just compensation to the owner is an indemnity for the loss he sustains, irrespective of the general advantages and disadvantages which affect the community at large. Indemnity in the case supposed does not include the value of works prematurely placed upon the property. The owner has not lost the value of such works; but, if their value is given to him, it is so much in excess of his loss, which is something never contemplated by the Constitution."

So far as this statement applies in condemnation cases to entries made with the consent of the owner, it is sustained by the overwhelming weight of authority. See cases cited in notes to section 507 of Lewis, and in notes to *Village of St. Johnsville v. Smith*, 6 Am. & Eng. Ann. Cas. 379, 382-384 (184 N. Y. 341, 77 N. E. 617, 5 L. R. A. [N. S.] 922).

In quoting what Lewis said, we do not wish to be understood as approving his statement so far as it applies to entries upon land without authority express or implied. As was said by the Court of Appeals of New York in the case last cited above, where the entry was without authority: "So far as actual intent is concerned, a personal trespasser who annexes a structure to another's freehold does not mean that it shall become

the property of the landowner any more than does a trespassing railway company or municipality, which does the same thing in contemplation of acquiring the land at some future time by the exercise of the right of eminent domain. The law affixes consequences to the act, and not to the intent. It says to those who invoke the power of eminent domain, as well as to all others: "If you invade land without legal right, and place structures thereon, those structures belong to the landowner. There is no more hardship in applying the rule to the one class of trespassers than to the other. In both cases the application tends to prevent a wrong. Its operation in this state has been and will doubtless continue to be most salutary in constraining those municipal and other corporations which the state has authorized to exercise the power of eminent domain not to assume the possession of lands in advance of any right so to do, and thus practically nullify, during the period of wrongful possession, that provision of the Constitution which guarantees the citizen against being deprived of his property for public use without just compensation."

Where the possession of the party seeking to condemn is lawful, Lewis' statement, that in ascertaining just compensation the improvements placed upon the premises by it are not to be included, is not only sustained by the great weight of authority, but by the better reason. In a controversy between the landowner and the condemning party, the former cannot in justice claim the value of the land in its improved condition when the improvements were made with his consent. Neither can a mortgagee or deed of trust creditor. In granting permission to the condemning party to enter upon the premises and place his improvements upon them, the landowner has not prejudiced the mortgagee or trust creditor. It is not pretended that such act has lessened the security, but it is admitted that it has increased the value, and the claim of the deed of trust creditor is that he is entitled to have the benefit of this increase, not because in justice and equity he is entitled to it, but because under the strict rules of the common law all structures placed upon the property subject to his lien inure to his benefit.

We are of opinion that where a corporation, clothed with the power of eminent domain, lawfully enters into the possession of land for its purposes, and places improvements thereon, and afterwards institutes condemnation proceedings to cure a defective title, or to extinguish the lien of a deed of trust, it is not proper, in ascertaining "just compensation" for such land, to take into consideration the value of such improvements.

The commissioners in their report ascertained the value of the land as of the date of their report, without considering the im-

provements, at \$6,200. This sum, we think, should have been fixed as the just compensation for the land taken, and that the trial court erred in not so holding.

The other ground upon which this assignment of error is based is the action of the court in requiring the plaintiff in error within three months to pay the sum ascertained as just compensation into some national bank in the city of Norfolk.

The Code (section 1105f, subsecs. 9 to 13) provides how payment is to be made for lands taken in condemnation proceedings. If the condemning company is not in possession when the report ascertaining a just compensation is confirmed, it can only acquire title to or the right of possession of the land so condemned by paying such sum into court or to the party entitled. If such company is in possession of the land when the report of the commissioners is confirmed, as it may be where there has been a prior report which was not confirmed, and the confirmed report increases the compensation over that ascertained by the former report, the condemning company has thereafter no right to the possession until full payment has been made into court or to the party entitled.

Mr. Lewis, in his work on Eminent Domain, in discussing the character of the judgment to be entered in condemnation cases, says: "If the statute is so far silent upon the subject as to leave the matter open for judicial construction, then the proper judgment to be entered will depend upon the following considerations: If possession has already been taken of the property, either by consent or otherwise, or if the property has already been taken by virtue of an instrument of appropriation, as it may be in some states, before the compensation is paid, then a personal judgment, with all its incidents, may properly be entered."

Our statute does not expressly provide for such a case as we are now considering. In neither of the classes of cases provided for, whether the condemning party is in or out of possession, is there any authority conferred upon the court to enter a personal judgment. The reason for this may be in the fact that, in the absence of statutory provisions on the subject, it is generally held that the effect of condemnation proceedings is simply to fix the price at which the party condemning can take the property sought, and that, even after confirmation of the report fixing such price, the purpose of taking such property may be abandoned, without incurring any liability to pay the damages awarded. See Lewis, § 656, and cases cited. Whatever be the reason of our lawmaking power for not authorizing a personal judgment in the class of cases provided for, we find no authority in the statute for entering a personal judgment in this case, and to do so would seem to be contrary to the principle upon which our statute was framed. Whatever be the

effect of the amendment of March 15, 1906, heretofore quoted, as to the right of a party to abandon or discontinue condemnation proceedings instituted by it, it cannot affect this case; for it is well settled "that, although the words of a statute are broad enough in their literal extent to comprehend existing cases, they must be construed as applicable to cases that may thereafter arise, unless a contrary intention is unequivocally expressed therein." *Campbell, etc., v. Nonparell*, 75 Va. 291, 298; *Price v. Harrison*, 31 Grat. 114. There is nothing in that amendment which shows that it was intended to have any retroactive effect.

As to the remaining assignment of error, that the report of the commissioners is not in accord with the order and direction of the court in appointing them, it is sufficient to say that no such objection was made to the report in the lower court.

We are of opinion to reverse the judgment or order complained of, and to enter such judgment as the trial court ought to have entered.

Reversed.

HARRISON, J., absent.

(111 Va. 59)

COMMONWEALTH ex rel. NORTON BOARD OF TRADE, Inc., v. NORFOLK & W. RY. CO. et al.

(Supreme Court of Appeals of Virginia. June 9, 1910.)

1. RAILROADS (§ 9*)—REGULATION—CORPORATION COMMISSION—POWERS.

Const. § 156b (Code 1904, p. cclii), provides that the Corporation Commission shall have power to supervise and control all transportation companies doing business in the state in all matters relating to their public duties, correct abuses therein, and prescribe and enforce rates and rules and regulations, and shall require the establishment and maintenance of all such public service and conveniences as may be reasonable and just, etc. *Held*, that the power imposed on the commission referred to matters relating to the performance of public duties, and had no application to particular acts not based on a duty imposed.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 13; Dec. Dig. § 9.*]

2. CARRIERS (§ 10*)—REGULATION—UNION DEPOT FACILITIES.

Code 1904, § 7294c (4), provides that transportation companies shall afford reasonable facilities for the interchange of traffic between their respective lines, and for the forwarding and delivery of passengers and property to and from their several lines without discrimination, but that the section shall not require any such company to give the use of its track or terminal facilities to another company engaged in like business. Section 1313a (16) provides that the Corporation Commission shall have authority to require all corporations doing business within the state to discharge any public duty imposed on such corporations by the Constitution or by law. *Held*, that section 1313a (16) did not define or create any public duty to be performed by transportation companies, and did not, therefore, modify or restrict the operation of section

1294c (4), under which the Corporation Commission had no authority to compel railroads owning and operating a joint depot in a town to permit the use of such depot and its terminal tracks by another railroad company.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 14-20; Dec. Dig. § 10.*]

3. CARRIERS (§ 15*)—TERMINAL FACILITIES—UNION DEPOT.

Const. § 166 (Code 1904, p. cclxi), declaring that all railroad companies whose lines connect shall receive and transfer each other's passengers, freight, and loaded or empty cars without delay or discrimination, does not require railroads maintaining and using a union depot to permit its use by another railroad.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 25-27; Dec. Dig. § 15.*]

4. EMINENT DOMAIN (§ 47*)—USE OF UNION DEPOT—CONDEMNATION OF RIGHT.

Since the exercise of the power of eminent domain is against common right and cannot be implied or inferred, there being no provision in the Virginia law for the ascertainment of the compensation payable to railroad companies owning a union depot by another railroad company desiring to use the same, such right cannot be obtained by condemnation.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 107, 111; Dec. Dig. § 47.*]

Appeal from Corporation Commission.

Petition by the Commonwealth, on relation of the Norton Board of Trade, Incorporated, against the Norfolk & Western Railway Company, to compel the Norfolk & Western Railway Company and the Louisville & Nashville Railroad Company to permit the Interstate Railroad Company to use their common depot in the town of Norton. From an order of the Corporation Commission denying such relief, petitioner appeals. Affirmed, on the opinion of the chairman of the commission.

Irvine & Morrison, for appellant. L. H. Cocke, C. T. Duncan, H. L. Stone, and A. S. Brandeis, for appellees.

KEITH, P. The opinion of the chairman of the Corporation Commission, filed in this case, so fully and satisfactorily disposes of all the questions involved that we cannot do better than to adopt it as the opinion of this court, with slight verbal changes.

"The petitioner, suing on behalf of itself and all other citizens of the town of Norton, alleges: That Norton is the western terminus of the Clinch Valley Division of the Norfolk & Western Railway Company, the eastern terminus of the Cumberland Valley Division of the Louisville & Nashville Railroad Company, and the eastern terminus of the Interstate Railroad Company, and that Norton is also the terminus of two other local roads, namely, the Wise Terminal Company and Virginia & Kentucky Railway Company; that the only practicable means of connection between the eastern and western portions of the county of Wise is through the town of Norton, and that owing to the topography of the country all through travel and traffic must pass through the said town; that the Norfolk & Western Railway Company and

the Louisville & Nashville Railroad Company, jointly, have railroad yards and a passenger and freight depot in the town of Norton; that the Virginia & Kentucky Railroad Company and the Wise Terminal Company have, under some arrangement, the use for their purposes of said railroad yards and depot; that all of these railroads, except the Interstate, have been entering Norton and doing business there for a number of years; that the Interstate, on the other hand, is at this time completing the extension of its road from Appalachia to Norton; that it is about ready to begin a regular passenger and freight business; that it parallels the Louisville & Nashville Railroad from Appalachia to Norton, a distance of about 10 miles, and enters the town through a narrow valley at the west end of Norton at the same point at which the Louisville & Nashville Railroad enters; that the Interstate Railroad Company has acquired a location for its freight yard and for a freight and passenger station in the west end of the town, and will shortly establish its freight and passenger station at said point, unless otherwise directed by this commission; that the distance between the said points is somewhat less than a mile; that the present station of the Norfolk & Western Railway and Louisville & Nashville Railroad is nearly opposite the business center of the town, while the proposed location of the Interstate Railroad station is at the extreme western end of the town at a very inconvenient place; that such joint station is ample in size to accommodate the business of the Interstate Railroad Company, in addition to accommodating the business of the other railroads now using it; that it is highly important to the commercial interests and to the convenience of the people of Norton and of Wise county that there should be one station for all of the railroads at the town, and that the object of the petition is to require the Interstate Railroad Company to use the present freight and passenger depot of the Norfolk & Western Railway Company and the Louisville & Nashville Railroad Company for its freight and passenger business, and to require the Norfolk & Western Railway and the Louisville & Nashville to permit the said Interstate Railroad Company to use their said freight and passenger depot, upon such terms as may be equitable. There are other allegations showing the desirability of a single station at the said town.

"The prayer of the petition is that this commission shall enter an order requiring the Louisville & Nashville Railroad Company and the Norfolk & Western Railway Company to grant to the Interstate Railroad Company the right, upon such fair and equitable terms as may be prescribed by the commission, to use in common with themselves their present Norton depot for passenger and freight business, and to require the said Interstate Railroad Company to adopt and use the said depot in common with the Norfolk & West-

ern Railway Company and the Louisville & Nashville Railroad Company, upon such just and equitable terms as may be prescribed by this commission.

"The Interstate Railroad Company has not answered the petition, and presumably is anxious that the prayer of the petition shall be granted. The Norfolk & Western Railway Company and the Louisville & Nashville Railroad Company have each demurred to the petition, claiming that it appears upon the face of the complaint that the Virginia Constitution and statutes give this commission no jurisdiction to grant the relief prayed for; that to grant such relief would be to deprive the defendants of their property without due process of law, and therefore be a violation of section 11 of article 1 of the Constitution of Virginia [Code 1904, p. ccx] and of the fourteenth amendment to the Constitution of the United States.

"Sections 156b and 166 of the Constitution of Virginia [Code 1904, pp. cclii, cclxi], and section 1313a (16), Pollard's Code of Virginia, are relied upon by the petitioner to give the commission authority to grant the relief asked for, and it is claimed that such action will not violate any provision either of the state or federal Constitution, and that to deny the relief will be to violate section 156b and section 166 of the Constitution of Virginia, requiring the commission to make and enforce such regulation as may be necessary to prevent injustice or unreasonable discrimination by any transportation company in favor of or against any person, locality, community, or any connecting line.

"These being the issues, it becomes necessary to examine the sections of the Constitution and the statutes applicable thereto.

"The portion of section 156b relied upon by the petitioner is in these words: 'The commission shall have the power, and be charged with the duty, of supervising, regulating and controlling all transportation and transmission companies doing business in this state, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies; and to that end the commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements the commission may, from time to time, alter or amend.'

"The power given and the duty imposed upon the commission by this clause refer to all matters relating to the performance of the public duties of the transportation and transmission companies, and it is 'to that end,' to use the words of the Constitution,

that the commission is given authority to require the establishment and maintenance of 'all such public service, and facilities and conveniences as may be reasonable and just.' Therefore, unless the Norfolk & Western Railway Company and the Louisville & Nashville Railroad Company, as the owners of the joint station at Norton, are required in the performance of their public duties to allow the Interstate Railroad Company to enter and share in such use, then the first clause above quoted does not confer the authority claimed, because the power and duty of the commission are both limited to matters relating to the public duties of such companies. So, also, as to the discrimination which is forbidden. If there is no duty imposed as to the particular act, the carrier is free to make such contracts as its interests may require. First I. C. C. Act (Drinker) pp. 214-333; Consolidated Forwarding Co. v. Southern Pacific R. Co., 9 Interst. Com. R. 206e; Re Transportation of Fruit, 10 Interst. Com. R. 360; United States v. Delaware, L. & W. Ry. Co. (C. C.) 40 Fed. 101; Worcester Car Co. v. Pennsylvania R. Co., 3 Interst. Com. R. 577; Kentucky R. Commission v. L. & N. R. Co., 10 Interst. Com. R. 173; Butchers', etc., Co. v. L. & N. R. Co., 67 Fed. 35, 14 C. C. A. 290; Central Stockyards Co. v. L. & N. R. Co., 118 Fed. 113, 55 C. C. A. 63, 63 L. R. A. 213; Id., 192 U. S. 568, 24 Sup. Ct. 339, 48 L. Ed. 565; Alex. Bay Co. v. N. Y. C. & H. R. R. Co., 18 App. Div. 527, 45 N. Y. Supp. 1091.

"The Norfolk & Western Railway Company certainly owes to its patrons, the general public, desiring its services, all proper station facilities and conveniences. The same duty is incumbent upon the Interstate Railroad Company as to its patrons; but can it be said that the Norfolk & Western should supply station facilities for the patrons of the Interstate? If so, there must be a corresponding duty on the Interstate to furnish station facilities for the Norfolk & Western. We think that neither owes such a duty to the other, or to the patrons of the other. There are certain important duties, however, which railroad companies owe to each other, which in the interest of the general public are imposed by statute in Virginia.

"Section 4 of chapter 3 of the act concerning public service corporations (Pollard's Code, § 1294c (4)) reads thus: 'All transportation companies shall, according to their respective powers and with due regard to the exigencies of their other traffic, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for receiving, forwarding and delivering of passengers and property to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such company to establish

or maintain unremunerative train service, or to give the use of its track or terminal facilities to another company engaged in a like business.'

"The commission's power to prescribe rates under section 156b of the Constitution is declared to be 'paramount,' but its authority to prescribe any other rules, regulations or requirements for corporations or other persons, shall be subject to the superior authority of the General Assembly to legislate thereon by general laws.' Unless, therefore, the Legislature has exceeded its constitutional authority, the proviso in the concluding clause of the statute above quoted—clause 4, § 1294c—that it shall not be construed as requiring a company 'to give the use of its track or terminal facilities to another company engaged in a like business,' is conclusive of this case. The superior authority of the General Assembly having been exercised by the enactment of this statute, this commission has no authority to require the Norfolk & Western Railway Company and the Louisville & Nashville Railroad Company to grant to the Interstate Railroad Company the use of their track and terminal facilities at Norton. The decisive force and effect of this statute seems to have been fully realized, for in the brief of the learned counsel for the petitioner it is claimed that section 1294c (4) must be construed in connection with section 1313a (16), that when so construed it does not forbid the relief asked for, and that, even if these sections be repugnant, section 1294c (4) cannot operate, because it conflicts with section 166 of the Constitution.

"The language of section 1313a (16), which is thus relied upon, is as follows: 'The commission shall have power and authority to require, by its rules, regulations, and requirements, all corporations chartered under the laws of this state, and all foreign corporations doing business in this state, to perform and discharge any public duty or requirement imposed upon such corporations by the Constitution or by law.'

"It is manifest, however, that this language does not define or create any public duty to be performed by transportation companies, but simply affirms the constitutional power of the commission to require corporations doing business in this state to perform all public duties or requirements imposed upon such corporations by the Constitution or by law; so that we cannot agree that it aids in the construction of section 1294c (4), or illumines its meaning in any respect whatever.

"Section 166 of the Constitution is relied on to show that this commission has the power to require the Norfolk & Western Railway Company and the Louisville & Nashville Railroad Company to grant the use of its track and terminal facilities to the Interstate Railroad Company, notwithstanding the provision contained in section 1294c (4).

"Section 166 is as follows: 'All railroad companies whose lines of railroad connect, shall receive and transfer each others passengers, freight and loaded or empty cars without delay or discrimination.'

"We think that a careful reading and comparison of the various clauses quoted demonstrates the fallacy of the contention that there is any such conflict as is contended for. We find it impossible to read into section 166 of the Constitution any requirement that a railroad company is bound to share its tracks and station buildings, acquired with its own means and to enable it to better discharge its own public duties, with a competing railroad, because bound under that section to receive and transfer passengers, freight, and cars, without delay or discrimination from connecting railroads.

"All the public duties of transportation companies must be performed, but when we inquire as to what is the public duty of one transportation company to another with reference to its tracks and terminal facilities, the answer is found in section 1294c (4), which, fairly construed, prohibits this commission from requiring such company to grant the use of its track or terminal facilities to another company engaged in a like business.

"Section 1294c (4) corresponds very closely with section 3, cl. 2, of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]), and it is a well-settled principle of construction that, when one sovereignty enacts a statute similar to one previously in force in another jurisdiction, the latter enactment includes such construction as the courts have previously placed upon the statute thus copied, and this section 3, cl. 2, of the act to regulate commerce has already received in the courts of the United States the construction which is here put upon it. *Little Rock Railroad v. St. L. Ry. Co.* (C. C.) 59 Fed. 400; same case, 63 Fed. 775, 11 C. C. A. 417, 26 L. R. A. 192; *Oregon Short Line v. Northern Pacific*, 61 Fed. 158, 9 C. C. A. 409; same case (C. C.) 51 Fed. 465; *Ky. & I. Bridge Co. v. L. & N. R. Co.* (C. C.) 37 Fed. 567, 2 L. R. A. 239; *L. & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 29 Sup. Ct. 246, 53 L. Ed. 441.

"Another serious difficulty about requiring the Norfolk & Western Railway Company and the Louisville & Nashville Railroad Company to grant to the Interstate Railroad Company the right to use its tracks and station, to use the language of the petition, 'upon such fair and equitable terms as may be prescribed by the commission,' is that the Virginia law has made no provision for the ascertainment of the compensation which would be due to the defendant companies by the Interstate Railroad Company for the joint use of its property. The exercise of the power of eminent domain being against com-

mon right, it cannot be implied or inferred, but must be given in express terms or by necessary implication, and the Legislature of Virginia has not granted the power to one transportation company to condemn the right to jointly use the tracks and terminal facilities of another transportation company. In the last case referred to, the Supreme Court of the United States declared that the lack in the section of the Kentucky Constitution of adequate provisions for compensation for property could not be supplied by inserting them in the judgments of the court or otherwise. 'The law itself,' said the court, 'must save the party's rights, and not leave them to the discretion of the court as such.'

"From the allegations of the petition there appear to be good reasons for supposing that the public at Norton would be greatly accommodated by allowing the Interstate Railroad Company to enter and share with the other railroads at Norton in the use of the ample station facilities alleged to be there; but, in order to allow it to do so, there should be a contract between the corporations involved, defining the terms and conditions upon which such joint use is to be enjoyed, and this commission is without authority to make such a contract for the parties, and the laws of Virginia have made no provision for the condemnation of such a joint use of station facilities.

"As we have concluded that under the Constitution and laws of Virginia we have no authority to grant the prayer of the petition, we deem it unnecessary to discuss or decide whether to grant such prayer would be to violate the fourteenth amendment of the Constitution of the United States."

For the foregoing reasons, we are of opinion that the final order of the Corporation Commission should be affirmed.

Affirmed.

HARRISON, J., absent.

(67 W. Va. 422)

PICKENS et al. v. STOUT et al.

(Supreme Court of Appeals of West Virginia.
May 3, 1910. Rehearing Denied
June 11, 1910.)

(Syllabus by the Court.)

1. PARTITION (§ 17*)—TITLE—OUSTER BETWEEN TENANTS IN COMMON.

The defense of an ouster between tenants in common, effected by the possession of a stranger under a contract of purchase from one of the co-tenants, does not present a question of title of which a court of equity cannot take cognizance on a bill for partition of the land.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 53-59; Dec. Dig. § 17.*]

2. ACKNOWLEDGMENT (§ 25*)—BY MARRIED WOMAN.

A married woman cannot divest herself of legal or equitable title to land, otherwise than

by a deed or contract, acknowledged in the manner prescribed by the statute.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 133; Dec. Dig. § 25.*]

3. SPECIFIC PERFORMANCE (§ 121*)—PROCEEDINGS—SUFFICIENCY OF EVIDENCE.

To sustain a demand in equity for specific performance of an oral contract of purchase of land, the evidence must be clear, full, and free from suspicion.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 388; Dec. Dig. § 121.*]

4. SPECIFIC PERFORMANCE (§ 31*)—CONTRACTS ENFORCEABLE—CONTRACT FOR PURCHASE OF LAND—COMPLETENESS.

To be enforceable in equity, a contract of purchase of land must be complete, fixing the price and terms as well as the identity of the land.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 86; Dec. Dig. § 31.*]

5. JOINT TENANCY (§ 9*)—TENANCY IN COMMON (§ 14*)—ADVERSE POSSESSION—OUSTER BETWEEN CO-TENANTS.

An ouster between joint tenants, tenants in common, or coparceners may be effected by open, notorious, and exclusive possession of the land by a stranger, under a deed or an executory contract of sale, executed by one of the co-tenants to such stranger, purporting to convey or sell the whole thereof to the latter.

[Ed. Note.—For other cases, see Joint Tenancy, Cent. Dig. § 12; Dec. Dig. § 9; * Tenancy in Common, Cent. Dig. §§ 30-41; Dec. Dig. § 14.*]

6. JOINT TENANCY (§ 9*)—TENANCY IN COMMON (§ 14*)—ADVERSE POSSESSION—OUSTER BETWEEN CO-TENANTS.

Mere execution and delivery of such deed or contract is not of itself sufficient to work an ouster. To it there must be added express actual notice of the adverse claim and possession, or open, notorious, exclusive, and hostile possession of the land by the grantee or vendee of which the true owner in co-tenancy must take notice, and inquire by what right such dominion is exercised.

[Ed. Note.—For other cases, see Joint Tenancy, Cent. Dig. § 12; Dec. Dig. § 9; * Tenancy in Common, Cent. Dig. §§ 30-41; Dec. Dig. § 14.*]

7. ADVERSE POSSESSION (§ 43*)—POSSESSION OF TENANT.

If, when such vendee secures his deed or contract, a tenant is in possession of the land, holding under the true owners, and continues to remain thereon, under an agreement of attornment to the purchaser, of which any true owner has no notice, the possession of the vendee by such tenant is not adverse to such owner; but his possession becomes adverse from the date of the removal of such tenant from the land, if he himself openly uses it or substitutes new tenants thereon.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 219; Dec. Dig. § 43.*]

8. ADVERSE POSSESSION (§ 43*)—POSSESSION OF TENANT.

In such case, the ouster is effected by the combined action of the vendor and vendee; but, in law, the vendor may be regarded as the real actor and the title under which the estate was held in common as his color of title, of which the vendee may avail himself as a claimant under it.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 219; Dec. Dig. § 43.*]

9. PARTITION (§ 63*) — TITLE IN COMMON SOURCE—PRESUMPTION.

When all the parties to a suit for partition claim title from a common source, title in such common source is conclusively presumed for the purposes of the suit, though no deed or other muniment of such title has been introduced as evidence or is known to exist.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 183; Dec. Dig. § 63.*]

10. LIMITATION OF ACTIONS (§ 76*)—COMPUTATION OF PERIOD — DISABILITIES — INFANCY.

The running of the statute of limitations against a person is not interrupted by his death, and continues to run against his heirs, though they be infants, and, in such case, the heirs are not within the saving clause of said statute.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 418; Dec. Dig. § 76.*]

11. LIMITATION OF ACTIONS (§ 195*)—COMPUTATION OF PERIOD — DISABILITIES — INFANCY—BURDEN OF PROOF.

The disability of infancy at the date of the accrual of a right of action must be shown by the party claiming the benefit thereof. To prevent the bar of the statute of limitations, an infant must show that the right of action accrued to him, while he was under such disability, and, therefore, that it did not begin to run against his ancestor, if he claims the property in controversy by inheritance.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 714; Dec. Dig. § 195.*]

12. LIMITATION OF ACTIONS (§ 70*)—COMPUTATION OF PERIOD — DISABILITIES — INFANCY—CO-TENANTS.

The disability of infancy on the part of one or more tenants in common or coparceners does not avail their co-tenants, who, though once under the like disability, have failed to sue for the recovery of their interests in the land within five years after the attainment of their respective majorities. Each is barred by the lapse of said period.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 386; Dec. Dig. § 70.*]

13. PARTITION (§ 32*)—DISCLAIMER OF CO-TENANT—EFFECT ON SUBSEQUENT PARTITION.

A disclaimer, filed by an heir to an estate, in a suit for partition of the real estate of the ancestor, acknowledging advancements to the extent of his full share of the estate in the lifetime of the latter, followed by a voluntary partition of a portion of the land in which those participating in it apportioned, assumed, and paid indebtedness of the estate, precludes such heir and his assigns from participation in a subsequent partition of the residue of the lands.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 83; Dec. Dig. § 32.*]

(Additional Syllabus by Editorial Staff.)

14. SPECIFIC PERFORMANCE (§ 121*) — ORAL CONTRACT FOR PURCHASE OF LAND—SUFFICIENCY OF EVIDENCE.

Evidence held too uncertain and indefinite to warrant specific enforcement of an oral agreement for purchase of land.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 390; Dec. Dig. § 121.*]

15. ADVERSE POSSESSION (§ 1*)—COLOR OF TITLE—NATURE.

Color of title is always an element of defense and not a weapon of offense, and with-

out possession or right of possession no person can invoke it, for of itself it confers no title.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 1.*]

Williams, J., dissenting in part.

Appeal from Circuit Court, Lewis County.

Bill by Celia T. Pickens and others against Benjamin B. Stout and others. Judgment of dismissal, and plaintiffs appeal. Affirmed in part, reversed in part, and remanded.

Melvin G. Sperry, for appellants. W. E. Haymond, for appellees Krenn. W. W. Brannon, for appellee B. B. Stout. A. B. Fleming, Charles Powell, and Kemble White, for appellee South Penn Oil Co.

POFFENBARGER, J. A bill for partition filed in the circuit court of Lewis county, by Celia T. Pickens and others, heirs of Mary Martha Jarvis, deceased, to which Albert R. Bond and others, heirs of Chas. B. Bond, deceased, were defendants, likewise claiming right to partition, by proper pleadings, was dismissed, on final hearing, in so far as it seeks partition, and the heirs aforesaid have appealed.

The land involved had originally belonged to James M. Stout, the father of Mrs. Jarvis and Mrs. Bond, and consisted of about 400 acres. James M. Stout died in 1879, seised and possessed of other lands situated in Harrison county. His wife and seven children, Benjamin B. Stout, Elmer H. Stout, Mary Martha Jarvis, Sue J. Bond, Elizabeth C. Ward, and James F. Stout survived him. The widow has since died. Soon after the death of James M. Stout, a suit in equity was instituted in Harrison county for the partition of his lands; the bill setting forth, as belonging to the estate, the lands in Lewis county as well as those in Harrison. No decree of partition was made in that suit. The estate was liable to some indebtedness which the personal property was insufficient to pay, and in 1883 the Harrison county lands were partitioned by agreement, which agreement was executed by conveyances. The cause was, however, referred to a commissioner, who reported an indebtedness to the administrator, B. B. Stout, one of the heirs, and this indebtedness was apportioned among and assumed by the heirs in the partition; each portion being charged upon the lands conveyed. In that suit, Elmer H. Stout filed a paper in which he represented that he had received from his father, by way of advancement, his full share of the estate, and did not claim any interest therein. Accordingly, he took no part in the partition. The agreement was made among the other six heirs. This did not include the lands in Lewis county. Over these, B. B. Stout exercised control and oversight, with the consent of the other heirs, receiving the rents, issues, and profits and paying the taxes, in so far as

they were paid, until 1886. In that year, he sold one portion of the land, containing 245.5 acres, to Joseph Krenn, and the residue thereof, containing 150 acres, to John Krenn, executing to each of them a title bond, which, though not acknowledged for record, was recorded in the clerk's office of the county court, April 19, 1896, the date on which they were executed. These lands were returned delinquent for nonpayment of the taxes thereon for the year 1884 and sold in the year 1885 for such delinquency, B. B. Stout becoming the purchaser, but he took no deed under this purchase until 1893.

Soon after their purchase, the Krenns took possession of the land. On the 25th day of May, 1893, Stout obtained a tax deed under his purchase. On the 3d day of May, 1894, he executed deeds to the Krenns. In 1898 the Krenns leased the land for oil and gas purposes to the South Penn Oil Company. That company has developed the property and found it to be productive of both oil and gas in large quantities. This bill was filed at January rules, 1901, and all interested persons were made parties.

B. B. Stout defends under his purchase at the sale for nonpayment of taxes. He has also procured deeds for all of the interests except that of the Jarvis heirs and a one-half interest, which was conveyed by Benton Stout, one of the heirs, to Chas. B. Bond and Taylor Ward. Ward conveyed his half of the Benton Stout interest to B. B. Stout. Said B. B. Stout claims also to have purchased from Mrs. Jarvis, in her lifetime, and C. B. Bond, in his lifetime, all of their interests, by verbal contracts. The Krenns and the South Penn Oil Company predicate their defense upon the theory of adverse possession, as well as title acquired from Stout.

Demurrers to the bill were properly overruled. Whatever the title of James M. Stout may have been, B. B. Stout claimed under him and along with his coheirs and could not allow the land to become delinquent and purchase it to their prejudice. He was under a duty to pay the taxes. This being true, it is immaterial whether the long delay in obtaining a deed under his purchase rendered it invalid or not. As all the parties must necessarily claim under the same title, all questions of title are cognizable in a suit for partition. There is no strange, adverse title involved, as color or otherwise, unless it be the deeds made in 1893 and 1894, and the period of limitation since their date has not elapsed. As to whether the title bonds, made in 1886, are color of title, or there has been sufficient possession under them, will be deferred for the present.

The decree does not expressly state the ground upon which relief was denied. It dismisses the bill, declaring the Krenns have perfect and indefeasible right and title to the land, setting forth the facts relating to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the execution and recordation of said title bonds, but admitting that they were not entitled to be recorded. On the failure of the court to say in its decree whether or not the claims of purchase of the Jarvis and Bond interests, set up by B. B. Stout in his answer, praying specific performance of the alleged contract, by way of affirmative relief, and to dismiss said answers, counsel for the appellees base the contention that the court did not find adversely on these claims of purchase, but there is incorporated in one of the briefs for the appellants what purports to be an opinion, delivered by the trial court, in which these claims are overthrown. The whole decree is here for review, and, if it shall appear that the claim of title by adverse possession cannot be sustained, it will be necessary to inquire whether the decree can stand upon title by purchase. If title in the Krenns can be made out on either theory, the decree will be affirmed, and it cannot be reversed unless both theories fail.

As there is no claim of purchase from Mrs. Jarvis otherwise than by a verbal contract, it is impossible that she could thus have parted with title to her land prior to the 15th day of September, 1887, for, until that time, she was a married woman, and therefore incapable of divesting herself of title to real estate otherwise than by a written instrument, acknowledged in the manner prescribed by the statute. *Simpson v. Belcher*, 61 W. Va. 157, 56 S. E. 211; *Amick v. Ellis*, 53 W. Va. 421, 44 S. E. 257; *Rosenour v. Rosenour*, 47 W. Va. 554, 35 S. E. 918; *Moore v. Ligon*, 30 W. Va. 146, 3 S. E. 572; *Moore v. Ligon*, 22 W. Va. 292. On the 15th day of September, 1887, she procured an absolute divorce from her husband, and two months later, lacking one day, November 14, 1887, died of consumption, at her home in Harrison county, on the tract of land allotted to her in the partition of the Harrison county lands. There is much evidence tending to show that she was in a very feeble condition during the whole of this period and never away from her home, but once. Many witnesses say she made a trip on horseback to Randolph county in 1887, for the purpose of visiting relatives, and returned in about two weeks. Shortly after her return, the disease of which she was suffering had made such progress, and she had become so feeble, that she was soon confined to her home. Mrs. McDonald says she went about the middle of August, was gone about two weeks, and, in about a week afterwards, was confined to her bed. Much of the evidence of purchase consists of oral admissions and declarations, said to have been made by Mrs. Jarvis. The greater number of the witnesses who testified to these admissions are members of B. B. Stout's own family, his wife and children. Mrs. Stout and her children say Mrs. Jarvis came to their house after her return from the visit to Randolph

county, and some of them say she came for money due her on account of her Fink creek lands, and that, on this occasion, she said she had procured her divorce. Mrs. Stout says she got \$20, for which she gave a receipt, signing her name, Mary M. Stout, which receipt has been lost and cannot be found. Some of these witnesses place this visit to B. B. Stout as late as three weeks before her death. Mrs. Stout also thinks Mrs. Jarvis returned from her visit to Randolph county about the middle of October. Other witnesses whom she visited on that trip, as well as her daughters and neighbors, say it was made in August. W. F. Stout and Mrs. E. H. Stout not only say the visit was made in August, but that Mrs. Jarvis then said she had sold her Fink creek land. That Mrs. Jarvis even went to B. B. Stout's after her return from Randolph county is denied by her daughter, Mrs. Pickens, who says she never left her home but once after her return from Randolph county and, on that occasion, visited her sister, Mrs. Bond, and her uncle, Henry Bassel. This is confirmed by Mrs. Bond, who says Mrs. Jarvis was never away from home afterward, and she fixes the time as the first or second week in September. Corroboration of the testimony of Mrs. Stout and her children is sought in the evidence of one George Murphy, who says Mrs. Jarvis owed him for work, and, after her return from Randolph county, went to B. B. Stout to obtain the money with which to pay him. He is flatly contradicted by Mrs. Pickens and Mrs. Currence, who say he never did any work for their mother and was never on her place. He does not fix the exact date of this alleged transaction, and it may have occurred, if at all, before Mrs. Jarvis obtained her divorce. Confirmation of the claim of purchase and corroboration of the witnesses who testified to these admissions is sought in the will of Mrs. Jarvis, made just a few days before her death. By this instrument, she gave her farm in Harrison county to her daughters, Cella and Louise. It was then subject to the lien for the money, charged upon it in the partition. The will contained this provision, respecting the farm and her interest in other lands: "I direct that any money that may be payable to me from the sale of land belonging to the estate of my father be applied in payment of the amount charged upon my land on Brushy Fork creek whereon I now reside under the deed of partition between the heirs and my said father." No other reference to the Fink creek land is found in the will. There is no direction to sell the same. It is said this provision in the will impliedly admits a previous sale of it. We think this clause is susceptible of a different interpretation. It may as well be assumed that the testatrix referred to the future or contemplated sale as a past sale. The expression is, to say the least, equivocal and lacks clear-

ness and positiveness. It does not necessarily say the lands had been sold. It may well be assumed that, if the sale had been made to B. B. Stout, the reference would not have been made to the land, but to money due her from Stout. There is no better foundation in the clause for the view that a sale had been made than for the opposite view that the land still belonged to her father's estate. We do not think this provision in the will is an admission of the sale of the land. If it be admitted that Mrs. Jarvis made demands upon her brother for money before her death, there are circumstances in evidence affording a basis for the view that he was indebted to her. Some years before her death, he had verbally purchased her Harrison county land, and, under that contract, had possession of it for more than a year. On account of the refusal of Mrs. Jarvis' husband to join in a deed conveying the land to him, Stout abandoned the purchase and yielded possession of the land. About this time, he received some cattle from her.

Taken all together, we think this evidence of purchase is too uncertain and indefinite to sustain the claim. It is uncertain and contradictory as to time and is altogether silent as to the price and terms. No doubt B. B. Stout expected to buy it, and likely Mrs. Jarvis looked upon him as a prospective purchaser. There may have been some loose conversation on the subject, as there seems to have been between B. B. Stout and some of the other heirs; but the evidence falls short of the establishment of a contract of sale, fixing the price and terms and the execution of a written contract or memorandum, and there was no change of possession within the lifetime of Mrs. Jarvis, of which she had any notice, disclosed by the evidence. To sustain a bill for specific performance of an oral contract of purchase, the evidence must be clear, full, and free from suspicion. *Harris v. Elliott*, 45 W. Va. 245, 32 S. E. 176; *Gillaspie v. James*, 48 W. Va. 284, 37 S. E. 598; *Ensminger v. Peterson*, 53 W. Va. 324, 44 S. E. 218; *Westfall v. Cottrills*, 24 W. Va. 763; *Mathews v. Jarrett*, 20 W. Va. 415; *Blankenship v. Spencer*, 31 W. Va. 510, 7 S. E. 423. It must also disclose the price to be paid; this being an essential element of the contract.

The evidence of the purchase of the Bond interest consists, for the most part, of a memorandum, made on a note for \$140, executed by Bond to Stout, which memorandum A. J. Sullivan says accords with an agreement made in his presence, and the testimony of James F. Stout to the effect that a deed had been sent to him for joint execution by himself and Bond, bearing the signature of Bond, which transaction he thinks occurred about 1882 or 1884. The memorandum on the note reads as follows: "It is agreed the above note shall be payment on the Lewis

county land on Fink's creek. September, 1885." This is not signed by Bond, and the note, with the memorandum on it, remains in the hands of B. B. Stout. Some other witnesses say Bond admitted to them his sale of the land to Stout. On the contrary, there is testimony to admissions on the part of B. B. Stout that he had not purchased of Bond, and James F. Stout is flatly contradicted in words and by evidence of inconsistent circumstances. That the note was never surrendered is another contradictory fact. Here, again, there is no evidence showing what price was to be paid. We do not think the evidence measures up to the requirement of the rule governing the proof of a parol contract for the sale of land.

A great deal of space in the briefs is devoted to discussion of the question whether the title bonds executed by B. B. Stout constitute color of title. On the one hand, they are regarded as having the same effect as deeds. On the other hand, they are denied such effect, and the Krenns in possession under them are treated as tenants in common with the heirs of Mrs. Jarvis and the heirs of C. B. Bond. If they could be treated as deeds, void as to the interests of the Jarvis and Bond heirs and constituting only color of title as to these interests, the mere execution and delivery thereof would not constitute an ouster and put the statute of limitations into operation. The statute does not begin to run until after possession has been taken under such a deed. *Parker v. Brast*, 45 W. Va. 399, 32 S. E. 269; *McNeeley v. Oil Co.*, 52 W. Va. 618, 638, 44 S. E. 503, 62 L. R. A. 562; *Hannon v. Hannah*, 9 Grat. (Va.) 146; *Freeman on Co-Ten.* § 226.

Another important principle, the application of which must be tested by the evidence in the case, is that the statute of limitations did not run against the heirs of Mrs. Jarvis and C. B. Bond, unless there was an ouster before the respective deaths of these ancestors. In other words, if there was an ouster of C. B. Bond, in his lifetime, the statute began to run against him and continued to do so against the heirs after his death; and, if it was put into operation against Mrs. Jarvis, before she died, her death did not interrupt or stop it. On the contrary, if the act of ouster occurred after these parties died, the statute did not begin to run against such of their heirs as were infants, or, if it did, their right of action was not taken away or barred, until the lapse of five years after the attainment of their majorities. Their rights of action were saved by section 3 of chapter 104 of the Code. *Rowan v. Chenoweth*, 49 W. Va. 287, 33 S. E. 544, 87 Am. St. Rep. 796; *Mynes v. Mynes*, 47 W. Va. 681, 35 S. E. 935; *Jones v. Lemon*, 26 W. Va. 629, 635; *Talbott v. Woodford*, 48 W. Va. 449, 37 S. E. 580.

B. B. Stout never actually resided on the Lewis county land. Before the death of

James M. Stout, it was occupied by M. C. Gum, his tenant, but he had left it before said Stout died. Afterwards, about the year 1888, as nearly as he can recollect, he went back on the land at the instance of one Shackelford, who claimed to act for B. B. Stout. Whether Shackelford had any authority or not is immaterial, since B. B. Stout afterward recognized Gum as his tenant, by accepting payment from him for the use of the land in labor, performed in cleaning up a portion of the land. Gum says: "I done the job of cleaning up for B. B. Stout as I told you a while ago. * * * I cleaned up for what I took off of it." In response to a question as to whether B. B. Stout exercised authority over him while on the premises, he said: "Well, he claimed that he had right to, but didn't bother anything about it until the last spring I was there. That was when he sold to Joseph Krenn." Gum staid on the land until February, 1888, some months after the death of Mrs. Jarvis. He says Krenn gave him charge of it under him after he purchased it in April, 1888. Neither Joseph Krenn nor John Krenn moved upon the land or put any other tenant upon it within the lifetime of Mrs. Jarvis, so far as the testimony shows. John Krenn says he put some cattle on the grass land and fixed up the fences within a few weeks after he bought, he thinks, but is unable to say just how long afterwards. He says Charles Shaner put part of the land in corn, as his tenant, the second summer after he bought it, and that said Shaner and his mother lived on the land for nearly two years. In response to a question as to whether he had had possession from the date of his purchase, he said: "This family that was living on it held possession for the summer of the part they had in wheat, and then after that no one had possession except when I let them under lease for rent." There may be doubt as to what family he refers to, but there can be none about the fact that the visible possession was not changed at the date of the purchase. If he refers to Shaner as the party living on it at the time, he still lived on it the second summer after the purchase, according to his own testimony, and no visible change is mentioned as having occurred, until after the death of Mrs. Jarvis. Joseph Krenn admits that M. C. Gum was on the land at the time of his purchase, but says he entered into possession immediately after the date of the title bond. In response to this question, "State if you can the names of the tenants besides yourself who occupied this land at the time of your possession," he said: "M. C. Gum, John Leseburg, and I let one field to a man William Buckhannon and another field to Jacob Starcher." He does not say in what year or years Leseburg, Buckhannon, and Starcher were tenants, and Gum said Leseburg succeeded him. This evidence fails to show that any new tenant was put on the land prior to the death of

Mrs. Jarvis, and Krenn does not show that he himself resided upon it. He testifies to no acts done upon the land by himself except fencing, clearing, and putting in grass certain portions thereof and placing tenants on it.

Even if the title bonds could be regarded as color of title, the execution thereof would not, of itself, constitute an ouster. As we have shown, the ouster is not effected until possession is taken under the deed, and such possession must be open, notorious, hostile, and exclusive. It must have all the elements of adverse possession in any other case. The mere execution of the deed is not notice of an adverse claim. Something more must be done to apprise the co-tenant of intent to assert a hostile claim. He might never know of the execution of the deed, since that could be done in secret, and recordation thereof would not be notice to him. The recordation of a deed or other instrument is constructive notice only to such persons, and for such purposes, as are specified in the statute—subsequent purchasers and creditors. It was not the intent of the Legislature, in ordaining it, to make it the duty of an owner of land to keep his eye upon the registry books to see whether some other person is selling his land. In order to effect an ouster, actual, express notice of the hostile claim must be given to the co-tenant, or such acts must be done upon the land as he is bound to take notice of as being hostile. Every owner is deemed to be cognizant of what is done upon his land and of who is in possession of it. The law exacts this measure of diligence from him. He must know whether strangers are entering upon it, and, knowing that, must inquire by what right they do so. In every instance, such inquiry will presumptively lead to discovery of the hostile claim. Hence, the owner is bound to know, and is estopped from denying, all information to which such inquiry, prosecuted with reasonable diligence, would have led. By the great weight of authority, actual, open, notorious, and exclusive possession under a deed from one co-tenant amounts to notice. The decisions and text-writers may not all analyze the proposition and disclose all the reasons upon which it rests; but they do say the possession is referable to the title. This can mean nothing more than that the owner is under a duty to know who is in possession and then inquire by what right he claims to be entitled to it. Freeman on Co-Tenancy, § 230, says: "The question manifestly is not to be determined solely by taking evidence to show that the co-tenant against whom an adverse possession is claimed had actual notice thereof. As a property owner he ought to manifest some interest in, and regard for, his property. He cannot close his eyes and ears, nor by wilful inattention occupy an advantage over the defendant on his want of diligence. It is sufficient that the acts of adverse possession were such in their characters

and attendant circumstances that a man reasonably attentive to his own interest would have known that an adverse right was being asserted." Our decisions enunciate the same general doctrine. *Clark v. Beard*, 59 W. Va. 669, 53 S. E. 597; *Justice v. Lawson*, 46 W. Va. 163, 33 S. E. 102; *Cooley v. Porter*, 22 W. Va. 123; *Bogges v. Meredith*, 18 W. Va. 1. It is also stated and fortified by a great volume of authority in 2 Enc. L. & P. 493, and 1 A. & E. Enc. Law, 806.

In order to work an ouster, the facts and circumstances must come up to these requirements. The possession must be unequivocal, else it is not sufficient to put the co-tenant upon inquiry. He must have notice in some form. If not actual notice, he must have the equivalent thereof. *Newell on Eject.* § 82. The doctrine of adverse possession is to be taken strictly in ordinary cases, and "the evidence to sustain an ouster by a co-tenant must be still stronger, because of the peculiar relation of the parties." *Id.* § 79.

In view of the evidence, relating to possession at the date to the death of Mrs. Jarvis, it is obvious that there was no visible change in it, nothing which could have apprised her of any possession hostile to her. If Gum, the tenant, had the right to attorn to Krenn, his agreement to hold under him was not an open, notorious act, evidenced by appearances upon the ground, and she could not be deemed to have had any knowledge of it, in the absence of proof thereof, and there is none. This view of that matter makes it unnecessary to inquire whether Gum, with the consent of B. B. Stout, who was possibly the only landlord he knew, rightfully agreed to hold under the purchaser. The attornment of a tenant, without the consent of his landlord, is void. Likely, Gum was as much the tenant of Mrs. Jarvis as of B. B. Stout, and his act was void as to her, but it is not necessary to decide this question.

We think it plain, therefore, that if the title bonds could be regarded as color of title under which an adverse possession could be held, as against a coparcener, there is no evidence of that open, notorious possession on the part of the vendee, necessary to the effectuation of an ouster and the starting of the statute of limitations in the lifetime of Mrs. Jarvis, and that her children, all of whom were then under age, were within the saving clause of said statute.

This does not dispose of the case, however. Some of her children had attained their majority more than five years before the institution of this suit, and it does not appear just when C. B. Bond died. It may be that the change of possession in 1888, when Gum left the land purchased by one of the Krenns, and the party occupying the other tract, at the time of the other Krenn purchase, left it, and these persons were succeeded by new tenants put on by the Krenns, their possession effected a change, sufficient to put the owners upon inquiry, and thus marked the

point at which a right of action accrued, and started the statute of limitations against Bond, if he was then living, which seems probable, since his youngest child was only 10 years old in 1903. This necessitates an inquiry as to the office and function of the title bond under the circumstances of the case and in view of the relation of the parties to one another and to the land.

Whether a title bond or other executory contract for the sale of land is color of title, as against a stranger, was discussed, but not decided, in *Lewis v. Yates*, 62 W. Va. 575, 59 S. E. 1073. Decisions of other jurisdictions are sometimes invoked in favor of the view that such a writing constitutes color of title, but these should be cautiously received. In some states, the English statute of uses, executing all forms of trust, prevails. After payment of purchase money, a court of equity looks upon the vendor as holding the land in trust for the vendee unconditionally. That is a sort of trust which said statute may execute, but which ours does not execute. We have held uniformly and without exception that, as between vendor and vendee, the possession of the latter is subservient, subordinate, and not adverse to the former, until after a deed has been made. If the statute of uses executed such a trust in this state, these decisions would be erroneous and could not stand, for the legal title would pass by force of the statute on payment of the purchase money. The scope, operation, and effect of our statute of uses have been defined in *Blake v. O'Neal*, 63 W. Va. 483, 61 S. E. 410, 16 L. R. A. (N. S.) 1147.

We do not think it necessary even here to hold that a title bond is color of title, and I am unable to conceive a case in which it would be necessary to do so. Color of title is always an element of defense and not a weapon of offense. Without possession or right of possession, no person can ever invoke it, for, of itself, it confers no title. A person in possession under a title bond may, so far as I can see at present, always avail himself of the title of his vendor, or his grantor, immediate or remote, for whatever it is worth, be it good or bad. It is not necessary to say the Krenns, by their acts alone, ousted the Jarvis heirs or Bond. Indeed, it cannot be said. B. B. Stout was the real actor. He executed title bonds and delivered them to the Krenns, and the Krenns entered under them. If they had merely taken possession under the order and direction of B. B. Stout, without more, there would have been no ouster. Having taken possession, not in that manner, but under a paper in which B. B. Stout declared the title to be in himself alone, and claiming right of possession under that paper, they are in a different situation. They are claiming the benefit of an act done by B. B. Stout, the co-tenant himself. He asserted a claim of title in himself, which, if brought home to his co-tenant, was enough to effect an ouster. The entry of the Krenns was,

therefore, mere execution of the adverse claim set up by B. B. Stout against his co-tenants. Hence the Krenns may stand and, in reason, do stand, not upon their own act, but upon the act of B. B. Stout, who alone had power to effect an ouster. If there is any color of title in the case, it is that which B. B. Stout holds, and which, together with his conduct in the assertion of an adverse claim, affords protection to his vendees.

Apparently in anticipation of this view, counsel for the appellees advert to the fact that James M. Stout seems not to have had any deed for the land. The bill filed in the partition suit, instituted in Harrison county, says he was the owner of a tract of land, lying on Fink creek, containing about 300 acres, which he purchased at a judicial sale, made under a decree of the circuit court of Lewis county, by a special commissioner, but for which no deed was executed, though the sale to him was confirmed. B. B. Stout says he has never been able to find a deed for the land and sets that fact up as a reason for his having suffered or procured a sale thereof for nonpayment of taxes. I do not think this constitutes any ground for an exception to the rule I would apply. For the purposes of this case, title in James M. Stout, at the time of his death, is necessarily admitted by all parties, for all trace their claims back to him. Whether he actually had a deed or not, all admit that he had good title, for they claim under him, and his title, whatever it was, constituted, in B. B. Stout, color of title to the whole of the land as against all of his co-tenants, on the assertion of his adverse claim. Let us suppose the Krenns had not projected themselves into this controversy, and it were one simply between B. B. Stout and his co-tenants; he being in possession and claiming to have ousted them by actual notice of an adverse claim and subsequent dominion over, and exclusive control and enjoyment of, the property, for the statutory period, after such notice. Is it possible that his defense would fail because of his inability to produce a deed, as color of title; all of them claiming title from a common source? It seems to me that each and all of them would be estopped to deny title in their ancestor. It is well settled in the law of ejectment that parties claiming title from a common source need never go beyond that. Title in that common source is conclusively presumed for the purposes of the case, and the same principle logically applies here.

In the cases of ouster between co-tenants, the making of a deed or establishment of independent color of title is not necessary, and, as a rule, does not exist. The color of title, if any, in such a dissensor, is the deed or title under which both held prior to the act of ouster. We discussed this principle in *Russell v. Tennant*, 63 W. Va. 623, 631, 60 S. E. 609, 612, saying: "Up to the time of the ouster, the extent of his interest was not defined upon the ground. He was seized of an

interest in every acre, foot, particle, and molecule of land within the limits of the ancestral deed. His right was coextensive with the boundaries thereof, but not exclusive. His possession, until that time, extended to the whole of the land, but, like his right, it was not exclusive. When he had effected the ouster, his possession was still coextensive with the boundaries in the deed, but exclusive, and, after the expiration of 20 years following the ouster, his title became perfect, not only in respect to area, but also as to the quantum of interest. By the act of ouster and subsequent possession, he changed not the limits of the territory in dispute, but the character of his possession and title. The ancestral deed conferred upon each heir the right of possession of all the land. Possession is evidence of title. Possession under such a deed is obviously possession under color of title, although the occupant is not the sole owner and his possession is that of his co-tenants; and if, being in possession, he exclude his co-tenant and make his possession hostile to him, his possession thereafter would logically and necessarily be adverse under color, as well as claim, of title."

On the question of adverse possession, the remaining inquiries are whether the execution of the title bonds and possession, taken under them, constitute a sufficient assertion of a hostile claim against the co-tenants out of possession and notice thereof to effect an ouster. All the principles and reasons advanced to sustain an ouster by possession under the deed by one co-tenant apply here with equal force. A co-tenant is not confined to any particular mode of ouster. Any act on his part, evincing an intent to set up a hostile and exclusive claim, brought to the knowledge of the other party, is sufficient. The notice need not be in writing nor be in any sense formal. This is so well settled as to require no citation of authority. The execution of a title bond is an unequivocal assertion of title in the vendor. By that act the vendor impliedly says he owns the land, and that is what he says in the same way by the execution of a deed. The paper itself is not of the dignity of a deed, but, as we have said, the form of the act done is immaterial. All that is required is a plain and unequivocal act of hostility and claim of exclusive ownership. If this be followed by exclusive possession and dominion, with knowledge, on the part of the tenant out of possession, of the hostile claim and possession under it, the ouster is effected. For an ouster effected by means of the execution of a title bond and possession under it, we have been unable to find a precedent; but the reasons upon which the like conclusion rests when a deed has been executed and possession taken under it are, so far as we can see, the same as those adopted here.

We are also of the opinion that after the tenants who were on the land, at the time of the execution of the title bond, were replaced

by new ones, put on by the Krenns, the possession was adverse and the statute began to run, subject to the rights of infants, under the saving clause found in section 3 of chapter 104 of the Code. These new tenants undoubtedly held under the Krenns. With them, neither B. B. Stout nor any of the other heirs of James M. Stout had any relation whatever. They were not their tenants. Seeing them upon the land, or being under a duty to know they were there, it was their duty to inquire, and the inquiry, had it been made, would have led to full information. Under the principles above stated, this conclusion is inevitable.

As the statute has been put into operation, it remains to say who are barred by it. In the case of John Krenn, purchaser of the 150-acre tract, the evidence seems to show that Shaner and his mother, tenants on it at the time he purchased it, left it within two years after the purchase. He says they were living on the place for nearly two years, but he does not know just how long, and then a few years afterwards a Mr. Starcher was put on it. Just when this occurred does not appear, but Krenn's evidence leaves no doubt that Shaner left in about two years, nor that after he left some other person was in possession of it, for he says it has never been vacant. He pastured his cattle on it, and has cleared 15 or 18 acres. His own use of it in that way would suffice. In the case of Joseph Krenn, purchaser of the 245-acre tract, the tenant, Gum, left the place in February, 1888, and was soon succeeded by John Leseburg. More than 10 years' adverse possession has been shown by each of them. This gives them title subject to the saving in favor of infants.

It was incumbent upon the heirs of C. B. Bond to bring themselves within this saving. A case of adverse possession having been shown, they could only avoid its effect by proving their disability. In this they have wholly failed. Nothing in the record discloses the date of the death of C. B. Bond, their ancestor. As we have said, the age of his youngest child indicates that he must have died long after 1888. This interest in the land is therefore completely barred. Mrs. Jarvis died before the possession became adverse, wherefore her children were within the saving clause. They were born, respectively, on the following dates: Mrs. Celia T. Pickens, February 7, 1869; Mrs. Louise Jarvis Currence, April 10, 1871; Meigs J. Jarvis, September 5, 1874; Arnold B. Jarvis, September 25, 1877; and Benjamin B. Jarvis, February 17, 1883. The bill in this cause was filed at January rules, 1901. The process issued December 22, 1900, and was served December 28th. Tested by the date of the service of process, with an allowance of five years after attainment of majorities, Mrs. Pickens is barred by more than five years; Mrs. Currence by more than three years; and Meigs J. Jarvis by more than three

months. The other two Jarvis heirs are safely within the limit of time. This state of the case makes it necessary to say whether the disability of some of these heirs saves the title of those as to whom the disability has ceased.

Our statute amplifying and defining the remedy by ejectment (chapter 90, Code 1906) provides, in section 4, that no person shall bring such action unless he has, at the time of commencing it, a subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or some share, interest, or portion thereof. Section 9 requires the plaintiff to state whether he claims in fee or for his life, or for the life of another, or for years, specifying such lives or the duration of such term; and, when he claims an undivided share or interest, he shall state the same. Section 18 allows the plaintiff to recover any specific or any undivided part or share of the premises, though it be less than he claimed in his declaration. These statutory provisions enable any person to sue for and recover any portion or undivided share of any tract of land in which he has any interest. After the removal of the disability of an infant by the attainment of his majority, there is no impediment to his suing and obtaining his share in a tract of land. His right of action is separate and not joint, or separate as well as joint. Therefore no reason is perceived, nor any legal principle recalled, upon which it can be asserted that the disability of one or more tenants in common can constitute any excuse for the failure of others, not under any disability, to sue for their interests or shares. In *Redford v. Clarke*, 100 Va. 115, 40 S. E. 680, it has been held that the statute of limitations is conclusive upon each tenant in common and joint tenant after the removal of his disability. To the same effect, see *Kane County v. Herrington*, 60 Ill. 232. In *Shannon v. Dunn*, 8 Blackf. (Ind.) 182, the court held as follows: "It is no answer to a plea of the statute of limitations to a writ of error that, within five years next after one of the plaintiffs had arrived at full age, the writ was prosecuted." This means that both were barred by the removal of the disability of one. In *Marsteller v. McLean*, 7 Cranch, 156, 8 L. Ed. 300, it was held necessary to show that all the plaintiffs were under disability to sue, in order to avoid the plea of the statute of limitations. This was an action of trespass for mesne profits after a recovery in ejectment by the plaintiffs. In *Wilkins v. Phillips*, 3 Ohio, 49, 17 Am. Dec. 579, it was held that the disability of one of the plaintiffs saved the remedy for all. These decisions are diametrically opposite. In those cases, however, the demands were probably joint and not separable. Here, we have separable demands. Each plaintiff could sue for his own interest on the removal of the disability. We are of the opinion, therefore, that in cases of this class each in-

fant is barred by the lapse of the period allowed to him within which to sue after the removal of the disability.

It results from these findings and conclusions that all of the plaintiffs, except Arnold B. Jarvis and Benjamin B. Jarvis, are precluded from right to share in the property by the statute of limitations. As these two are not barred, we must determine the shares to which they are entitled. Originally, there were seven shares. Elmer H. Stout, admitting advancements and refusing to bring them in, formally disclaimed in the Harrison county partition suit, and the other heirs assumed and paid the indebtedness against the estate, in consequence thereof. He filed a formal disclaimer in this suit also, but subsequently executed and delivered to B. B. Stout a deed for any interest he may have in the land. The first of these papers was more than a disclaimer. It was an admission in writing of the receipt by E. H. Stout of his entire share in his father's estate by way of advancements and a refusal to bring these advancements into hotchpot. That not only bars him, as a disclaimer, entered of record, would, but also passed his interest in the estate to his coheirs. Its effect was to leave the whole estate for division among the other six heirs, not merely as the result of a disclaimer, but of his acknowledgment of the advancements to him as and for his full share in the estate and his acceptance of the same as such. *Squires v. Squires*, 65 W. Va. 611, 64 S. E. 911; *Coffman v. Coffman*, 41 W. Va. 8, 23 S. E. 523; *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. 482.

Mrs. Jarvis was, therefore, entitled to one-sixth of the lands in question, which descended to her five children, each of whom inherited one-thirtieth of the tract. Hence Arnold B. Jarvis and Benjamin B. Jarvis are each entitled to an undivided one-thirtieth of each of said two tracts of land, aggregating one-fifteenth, and John Krenn to the remaining fourteen-fifteenths of the 150-acre tract, and Joseph Krenn to the remaining fourteen-fifteenths of the 245.5-acre tract.

In so far as the decree denies relief to said Arnold B. Jarvis and Benjamin B. Jarvis, adjudicates title against them, and dismisses the bill and amended bill as to them, and gives costs to certain defendants, it will be wholly reversed, with costs in this court to Arnold B. and Benjamin B. Jarvis; but in all other respects the same will be affirmed, and a decree entered here adjudicating title as aforesaid and to the extent aforesaid in said Arnold B. and Benjamin B. Jarvis, and the cause remanded for further proceedings in conformity with the principles and conclusions herein stated and the rules and principles governing courts of equity, including the adjustment of costs in the court below.

BRANNON, J. (concurring). I concur in the decision. The great weight of authority is that when a co-tenant makes a deed pur-

porting to pass legal title to a whole tract, and the grantee enters into actual possession, that ipso facto is an ouster or disseisin of the other tenants, and makes the grantee's possession adverse to other tenants, and the statute runs in his favor. 2 Enc. L. & P. 493; 2 Enc. L. & P. 521. The weight of authority will sustain the text of that very late great work, saying: "These cases rest on the ground that the conveyance in fee and entry under it and possession are notorious and unequivocal acts of ownership of such a nature as to give notice to other co-tenants that the entry and possession are hostile and adverse to their title." *Freeman, Co-Tenancy*, § 224, so finds the rule on many cases. *Sudduth v. Sumeral*, 61 S. C. 276, 39 S. E. 534, 85 Am. St. Rep. 883; *Buchanan v. King*, 22 Grat. (Va.) 414, 422. Our own cases so hold. *Talbot v. Woodford*, 48 W. Va. 449, 37 S. E. 580; *Bennett v. Pierce*, 50 W. Va. 604, 40 S. E. 395; *Perkins v. Pfalzgraff*, 60 W. Va. 142, 53 S. E. 913. As long as a co-tenant continues in possession, giving no notice of adverse claim, his possession is for all; but, where he conveys the whole to a stranger, this itself is a disloyal act, in itself repudiates his fellow's right; and added to this there is a stranger in physical possession, and the co-tenant must take notice that a stranger is in possession, and his co-tenant gone, and he has no right to presume that a stranger is holding in friendship to him. Possession is notice. The party must inquire as to his right. That surely is the law after deed. I go further and say that the same principle applies when one co-tenant assumes to sell the whole tract to a stranger by executory contract, and puts the stranger in possession. He has a writing passing right to the whole, just the same as a deed. What difference for this purpose? As *Freeman* says: "The entry of the grantee cannot be presumed to be that of a co-tenant nor in subordination to the rights of the co-tenancy. Acts of ownership by such a grantee must necessarily be adverse to any other part owner." If such is the presumption in case of a deed, why not in the case of an executory contract, as it purports to give right to the whole? But it is said that one holding under such agreement is not holding adversely to his vendor, and therefore not adversely to the co-tenant. But this vendee is a stranger. He is not bound to yield possession to his vendor, nor can the vendor force him out of possession, as he could have done before the statute. Code 1906, c. 90, § 20. The claim that the deed or contract is not itself notice, but there must be evidence of knowledge brought home to the ousted co-tenant, is not sound. The deed or contract, with possession, makes notice. I again assert that an executory contract is good color of title, as I did in *Lewis v. Yates*, 62 W. Va. 597, 59 S. E. 1073. I refer to my opinion there found, and will only add a few authorities. In *Deffenback v. Hawke*, 115 U. S. 392, 6 Sup. Ct. 95,

29 L. Ed. 423, it is held that a writing "purporting to transfer title or to give the right of possession" is good color of title. Does not a contract of sale give right to possession to one in occupancy? Even the vendor cannot turn him out, as our statute forbids. Judge Dent so asserted in *Cecil v. Clark*, 44 W. Va. 698, 30 S. E. 216. In *Hale v. Marshall*, 14 Grat. (Va.) on page 497, Judge Lee said: "And it never refuses to accept an equitable title as a sufficient basis for an adversary possession on which to make out a defense under the statute of limitations." *Mullan v. Carper*, 37 W. Va. 215, 16 S. E. 527, *Shanks v. Lancaster*, 5 Grat. (Va.) 110, 50 Am. Dec. 108, and *Kolner v. Rankin*, 11 Grat. (Va.) 425, say that an equitable title is good for color. We asserted in *Ketchum v. Spurlock*, 34 W. Va. 597, 12 S. E. 832, that an executory contract is color. In *Power v. Kitching*, 10 N. D. 254, 86 N. W. 737, 88 Am. St. Rep. 691, and 1 Cyc. 1098, it is shown that possession under contract when purchase money had been paid is color. How is payment material? As said in *McNeeley v. Oil Co.*, 52 W. Va., at page 633, 44 S. E. 508, 62 L. R. A. 562, discussing this matter, payment is not necessary, citing a Texas case. This is so especially under Code 1906, c. 90, § 20, dispensing with payment. See *Avent v. Arrington*, 105 N. C. 379, 10 S. E. 991, and *Wood on Lim.* 648, 649. In view of these many authorities, including our own, I cannot see why an executory contract is not color.

MILLER, J. I concur with BRANNON, J., in this note.

WILLIAMS, J. (dissenting in part). I concur in the views of the majority of the court in all the foregoing opinion except that portion of it which treats of the possession of the Krenns, prior to the time they received their deed for the land, as adversary to the plaintiffs, and which applies the statute of limitations in bar of the rights of such of them to have partition of the land who had attained their majority five years, or more, before the bringing of this suit. I do not think the Krenns' possession of the land was adverse until they received a deed of conveyance. They went into possession under a title bond, or contract of sale, under B. B. Stout. This title bond recognized title as still remaining in B. B. Stout, and provided for a future conveyance as well as future payments of the purchase money. Their deeds from B. B. Stout bear date May 3, 1894. Not until that time did their possession take on the nature of an adversary possession. To constitute adversary possession it must not only be actual and visible, but it must be accompanied with either good title, or with color, or claim, of title. *Parkersburg Industrial Co. v. Schultz*, 43 W. Va. 470, 27 S. E. 255; *Creekmur v. Creekmur*, 75 Va. 430; *Atkinson v. Smith*, 24 S. E. 901, 2 Va. Dec. 373. The writing under which the

Krenns took possession does not purport to convey title; it provides for the making of a deed at a future time. Their possession, therefore, until deeds were made, was under, and not adverse to, their vendor. *Core v. Faupel*, 24 W. Va. 238; *Nowlin v. Reynolds*, 25 Grat. (Va.) 137; *Clarke v. McClure*, 10 Grat. (Va.) 305; *Alleghany County v. Parrish*, 93 Va. 615, 25 S. E. 882; *Hudson v. Putney*, 14 W. Va. 561; *Parkersburg National Bank v. Neal*, 28 W. Va. 744. *Hudson v. Putney*, supra, holds that adversary possession depends upon the intention with which the possession was taken and held. In the present case the title bond expressly shows that the Krenns did not, and in fact could not, claim it as an evidence of title. It expressly recognizes the legal title as still outstanding.

I cannot see how it could be considered even as color of title. "Color of title for purpose of adverse possession under the statute of limitations as to land is that which has the semblance or appearance of title, legal or equitable, but which is in fact no title." 1 Cyc. 1082. To the same effect are the following decisions: *Sharp v. Shenandoah Furnace Co.*, 100 Va. 27, 40 S. E. 103; *Adams v. Alkire*, 20 W. Va. 480; *Oney v. Clendenin*, 28 W. Va. 34. "A void deed is good color of title." *Bennett v. Pierce*, 50 W. Va. 604, 40 S. E. 395; *Randolph v. Casey*, 43 W. Va. 289, 27 S. E. 231. "A deed or writing which purports to convey title is good as color of title." *Swann v. Thayer*, 36 W. Va. 46, 14 S. E. 423; *Mullans, Adm'r, v. Carper*, 37 W. Va. 215, 16 S. E. 527. As long as the vendee is in possession of the land claiming under an executory contract of sale which provides for a future conveyance, there is a privity of relation between them, and the vendee can always rely on his vendor's title to protect his possession, and, on the other hand, the vendor can always rely upon his vendee's possession in order to protect his title. I think it logically and necessarily follows, from the numerous authorities above quoted, that the Krenns' possession was not an adversary possession until they got their deeds, and that, so far as possession affects title, their possession, until that time, was the possession of B. B. Stout, and his possession was the possession of all the co-tenants. Consequently, the statute of limitations did not begin to run in the Krenns' favor until the 4th of May, 1894, which was less than 10 years before the bringing of this suit. Even if a title bond could be regarded as constituting an equitable claim of title, it could not be so considered until all the purchase money had been paid, and the Krenns thus placed in a position to demand a conveyance of the legal title. By the terms of the title bond the last deferred payment was not due until the 1st of October, 1895. Consequently they did not have so much as an equitable title for as much as 10 years prior to this suit.

Possession of the Krenns under the title

bond, not being adverse to B. B. Stout, could not be adverse to his co-tenants, until they had knowledge of his intention to oust them from the land, and the statute of limitations would begin to run only from the time of such knowledge.

Possession cannot be adversary as to one co-tenant without being adversary as to all. In the case of *McNeeley v. Oil Co.*, 52 W. Va. 616, 44 S. E. 508, 82 L. R. A. 562, point 6 of the syllabus is: "Possession by a purchaser under an executory contract of sale made by the husband alone, of land owned in joint tenancy by husband and wife, is not adverse to the wife." In that case the wife's interest in the land was her separate estate. I think that case should control the decision in this one, unless it is the purpose of the court to overrule it, and the majority opinion does not expressly do so. The logic of Judge Brannon's opinion in that case is so potent that I here quote the following extract from it, found on page 645 of 52 W. Va., on page 519 of 44 S. E. (82 L. R. A. 562), viz.:

"I have stated above that it is impossible to say that, as the possession under the executory contract was not hostile to Nathan Higgins, it was nevertheless hostile to his wife, and I say again that there could not be a possession adverse to half the tract, half the acre, half the pebble, half the molecule.

"But reflect further that nobody will say that as to Nathan Higgins the possession as to the whole tract was adverse. Every one must admit that it was friendly. This being so, we then bring in the fact that between Higgins and his wife there was a relation of privity and unity, that of joint tenancy, and the same character the possession bore to Nathan Higgins it bore to his wife. The possession being by executory contract while the wife lived and not being adverse to him neither was it adverse to her. He was her tenant as well as his tenant. Dry law views them as such. A court of law views them as such, and adverse possession is governed by this view. Had Higgins made a deed, instead of a contract, the possession would have been adverse to him, and, being adverse to him, so it would have been as to her."

I may add that the facts in that case are much stronger to affect the wife with constructive notice of the husband's intention to oust her than they are in the present case to affect these plaintiffs, or their mother, with knowledge of such intention on the part of B. B. Stout. But it was there held that the statute of limitations did not begin to run as to either co-tenant until deed was made.

I cannot see that the Krenns have established title by adversary possession. The case must then turn upon the question of whether or not there was an actual ouster of these plaintiffs by B. B. Stout, more than 10 years before they sued. On account of the confidential relation and mutual rights of co-tenants, the law places the burden of proving an ouster upon the co-tenant assert-

ing it, or upon his vendee who claims the benefit of it. *Parker v. Brast*, 45 W. Va. 399, 32 S. E. 269; *Justice v. Lawson*, 46 W. Va. 163, 33 S. E. 102.

The statute would not begin to run until plaintiffs, or their mother, Mary M. Jarvis, had knowledge of the intention of B. B. Stout to claim title adversary to them. *Parker v. Brast*, 45 W. Va. 399, 32 S. E. 269; *Justice v. Lawson*, 46 W. Va. 163, 33 S. E. 102; 23 Cyc. 492. There is no pretense that there was actual knowledge. I do not think the possession of the Krenns can properly be regarded as constructive notice to them. Their possession was the same as B. B. Stout's possession, while holding under the title bond. B. B. Stout had a right to the possession, as did every other one of the co-tenants, and the possession of one co-tenant is the possession of all. The land lay remote from plaintiffs, and in a different county from that in which they lived. B. B. Stout was administrator on his father's estate, and, as the evidence tends to show, was taking care of this land. His co-tenants had a right to rely upon his performing this service faithfully, and no doubt they trusted him to do so. I admit that, if B. B. Stout had been receiving all the rents and profits from the land, and making use of the same to the exclusion of the others, and they had had knowledge of this, it would be sufficient to constitute an ouster, and would have set the statute of limitations in operation from the time of such knowledge. But there is no evidence that there was any rent received from the place by him. Witness M. C. Gum states that he (witness) was living on the land at the time it was sold to the Krenns, that he went there as a tenant of James M. Stout, deceased, and that all the rent he paid was in the way of work done on the place, and that there was very little of the land cleared at the time B. B. Stout sold to the Krenns. Under all the facts and circumstances of this case, I do not think the possession of the Krenns could operate any more as constructive notice to the co-tenants of B. B. Stout's intention to oust them than if the possession had been held by B. B. Stout himself. It is against all authority to apply the same strict rule of law between co-tenants which applies between strangers claiming the same land by adverse title. I do not think it is law to hold that each co-tenant is bound to take notice, at his peril, by what right one claims title who happens to be in actual possession of the joint property, regardless of the question whether such person claims title under one of the other co-tenants or under a stranger. Yet this is the effect of the majority opinion. It would place the same obligation on a co-tenant to see that he is not ousted by his joint owner that the law places upon an individual owner of land to see that his land is not taken by the adverse possession of a stranger. It would change the rule of law which makes it the duty of the ousting co-tenant to prove an ouster. It would discharge

the burden which the law places on him to prove it, by raising a presumption in his favor, of notice to his co-tenants, from facts of which they have no actual knowledge. Notwithstanding one tenant in common may be in the exclusive possession of the land, claiming it as his own in severalty, it will not constitute an ouster of his co-tenants until knowledge of his adverse claim is brought home to them. *Bogges v. Meredith*, 16 W. Va. 1; *Cooley v. Porter*, 22 W. Va. 120; *Justice v. Lawson*, 46 W. Va. 163, 33 S. E. 102.

"Laches or acquiescence cannot bar the right of entry of a co-tenant, until the actual disseisin has been effected by some notorious act of ouster brought home to his knowledge." *Parker v. Brast*, 45 W. Va. 399, 32 S. E. 269.

I do not think the statute of limitations began to run in favor of B. B. Stout against plaintiffs at any time because they had no notice of his intention to claim adversely to them, and I do not think it began to run in favor of the Krenns until they got their deed, because prior to that time their possession was under, and not adverse to, the common title of all the co-tenants.

For these reasons I would reverse the decree of the circuit court as to all of the appellants, regardless of the question of infancy. I do not think any of them are barred.

(87 W. Va. 490)

MITCHELL v. UNITED STATES COAL & COKE CO.

(Supreme Court of Appeals of West Virginia.
May 10, 1910. Rehearing Denied June
11, 1910.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§§ 101, 102, 103*)—INJURY TO SERVANT—SAFE APPLIANCES.

It is the duty of the master to furnish reasonably safe appliances in and about the working place of his servants. This duty is nonassignable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 175, 178; Dec. Dig. §§ 101, 102, 103.*]

2. MASTER AND SERVANT (§ 119*)—INJURIES TO SERVANT—DANGEROUS APPLIANCES.

An electric wire, used on a motor car to carry the electric current from the overhead trolley wire to the machinery of the motor car, on which the insulation is allowed to become so broken, or defective, as to permit the naked wire to come in contact, either with the metal top of the circuit breaker, or with the body of a servant, whose duties are such as to require him to work on, and about, such motor car, is not a reasonably safe appliance.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 210; Dec. Dig. § 119.*]

3. MASTER AND SERVANT (§§ 101, 102*)—INJURY TO SERVANT—DEFECTIVE APPLIANCES.

The master is liable if a servant who has no knowledge of such defective appliance is injured, or killed, thereby.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 171, 173, 178; Dec. Dig. §§ 101, 102.*]

4. NEW TRIAL (§ 70*)—SUFFICIENCY OF EVIDENCE.

When the plaintiff's evidence is such that the court should not sustain defendant's motion to exclude it, it is error to set aside a verdict found for plaintiff.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.*]

Error to Circuit Court, McDowell County.

Action by G. C. Mitchell, administrator, against the United States Coal & Coke Company. Verdict for plaintiff. From an order setting it aside, he brings error. Reversed, and judgment for plaintiff.

Cook & Howard, for plaintiff in error.
Anderson, Strother & Hughes, for defendant in error.

WILLIAMS, J. Writ of error to an order of the circuit court of McDowell county setting aside a verdict rendered in favor of plaintiff.

Lawrence Mitchell, a boy 17 years of age, was employed as brakeman and trapper in defendant's coal mine in McDowell county. His duties were to brake the cars which were hauled in and out of the mine to the tippie by means of an electric motor, and to open and close the trapdoors across the entry. When the cars were going upgrade, and it was not necessary to apply the brakes, his duty required him to ride on the motor, in order to be in position to open the doors to permit the passage of the motor and cars. He was riding on the hind end of the motor by the side of the motorman on the 6th of May, 1907, when he received a severe electric shock, which caused him to fall backward off the motor and to be crushed to death by the passing cars. His administrator brought an action against defendant for damages for negligently causing the death, and on the 3d of March, 1908, recovered a verdict for \$1,200. The court set it aside and granted the defendant a new trial, by order made October 1, 1908. To this order a writ of error was awarded by this court. Plaintiff insists that the court erred. This depends upon whether or not there is sufficient evidence to prove the negligence of defendant, as the proximate cause of the death. Defendant offered no evidence, and relies wholly upon the alleged failure of plaintiff's evidence to establish negligence. Ed Wolfe, the motorman, is the only eyewitness to the fatal accident who testified at the trial. Mr. C. Reedy, the mine foreman, was sitting on the front end of the motor at the time the accident happened, but his testimony was not taken.

The proof shows that the electric current used to operate the motor was conducted to the machinery of the motor car by means of an insulated wire on the trolley pole, which connected with the trolley wire overhead. Wolfe says the rubber insulation on this wire was broken on the top side, and also that "the rubber insulator that went over the cir-

cuit breaker was burnt from the circuit breaker"; that at a point near where the wire enters the circuit breaker on the motor it was not insulated; and that two days before the accident occurred he called the attention of Mr. Sharp, the defendant's electrician, to this defective insulation. Mr. Sharp was dead at the time of the trial. It, therefore, does not appear whether he considered the insulation to be safe, or not. Plaintiff's theory is that this defective insulation permitted the naked wire to come in contact with the metal, and thus to charge the whole motor car, so as to shock deceased and cause him to fall off the motor; or that his body, in some way, came in contact with the exposed wire, and thus caused him to receive the shock. That the electric shock caused him to fall is not denied. The defendant's theory is that the shock resulted from what is known by motormen and electricians as a "sand-ground." Sand is sometimes applied to the track, when going upgrade, to prevent the wheels of the motor from slipping. It is a nonconductor of electricity; and if there is a sufficient quantity applied to prevent the wheels of the motor from coming in contact with the rails, the circuit will be thereby broken. This causes what is called a sand-ground. If a sand-ground occurs, and the current is communicated to the motor car by means of some other connection with the rails than by its own wheels, the entire motor car will become charged, and is liable to produce a shock to any one who happens to be on it. The testimony of the motorman is, that young Mitchell was sitting on the circuit breaker with one hand resting on the front end of the metal car next to the motor, and the other upon the motorman's shoulder; that he had been sitting in this position for a minute, or such time, while they were drifting down an incline, and that when they reached the bottom of the swag, and started upgrade, he (Wolfe) opened the trolley, and immediately young Mitchell fell backward off the motor. It is insisted that, while the motor was sand-grounded, Mitchell's body formed a short circuit by means of his hand resting on the metal car behind the motor; that the wheels of the car on which his hand rested communicated the current to the rails. But this is only a theory. There is no evidence that a sand-ground actually did occur. The evidence only shows that the shock might have resulted in such manner. But we fail to see why a short circuit would not have been formed by the coupling device between the car and the motor as well as by Mitchell's hand being on the rear car. The evidence is that his hands were gloved. It would, therefore, seem that the car coupling would be a much better conductor of electricity than Mitchell's gloved hand. The jury were justified in concluding that his body may not have caused the short circuit which gave him the shock. The presentation of defendant's theo-

ry may have occasioned some doubt in the minds of the jury as to what actually caused the short circuit. They may have doubted whether it was the defective insulation of the wire at the circuit breaker, or a sand-ground, that caused the shock; still it was their province to resolve this doubt. It is clearly a jury question. It is both proven, and virtually admitted, that the shock caused the boy to fall off the motor, and there is evidence which tends strongly to prove that the shock was caused by the defendant's negligence in not keeping its wire and circuit breaker properly insulated. While the evidence does not amount to absolutely certain proof, it is sufficient, nevertheless, to warrant a verdict for plaintiff. *Carrico v. Railroad Co.*, 35 W. Va. 389, 14 S. E. 12; *Powell v. Love*, 36 W. Va. 93, 14 S. E. 405. These cases were decided upon a motion to exclude evidence, but the same value is given to such evidence whether on motion to exclude, or on a motion to set aside a verdict. If there is sufficient evidence to permit a case to go to the jury, it is also sufficient to support a verdict, if one should be found on it, and the court will not be warranted in setting it aside, simply because it may not have found with the jury. This is a corollary to the rule recently reviewed and affirmed in the case of *Butcher v. Sommerville* (decided by this court) 66 W. Va. —, 67 S. E. 726, that the court is not bound to submit a case to the jury when the evidence is so slight that it would not support a verdict, if one should be found on it. They were clearly warranted, by the facts proven, to infer that the defective insulation of the wire and of the circuit breaker was the proximate cause of Mitchell's death. It is insisted that he was not riding in his proper place. But there is no evidence that he was forbidden, by any rule of the defendant company, to ride on the rear end of the motor, or that he was instructed by any one having authority over him not to ride there. Neither does it appear that, if there had been proper insulation, it would have been any more dangerous to ride on the rear end of the motor than it was to ride on the front end. It is true the motorman told him it was dangerous to ride on the rear end. But he did not tell him why it was so, nor point out to him any particular element of danger. It was very natural for the boy to suppose that he encountered no more danger there than the motorman himself was exposed to. He had only been employed in this capacity for about three weeks. He had ridden in this same position frequently, and no previous accident had occurred. The motorman had told him only once that the rear end was a dangerous place on which to ride. He may have thought the motorman meant, by this warning, that he would be more liable to fall off, if he occupied that position, and he may not have appreciated that he was in any danger from

the electric wire; neither do we see how he could have been in any danger from the wire, provided it was insulated. If the defendant failed to keep the wire properly insulated at those places where its employes were liable to come in contact with it in the discharge of their duty, it was guilty of negligence, in that it did not provide reasonably safe appliances in, and about, the place where its servants were required to labor. The master's duty in this regard is not assignable. The defendant could not intrust the keeping of its electric appliances in proper condition to its electrician, or mining boss, so as to escape liability for injury to its servant. *N. & W. R. R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226; *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509; *Lane Bros. & Co. v. Bauserman*, 103 Va. 148, 48 S. E. 857, 106 Am. St. Rep. 872.

"If a master is guilty of negligence in failing to procure suitable appliances and machinery for carrying on his business, and injuries result therefrom to his servant, he must respond in damages." *Humphreys v. Newport News & M. V. Co.*, 33 W. Va. 135, 10

S. E. 39; *Giebell v. Collins Co.*, 54 W. Va. 518, 46 S. E. 569.

Young Mitchell was not guilty of contributory negligence in occupying a position on the circuit breaker, unless he knew of the uninsulated condition of the wire, and there is no evidence that he knew of it. *Thomas v. Electrical Co.*, 54 W. Va. 395, and authorities cited on pages 405 and 406 of the opinion, 46 S. E. 217.

"It is manifest that a servant cannot be deemed to have been in fault for the reason that he failed to take precautions which he did not know to be necessary for his safety." 1 *Labatt on Master and Servant*, § 319. This doctrine applies as well to Mitchell's having his hand on the car next to the motor as it does to his sitting on the rear end of the motor.

It follows, from what we have said, that the circuit court erred in setting aside the verdict and in granting the defendant a new trial. Therefore the order made on the 1st of October, 1908, will be reversed, and this court will render judgment on the verdict for the plaintiff.

(67 W. Va. 298)

CLARK v. DOWER et al.

(Supreme Court of Appeals of West Virginia.
March 29, 1910. Rehearing Denied June
11, 1910.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 50*) — DECISIONS REVIEWABLE—AMOUNT IN CONTROVERSY.**

In an action of trespass on the case for injury to real estate, where plaintiff and defendant agree before trial that if plaintiff is entitled to any damage at all it shall be \$25, and there is a verdict and judgment for defendant, there is no jurisdiction by writ of error in this court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 50.*]

2. APPEAL AND ERROR (§ 38*) — DECISIONS REVIEWABLE—CONTROVERSY CONCERNING A WAY.

If, in such action, defendant does not plead the general issue, but sets up by special plea the right to a private way by prescription over plaintiff's land, such plea does not convert the plaintiff's action into a controversy "concerning a way," within the meaning of section 3, art. 8, of the Constitution of West Virginia, so as to entitle him to a writ of error to this court, when the damage claimed for the trespass is less than \$100.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 38.*]

3. QUÆRE.

Whether a license, or right of defendant acquired by prescription, to use plaintiff's land, can be given in evidence under the general issue, in actions of trespass *quare clausum fregit*, discussed, but not decided.

*(Additional Syllabus by Editorial Staff.)***4. APPEAL AND ERROR (§ 38*) — DECISIONS REVIEWABLE—AMOUNT IN CONTROVERSY.**

In actions for damages to real property, where the damage claimed is less than \$100, the Supreme Court of Appeals is without jurisdiction to review the judgment of the circuit court, notwithstanding other matters may have been involved and necessarily decided to determine the main issue in the case, which, if they had been made the direct subject of an action, would have given the right of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 118-126, 178; Dec. Dig. § 38.*]

5. TRESPASS (§ 43*)—QUÆRE CLAUSUM FREGIT—PLEADING—SCOPE OF DEFENSE UNDER GENERAL ISSUE.

In actions of trespass *quare clausum fregit*, defendant may, under the general issue, prove want of title or right to possession in plaintiff.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 104; Dec. Dig. § 43.*]

Poffenbarger, J., dissenting.

Error to Circuit Court, Mason County.

Action by Herman A. Clark against Patrick Dower, and others. Judgment for defendants. Plaintiff brings error. Dismissed.

Chas. E. Hogg, J. W. English, and John L. Whitten, for plaintiff in error. Wm. O. Parsons, Rankin Wiley, and Somerville & Somerville, for defendants in error.

WILLIAMS, J. Plaintiff brought an action of trespass on the case in the circuit court

of Mason county to recover damages for injury to real estate. Defendants did not plead the general issue, but pleaded specially a right of way by prescription over plaintiff's land. To this special plea plaintiff replied generally, and issue was joined. The case was tried by jury on the 12th of December, 1906, resulting in a verdict and judgment for the defendants. To this judgment a writ of error was awarded plaintiff. A number of errors are assigned, but we are confronted at the outset with the question whether, or not, this court has jurisdiction. It is insisted that this court is without jurisdiction, because the action is concerning a matter that is only pecuniary, and the amount in controversy is less than \$100. If this be true, we have no jurisdiction of the case. But counsel for plaintiff insist that the real controversy is concerning the right of way claimed by defendants over plaintiff's land, and that this confers jurisdiction without regard to the amount of damages claimed. It was agreed between counsel in the lower court, and before trial, "that if the plaintiff is entitled to anything at all in this case, the amount of damages shall be \$25." This agreement unquestionably fixes the pecuniary amount of damages that plaintiff would have any right to demand, notwithstanding \$500 was the amount alleged in his declaration, provided the attorneys had authority to bind their clients by such agreement, and we assume they had, as their authority is not questioned in the brief of counsel. Counsel for defendants insist that this agreement took away from the circuit court jurisdiction to try the case, because it fixes the amount in controversy at less than \$50. Section 2, c. 112, Code 1906. But we have no right to decide this question unless this court has appellate jurisdiction to review the case.

If the right of plaintiff to sue out writ of error in this court depends alone on the amount of damages involved in the action, then on principle, and according to the decision of this court in *Dickinson v. Mankin*, 61 W. Va. 429, 56 S. E. 824, the agreement fixing the amount to be recovered, if any recovery at all, at \$25, is conclusive, and precludes the right of appeal, notwithstanding the declaration states the damages to be more than the appealable amount.

Section 3, art. 8, of our Constitution provides that the Supreme Court of Appeals "shall have appellate jurisdiction in civil cases where the matter in controversy, exclusive of costs, is of greater value or amount than one hundred dollars; in controversies concerning the title or boundaries of land, the probate of wills, the appointment or qualification of a personal representative, guardian, committee or curator; or concerning a mill, road, way, ferry or landing; or the right of a corporation or county to levy tolls or taxes."

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
63 S.E.—24

Counsel for plaintiff insist that defendants, by failing to plead the general issue, and by pleading specially the right of way claimed by them over plaintiff's land, have converted this action into one "concerning a way," and that this entitles plaintiff to have the matter reviewed by this court, notwithstanding the amount of damages claimed is less than \$100. We do not think so. We do not think that the filing of the special plea has changed plaintiff's suit from an action of trespass, demanding pecuniary damages, into a controversy concerning a way, within the meaning of the constitutional provision defining the appellate jurisdiction of this court.

What is the real matter in controversy? How is this to be determined? Must we not look to the plaintiff's declaration to see what his complaint is—what his demand? Does this not determine the nature of his suit? What kind of a judgment could the court render in response to his declaration, if the verdict be for him; or what must be the judgment if perchance it should be against him? It would seem that an answer to these questions would go far toward determining the matter in issue, the controversy, because the judgment must respond to the issue. If plaintiff should prevail the judgment would be that he recover against the defendants \$25; if the judgment should be against him it would be that he take nothing by his suit. These are the only kinds of judgment that could be rendered in the case, and they, as well as the declaration itself, show that the demand is purely pecuniary. The matter in controversy by which appellate jurisdiction is to be determined is "that which is the essence and substance of the judgment, and by which the party may discharge himself." *Umberger v. Watts*, 25 Grat. (Va.) 167. It is true that the right of way was brought in question and was involved in the suit but only indirectly and as matter of defense to the suit. The trespass complained of consisted in the cutting of a wire fence by the defendants which plaintiff had erected across the way claimed by defendants. It therefore followed, as a matter of course, that if defendants could establish their claim to the right of way they would not be guilty of the trespass, as no other trespass was alleged than the cutting of the fence, and the passing over plaintiff's land along the alleged right of way. Defendants therefore filed a special plea by way of confession and avoidance setting up their right of way over plaintiff's land by prescription. If they could succeed in proving their title to the easement, it would be as complete a defense to plaintiff's suit as it would be to prove that they had never committed any trespass under the plea of "not guilty." They had a right to plead specially and were not bound to plead the general issue, and inasmuch as the only trespass complained of was confined to the alleged right of way, a complete defense could be made to plaintiff's action by prov-

ing the right set up in the plea. True the plea alleges affirmative matter, but it does so only as a defense to plaintiff's action; it calls for no affirmative relief, neither could any be given a defendant in such an action. The same kind of judgment would have to be rendered in the case, whether the plea were special or general, or both special and general. The claim to the right of way is only defensive, and, therefore, collateral to the real matter in controversy which is whether, or not, plaintiff is entitled to recover damages for an alleged trespass to his land.

It is well established by repeated decisions, both by this court and by the Supreme Court of Appeals of Virginia, that in actions for damages on account of trespass to real estate, where the damage claimed is less than \$100, this court is without jurisdiction to review the judgment of the circuit court, notwithstanding other matters may have been involved and necessarily decided in order to determine the main issue in the case, which, if they had been made the direct subject of a suit, or action, would have given the right of appeal. It is urged by counsel for plaintiff that the filing of the special plea, and the failure to plead the general issue, gives this case a status different from what it would have had if the general issue had been pleaded. We do not think so. It may be that the special plea was necessary in order to admit proof of the easement, it being by way of confession and avoidance, and not a traverse of the declaration. But it is not necessary for us to decide this point, as we do not think it determines the jurisdictional question. Whether the proof of a right of way could have been given under the general issue, if it alone had been pleaded, or whether a special plea was essential in order to admit such proof, does not change the nature of the controversy shown by plaintiff's declaration, or the character of the judgment that would have to be rendered by the court pursuant to the only kind of verdict that could have been found in the case, regardless of the plea, or pleas, filed, which must have been either "for the plaintiff for \$25 damages," or for the defendant, "not guilty." It seems to be settled in this state that in actions of trespass *quare clausum fregit* defendant may, under the general issue, prove want of title or right to the possession in plaintiff. *Dickinson v. Mankin*, 61 W. Va. 429, and authorities cited in the opinion by Judge Brannon on page 434, 56 S. E. 824; *Hogg's Pl. & Pr.* § 229; and *Rob. New Pr.* 648.

In England and also in many of the states of the Union, the rule of practice is that in order to be allowed to prove a license, or prescriptive way over plaintiff's land in actions of trespass *quare clausum fregit*, it must be specially pleaded. 21 *Enc. Pl. & Pr.* 338, and cases cited in note 8. But it may be that, in Virginia and in this state, this

rule is modified by statute (section 8, c. 103, Code 1900), which authorizes "trespass on the case" to be brought in any case where "trespass" lies; and in actions of trespass on the case the rules of practice were always liberal enough to admit, under the general issue, proof of anything that would bar plaintiff's action. 21 Enc. Pl. & Pr. 921, and *Ridgeley v. West Fairmont*, 46 W. Va. 445, 33 S. E. 235. May not this statute intend that, where an action of trespass on the case is brought for a wrong which prior to the statute could only have been redressed by an action of "trespass vi et armis," the rules of pleading and evidence which have always applied in actions of trespass on the case shall apply to it also? I am inclined to think so. But, as before stated, we do not decide whether defendants in the present case could have proven the alleged right of way by prescription over plaintiff's land under the general issue, if it had alone been pleaded, as a decision of this question is not necessary to a decision of the question of our jurisdiction to review the case.

If the question of our jurisdiction were one of first impression, we might feel inclined to give the language of the Constitution such a construction as would permit an appeal to this court in this and in similar cases, notwithstanding the right of way is collaterally drawn in question, and only as a defense to plaintiff's action. But we feel bound by the construction given to the statute by this court in a number of previous cases, and also by repeated decisions of the court of Virginia construing the same language used in the statute of that state prior to the formation of this state. The question is settled by decisions which we regard as binding on us.

Greathouse v. Sapp, 26 W. Va. 87, was a case where the plaintiff brought trespass *quare clausum fregit* for the cutting and carrying away trees from his land, claiming \$250 damages. The defendant pleaded "not guilty," and the proof showed that he claimed title to the land on which the trespass was alleged to have been committed. Plaintiff recovered a verdict and judgment for \$12. The court in that case held that a writ of error did not lie to this court, "though it appears from the record that the title or boundaries of the land are drawn in question." The same doctrine was again announced in *Dickinson v. Mankin*, 61 W. Va. 429, 56 S. E. 824. This was also a case of trespass *quare clausum fregit* for the cutting of timber. Here the plaintiff pleaded both "not guilty" and *liberum tenementum*. Trial was had, which resulted in a verdict and judgment for the defendants. The plaintiff sought to have the case reviewed by this court, and it was held that, because plaintiff's own evidence showed that the amount, at most, to which he was entitled, if to anything at all, was less than \$100, this court was without jurisdiction, notwithstanding

the title to the land was drawn in question.

It will be observed that the same phraseology, used in the Constitution in defining the appellate jurisdiction of this court, applies in respect to cases involving title to land as applies to controversies concerning a mill, road, way, ferry or landing; hence the analogy of the two cases above referred to to the one under review. The language of the Constitution is: "In controversies concerning the title or boundaries of land; * * * or concerning a mill, road, way, ferry or landing." The title to the land in those two cases was brought in question collaterally, and for the purpose of defense to plaintiff's money demand, just as the defendants' right of way is brought in question in the present case for the purpose of defeating plaintiff's money demand. If it cannot be said that the title to the land in those cases was in controversy, so as to give right of appeal, how can it be said that the right of way in the present case is the matter in controversy, so as to give the plaintiff a writ of error to this court?

This question again received careful consideration by this court in the case of *Miller v. Navigation Co.*, 32 W. Va. 46, 9 S. E. 57. That was an action by the Navigation Company to recover certain tolls from the defendant for floating rafts over its dams constructed across the Little Kanawha river under the rights given it by charter. The defendant pleaded non assumpsit, and under this plea set up the defense that the plaintiff had no right to charge toll. The trial resulted in a verdict and judgment for the plaintiff for \$66. A portion of the syllabus in that case reads as follows: "Upon a writ of error by the defendant, held, this court has no jurisdiction to review the judgment of the circuit court, although the record shows that the real defense to the action was that the condition of the river was such that the plaintiff had no right to levy the toll, for which the judgment was recovered." In that case Judge Snyder, who delivered the opinion of the court, reviewed a number of Virginia cases which are authority for the general proposition that, in relation to those matters concerning which an appeal is given to this court, such matters must be the subject of direct proceeding, and not such as may be introduced into the case collaterally, and merely as defense to plaintiff's suit or action, viz.: *Hutchinson v. Kellam*, 3 Munf. (Va.) 206; *Skipwith v. Young*, 5 Munf. (Va.) 276; *Hancock v. Railroad Co.*, 3 Grat. (Va.) 328; *Clark v. Brown*, 8 Grat. (Va.) 549; and *Umbarger v. Watts*, 25 Grat. (Va.) 167.

We hold that we have no jurisdiction to review this case, and therefore dismiss the writ of error as improvidently awarded.

POFFENBARGER, J. (dissenting). I am unable to concur in the views of my associates. The parties to this action have put into direct issue, by the special plea and trav-

erse thereof, the private way claimed by the defendant, and the Constitution gives appellate jurisdiction in all controversies concerning roads and ways. None of the decisions of this court and the Virginia court, relied upon as denying such jurisdiction, save that of *Dickinson v. Mankin*, 61 W. Va. 429, 56 S. E. 824, passes upon the exact question, for in the latter only was the question of title put in issue by a plea, and that case is not exactly in point, because it related to title and boundaries of land and not a way. Besides, it is offset by *Shaver v. Edgell*, 48 W. Va. 502, 37 S. E. 664, in which a writ of error was entertained under almost the exact conditions presented here.

The interposition of the special plea, setting up right in the defendant, constitutes ground for distinction. *Herman on Estoppel and Res Judicata*, § 276, says: "Thus in trespass, upon not guilty pleaded, the title is not concluded, though, if the title is put in issue by a plea of soil or freehold, the verdict will be conclusive on the title in another action of trespass for an injury done to the same land. So, in actions on the case for interruptions of rights and other easements, on the general issue, the title is not settled, though if the defendant plead a title in bar, and issue is taken on it, the verdict will settle that point for future actions." This is fully sustained by decisions of reputable courts, cited in the notes. Upon principle, therefore, the judgment in favor of Dower is *res judicata* and gives him an unimpeachable right of way over Clark's land, for review of which this court denies the latter right of review, notwithstanding the Constitution says such right shall exist in all cases of controversy concerning roads and ways. *Dickinson v. Mankin* says the judgment in such case is not *res judicata*, but I think this proposition is not sustained by any other decision of this court or those of Virginia.

The doctrine of *Hutchinson v. Kellam*, 3 Munf. (Va.) 202, and *Skipwith v. Young*, 5 Munf. (Va.) 276, is consistent with the principle stated in *Herman on Est. & Res Jud.* as quoted, because there was no special plea in either of them. The same is true of *Great-house v. Sapp*, 26 W. Va. 87, and *Miller v. Navigation Co.*, 32 W. Va. 46, 9 S. E. 57, and none of them is authority for the view expressed in *Dickinson v. Mankin*. The idea that this plea does not put the title to the road directly in issue and make the judgment *res judicata* is based upon mere argument against authority, founded in nothing more substantial than that the same evidence would have been admissible under the plea of not guilty. That might do, if it had not been repudiated by so many decisions. There are a few cases which say a judgment on such a plea in an action, involving right of possession only, will not bar one involving the superior right of title. *McKnight v. Bell*, 135 Pa. 358, 19 Atl. 1036, and *Arnold v. Arnold*, 17 Pick. (Mass.) 4. But these admit its

binding force in actions of equal dignity, or involving the same right. On the other hand, the exception, made by these cases, is denied by the great weight of authority, holding the judgment final and binding as to every question, directly put in issue by the plea. *Elson v. Comstock*, 150 Ill. 303, 37 N. E. 207; *White v. Chase*, 128 Mass. 158; *Standish v. Parker*, 2 Pick. (Mass.) 20, 13 Am. Dec. 393; *Smith v. Sherwood*, 4 Conn. 282, 10 Am. Dec. 143; *Church v. Leavenworth*, 4 Day (Conn.) 277; *Richmond v. Hays*, 3 N. J. Law, 492; *Richardson v. Boston*, 19 How. 263, 15 L. Ed. 639; *Shepherd v. Willis*, 19 Ohio, 142; *Dick v. Webster*, 6 Wis. 481; *Van Fleet's For. Adj.* § 404, citing numerous authorities.

However, in view of the holding of this court, I shall now be compelled to say it is not *res judicata*. This decision denies right of review on the ground that the right of way is only collaterally involved, and *Dickinson v. Mankin* says the judgment is not final and conclusive as to it. Rather than deny any right of review at all, I yield to that conclusion, as a choice between evils, being unable to obtain a correction of what I consider an erroneous decision.

Note by BRANNON, J. I am entirely satisfied with the opinion prepared for the court by Judge WILLIAMS; but it being claimed that a judgment in trespass *quare clausum fregit*, when there is a plea of *liberum tenementum*, is final as to title even in an after action of ejectment, and that *Dickinson v. Mankin*, 61 W. Va. 429, 56 S. E. 824, is wrong, I have been led to re-examine the matter.

If we go to *Hutchinson v. Kellam*, a thoroughly considered case, 3 Munf. (Va.) 202, we find the court holding that an appeal does not lie in an action of trespass when the damage is less than \$100, though the statute gave the writ of error where the title or bounds of land or a franchise is drawn in question. The pith of the reason for this is stated thus in the opinion: "The action of trespass is one in which damages only are recovered; and although the title or bounds of land may be incidentally and collaterally brought in question, yet the value of the matter in controversy is, from the *very nature of the action*, the value of the damages sustained by the trespass; and this, as well where the title or bounds of land may be drawn in question, as where they may in no manner be involved in the dispute." The court did not make this dependent on whether the plea was not guilty or *liberum tenementum*, but on the nature of the action. *Morse v. Marshall*, 97 Mass. 519, so holds. *Johnson v. C. & M. Co.*, 86 Fed. 269, 30 C. C. A. 35, says title cannot be tried in trespass. In *Warwick v. Underwood*, 3 Head (Tenn.) 238, 75 Am. Dec. 767, held conclusive in second action of trespass. Court declined to say whether in ejectment. Our Code 1906, c. 185, demands certain "matters in controversy" to warrant appeal, and grants it "in controver-

sies concerning the title or boundaries of land," meaning involving title or boundaries directly in issue and directly affected by the judgment. In *Skipwith v. Young*, 5 Munf. (Va.) 276, it is held that no appeal lies from an action of trespass where the damages are below \$100, "notwithstanding it appears from the record that the right to erect the mill was drawn in question." In that case the court defined "the matter in controversy" as "that for which the suit is brought, not that which may or may not come in question." Trespass is only for money recovery. But it is said that where the plea of not guilty only is used there is no appeal, but where *liberum tenementum* is the plea title of land is involved. I answer that defense of superior title or right in the defendant may be given in evidence under not guilty. Citations in *Dickinson v. Mankin* on page 434 of 61 W. Va., 56 S. E. 824; 21 Ency. Pl. & Prac. 832. If title can be relied on under the general issue as well as under the plea of *liberum tenementum*, what difference that this plea is in? It does not change the nature of the action. It is still the fact that the action is only one for invasion of present possession, involving only right to *present possession*, not *title*. The theory of this difference of plea will not do. There was such a plea in *Skipwith v. Young*, yet the court held that title was not involved. And in *Clark v. Brown*, 8 Grat. (Va.) 549, the court, asserting that title is not involved so as to give appeal in trespass, said that "notwithstanding the imposing form in which the questions (right to land) were there presented, and although it was argued and authorities adduced to prove that a verdict and judgment in an action t. c. f. in which the pleadings put the freehold in issue were conclusive of the right and could be pleaded by way of estoppel, the court determined that as the damages were less than \$100 the defendant could not appeal." Now, I say that this view of the question was taken in *Greathouse v. Sepp*, 26 W. Va. 87, and *Miller v. Navigation Co.*, 32 W. Va. 49, 9 S. E. 57. Those cases give the prior Virginia cases that construction. So do the cases of *Umbarger v. Watts*, 25 Grat. (Va.) 177, and *Buckner v. Metz*, 77 Va. 125. The *Hutchinson Case*, supra, holds that to give appeal title to land must be directly in question. So we said in *McClaugherty v. Morgan*, 86 W. Va. 193, 14 S. E. 992. Judgment in trespass would bar a second action of trespass; but not a writ of right when it prevailed, or ejectment, now a real action, now substituted for the writ of right. Ejectment once did not settle title, but only present possession, and was no bar to a writ of right. Now ejectment is a real action in place of the abolished writ of right. And now judgment in trespass does not bar ejectment. Ejectment requires ouster; not so for trespass. "Trespass cannot be employed as

a substitute for ejectment." *Sedgwick & Walt, Trial of Land Titles*, §§ 93, 178. Such is the law in the Virginias, whatever it is elsewhere.

(67 W. Va. 639)

TOTTEN v. POCAHONTAS COAL & COKE CO. et al.

(Supreme Court of Appeals of West Virginia. May 17, 1910.)

(Syllabus by the Court.)

1. DEEDS (§ 124*)—CONSTRUCTION—NATURE OF ESTATE.

A deed whereby the grantor, for a small money consideration and "a good and peaceable life maintenance," bargains and conveys to his wife and infant children all his real and personal estate, but which contains no words of limitation, and which at common law would not have passed to the grantees a greater estate than one for the life of the grantor, will not now, by virtue of section 8, chapter 71, Code 1906, pass a fee simple estate if the contrary intention appears.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 124.*]

2. DEEDS (§ 134*)—RESERVATIONS—POWER TO CONVEY.

Where in such deed the grantor after the premises, and in express terms retains the legal title to the land granted, and in himself and wife, one of the said grantees, upon certain contingencies and conditions stipulated therein, the power to sell and convey said land, a subsequent deed by him and his wife to a third party, made in execution of the right and power so reserved, reciting the occurrence of said contingencies and conditions, will pass good title to the land to such third person, and operate as a defeasance of all right and title which vested immediately in the grantees in said former deed, or that on the death of the grantor but for the execution of such power might have vested in them by virtue of the grant or by virtue of the subsequent provision thereof that "the division of this deed, shall at the death of said T. K. Totten be made equal between his wife, and all of the children now surviving and those that may survive."

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 134.*]

3. DEEDS (§ 134*)—CONSTRUCTION.

In the construction of such deeds the rules against repugnancy of terms and restraints upon alienations, applicable to deeds granting estates in fee simple have little, if any, application.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 134.*]

Williams and Brannon, JJ., dissenting.

Appeal from Circuit Court, McDowell County.

Suit by Major Henry Totten against the Pocahontas Coal & Coke Company and others. Decree for plaintiff, and defendant Coke Company appeals. Reversed, and bill dismissed.

A. W. Reynolds, J. S. Clark, and Anderson, Strother & Hughes, for appellant. Chapman & Gillespie and A. S. Higginbotham, for appellees Totten and others. Bernard McLaugherty, for appellee Lambert.

MILLER, J. This is a suit for partition of four several tracts of land in Pocahontas county. Plaintiff alleges that he is the owner of an undivided one sixth thereof; Victoria Totten of another sixth; the defendants Effler and Belcher, jointly of a one twelfth, and George W. Lambert of another twelfth, together constituting the one sixth conveyed to W. L. Totten; and the Pocahontas Coal & Coke Company, of three sixths undivided interest therein, constituting, as the bill alleges, the one sixth originally conveyed to Matilda J. Totten, and the two sixths conveyed to Walter C. Totten and Boyd M. Totten, deceased, infant children of T. K. and Matilda J. Totten, who died subsequent to the conveyance thereof to them and inherited from them by their father, said T. K. Totten.

The Pocahontas Coal & Coke Company denies that plaintiff and its co-defendants, alleged to have such interests in said land, have in fact any interest therein. On the contrary it alleges that by deed from the said T. K. Totten and Matilda J. Totten, February 24, 1902, made in execution of the power of sale and rights reserved to them in a deed of September 5, 1889, and now calling for our construction, it acquired and now owns the entire and exclusive right and title to said land, and that plaintiff and others who would have the same partitioned in this suit have absolutely no interest therein entitling them to partition.

The decree appealed from granted partition as prayed for.

By deed of September 5, 1889, upon which the conflicting claims of the parties depend, the said T. K. Totten, in consideration of one hundred dollars, receipt of which is therein acknowledged, and "the further consideration of a good and peaceable life maintenance, * * * bargained and conveyed" unto the said "Matilda J. Totten, his wife, and Wm. L. Totten, Major H. Totten, Boyd M. Totten, Walter C. Totten and Victoria Totten" all of his estate real and personal, particularly described, including the land which the bill seeks to have partitioned. The deed recites that certain option contracts were outstanding for certain of the tracts conveyed, and provides that if the lands covered thereby should thereafter be sold and conveyed pursuant to said contracts, then the purchase money therefor should be thereby conveyed. The deed also contains a covenant on the part of the grantees binding them "to pay all debts made by the said T. K. Totten for the purchase of goods north or elsewhere, also a fee to D. E. Johnston." But the important provisions thereof calling for construction, and the one upon which the rights of the parties to the controversy mainly depend, are as follows:

"And the said T. K. Totten claim and retain the power in this deed, if the family ever wants to move from the premises or if the said T. K. Totten & wife think they can better their situation then they shall be vested

with the right and power to sell and convey anything embraced in this deed, that is to say, as long as the said T. K. Totten is living, and the said T. K. Totten does vest in himself the legal title to sell or dispose of anything or any part of any land or lot mentioned in this deed by the consent of his wife, if the family ever become needy of anything, and it is his opinion that it is advisable to do so.

"The division of this deed, shall at the death of the said T. K. Totten be made equal between his wife, and all of the children now surviving and those that may survive."

The Pocahontas Coal & Coke Company, appellant, by its counsel, contends that taken by its four corners and applying the legal rules of construction, and having due regard to the rules of property, this deed invested in the grantees, not an absolute fee simple title, but an equitable estate or title for the life of the grantor, subject to a reserved power of alienation, and in case of failure to exercise this reserved power, the complete legal title to vest in the grantees and their survivors, and the survivors of them, upon the death of the grantor. The claim of appellees on the other hand is that the provisions of the deed reserving in the grantor legal title to sell and dispose of the land granted by the premises upon the several conditions named, and for the final disposition of the land at the death of the grantor, are repugnant to and inconsistent with the estate granted, or intended to be granted, and therefore void, and that an estate in fee simple absolute was thereby invested in the grantees in present. We have thus presented squarely the controlling issues in the case.

It is conceded on both sides that the polar star that should guide us in the construction of deeds as of all other contracts is, what was the intention of the party or parties making the instrument, and when this is determined, to give effect thereto, unless to do so would violate some rule of property. This rule has been often declared by this court. *Gibney v. Fitzsimmons*, 45 W. Va. 334, 82 S. E. 189; *Uhl v. Railroad Co.*, 51 W. Va. 106, 41 S. E. 340, and cases cited. In the latter case Judge Brannon says: "As to wills the rule has ever been that regardless of form or orderly parts, we must look at the real intention; but this has not been the case in the construction of deeds. Deeds have orderly parts, technical words of precise legal signification, and in times gone by those parts and words, and the strict rule of construction of them, have been rigorously observed often defeating the manifest intention. Modern construction, however, has leaned towards the intention, overriding mere form and technical words, and nowadays it may be said that the intention must rule the construction in deeds as well as in wills. *Humphrey v. Foster*, 13 Grat. (Va.) 653; *Mauzy v. Mauzy*, 79 Va. 537; *Lindsey v. Eckels* (Va., 1901) 99 Va. 668, 40 S. E. 23, show this to be the rule

in Virginia; and *Hurst v. Hurst*, 7 W. Va. 289; and *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 266; *McDougal v. Musgrave*, 46 W. Va. 509, 33 S. E. 281, and *Bank of Berkeley Springs v. Green*, 45 W. Va. 171, 174, 31 S. E. 260, show this to be the rule in West Virginia."

On behalf of appellees it is said that one of the rules of property well established is that "stipulations, reservations, exceptions, or conditions, in a deed, which are inconsistent with, or tend to depreciate or destroy, the estate or interest granted, are void," and that repugnant words, clauses or conditions must be made to yield to the main purposes of the grant. *Riddle v. Town of Charlestown*, 43 W. Va. 796, 28 S. E. 831; *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 266; *Uhl v. Railroad Company*, supra; *Chapman v. Coal & Coke Co.*, 54 W. Va. 193, 46 S. E. 262. That another rule, of ancient origin, is that against restraints on the power of alienation. This rule is perhaps nowhere better stated than by the Supreme Court of the United States in *Potter v. Couch*, 141 U. S. 296, 11 Sup. Ct. 1005, 35 L. Ed. 721, as follows: "The right of alienation is an inherent and inseparable quality of an estate in fee simple. In a devise of land in fee simple, therefore, a condition against all alienation is void, because repugnant to the estate devised." Other cases relied on and stating and applying these rules are *McClure v. Cook*, 39 W. Va. 579, 20 S. E. 612; *Steib v. Whitehead*, 111 Ill. 247, 251; *Pynchon v. Stearns*, 11 Metc. (Mass.) 804, 45 Am. Dec. 210; *De Peyster v. Michael*, 6 N. Y. 407, 57 Am. Dec. 470; *Mandlebaum v. McDonnell*, 29 Mich. 78, 18 Am. Rep. 61; *Anderson v. Cary*, 36 Ohio St. 506, 38 Am. Rep. 602; *Maker v. Lazell*, 83 Me. 562, 22 Atl. 474, 23 Am. St. Rep. 795; *Latimer v. Waddell*, 119 N. C. 370, 26 S. E. 122, 3 L. R. A. (N. S.) 668; *Bouldin v. Miller*, 87 Tex. 359, 28 S. W. 940; *White v. Dedmon* (Tex. Civ. App.) 57 S. W. 870; *Jones v. Port Huron Co.*, 171 Ill. 502, 49 N. E. 700; *Murray v. Green*, 64 Cal. 363, 28 Pac. 118; *Oase v. Dwire*, 60 Iowa, 442, 15 N. W. 265; *Miller v. Denny*, 99 Ky. 53, 34 S. W. 1079; *Pritchard v. Bailey*, 113 N. C. 521, 18 S. E. 608; *Teany v. Maina*, 113 Iowa, 53, 34 N. W. 953; *Maynard v. Polhemus*, 74 Cal. 141, 15 Pac. 451; *Ray v. Spears*, 64 S. W. 413, 23 Ky. Law Rep. 814; *Hardy v. Galloway*, 111 N. C. 519, 15 S. E. 890, 32 Am. St. Rep. 828; *McDaniel v. Puckett* (Tex. Civ. App.) 68 S. W. 1007; *Blair v. Muse*, 88 Va. 238, 2 S. E. 31; *Durand v. Higgins*, 67 Kan. 110, 72 Pac. 567; *Hamilton v. Jones*, 32 Tex. Civ. App. 598, 75 S. W. 554; *Pritchett v. Jackson*, 103 Md. 696, 63 Atl. 965; *McDonald v. Jarvis*, 64 W. Va. 62, 60 S. E. 990; *Brady v. Fuller*, 78 Kan. 448, 96 Pac. 854.

It would not be profitable, or within the limits of judicial opinion, to attempt to quote from or to analyze these cases, in order to show their applicability or inapplicability to the case we have here. This gen-

eral observation, however, may be made with reference to all or substantially all of them, namely, that these rules which they declare and in some cases apply are applicable to deeds granting estates in fee simple absolute.

The proposition for which these cases are cited is not controverted by the appellant, but the application of them to the case in hand is controverted. We must return then to the pivotal question in the case, namely, what estate was and was intended to be granted by the deed of September 5, 1889? If a fee simple estate the plaintiff should prevail, and the decree below should be affirmed.

As we have seen the rules of construction not only permit, but require us to look to the whole instrument. See on this subject in addition to cases cited, 2 Devlin on Deeds, § 836; 1 Sheppard's Touch. 50 et seq. In the premises of the deed of September 5, 1889, the grantor "bargained and conveyed * * * all of his estate both personal and real," without any words of limitation, sufficient we may say, under section 8, chapter 71, Code 1906, if unaffected by its subsequent provisions, to pass the fee simple or the whole estate which the grantor had the power to dispose of. That section says such a deed shall have that effect "unless a contrary intention shall appear by the will, conveyance or grant." At common law, prior to the original enactment of this section, such a deed would have been construed to pass no greater estate than one for the life of the grantor or testator. *Markells v. Markells*, 32 Grat. (Va.) 544, 557, and cases cited; 2 Minor (4th Ed.) 915, 916. We have here then a deed, which but for the statute, would not pass a fee simple estate. This statute by its very terms is not to have the effect of passing such an estate if the contrary intention appears. Now when we look to the provisions of the deed of September 5, 1889, following the words of bargain and conveyance, we see that the grantor plainly did not intend to grant a fee simple estate, for in terms too plain to call for interpretation he specifically reserves or excepts the legal title, and the power of sale, and upon the conditions named therein, not a naked power, but one coupled with an interest, for there is the provision for his support and maintenance during life. The power of sale reserved was not without restrictions or limitations, for the grant was to Matilda J. Totten, wife, and the five children named, and the consent and joinder therein of Matilda J. Totten, one of the grantees, was by the provisions of the deed, necessarily required in any valid deed by the grantor. The plain purpose of this deed was to provide for the support and maintenance of the grantor and his family, by investing in his grantees during his life some equitable right or title, subject to his reserved power of sale and disposition of the property, with the

consent of his wife. While the general rule applicable to grants of estates in fee simple is that conditions repugnant to a grant are void, nevertheless, according to the modern authorities, it may be necessary to look to the conditions in a deed to find out plainly what estate is or is intended to be granted. *McDougal v. Musgrave*, 46 W. Va. 509, 33 S. E. 231; *Gay v. Walker*, 36 Me. 54, 58 Am. Dec. 734; *Bassett v. Budlong*, 77 Mich. 338, 43 N. W. 984, 18 Am. St. Rep. 404; *McClure v. Cook*, 39 W. Va. 579, 20 S. E. 612; *Triplett v. Williams*, 149 N. C. 394, 63 S. E. 79; *Varner v. Rice*, 44 Ark. 236; *Johnson v. Reeves*, 48 How. Prac. (N. Y.) 505; *Horn v. Broyles* (Tenn. Ch. App.) 62 S. W. 297; *Bouton v. Doty*, 69 Conn. 531, 37 Atl. 1067; *Sadler v. Taylor*, 49 W. Va. 104, 38 S. E. 583. These authorities, and many others that might be cited, hold, that in determining what estate or interest is granted, the habendum of a deed, as well as other parts of the instrument, may be looked to, as enlarging, explaining, or qualifying the premises. This rule was applied in *Gay v. Walker*, in construing a deed requiring the land granted to remain common and unoccupied; and in *McDougal v. Musgrave*, in the construction of a deed reserving a life estate in the land granted; and in *Triplett v. Williams*, holding the granting clause of a deed to have been modified by the habendum, and that the grantee took a life estate, with remainder to her children, such being the intention of the parties; and in *McClure v. Cook*, where the grant provided for support and maintenance of the grantor, and restraining alienation without his consent, the court holding such restraint to be for the protection of the interests of the grantor, and good as against the creditors of the grantee; and in *Bouton v. Doty*, where the deed conveyed a fee estate subject to a life estate in the grantor, reserving to him the right to occupy and use the premises as fully and freely as he might do if the fee simple title remained in himself, with full power to mortgage the premises, and raise money for his own personal benefit at any time he might desire for and during his natural life, and in which case it was held, that the grantor thereby retained the right to mortgage the fee, and not merely his life estate, and that the reservation of the power was valid. The court in this case, referring to 2 Washb. on Real Property (2d Ed.) p. 314, says: "A power of this kind can be created by deed as well as by will, and in a deed it can be reserved to the grantor as well as granted to another."

The intention of the grantor in the deed involved here being plain, and not being competent for reasons given to pass a fee simple estate to the grantees, the rules against repugnancy and restraints upon alienation, applicable to grants of estates in fee simple, can have but little, if any, application. Totten had the absolute property in the land at

the time of the conveyance. He placed no restraint upon his grantees in the alienation of such estate as was granted.

Two cases, which we regard pointedly applicable to the case here, are *Blanchard v. Morey*, 56 Vt. 170, and *Hardy v. Clarkson*, 87 Mo. 171. In the first case the conditions of the deed were: "That the said Wm. C. and John Morey, Jr., are not to have any right or title whatever to the above described premises as long as we or either of us live; and the above deed is not to be binding upon us or either of us if in any case we should want or need to sell a part or all of said real estate in order to maintain us, and the above deed is to be null and void in such case and we are to have the entire control of the above premises during our natural lives." The deed was in form a grant of an estate in fee simple. While commenting upon these apparently repugnant provisions of the deed the court says: "But a deed should be interpreted most favorably for its own validity and for the effectuation of the design of the grantors, where that is plainly expressed or can be collected, or ascertained from the deed, unless it is in conflict with some rule of law." "The intent is to be derived upon view and comparison of the whole instrument. We think the grantors' intent in this deed, though clumsily expressed, yet fairly collectible and ascertainable from it as a whole, was to convey the premises in fee, conditioned upon a right of possession and use in the grantors and the survivor of them during life, and of being supported, so far as needed in addition and suitable to their condition in life, by the grantees; with the further right to the grantors to sell and convey for their necessities in case of failure to receive support from the grantees. *Sherman v. Dodge*, 28 Vt. 28. The right to support and to sell for their necessities was a provision in the nature of a condition of absolute defeasance. If the grantees wished the conveyance to become absolute, they were bound to see that no occasion should arise for the grantors to sell for their necessities. But a court of equity will seek to avoid a forfeiture." In this case the grantor in place of making an absolute sale under the power executed a mortgage, which gave right of redemption to the grantees, but the court said at page 174: "If John, Sr., had sold absolutely instead of mortgaging, under a necessity for support, the grantees in this deed of 1857 would have had no remedy." *Hardy v. Clarkson* is a still stronger case. In that case Hardy conveyed the land to Feazel, as trustee of Mary Hardy, his wife, and to children named, the last two of which were survivors and plaintiffs in the suit. The consideration recited in the deed to the trustee was, money belonging to Mrs. Hardy and her said children, amounting to \$4,991, which the deed recited Hardy had borrowed from the trustee, and to secure the payment of which he had executed the conveyance

of the land involved, and certain personal property therein mentioned, which said property said trustee was "to have and to hold for the separate use of said Mary and her said children forever, free from all claims and demands of all and every nature whatever, subject to the covenants hereinafter contained, which, on the part of the grantor, was to warrant the title to the trustee and to hold him harmless from all damages arising from the execution of the trust, and which said covenants therein, on the part of said trustee, Wm. Feazel, were: (1) That he will permit the land conveyed, 'and personal property so bargained and sold,' to remain in the possession, and under the control of the grantor so long as he shall live. (2) And then in possession of his wife Mary Hardy, if she survive her husband, so long as she should live. (3) After her death to divide and deed the real estate, in equal proportions, to Margaret Jane, Virginia W., Joseph, Robert A., and Daniel Hardy, and the personal property and its increase to be divided in equal proportions among the above named beneficiaries. (4) That upon the written direction or command of the aforesaid Mary Hardy, at any time, the said party of the second part shall make and execute deeds, bills of sale, and other assurances, to her, the said Mary, or to any other person she may direct, for a part or all of said property, and the said party of the second part covenants faithfully to perform said trust." Hardy and wife entered into an agreement with Clarkson, as trustee for his wife, whereby they agreed to convey a part of said lands for the consideration named, to be paid to the said Mary Hardy, reciting there that "that this agreement is made by said Joseph Hardy and wife, in virtue of any and all interest they have, or may have, in said lands, and also in virtue of the powers invested in said Mary Hardy by the deed aforementioned from Joseph Hardy to Wm. N. Feazel; and the said Mary Hardy, in execution of said powers, hereby directs, requests and commands said William N. Feazel, and all persons claiming or holding any right, title, or interest, to said lands under or through said Feazel, to convey and release the same to said Charles Clarkson, trustee of his wife, Charlotte, as aforesaid, and the said Mary Hardy hereby appoints all title, uses, or interests under her control, by virtue of said powers or otherwise, to said Charles Clarkson in trust as aforesaid." The suit was ejectment, and one of the questions was whether said contract was a valid execution of the power of sale, and whether the decree of the St. Louis Land Court divesting the legal title out of Feazel, trustee, and investing it in Clarkson, as was adjudged by the lower court, vested the legal title in Clarkson. The Missouri court, affirming the lower court, said: "The execution and exercise of the power of sale by the wife, at any time, would defeat alike the

right of use and enjoyment as conferred upon or reserved to the grantor, and prevent the estate from vesting, by way of remainder, in the children. It is only in the event of the death of the grantor and of his wife, Mary, without executing the power of sale, that the children were to take and to receive deeds from the trustee. These were the conditions and events upon which the remainder is contingent to the children, and upon the happening of which it was to spring up, to vest in them. The legal title being in said trustee, a deed from him, made under the written direction of the wife, would be a complete exercise and execution of the power, and would pass the fee to the purchaser, and be to him an adequate defence in the action of ejectment. *Norcum v. D'Oench*, 17 Mo. 98; *Rubey v. Barnett*, 12 Mo. 3 [49 Am. Dec. 112]."

The deed from T. K. Totten and Matilda J. Totten to the Pocahontas Coal & Coke Company, of February 24, 1902, which recites the occurrence of the contingencies and conditions upon which the grantors by the terms of the deed of September 5, 1889, reserved the right and title to convey said land, was we think a valid execution by them of the powers thereby lawfully conferred, and invested in the appellant company title to the land, and operated as a defeasance of any and all right and title immediately vested, or that might have become invested in the grantees, or the survivors of them, upon the death of the grantors, as provided therein.

The theory that the power of sale reserved in the deed of September 5, 1889, might be construed as a power of revocation, and the deed to appellant of February 24, 1902, as a valid execution of that power, has also been presented and elaborately argued by counsel. And the questions have also been presented and argued, whether there was ever a valid delivery to and acceptance by the grantees of the deed of September 5, 1889, and whether or not there could be an acceptance thereof by the infant children and grantees burdened with the obligations thereof to be performed on their part?

The conclusions already reached render it wholly unnecessary to consider these questions. The authorities cited and relied on, on the theory of a power of revocation, are *Waldron v. Coal Co.*, 61 W. Va. 280, 56 S. E. 492; *Ocheltree v. McClung*, 7 W. Va. 232; *Fitzgerald v. Fauconberge* (1729) *Fitz-Gibbon's King's Bench Reports*, 207; *Ricketts v. Louisville, etc., Ry. Co.*, 91 Ky. 221, 15 S. W. 182, 11 L. R. A. 422, 34 Am. St. Rep. 176; *Stamper v. Venable*, 117 Tenn. 557, 97 S. W. 812; *Funkhouser v. Porter*, 107 S. W. 202, 32 Ky. Law Rep. 676; *Pollard v. Union National Bank*, 4 Mo. App. 408; *Nichols v. Emery*, 109 Cal. 323, 41 Pac. 1089, 50 Am. St. Rep. 43. We would reach the same conclusion, whatever our answers to these ques-

tions might be, and it is therefore unnecessary to decide them.

Our conclusion is to reverse the decree below, and enter such decree here as the circuit court should have entered, dismissing the plaintiff's bill with costs to appellant in both courts. And it will be so ordered.

WILLIAMS and BRANNON, JJ. (dissenting). We shall not elaborate our dissent. We hold that the granting clause, using words of grant found in Code 1906, c. 72, §§ 1, 2, passed a full fee along with *jus disponendi*, that is, full right of alienation, and that the clause reserving to the grantor title and power of alienation is repugnant to the granting clause and void. By established rules of law, constituting through ages rules of property, a man cannot by deed grant and yet hold. It is a rule of law that, where in a deed clauses conflict, that first occurring shall prevail, especially shall the granting clause prevail over any inconsistent clause down lower in the deed. Principles touching the habendum and tenendum clause used in old common-law deeds apply to inconsistent clauses. In that late work, very valuable for its elaborate collection of cases and its annotations, 8 Am. & Eng. Ann. Cas. 444, is a full collection of cases on this intricate, technical subject. Washburn on Real Prop. says: "If there is a clear repugnance between the nature of the estate granted and that limited in the habendum, the latter yields to the former; but if they can be construed so as to stand together by limiting the estate, without contradicting the grant, the court always gives that construction, in order to give effect to both." Just here we would ask how in the world these two clauses can live together in the deed involved in this case? Referring to 8 Am. & Eng. Ann. Cas. 445: "If the habendum be found to be in conflict to the granting clause the habendum must give way upon the theory that the deed shall be construed most strongly against the grantor, in order to prevent a contradiction or retraction by a subsequent part of the deed, or a limitation being placed upon a right which had been granted and given in the premises." "This is a consequence of the rule already stated that deeds shall be construed most strongly against the grantor; therefore, that he shall not be allowed to contradict or retract by any subsequent part of the deed the gift made in the premises." 2 Lomax's Dig. 216. Justice Field says in Cowell v. Springs, 100 U. S. 57, 25 L. Ed. 547: "Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of property." Now, does not this second clause prohibit alienation? The power to alien cannot reside in the grantor and grantee both. If the grantor exercise the power of sale, does it not utterly subvert the es-

tate granted by the granting clause? 2 Bacon's Abridgment, 303, says: "If a man make a feoffment in fee, provided that the feoffor shall have the profits, this condition is void, because repugnant to the grant." The deed in this case, for valuable consideration in money paid, in obligation to support, and the assumption by the grantee of the grantor's debts, grants a fee simple, and in its second clause reserves right to legal title in the grantor, and gives him power to sell and pocket the proceeds. We need not be told that the grantor intends to retain the power of sale. He did so intend; but can this be allowed consistently with law? Intent is to prevail, but not against rules of law. We cite Blair v. Muse, 83 Va. 238, 2 S. E. 31, holding: "Unlimited power of alienation is an essential incident of a fee-simple estate. A deed conveys land to four grantors in fee simple. Subsequent clause giving one of them power to dispose of the whole at her pleasure is invalid; the rule being that, where two clauses in a deed are repugnant, the first shall prevail."

(87 W. Va. 582)

McDADE v. NORFOLK & W. RY. CO.

(Supreme Court of Appeals of West Virginia.
June 11, 1910.)

(Syllabus by the Court.)

1. CARRIERS (§ 247*) — RELATION BETWEEN PASSENGER AND CARRIER.

The relation of carrier and passenger does not terminate merely by the act of the passenger in alighting from the car at his destination. It continues until a reasonable time for the passenger to leave the railway premises has elapsed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 984-993; Dec. Dig. § 247.*]

2. CARRIERS (§ 283*)—ASSAULT ON PASSENGERS—JUSTIFICATION.

Provocation by insulting words alone does not justify an assault upon a passenger by the conductor.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 283.*]

3. CARRIERS (§ 319*)—ASSAULT ON PASSENGER—EXEMPLARY DAMAGES.

Exemplary damages are allowable in an action against a railway company for willful injury inflicted by the conductor upon a passenger without lawful justification.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1338-1345; Dec. Dig. § 319.*]

Error to Circuit Court, McDowell County.

Action by Allen P. McDade against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Wyndham Stokes and Graham Sale, for plaintiff in error. Strother, Taylor & Flanagan, for defendant in error.

ROBINSON, P. McDade purchased a ticket at Bluefield which, according to his testimony, entitled him to transportation by the

Norfolk and Western Railway Company from that place to Coaldale. The conductor says the ticket was one for Cooper. The train on which he took passage was not scheduled to stop at Coaldale. He was told by the conductor that for Coaldale he would have to get off at Elkhorn. That place was beyond Coaldale. The conductor collected fare for the additional distance. McDade says two additional fares were collected from him during the trip. After the train passed Coaldale and before it reached Elkhorn a stop was made because of an obstruction on the track. McDade naturally took advantage of the opportunity to leave the train there and save distance in returning to Coaldale. He alighted from the car and requested the conductor to return him the extra fare that he had paid. There are different stories in relation to the words that were spoken between McDade and the conductor at the time McDade was leaving the train. The conductor says that McDade called him a most insulting and provoking name after he alighted from the car. It is clear from the evidence—in fact it is conceded—that the only provocation that McDade gave the conductor, if any, was by the use of insulting words. While McDade was still near the train, on the premises of the railway, the conductor violently assaulted him and did him bodily injury. A jury found damages in favor of McDade against the railway company in the sum of \$400. From a judgment upon the verdict, the railway company has prosecuted the writ of error now before us.

McDade was still a passenger at the time he was assaulted if reasonable time in which to leave the premises of the railway company had not elapsed. Baldwin on American Railroad Law, 327; 4 Elliott on Railroads, § 1592; 2 Hutchinson on Carriers, § 1016; Moore on Carriers, 556. Whether such reasonable time had elapsed before the assault was a question for the jury which they have determined in the negative. An instruction properly submitted this question to them. The jury found from the facts and circumstances that the relation of carrier and passenger had not terminated. There is little conflict of evidence on this feature of the case, and that finding is undoubtedly warranted.

Since McDade had not ceased to be a passenger, the railway company was under an absolute contractual duty to protect him from wilful and unlawful injury at the hands of its servants. The railway company still owed him that duty at the time the injury was done to him. Insulting language alone did not justify the assault. The conductor made the carrier liable when he injured the passenger because of mere words spoken. "For wilful injury, inflicted upon a passenger of a common carrier by a servant of the latter, under provocation, by the exercise of force or violence, not justified under the prin-

ciples of the law of self-defense, the carrier is liable." *Teal v. Coal & Coke Railway Co.*, 66 S. E. 470.

The point is made that the damages found are excessive. The amount is indeed beyond the compensatory damages proved. But exemplary damages were allowable in this case. The assault was a breach by the carrier, through its conductor, of the duty which it owed to persons intrusting themselves to its care, at its solicitation and for compensation. *Claiborne v. Railway Company*, 46 W. Va. 363, 33 S. E. 262. The jury were told that they might mitigate the damages if they believed the provocation by the passenger's language warranted their doing so. There is conflict of oral evidence in reference to the use of insulting words. The jury saw the witnesses and were the judges as to the credibility of those witnesses. They were also the judges of the facts and circumstances given in evidence. The question of wantonness and wilfulness was within their province. There is no rule by which the amount of damages found can be said to be excessive.

The verdict is not contrary to the evidence. The trial court rightly applied the law to the case. There is no error in the judgment. It will be affirmed.

(67 W. Va. 585)

STATE ex rel. TULLY v. TAYLOR et al.
(Supreme Court of Appeals of West Virginia.
June 11, 1910.)

(Syllabus by the Court.)

INJUNCTION (§ 252*) — ACTION ON BOND — JUDGMENT—EVIDENCE.

When counsel fees and personal expenses are sought to be recovered as damages on an injunction bond, it is incumbent on the plaintiff to show either that injunction was the sole relief to which the suit pertained, or that the fees and expenses were paid out solely for the purpose of procuring a dissolution of the injunction as distinguished from expenditures for the hearing of the principal issues involved in the case.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 596, 597; Dec. Dig. § 252.*]

Error to Circuit Court, Braxton County.

Action by the State, for the Use of J. V. Tully, against A. T. Taylor and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

W. E. Haymond, for plaintiffs in error.
Alex Dulin and Linn & Byrne, for defendant in error.

ROBINSON, P. This suit is one for the recovery of damages on an injunction bond. The damages claimed are based on counsel fees and personal expenses alleged to have been paid out and contracted in securing a dissolution of the injunction in the case of *Taylor v. County Court*, 57 W. Va. 165, 50 S. E. 720. From a judgment on the injunction bond, by the verdict of a jury, based wholly

on counsel fees and expenses relating to that case, the principal and surety come with this writ of error.

It is settled law in this jurisdiction that counsel fees and personal expenses paid out in procuring the dissolution of an injunction are recoverable as damages in an action on the injunction bond. *State v. Medford*, 34 W. Va. 633, 12 S. E. 864; *State v. Corvin*, 51 W. Va. 19, 41 S. E. 211. Whatever may be said against the doctrine that such charges may be recovered as damages on an injunction bond, this court has approved that doctrine by the decisions in the cases cited.

When the sole relief sought is the injunction itself, of course the whole expenditure in defense of the suit relates to procuring the dissolution of the injunction awarded therein. The two decisions to which we have referred were in cases of that character. But where other matters are involved in the suit to which the injunction pertains, it is frequently impossible to reliably segregate counsel fees and personal expenses devoted to a dissolution of the injunction from the expenses of defending independent rights in the suit to which the injunction may be merely ancillary. When the injunction is only incidental to other relief sought, the general expenses of the case cannot properly be charged to the injunction. If, however, the expenditures in securing the dissolution of the injunction can be separated from those which would have been incurred on the suit in any event, they are recoverable as damages on the bond. When the right to an injunction is not the sole issue of the case, damages on the bond are limited to the expenses incurred in procuring the dissolution of the injunction as distinguished from the expenses incurred in the hearing of the principal issues involved. It is only when a hearing of the principal issues involved is absolutely necessary to dispose of the injunction that expenditures for the hearing of the case are proper to be allowed as damages caused by an injunction wrongfully issued. The clearest and soundest exposition in the premises is the following one: "Where the attorneys' fees and expenses are incurred in defeating the action, and the dissolution of the injunction is only incident to that result, they are not damages sustained by reason of the injunction. The reason is obvious: expenses for another purpose, and which would have to be incurred whether a preliminary injunction had been granted or not, cannot be set down to the account of the injunction. But where no other relief is asked for but an injunction, the expense to get rid of it on a final hearing, as well as on motion, may be recovered. If a temporary injunction is continued during the pendency of the trial, notwithstanding the objection of the defendant, thus obliging him to try the action in order to secure the dissolution of the injunction, counsel fees incurred for the trial may be recovered: but

not for services rendered before the entry of an order continuing the injunction." 2 *Sutherland on Damages*, § 525. So we hold that when counsel fees and personal expenses are sought to be recovered as damages on an injunction bond, it is incumbent on the plaintiff to show either that injunction was the sole relief to which the suit pertained, or that the fees and expenses were paid out solely for the purpose of procuring a dissolution of the injunction as distinguished from expenditures for the hearing of the principal issues involved in the case.

The case of *Taylor v. County Court* was not purely an injunction case. The injunction issued therein was only ancillary to the main relief sought by the suit. The principal object of that case was to establish the illegality of contracts made by the county court. The bill shows it to have been a suit to vacate those contracts. It struck directly at the invalidity. At any rate, the bill prayed for more relief than a mere injunction. It asked that the contracts be declared void. The injunction feature could have been wholly disregarded and a complete case would have remained. So it could not be called a pure injunction case. The bill made a case without injunction. The injunction prayed for and temporarily awarded was indeed ancillary to the main relief sought—the establishment of the invalidity of the contracts. The injunction was merely an ancillary feature of the case, the purpose of which was to effectuate more fully the main relief. The purpose of that injunction was to hold up payments under the contracts until it could be shown and decreed that those contracts were void. A decree declaring the contracts void would operate practically to end the necessity for the injunction. Thus we see that it was only incidental to the main purposes of the suit.

Though the injunction awarded in the case of *Taylor v. County Court* was only incidental to the principal issues therein, no distinction has been made in this action on the bond between the expenditures in relation to a dissolution of the injunction and those in relation to the general defense of the suit. Neither the declaration nor the proof introduced under it makes any distinction in this regard. As we have seen, it was incumbent on Tully, the relator plaintiff in this action, since the injunction was incidental to other issues, to show that the fees and expenses were paid out solely for the purpose of procuring a dissolution of the injunction as distinguished from expenditures for the hearing of the principal issues. Tully did not bring himself within this rule. The whole case makes no distinction as to particular expenses in regard to a dissolution and the general expenses of the suit to which the injunction was incidental. No direct effort was made by Tully to get rid of the injunction except by a hearing of the whole case. He set in solely to defeat a permanent in-

junction—to establish the validity of the contracts—and not to rid himself of the temporary restraint. He seems not to have minded the temporary restraint. Now, as far as is shown by the pleadings and proof, Tully spent no more than he would have spent if no temporary injunction had ever issued. The expense of a general hearing in the case cannot therefore be said to have been caused by the injunction. The principal and surety in the injunction bond are not liable for costs and charges which would have been incurred in any event—for charges which the injunction did not bring about. The case might have been different if Tully had made a direct effort to get rid of the injunction that issued against him. Instead of such effort he only sought to defeat the entry of a decree declaring the contracts void and pronouncing a permanent injunction. He made no effort to defeat the preliminary injunction except by a final hearing of the cause. It does not appear that such hearing was absolutely necessary to a dissolution, or that the expenses for which he sues were other than those that would have been spent if no temporary injunction had ever issued.

The judgment is erroneous. It will be reversed, and the verdict set aside as contrary to law and the evidence. The demurrer to the declaration will be sustained, with leave to amend if the plaintiff is advised so to do.

(67 W. Va. 321)

FULTON v. RAMSEY et al.

(Supreme Court of Appeals of West Virginia.
March 29, 1910. Rehearing Denied
June 11, 1910.)

(Syllabus by the Court.)

1. APPEARANCE (§ 24*)—SERVICE OF PROCESS—WAIVER OF DEFECTS—APPEARANCE.

Though an appearance in a cause, for any purpose other than to take advantage of defective execution or nonexecution of process, constitutes a waiver of defects in the service of process, the purpose of such appearance must bear some substantial relation to the cause. In other words, it must be a purpose within the cause, not merely collateral thereto.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 118-143; Dec. Dig. § 24.*]

2. APPEARANCE (§ 9*)—GENERAL APPEARANCE.

A mere inquiry, as to whether a continuance can be taken, without waiver of service, or offer to move for a continuance, provided it can be done without such waiver, does not amount to a general appearance.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42-52; Dec. Dig. § 9.*]

3. APPEARANCE (§ 9*)—"GENERAL APPEARANCE."

A "general appearance" must be express or arise by implication from the defendant's seeking, taking, or agreeing to some step or proceeding in the cause beneficial to himself or

detrimental to the plaintiff, other than one contesting the jurisdiction only.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42-52; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3051, 3052.]

(Additional Syllabus by Editorial Staff.)

4. JUDGMENT (§ 299*)—CORRECTION—JUDGMENT BY CONFESSION.

Where no plea, demurrer, or answer is filed, and no resistance made by defendants to entry of the decree, nor any facts introduced by them not alleged in the bill, the decree is upon the bill taken for confessed, if there was an appearance, and the court could correct any error in it upon motion, under the express provisions of Code 1906, § 4036, notwithstanding the expiration of the term at which it was entered.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 299.*]

Brannon and Williams, JJ., dissenting.

Appeal from Circuit Court, Braxton County.

Action by Elwood D. Fulton against Joseph Ramsey, Jr., and others. Judgment for defendants, and plaintiff appeals. Affirmed.

W. E. Haymond, for appellant. Morrison & Rider, Lawrence Greer, Appleton D. Palmer, Benj. A. Richmond, and F. C. Nicodemus, Jr., for appellees.

POFFENBARGER, J. The sole question in this cause, namely, whether Joseph Ramsey, Jr., George J. Gould, and William E. Guy, nonresident defendants, proceeded against by order of publication, appeared herein, in the court below, by attorneys, so as to enable that court to render a personal decree against them, grows out of the operations of what is styled in an agreement, and popularly known, as "the Little Kanawha Syndicate," which agreement is dated December 2, 1901, and was signed by said Ramsey, Gould, Guy, and others. That syndicate seems to have been formed for the purpose of purchasing the Little Kanawha Railroad, large areas of coal lands and other properties in this state, and extending said railroad eastward to Elkins, for connection with the West Virginia Central Railroad, owned by Mr. Gould and his associates, and westward so as to connect with the Wabash Railroad, also owned by them; all with the view of giving said last-mentioned road an outlet to the Atlantic seaboard, developing the coal and timber lands along the connecting lines, and securing traffic for said railroad properties. By the terms of that contract, Ramsey, Gould, and Guy were made syndicate managers, with power to take the title to all syndicate property in their names and make binding contracts concerning the same, all other parties thereto being mere subscribers, without power of management or control. In anticipation of the launching of this enterprise, Mr. Edward D. Fulton had acquired an option on the Little Kanawha Railroad as well as the title to, and options upon, large areas

of coal and coal lands and other property in the counties of Braxton, Gilmer, and Lewis. Under certain agreements, and with intent to dispose of the same to the syndicate, he assigned the option on the railroad, at the option price, and assigned his coal and coal land options, and conveyed his coal and coal lands, at certain prices named in the assignments and deeds, to the St. Louis Union Trust Company, to hold as trustee for the syndicate. For some reason, the syndicate concluded to abandon its plan and sell all its property. Accordingly, it failed to carry out its contemplated arrangements with Fulton, and he brought this suit, in the circuit court of Braxton county, to compel specific performance of his alleged contract with the syndicate, claiming the right to compel its managers to accept a conveyance of 17,256.19 acres of land and a large purchase-money liability in his favor. An attachment was sued out on the ground of nonresidence of the defendants and levied on the land, so conveyed to the St. Louis Union Trust Company.

On the 1st day of December, 1908, the following order, relied upon by Fulton as showing a general appearance, was entered: "This day R. W. McMichael and John B. Morrison, attorneys practicing in this court, appeared and asked the court to permit them to appear specially for Joseph Ramsey, Jr., George J. Gould, and William E. Guy, as managers of the Little Kanawha Syndicate, and ask a continuance of this cause for thirty or sixty days to enable them to prepare their defense, or to determine whether they would desire to appear generally, and stating that they did not desire to appear generally for said parties at this time, but that they desired to move the court to continue the cause without appearance other than specially for the purposes of the continuance. The plaintiff, by his counsel, resisted the said motion to continue the hearing, and thereupon said counsel for said defendants Ramsey, Gould, and Guy announced that it was their desire to withdraw and not appear to the case, and thereupon counsel for plaintiff, and while said counsel for defendants were present, asked that the cause be submitted for hearing and accordingly the said cause was submitted for hearing." On the next day, a decree was entered, reciting service of process upon certain defendants and orders of publication as to Ramsey, Gould, Guy, and others, non-residents, and the order of attachment and orders of publication thereon. By it, the amount of the plaintiff's claim and the lands and other property were ascertained, and it was ordered that unless Ramsey, Gould, and Guy, or some one for them, should pay the plaintiff the sum (\$367,266.18) within 60 days, a special commissioner, appointed for the purpose, should sell all of the attached coal and coal lands, or enough thereof to pay said debt, interest, and cost. This was not a personal decree. On the 18th day of March, 1909, the plaintiff again appeared and filed

a deed, executed by himself and his wife, conveying the lands in question to the St. Louis Union Trust Company, as and for a tender of conveyance to the Little Kanawha Syndicate and its managers, and, deeming the order entered on the 1st day of December, 1908, sufficient to establish submission of Ramsey, Gould, and Guy to the jurisdiction of the court, by appearance, he asked a personal decree against them for the sum of \$371,922.83, the amount formerly ascertained and interest thereon, and the court entered it. On the 18th day of May, 1909, said defendants filed a petition, praying vacation of this decree, as one entered upon a bill taken for confessed, which petition was accompanied by affidavits, showing that McMichael and Morrison had never been authorized to enter a general appearance for them, and that said attorneys had had no intention of doing so. On reconsideration of the order of December 1, 1908, the court set aside said decree of March 18, 1909, and, from this decree, Fulton has appealed.

No plea, demurrer or answer having been filed, nor any resistance made by the defendants to the entry of the decree, nor any facts introduced by them, not alleged in the bill, the decree of March 18, 1909, was, in fact and law, as well as by profession, a decree upon the bill taken for confessed, if there was an appearance; and the court could correct any error in it, upon motion, under section 5 of chapter 134 of the Code of 1906, notwithstanding the expiration of the term at which it had been entered. *Watson v. Wigginton*, 28 W. Va. 533; *Steenrod v. Railroad Co.*, 25 W. Va. 133; *Bock v. Bock*, 24 W. Va. 586; *Hunter v. Kenedy*, 20 W. Va. 343.

This being true, the inquiries are whether there was an appearance in the cause, not merely in the court, for any purpose, and, if so, a general appearance, or one that must be deemed and regarded as a general appearance, notwithstanding the expressed desire that it be treated and held to be special, or one for a certain limited purpose and no other, and, if an appearance in the cause, whether it bound the defendants. The petition sought vacation of the decree upon the following grounds: (1) That the order entered on December 1, 1908, does not show a general appearance; and (2) that the attorneys McMichael and Morrison had no authority to enter such an appearance. It is accompanied by affidavits, showing not only want of authority in the attorneys to enter the appearance, but also the details of the transaction of December 1, 1908, substantially recorded in the order. Counteraffidavits were filed by the plaintiff, somewhat variant as to these details, from the statements in the affidavits, filed by the defendant.

Under the impression that a false recital of appearance can be reached only by bill in equity or a similar proceeding, the court below disregarded the affidavits and dealt only with interpretation of the order, reaching the

conclusion that it did not show an appearance in the cause. As we concur in that conclusion, we deem it unnecessary to enter upon any inquiry as to whether the affidavits, in so far as they show details of the transaction of December 1, 1908, not entered upon the record, might have been considered. If the recitals of the order can be contradicted or added to, we suggest, but do not decide, that a motion, under section 1 of chapter 134 of the Code of 1906, might be as available as a bill in equity. If such an error is one of fact, correction thereof is within the letter and spirit of said section, and the remedy there given has been successfully invoked and suggested, under somewhat similar circumstances. *Carlton's Adm'r v. Ruffner*, 12 W. Va. 297; *Watt v. Brookover*, 35 W. Va. 323, 13 S. E. 1007, 29 Am. St. Rep. 811; *Lumber Co. v. Lance & Co.*, 50 W. Va. 636, 41 S. E. 128; *Gunn v. Turner's Adm'r*, 21 Grat. (Va.) 382; 4 Min. Ins. 848; 2 Tuck. Comm. 328; *Powell*, App. Pro. § 116.

We think the order was nothing more than an inquiry, addressed to the court, for information as to what could be done by way of obtaining a postponement of action in the cause, without submitting to the jurisdiction of the court for all purposes, or a conditional, not an absolute and unqualified, motion for a continuance. The motion, as recorded, if it can be regarded as a motion, signified a desire for a continuance, if it could be had without a waiver of service of process upon the defendants, but distinctly declared unwillingness to ask or take a continuance, if it involved such a waiver. It does not say in express terms that a motion to continue was made. On the contrary, it says *McMichael and Morrison* asked the court to permit them to appear specially for their clients and ask a continuance, to enable them to determine whether they would desire to appear generally, and stated that they did not desire to appear generally at that time. It then says counsel for plaintiff resisted "said motion to continue." That means the motion or request made. It was not in terms a motion, and, read in the light of the protest, submitted along with it, it cannot be regarded as anything more, in substance and effect, than an offer to move for a continuance, if it could be done without waiving process, accompanied by a declaration of intent not to move at all, if such action involved waiver, and an immediate declaration of determination not to say or do anything more, after having been informed that a motion for a continuance, so made and described upon the record, would be in law a submission to the jurisdiction of the court.

We apprehend no dissent from the proposition that the establishment of the jurisdiction of a court, whether over the person or the subject-matter, must be affirmatively shown by the record. *Groves v. Grant County Court*, 42 W. Va. 587, 600, 26 S. E. 460. Something must be done to confer it. Jurisdiction of the person may be acquired by

implication, arising out of some act done, or by direct and positive acknowledgment thereof; but in either event, it should clearly appear. It ought to be reasonably free from uncertainty and doubt. A favorite statement of the rule, respecting the acquisition of jurisdiction by implication or waiver, is this: "By appearance to the action in any case, for any other purpose than to take advantage of the defective execution, or non-execution, of process, a defendant places himself precisely in the situation in which he would be if process were executed upon him, and he thereby waives all objection to the defective execution or nonexecution of process upon him." *State v. Coal Co.*, 49 W. Va. 143, 38 S. E. 539; *Lumber Co. v. Lance*, 50 W. Va. 640, 41 S. E. 128; *Layne v. Railroad Co.*, 35 W. Va. 438, 14 S. E. 123; *Blankenship v. Railway Co.*, 43 W. Va. 135, 27 S. E. 355; *Mahany v. Kephert*, 15 W. Va. 609; *Bank v. Bank*, 3 W. Va. 386. This is a declaration of a general principle, to be read in the light of the facts and circumstances under which it is applied, in seeking its true meaning. Some attention must also be paid to its terms. It must be an appearance for a purpose in the cause, not one merely collateral to it. In this state, litigants have put themselves within this rule, for the most part, by asking or accepting some sort of relief in the cause, consistent with the hypothesis of a submission and inconsistent with any other view, such as a continuance. No instance can be found in which a party has been held to have impliedly bound himself to submission, without having asked or received some relief in the cause or participated in some step taken therein. Mere presence in the courtroom when the case is called, or examination of the papers in it filed in the clerk's office, is not enough. Nor could a conversation with plaintiff's counsel or the judge of the court, about the case, be regarded as an appearance. No decision goes that far. Under this text in 3 Cyc. 504, "Any action on the part of defendant, except to object to the jurisdiction, which recognizes the case as in court, will amount to a general appearance," a long list of decisions is cited, but, in every one of them, something was done in the cause—some affirmative act was done to delay, speed, or defend the cause. In every instance the conduct, deemed a waiver, amounted to more than a mere inquiry or conversation about it. The test, according to a late decision of the federal Supreme Court (*Merchant's Heat & Light Co. v. Clow & Sons*, 204 U. S. 286, 27 Sup. Ct. 285, 51 L. Ed. 488), is whether the defendant became an actor in the cause. The instances of the assumption of the rôle of actor in a suit disclosed by the federal decisions, are such as the taking of a continuance; filing a demurrer to plaintiff's pleadings, without limiting it to the question of jurisdiction; filing a plea of intervention; pleading to issue or to the merits

in the first instance; or filing sets-off, counter-claims, or notices of recoupment. Broad as is this doctrine of waiver, it does not cover all acts done by a defendant. He may talk even to the court about the merits of the cause without subjecting himself to it. In *Citizens' Saving & Trust Co. v. Railroad Co.*, 205 U. S. 46, 27 Sup. Ct. 425, 51 L. Ed. 703, argument upon the merits of the cause was indulged in, at the hearing upon the sufficiency of the pleas to the jurisdiction, and this was relied upon as constituting a general appearance; but Mr. Justice Harlan, speaking for the court, said: "This is too harsh an interpretation of what occurred in the court below. There was no motion for the dismissal of the bill for want of equity. The discussion of the merits was permitted or invited by the court in order that it might be informed on that question in the event it concluded to consider the merits along with the question of the sufficiency of the pleas to the jurisdiction. We are satisfied that the defendants did not intend to waive the benefit of their qualified appearance at the time of filing the pleas to the jurisdiction." In *Pendleton v. Russell*, 144 U. S. 640, 12 Sup. Ct. 743, 36 L. Ed. 574, a receiver of a dissolved life insurance company appeared in the Supreme Court of the United States and prosecuted a writ of error to obtain a release of property, pledged to indemnify the sureties in a supersedeas bond, given upon a writ of error to a judgment against the company. That judgment was reversed and the case remanded to the circuit court, where, without summoning the receiver and without any appearance by him, another judgment was recovered in the action, which was filed as a claim against the assets of the company in the hands of the receiver and disallowed, on the ground that the court which rendered it had no jurisdiction of the receiver. From this judgment of disallowance, an appeal was taken to the Supreme Court of the United States, and it was there held that the prosecution of the writ of error by the receiver and the remanding of the case, at his instance, did not give the court below jurisdiction over him, and that the judgment did not bind the assets in his hands. In *Fairbank & Co. v. Cincinnati, etc., Ry. Co.*, 54 Fed. 420, 4 C. C. A. 403, 38 L. R. A. 271, the court held as follows: "Where a defendant appears specially for the purpose of moving to quash the return on the summons, the fact that, in such motion, it also prays judgment whether it should be compelled to plead, for the reason that it is a nonresident corporation, does not constitute a waiver of the objection to the service." These precedents amply sustain the view that something substantially beneficial to the defendant or detrimental to the plaintiff, relating to or affecting the progress of the cause, asked, done, or accepted by the former, is essential to the establishment of a waiver of process or service thereof.

There must be something more than a mere pretext for the claim of jurisdiction over him. He must either enter an appearance, ask some relief in the cause, accept some benefit as a step therein or do something from which the necessary implication of submission to the jurisdiction of the court over his person arises. "The principle to be extracted from the decisions on the subject as to when a special appearance is converted into a general one is that, where the defendant appears and asks some relief which can only be granted on the hypothesis that the court has jurisdiction of the cause and the person, it is a submission to the jurisdiction of the court as completely as if he had been regularly served with process, whether such an appearance, by its terms, be limited to a special purpose or not." 2 Ency. Pl. & Pr. 625. "The expression 'for any purpose connected with the cause,' however, is not to be taken as wholly unrestricted in meaning. The appearance must have some relation to the merits of the controversy, and the purpose must be to invoke some action on the part of the court having direct bearing in some way upon the question of the judgment or decree proper to be entered." *Bank v. Knox*, 133 Iowa, 443, 446, 109 N. W. 201. The general principle, upon which we rely, was applied by the Supreme Court of Massachusetts in *Lowrie v. Castle*, 198 Mass. 82, 83 N. E. 1118, under circumstances even more unfavorable to the defendant than those presented here. The nonresident defendant in that case, within 10 days after the return day of the writ, applied to the court for an extension of the time within which he could appear, in order that he might decide whether to waive the lack of proper service and voluntarily appear, or to insist upon his rights as a nonresident, and the court allowed such extension. After the expiration of the 10 days, but within the period of the extension allowed, he moved to dismiss the action, stating in his motion that he appeared only for the purpose of moving a dismissal, and the motion was sustained. The appellate court held it to be within the inherent power of the trial court to grant such an extension, without prejudice to the right to except to the jurisdiction, and affirmed the judgment of dismissal. In delivering the opinion of the court, Hammond, Judge, said: "It is to be borne in mind that this is not a case where a defendant, upon whom process has been duly served, and who, therefore, is within the jurisdiction of the court and liable to default if he does not seasonably appear, asks for delay. It is a case where a nonresident defendant who, for lack of service upon him, is not within the jurisdiction and cannot be brought within it, fearing lest the court may regard the service sufficient and default him, comes into court, and says, in substance, that he is in doubt whether to waive proper service and

voluntarily appear, or to insist upon his rights as a nonresident, and ask for time to decide. Certainly it is a part of the inherent power in a court to set a time within which the nonresident must make up his mind and act accordingly. And that was all the court did. The motions for dismissal were properly before the court." Against this express decision of a reputable and able court, under a state of facts less favorable to the defendant than those presented here, and other decisions, showing that something substantial must be asked or done by the defendant, relating to or affecting the merits of the cause, we have nothing but a generalization, founded upon, and, therefore, to be interpreted by, facts falling far short of those disclosed here, for the proposition that a mere offer by defendant to move for a continuance provided it can be done without a waiver of service, accompanied by his declaration of intention not to appear generally nor to ask or take such continuance, if it involved such waiver, and signification of his desire and determination to withdraw the request, for nothing but a request had been made, on being informed that such a motion would be a general appearance, is bound thereby. We feel amply justified, upon authority as well as upon reason and principle, in withholding our assent to it, and saying such action did not constitute a general appearance. If we could notice the fact, shown by the affidavits, but not by the order, that the court, with the assent of counsel for the plaintiff, agreed to take the request under advisement until the next morning, it would not alter our conclusion. That did not make it a motion for a continuance, nor constitute a continuance. It was only an agreement to further consider the conditional offer to move for a continuance.

In view of this conclusion, power to inquire whether McMichael and Morrison had authority to enter a general appearance, and whether the decree could be avoided for lack thereof, by motion or otherwise, becomes an immaterial question, and we refrain from discussion thereof.

Perceiving no error in the decree appealed from, we affirm it.

BRANNON, J. (dissenting.) The plain, real construction of the record is that Ramsey, Gould, and Guy asked a continuance, and thus appeared; but say that this is going too far. Then, we can say by the very letter of the record that they "appeared and asked the court to permit them to appear specially, and ask a continuance of this cause for thirty or sixty days to enable them to prepare their defense, or to determine whether they would desire to appear generally, and stating that they did not desire to appear generally for said parties at this time, but that they desired to move the court to continue the cause without appearance other than specially for the purposes of the continuance." Another

part of the record says that one of their counsel "proceeded to argue at some length the right to such continuance and appearance, and did move the court for leave to so appear specially and continue the case." When counsel for those parties argued for right to make such special appearance, the plaintiff resisted any continuance and asked that the case be submitted for decree, and counsel for Ramsey, Gould, and Guy then asked time "until next morning to determine what course they would pursue, the court not having acted upon the motion aforesaid; and counsel for plaintiff assented to said request, the court saying nothing, but tacitly assenting thereto; and later on the same day, within about half an hour, and before the court had taken any action, said Morrison, of counsel for said defendants, returned into court, and stated that they desired to withdraw and not appear in the case," and in the presence of Morrison the plaintiff submitted the case for decree. What is this in plain intent but a motion to continue? It was either an appearance or not one; and if any appearance, what but a motion for continuance? But say that is going too far. Then it was a motion, not denying jurisdiction, but recognizing a case in court, and asking relief; that is, asking from the court an order in the case giving leave to appear specially; and if such order be made, then to ask actual continuance. If leave had been granted, and a continuance had for 60 days, it would have been a general appearance. What difference that leave was not given? They moved for an order in the case, not denying the presence of a case or the jurisdiction or its power to make orders and decrees, but admitting that power. I will not argue in my own language that this is an appearance justifying a decree, but will cite authorities to sustain this position.

"If a party appear in a suit for any purpose other than to object to the legality of process or its service, it is a general, not a special, appearance, and dispenses with service of process." *Frank v. Zeigler*, 46 W. Va. 614, 33 S. E. 761.

"Procuring or Consenting to a Continuance.—Procuring a continuance of a cause operates a general appearance; and, likewise, an application by motion or otherwise for a continuance is a general appearance." 2 *Ency. Pl. & Prac.* 633. *Layne v. Railroad Co.*, 35 W. Va. 438, 14 S. E. 123.

"An appearance by attorney, so as to secure an extension of the time to plead or answer, is a general appearance, and defendants cannot thereafter have their appearance taken as special to plead to the jurisdiction." *Briggs v. Stroud* (C. C.) 58 Fed. 717.

"A defendant is also considered to have made a general appearance when he applies for or obtains leave to answer, or when he applies for or obtains an extension of time to answer." 3 *Cyc.* 507.

"The appearance by a party who asks a postponement until his attorney could arrive

is a general appearance, although the attorney, when he arrives, moves to quash the service as insufficient." *Epps v. Sasby*, 43 Ark. 545.

Justice Brewer said that the mere fact that a party proclaims or declares that his appearance is special does not make it so or convert what in law is a general appearance into a special appearance. *Burdett v. Corgan*, 28 Kan. 102. Also *Kaw Life Ass'n v. Lemke*, 40 Kan. 142, 19 Pac. 337. So *Grantier v. Rosecrance*, 27 Wis. 488. The nature of the appearance of this case makes it a general appearance.

"It is imperative that a party must occupy no ambiguous position. A party must either appear at a trial and abide the consequences, or not appear. He cannot occupy an uncertain status, partly appearing and partly not appearing." 2 Ency. Pl. & Prac. 593.

In the same volume on page 625 we find this: "The principle to be extracted from the decisions on the subject as to when a special appearance is converted into a general one, is that, where the defendant appears and asks some relief which can only be granted on the hypothesis that the court has jurisdiction of the cause and the person, it is a submission to the jurisdiction of the court as completely as if he had been regularly served with process, whether such an appearance, by its terms, be limited to a special purpose or not. Where a party appears in court and objects by motion to the jurisdiction of the court over his person, he must state specially the grounds of objection; by not so stating them his appearance will be construed a general one, although he moves to dismiss on that ground." Supported by *Belknap v. Charlton*, 25 Or. 41, 34 Pac. 758, and *Blackburn v. Sweet*, 38 Wis. 578. Here, I ask, how could the court make the order asked by the defendant if it had no jurisdiction, if there was no case? How could it do so except upon the hypothesis that the court had jurisdiction of the cause and person?

"I think a defendant may appear specially to object to the jurisdiction of the court, either over his person or the subject-matter of the suit, without waiving his right to be heard on the question in bank. But if, by motion or by other form of application to the court, he seeks to bring its power into action, except on the question of jurisdiction, he will be deemed to have appeared generally. Such application concedes a cause over which the court has power to act." *Porter v. Chicago*, etc., R. Co., 1 Neb. 15.

"The rule is this: If the defendant does anything, or takes any step in the case which can be fairly construed into an admission that the case is properly in court, he will be held to have waived not only defects in the process, but the process itself." *Cropsey v. Wiggenhorn*, 3 Neb. 108. So in *McKillop v. Harvey*, 80 Neb. 264, 114 N. W. 155.

"Acts Recognizing Case as in Court. In General.—Any action on the part of defend-

ant, except to object to the jurisdiction, which recognizes the case as in court, will amount to a general appearance." 3 Cyc. 504.

Any action recognizing case in court is a general appearance. *Lampley v. Beaver*, 25 Ala. 534.

Appearance for any other purpose than to question jurisdiction. 2 Ency. Pl. & Prac. 632 and 621; *Zobel v. Zobel*, 151 Cal. 98, 90 Pac. 191.

"If jurisdiction is essential to the granting of the relief sought, the appearance is general, regardless of the purpose or character of the appearance." *Winter v. Union P. Co.*, 51 Or. 97, 93 Pac. 931.

"In order to object to the jurisdiction of the court, either over the person or the subject-matter, a special appearance may be made, but if the appearance is for any other purpose, it will be considered general. An application for a continuance is an appearance, and waives defects in the service of process." *Ulmer v. Haitt*, 4 G. Greene (Iowa) 439.

An apt rule is this given in *Lowe v. Stringham*, 14 Wis. 225: "If a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection. *Caughy v. Vance*, 3 Chand. [Wis.] 315, 316; *Thayer v. Dove*, 8 Blackf. [Ind.] 567." Likewise *Security Co. v. Boston*, 126 Cal. 418, 58 Pac. 942.

The parties withdrew their appearance. How could they, if there had been none? But they had no consent of the court to withdraw. This is necessary. *U. S. v. Curry*, 6 How. 106, 12 L. Ed. 363. After such withdrawal, the appearance is not destroyed, but is still good for judgment. *Eldred v. Bank*, 17 Wall. 546, 21 L. Ed. 685; *Rio Grande Irr. Co. v. Gildersleeve*, 174 U. S. 603, 19 Sup. Ct. 761, 43 L. Ed. 1103; *Creighton v. Kerr*, 20 Wall. 13, 22 L. Ed. 309.

WILLIAMS, J., dissents, and concurs in this opinion.

Note by BRANNON, J. By chance I meet two cases bearing on the subject. In *Yale v. Edgerton*, 11 Minn. 271 (Gil. 184), the defendant, appearing specially, made a motion to set aside the summons, and later the amended summons, etc. These motions were both submitted to the court, and while under advisement, the time to answer being about to expire, the defendant obtained an order extending the time to answer, stating that he appeared specially. The court said: "To extend the time to answer is a favor which can only be granted in an action. And to ask a favor, an extension of time to answer on the merits, is a submission to the jurisdiction of the court. There is no protest in the act itself against the jurisdiction, as in a special appearance to vacate the summons."

In *Mulhearn v. Press Pub. Co.*, 53 N. J. Law, 150, 20 Atl. 790, was a motion to dismiss for want of service of process, and later time was given to demur or plead. The court held this grant of time to plead or demur was not a general appearance; and said that, if the motion for extension of time had been first made, it would have been an appearance. Remember that in our case there was no exception in any form to jurisdiction or denial that there was a suit in court.

(67 W. Va. 589)

TENNANT'S HEIRS v. FRETTS et al.
(Supreme Court of Appeals of West Virginia.
June 11, 1910.)

*(Syllabus by the Court.)***1. QUIETING TITLE (§ 7*)—REMOVAL OF CLOUD ON TITLE—RIGHT TO EQUITABLE REMEDY.**

Equity has jurisdiction, at the suit of an owner of land who is in possession thereof under a good legal title, to remove a cloud from his title by a decree canceling and expunging from the records of the county in which the land is situate a void deed, or writing, constituting a cloud upon, or menace to, his title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 14; Dec. Dig. § 7.*]

2. QUIETING TITLE (§ 7*)—REMOVAL OF CLOUD ON TITLE—JURISDICTION OF EQUITY.

The power of a court of equity to grant relief, in such case, is independent of any statute conferring jurisdiction, and rests on general equity principles and practice.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 14; Dec. Dig. § 7.*]

3. COURTS (§ 7*)—LOCAL ACTION—VENUE.

A suit to remove cloud and quiet title is local in its nature, and the jurisdiction of the court is determined by the situs of the land.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 14-31; Dec. Dig. § 7.*]

4. QUIETING TITLE (§ 52*)—DECREE—OPERATION.

The decree for relief in such suit operates generally, if not always, in rem, and need not be in personam.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 102; Dec. Dig. § 52.*]

5. JUDGMENT (§ 17*)—PROCESS TO SUSTAIN JUDGMENT—NONRESIDENTS—SUBSTITUTED SERVICE—JUDGMENT IN REM.

The statute (sections 11, 12, 13, c. 124, Code 1906) providing for service of process on a nonresident by publication, or by personal service out of the state, cannot authorize the rendition of a personal judgment or decree against a nonresident so served; but it does authorize any court, whether of law or of equity, to pronounce a judgment or decree binding in rem, in any case in which such court would otherwise be competent to do so, if the defendant were personally served within the state.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 26; Dec. Dig. § 17.*]

6. JUDGMENT (§ 17*)—PROCESS TO SUSTAIN JUDGMENT—SERVICE ON NONRESIDENT BY PUBLICATION—DECREE IN REM.

Equity may, upon service of process on a nonresident by publication, remove cloud from title to land within its jurisdiction by a decree binding only in rem.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 26; Dec. Dig. § 17.*]

Appeal from Circuit Court, Monongalia County.

Bill by the heirs of Peter Tennant against A. E. Fretts and others. Decree for complainants, and the mentioned defendant appeals. Affirmed.

W. G. Bennett and Goodwin & Reay, for appellant. Terence D. Stewart and Charles E. Hogg, for appellees.

WILLIAMS, J. This is an appeal by A. E. Fretts from a decree of the circuit court

of Monongalia county, made on the 19th of May, 1908, granting relief to plaintiffs upon a bill to remove cloud from title to land.

The following are the facts: On May 2, 1900, Peter Tennant executed to A. E. Fretts a writing under seal, which plaintiffs call an option, but which defendants insist is a contract of sale, agreeing to sell to him the "Pittsburg or River vein of coal" underlying 163 acres of land in Monongalia county at \$25 per acre. This writing was signed by both Tennant and Fretts, but was not acknowledged by Tennant. On the 4th of May, 1900, Fretts acknowledged it before a notary public in Pennsylvania, and on the same day, by writing indorsed on the back of the instrument, assigned his interest therein to Wm. Allison of Uniontown, Pa. He acknowledged this assignment also before a notary public in Pennsylvania. On the 22d of May, 1900, both the original contract and the assignment were recorded in Monongalia county, W. Va. Nothing was ever paid to Tennant on the contract, except the \$1 consideration recited in it. Peter Tennant died in August, 1904. On the 3d of November, 1905, his heirs sold the same vein of coal to Smith Hood, Jr., and Homer C. Price, for \$95 per acre, to be paid, one-third upon approval of title and acceptance of deed, and the balance in one and two years from acceptance of deed. Hood and Price discovered the Fretts contract on record, and refused to make payment until the rights of Fretts and Allison in the coal were determined. Thereupon the heirs of Peter Tennant brought this suit, praying to have the Fretts contract canceled as constituting a cloud upon their title. Fretts and Allison are both residents of Pennsylvania, and were both personally served with original process in that state. Allison did not appear; but Fretts appeared by counsel and demurred, answered, and filed a cross-bill praying for specific execution of the contract.

The first question presented is one of jurisdiction. Counsel for Fretts insist that the court is without jurisdiction to grant relief upon personal service of process upon defendants in Pennsylvania, which has no more effect than an order of publication, published in a newspaper. This question has never before been presented to this court for adjudication. If relief in such case cannot be decreed, it might often happen that a party would be without remedy. It is not within the sovereign power of a state to give extraterritorial effect to the decrees and processes of its courts, nor is there any means by which a resident of one state can be compelled to submit himself to the civil jurisdiction of the courts of another. Consequently, it follows that, unless the circuit court of Monongalia county had jurisdiction to grant relief by means of an in rem

decree, plaintiffs are practically remediless. The courts of Pennsylvania cannot give them relief, because a decree of the court of that state could not affect title to land in this state. *Wilson v. Braden*, 48 W. Va. 196, 36 S. E. 367; *Polindexter v. Burnwell*, 82 Va. 507; *Gibson v. Burgess*, 82 Va. 650; *Vaught v. Meador*, 99 Va. 569, 39 S. E. 225, 86 Am. St. Rep. 908; *Cooley v. Scarlett*, 38 Ill. 316, 87 Am. Dec. 298; *Fall v. Eastin*, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. Ed. —, 23 L. R. A. (N. S.) 924. The relief in this case must come through the direct operation of the decree upon the subject-matter, or not at all. It is not a case where the relief depends upon an act which a court of equity may compel a defendant to perform, such, for instance, as the execution of a deed in completion of a contract, or the surrender of title to land acquired in violation of trust or by some species of mala fides. In cases of that character the court having jurisdiction of the person of defendant, may grant relief by compelling the defendant to perform the act essential to accomplish it. The decree in such cases would be purely in personam, and while they could not directly affect real estate in another state, yet the relief could be obtained through the act of the party, even to the extent of conveying land in another state. In such case it is the act of the party that affects the land, not the court's decree. *Massie v. Watts*, 6 Cranch, 143, 3 L. Ed. 181; *Guerrant v. Fowler*, 1 Hen. & M. (Va.) 6; *Farley v. Shippen*, Wythe (Va.) 254; *Dickinson v. Hoomes*, 8 Grat. (Va.) 353; *Wilson v. Braden*, 48 W. Va. 196, 36 S. E. 367; *W. U. Tel. Co. v. Western & Atl. R. R. Co.*, 8 Baxt. (Tenn.) 54; *Mullen v. Dows*, 94 U. S. 444, 24 L. Ed. 207; *Wood v. Warner*, 15 N. J. Eq. 81. But in the present case the suit is to cancel, and expunge from the records of Monongalia county, a writing which constitutes a cloud upon plaintiffs' title to land in this state, and unless the decree of the West Virginia court can operate directly upon the subject-matter, in other words, unless the court can pronounce an in rem decree, plaintiffs are without means of relief. They are in possession of the land and have the legal title; there is nothing that a Pennsylvania court can compel defendants to do that will afford them relief. But counsel for appellant insist that a court of equity cannot pronounce an in rem decree in the absence of a statute authorizing it to do so, and that we have no such statute. We must admit that there is no statute conferring jurisdiction on courts of equity to make an in rem decree in suits to quiet title, and the action of the lower court must be sustained, if sustained at all, upon principles of general equity practice.

But can it be possible that a court of equity is powerless to grant relief by way of canceling a recorded writing which affects title to land within its jurisdiction, without

it can obtain jurisdiction of the defendant also? Is this the state of our law? Does equity never act except upon the person? Is a statute necessary to give equity jurisdiction to quiet title where it cannot get jurisdiction of the person of defendant? We do not think so. Equity has exercised jurisdiction to grant such relief, independent of statute, both in England and in this country, for more than a century. *Hayward v. Dimsdale*, 17 Vez. 111; *Grover v. Hugell*, 3 Russ. (Eng. Ch.) 428; *Ward v. Ward*, 3 N. C. 226; *Pettit v. Shepherd*, 5 Paige (N. Y.) 493, 28 Am. Dec. 437; *Apthorp v. Comstock*, 2 Paige (N. Y.) 482; *Shattuck v. Carson*, 2 Cal. 588; *Norton v. Beaver*, 5 Ohio, 178; *Groves v. Webber*, 72 Ill. 606; *O'Hare v. Downing*, 180 Mass. 16; *Ambler v. Leach*, 15 W. Va. 677; *Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959; *Smith v. O'Keefe*, 43 W. Va. 172, 27 S. E. 353. This power is inherent in courts of equity. It needs no statute to confer jurisdiction on courts of equity to quiet title, any more than to set aside a fraudulent conveyance or specifically enforce a contract for sale of land. It was the rigid rules of the common law, and strict adherence to former decisions, simply as precedents, that made courts of equity necessary, and ever since their formation it has been the boast of the chancellor that there is no right which has not a corresponding remedy. 1 Pom. Eq. § 108. One of the principal grounds of original equity jurisdiction rests on the fact that courts of law are not always adequate to afford the relief, and in any case where, according to the principles of natural justice, there is a right to be protected, or enforced, and the law has not provided an adequate remedy, equity takes jurisdiction. *Bowyer v. Creigh*, 3 Rand. (Va.) 25. We cannot say that equity is impotent in the present case to grant relief, simply because defendants are beyond the jurisdiction of the court and cannot be compelled to obey its process. Equity can remove a cloud from title to land within the court's jurisdiction without having before it the person of defendant. It has power to make a decree which may operate upon the subject-matter of the suit, notwithstanding such a decree is, in its nature, in rem. It would indeed be a deplorable condition if our law afforded no relief to a landowner who is in possession of his land under good and sufficient title, but which happens to be incumbered by some adverse claim, or lien of record, which had been discharged but not released. Such claims might never disturb his possession, but they are a menace to his title, and may greatly affect the selling value of his land. No citizen whose lands are thus affected can enjoy his rights of property to the full extent, so long as the *jus disponendi* is thus interfered with. Every state owes to its citizens the duty to protect the rights of property, as well as the persons, of its citi-

sens, and we think the laws of this state are ample to authorize the court to give relief in the present case.

The land is situate in Monongalia county, and this gave the court of that county jurisdiction. The subject-matter of the suit is local. *Cooley v. Scarlett*, 38 Ill. 316, 87 Am. Dec. 298. The suit could not have been brought in any other court. It is local in its nature, like the abating of a nuisance (*Miss. & Mo. R. R. Co. v. Ward*, 2 Black, 485, 17 L. Ed. 381) or the enjoining of an act which affects real estate (*Northern Ind. R. R. Co. v. Michigan Cent. R. R. Co.*, 15 How. 233, 14 L. Ed. 674).

The next question is, is the court authorized to grant relief in this case upon an order of publication against a nonresident? We think it is. Of course a court cannot pronounce a judgment or decree that will be binding on the person of the nonresident defendant, or that can have any force or effect whatever beyond the territorial jurisdiction of the court, upon other than personal service of process. The leading case of *Pennoyer v. Neff*, 96 U. S. 714, 24 L. Ed. 565, settles this principle. But where the proceeding is in rem, as upon attachment of property, or where the judgment or decree is to settle and determine the title to real estate within the court's jurisdiction, it is competent for the Legislature to provide for service of process by publication against a nonresident defendant. *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918; *Witten v. St. Clair*, 27 W. Va. 762. But counsel for defendant insists that the Legislature of West Virginia has not made any provision for an order of publication to be had in a suit in equity to remove cloud from title. This depends upon the construction to be given to sections 11, 12 and 13 of chapter 124, Code 1906. This chapter deals with process of the court, and the manner of service thereof; its scope is not confined to processes to be issued by any particular courts, or in any special suits, or actions. Section 2 of this chapter begins by saying, "Process from any court," etc. This applies to courts in chancery as well as courts of law. Sections 11, 12 and 13 provide for order of publication against nonresident defendants, and how the same shall be published. Section 13 provides that personal service on a defendant outside of the state shall have the same effect as an order of publication duly posted and published against him. These provisions must be considered as applying to a nonresident defendant in any action at law, or suit in equity, where the court has jurisdiction of the subject-matter of the action or suit, and can render a judgment, or decree, in rem. Section 13 closes as follows: "Upon any trial or hearing under this section, such judgment, decree, or order shall be entered as may appear just." While these provisions are not intended to confer equity jurisdiction in cases

not otherwise cognizable in equity, it clearly warrants the service of process by publication in any case where equity has jurisdiction of the subject-matter, and is not obliged to have the defendant personally in court in order to give the proper relief. If it be true that a statute is necessary to give equity jurisdiction to quiet title to land, or if it be true that equity can grant relief only by means of a personal decree, except when it is otherwise expressly authorized by statute, the above provisions for service of process by publication can have no application in the present suit. But we do not understand that equity jurisdiction, to pronounce a decree in rem, is dependent upon statute. *Pomeroy* in his work (*Eq. Juris.*) says: "The decrees in a court of equity may be made to operate in rem to the same extent and in the same manner as judgments at law." Vol. 1, § 135. It depends upon the character of the wrong, and the nature of the relief which the court is asked to grant, whether or not the decree must be in rem, or in personam. The most usual method of procedure in equity is by decrees which directly affect the person. But it seems to be an established rule, that if the subject-matter of the suit is local, and the relief sought is such that it requires the performance of no act by the defendant to give effect to the court's decree, it can make a decree which will operate directly upon the subject-matter.

The case of *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918, bears on this subject, and is cited in the briefs of counsel for both plaintiffs and defendant, as authority for their respective contentions. That was an action in the Circuit Court for the District of Nebraska to recover possession of land and quiet title. The plaintiff obtained judgment, and the defendant carried the case to the Supreme Court of the United States. As we understand the decision in that case, it settles no other principle than that a state has authority to provide, by statute, for the settlement of title to real estate within the state, in which a nonresident defendant may claim title or interest, and that such nonresident may be served by publication. It does not decide that a nonresident may not also be brought in, by publication, to answer a suit brought to quiet title to land, where the court has jurisdiction of such suit on principles of general equity practice, independent of a statute conferring such jurisdiction. There had been a decree or judgment in favor of Charles L. Flint against Michael Hurley and another, in the state court of Nebraska, adjudicating title to land as against the defendants who had been proceeded against by publication as nonresidents. The question was whether the judgment of the state court was res judicata upon privies to the original parties, in the ejectment suit subsequently brought to recover the same land in the United States court, and the Supreme Court held that the judgment of the state

court was binding on the nonresident. It is true that there was a statute of Nebraska authorizing suits to try title to land, upon publication, but that fact does not make that case decisive of the point in the present case. A number of cases are cited by Mr. Justice Brewer, who delivered the opinion of the court, both from the state courts and from the Supreme Court of the United States, all of which go no farther than to support the general doctrine that the states have power to provide for the settlement of title to lands within their territorial limits, and that the title, or interest, of a nonresident therein may be settled, and determined against him upon publication. The most of the cases on this point are from states which have, by statute, greatly enlarged the jurisdiction of equity, which was originally exercised only for the purpose of quieting title in favor of the owner of the legal title who was in possession. In many states the statutes have so enlarged the original equity jurisdiction as to enable the court to determine any question of title, whether legal or equitable, between conflicting claimants, and whether the plaintiff be in or out of possession. These statutes have been uniformly upheld by the Supreme Court of the United States. But we find no decision which denies the doctrine that equity has original jurisdiction to remove a cloud and quiet title to land, in a suit brought by the legal owner who is in possession. Equity, unless aided by statute, will not entertain such a suit under any other conditions, and when such conditions do exist, no statute is needed to confer jurisdiction.

It is true that in the case of *Hart v. Sansom*, 110 U. S. 151, 154, 3 Sup. Ct. 586, 588 (28 L. Ed. 101) it was held that a judgment of the state court of Texas, rendered upon a petition to recover land, and quiet title, wherein Hart had been proceeded against by publication, was not binding on him. But the court did not so hold because the state court was not authorized to render a binding judgment in such case upon publication, but because the allegations of the petition did not sufficiently set forth and describe the claim or interest of Hart in the land. The court in its opinion by Justice Gray, says: "The petition alleged that Wilkerson was in possession; and that the other defendants, except Hart, held recorded deeds, which were fraudulent and void, and cast a cloud upon the plaintiffs' title. But as to Hart, it did not allege that he was in possession, or was in privity with the other defendants, or that he held any deed, but only that he set up some pretended claim and title. And the verdict finds that he claimed the land, but had no title of record or otherwise therein. The judgment is that the plaintiffs recover the land of the defendants, and that the deeds mentioned in the petition be and are annulled and canceled, and the cloud thereby removed, and for costs; and execution is awarded for costs only, and not for

any writ or process in the nature of a writ of possession or habere facias.

It is difficult to see how any part of that judgment (except for costs) is applicable to Hart; for that part which is for recovery of possession certainly cannot apply to Hart, who was not in possession; and that part which removed the cloud upon plaintiffs' title appears to be limited to the cloud created by the deeds mentioned in the petition, and the petition does not allege, and the verdict negatives, that Hart held any deed."

The court did not even intimate that Hart would not have been bound, if the claim which he afterwards asserted in another suit had been sufficiently pleaded in the first suit, involving the same land.

The case of *Roller v. Holly*, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520, is more directly in point than either of the other cases above cited. In that case two points arose: (1) Whether or not process from a court of Texas served upon a defendant residing in Virginia on December 30, 1890, to appear in Limestone county, Tex., on January 5, 1891, "was due process" of law under the fourteenth amendment, such service being given the effect of publication; (2) whether or not the court of Texas had jurisdiction to proceed against a nonresident to enforce a lien on land for purchase money, there being no statute of that state authorizing such proceeding, and there having been no seizure in rem of the lands, nor any notice to the vendees in possession claiming under the nonresident. In regard to the first point, the court did not undertake to say what length of time would be reasonable notice, so as to constitute due process of law, but held that on account of the long distance between the place of service and the place of return, five days was not sufficient time, and that judgment on such short notice was not binding. Concerning the second point, after discussing the questions decided in the two cases of *Hart v. Sansom*, and *Arndt v. Griggs*, *supra*, the court, in its opinion by Justice Brown, says: "It is true there is no statute of Texas specially authorizing a suit against a nonresident to enforce an equitable lien for purchase money, but article 1230 of the Code of Texas, hereinafter cited, contains a general provision for the institution of suits against absent and nonresident defendants, and lays down a method of procedure applicable to all such cases. Obviously this article has no application to suits in personam, as was held by the Supreme Court of Texas in *York v. State*, 73 Tex. 651, 11 S. W. 869; *Kimmarie v. Houston & Cent. Tex. Ry. Co.*, 76 Tex. 686, 12 S. W. 698; *Maddox v. Craig*, 80 Tex. 600, 16 S. W. 328; and by this court in *Pennoyer v. Neff*, 95 U. S. 714, 723, 24 L. Ed. 585. The article must then be restricted to actions in rem; but to what class of actions, since none is mentioned specially in the article? We are bound to give it some effect. We cannot treat it as wholly nugatory, and as it is im-

possible to say that it contemplates a procedure in one class of cases and not in another, we think the only reasonable construction is to hold that it applies to all cases where, under recognized principles of law, suits may be instituted against nonresident defendants."

The statute in West Virginia, authorizing service of process upon a nonresident by publication, does not specify in what particular class of cases such service is authorized. In this respect the statutes of the two states are similar. There was no statute in Texas expressly authorizing a court to proceed by publication to enforce a vendor's lien against a nonresident, yet the United States court held that the right to proceed by publication applied to such a suit, because, under the recognized principles of law obtaining in that state, the court had jurisdiction of such a suit. There is no statute in this state expressly authorizing a suit to remove a cloud from title, but under the well-recognized principles of law which obtain in this state, a court of equity has jurisdiction of such a suit brought by one who has both the legal title and possession of the land. Therefore, the analogy between the two cases is perfect, and the same principle may be properly applied to both. We do not understand any decision, state or federal, to hold that equity is dependent upon statute for jurisdiction to remove a cloud from title in a case where the plaintiff is in possession, claiming under a valid legal title. These are the requisites for original equity jurisdiction in suits to quiet title, and equity has always exercised it, for the reason that the law, in such a case, afforded no remedy. But many of the states have, by statutes, provided that suits in equity may be brought to settle and determine title to, and interest in, land, whether the title or claim be legal or equitable, and without regard to possession. And it is upon the construction of these statutes that nearly all of the cases involving the question of the right of a court to make a binding decree upon service by publication have been reviewed by the Supreme Court of the United States. We have no statute in West Virginia enlarging the jurisdiction of equity in such matters, nor do we assert that equity has authority in this state to give relief in a proceeding to quiet title, otherwise than is derived from the general equity practice. But inasmuch as it has jurisdiction to grant relief in the present case, and could under the principles of original equity practice do so, without the aid of statute, provided the defendant was before the court, by a decree operating directly upon the subject-matter, the statute above cited (sections 11, 12 and 13 of chapter 124) steps in, and empowers it to pronounce such a decree upon process served by publication against a nonresident, which will be as conclusive of his right in the land as if he had been personally before the court. 4 Pom. Eq. §§ 1396-1399.

The next question relates to the merits of

the case. Is the writing a contract of sale, or is it only an option? This depends upon its proper construction. The writing is under seal, and after describing the land, under which the vein of coal lies, it proceeds as follows, viz.: "The coal to be paid for as follows, at the rate of twenty-five (\$25) dollars per acre; one dollar on the signing of this agreement and the balance on payment as the party of the first part elects. The deed to be made for the above-described tract of coal by the party of the first part, their heirs or assigns, on 15 days notice in writing by the party of the second part, his heirs or assigns. A good deed with general warranty to be made whenever the unpaid purchase money is secured by bond with mortgage on the premises. A failure of the party of the second part to make the first payment within 30 days from the above date shall render this agreement null and void. The full amount for the above-described coal is to be paid when deed is made as above stated. It is further agreed that the second party has the right to enter in and under the above-described tract of land to mine and convey away the coal in this as well as other coal that he now owns or may hereafter secure with the undisputed right of roadways and not be responsible for any damage to the surface nor anything therein nor thereon by the removal of said coal. The first party has the right to drill, mine, or bore for oil, gas, and water. The second party agrees to pay for surveying and abstract of title when same is accepted. First party agrees to sell the Pittsburg vein of coal in and under the Kings Run Farm bounded on the north by H. & J. Brock, east by Devine, south by R. E. Stephens, west by lands of Ruth E. Stephens, containing 63 acres more or less, at the same rate, terms and conditions as set forth in this agreement for the purchase of coal."

It is impossible to construe the agreement so as to give effect to all of its provisions. Some of them irreconcilably conflict with others. It first says, after reciting that \$1 is to be paid at the signing of the agreement, that the balance is to be paid as Tennant may elect. Relying on this clause, counsel for appellant insist that Fretts was not bound to make any payment, or tender of payment, until Tennant should elect how much, and when it should be paid. But it also contains the further provision that Tennant was to make deed upon 15 days' notice in writing by Fretts, or his assignee, and that deed was to be made whenever the unpaid purchase money was secured by bond with mortgage on the premises. A mortgage, of course, could not be executed until Fretts, who was to become the mortgagor, had obtained title, and title was not to be conveyed until after Fretts had given 15 days' notice to Tennant. No notice was ever given, and nothing was ever paid, except the \$1. The foregoing provisions contradict each other, and both cannot be given effect. But the clause providing for a forfeiture of the com-

tract in the event Fretts did not make the cash payment within 30 days from its date, we think, clearly indicates that the writing was considered by the parties as an option, and not as a sale, and that Fretts had 30 days in which to elect whether or not he would accept. It is true the writing does not specify the amount of the cash payment to be made in 30 days. The cash payment cannot refer to the \$1, because that was expressly provided to be paid at the signing of the agreement. It must, therefore, necessarily refer either to a certain portion of the purchase money, the amount of which was agreed on by the parties but not expressed in writing; or it must refer to, and include, the whole purchase price. It is unnecessary, for the purposes of this case, for us to decide whether it referred to the whole, or only to a part of the price. Because it follows, that the failure of Fretts to make a tender of it, whether it was all or a part, within the 30 days, rendered the contract void. If no certain amount in fact was agreed on to be paid within 30 days, Fretts should have elected to pay the whole purchase price, if he would avoid the effect of this forfeiture clause; and not having done so, all his rights under the agreement ended. Courts of equity do not, as a rule, enforce a forfeiture, where there has been a vested right. But this rule does not apply to a case where the contract itself, under which the parties claim, contains an express provision forfeiting a right upon the happening of a certain contingency. *Carney v. Barnes*, 56 W. Va. 581, 49 S. E. 423.

After this suit was brought, Allison assigned back to Fretts a one-half interest in the aforesaid agreement. Fretts appeared to the suit by counsel and demurred to the bill; Allison made no appearance. The demurrer was overruled and Fretts filed an answer in the nature of a cross-bill praying for specific execution of the contract. Plaintiff demurred to the cross-bill, and the court sustained it. This is right. It is evident that Fretts could not obtain relief without making Allison a party, even assuming that his cross-bill was meritorious. The cross-bill, on its face, showed that Fretts and Allison were jointly interested in whatever rights were conferred by the contract, and Allison should have joined in the application to the court for specific execution, or, if he refused to join, he should have been made party defendant. In a suit to enforce a contract all persons interested in it should generally be made parties. *Waterman on Specif. Perf.* § 55; *Wilcox v. Pratt*, 125 N. Y. 688, 25 N. E. 1091; *Woodward v. Clark*, 15 Mich. 104. It was also proper to sustain the demurrer to the cross-bill, because its averments did not entitle defendant to any relief.

The decree of the lower court holds the writing to be an option which expired at the end of 30 days from its date, and canceled it

as constituting a cloud upon plaintiffs' title. This was a quasi in rem decree, and one which the court had jurisdiction to pronounce. Fretts having appeared in the cause by counsel, the court could render a personal decree against him for costs. His appearance, not having been limited to the one special purpose of objecting to the process, or to the manner of its service, was a general appearance. *Frank v. Zeigler*, 46 W. Va. 614, 33 S. E. 761; *State v. Thacker Coal & Coke Co.*, 49 W. Va. 140, 38 S. E. 539.

Fretts, having voluntarily appeared by counsel, and demurred to, and answered plaintiffs' bill, is estopped from denying the court's jurisdiction of his person. *Hunter v. Stewart*, 23 W. Va. 549; *State v. Rawson*, 25 W. Va. 23; *Giboney v. Cooper & Cooper*, 57 W. Va. 74, 49 S. E. 939.

There is no error in the decree, and it will be affirmed.

(111 Va. 70)

COPPERTHITE v. LOUDOUN NAT. BANK et al.

(Supreme Court of Appeals of Virginia. June 9, 1910.)

1. EVIDENCE (§ 76*)—FAILURE TO TESTIFY—PRESUMPTIONS.

When defendant can by his own testimony throw light upon matters necessary to his defense and peculiarly within his own knowledge if the fact exists and he fails to testify, the presumption is raised that the facts do not exist.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 96; Dec. Dig. § 76.*]

2. TRIAL (§ 105*)—FAILURE OF DEFENDANT TO TESTIFY—WRITTEN STATEMENT—PROBATIVE EFFECT.

Where a defendant had failed to testify, but voluntarily furnished counsel for plaintiffs with a signed statement of his version of the transaction, which was filed in the case, it was entitled to its natural probative effect.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 260-266; Dec. Dig. § 105.*]

3. FRAUDULENT CONVEYANCES (§ 158*)—NOTICE OF FRAUD—ACTUAL NOTICE—BONA FIDE PURCHASER.

One purchasing with a knowledge of facts sufficient to put a prudent man on inquiry, or to lead one of ordinary perception to infer fraud, has notice, equivalent to actual knowledge in contemplation of law, and cannot be deemed a bona fide purchaser.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 500-503; Dec. Dig. § 158.*]

Appeal from Circuit Court, Loudoun County.

Suit by the Loudoun National Bank and others against Henry Copperthite and others. Decree for plaintiffs, and defendant Copperthite appeals. Affirmed.

Moore, Barbour & Keith, for appellant. Cecil Connor and E. E. Garrett, for appellees.

WHITTLE, J. On September 19, 1906, the appellees, who are creditors of Charles W. Jenkins, filed a bill in equity in the circuit court of Loudoun county against him and his

son, Henry G. Jenkins, and Henry Copperthite, the appellant, and certain trustees, to set aside a deed of bargain and sale from Charles W. Jenkins to his son, by which deed, for the alleged consideration of \$2,500, he conveyed away practically the whole of his personal property, consisting of live stock, farming implements, and an undivided interest in the wheat, corn, hay, and other crops then growing on the farm of which he was tenant—property proved to be of the value of \$5,000. The bill also sought to set aside a contemporaneous deed of trust by which Henry G. Jenkins conveyed the identical property to trustees to secure to Copperthite an alleged debt of \$2,000, evidenced by note payable 12 months after date, with interest at 6 per cent., payable quarterly at the Farmers' & Mechanics' National Bank of Georgetown, D. C.

The bill alleges that Charles W. Jenkins was the lessee of a farm containing about 800 acres in Loudoun county, Va.; that he was a man advanced in life, with a wife and large family of children, who resided with him on the rented farm, dependent upon him for support; that Henry G. Jenkins, the eldest child, was 22 years of age, and worked with and under the direction and control of his father; that he had accumulated nothing, and owned no estate of any description; that the deed from the father to the son was without consideration, and made for the purpose of hindering, delaying, and defrauding the creditors of the grantor, and that the son participated in the transaction with full knowledge of its purpose; that if it should appear that the check of Copperthite for \$2,000 was drawn payable to Henry G. Jenkins, and indorsed by him to his father, who got the money from the bank, the transaction was colorable merely, and that Charles W. Jenkins immediately placed the money, either directly or indirectly, under the control of Copperthite, his agent or trustee; that he paid no debts with the money, and, if Copperthite parted with his cash, it was done to enable Charles W. Jenkins to convert his property into money, to hinder, delay, and defraud his creditors; that the execution of the bill of sale and deed of trust were parts of the general scheme to enable Charles W. Jenkins to put his property beyond the reach of his creditors; that \$2,500 was a grossly inadequate price for the property, and, even if Copperthite actually paid the \$2,000, the remaining \$500 were never paid.

The bill prayed for an injunction and a receiver, and that the bill of sale and deed of trust be set aside as fraudulent, and the property sold and the proceeds applied to the payment of plaintiffs' debts.

An injunction was granted accordingly and rules awarded against the defendants, returnable to the first day of the October term of the court, to show cause why a receiver should not be appointed as prayed for. At that term the two Jenkinses and Copperthite

answered the bill, and the court appointed a receiver to take possession of the property. It transpired, however, that in the meantime Charles W. Jenkins and Henry G. Jenkins, in utter disregard of the injunction order, had succeeded in carrying off, to Washington City and elsewhere, and disposing of, about four-fifths of the entire property. They also evaded process, and escaped beyond the jurisdiction of the court, and are still fugitives from justice. When these facts became known to the court, it expunged their answers from the record, and the bill as to them was taken for confessed.

After the case had been argued and submitted, the trustees filed a joint answer, containing a general denial of any fraudulent purpose on their part, or to their knowledge, in connection with the execution of the deeds in question. Copperthite's answer likewise contains a negation of the charges of fraud; but the answer embodies no specific responsive averment that he is a bona fide purchaser, for value and without notice. He states that he has no means of knowing of the correctness of the allegations of the bill in regard to the indebtedness of Charles W. Jenkins, or as to his farming operations, or the property owned by him, his business antecedents, his relations with his son and other members of the family, or the value of the personal property conveyed to the son, except that he considered it ample security for his debt. He further states that Henry G. Jenkins applied to him for a loan of \$2,000, which he made, being satisfied with the security offered, and the trust deed was accordingly executed. He admits that Henry G. Jenkins paid him \$1,000 on his indebtedness, which he represented as having been derived from the sale of some of the trust property.

In a subsequent written statement filed in the case by counsel for the appellees, he explains his connection with the transaction as follows: That he made the loan of \$2,000 to Henry G. Jenkins on July 13, 1906, by check on the Farmers' & Mechanics' Bank of Georgetown, D. C.; that his object in making the loan was to get 6 per cent. on his money, and the loan was made on the faith of the property; that he had several times been up to Charles W. Jenkins' place hunting, and knew Henry G. Jenkins, and had seen the property; that young Jenkins applied to him for the loan about three days before it was effected, and he requested his Washington attorney, Miller, to prepare the papers to secure it.

Charles W. Jenkins was present when the mortgage was executed, and Copperthite knew at that time that the father was conveying his property to his son, and thought that he had the right to do so. He did not know until the date this statement was prepared that Jenkins and his son were residing in the city of Washington; nor did he know that any part of the farming implements

had been sold by either of the parties, though his attorney, Miller, had informed him that the property was advertised for sale. On September 20, 1906, Henry G. Jenkins paid him \$1,000 on his indebtedness in a single note of that denomination, which at his request was, by Copperthite's direction, indorsed by his attorney, Miller, as a credit on the note. At the date of this payment he had no occasion to employ counsel, and had not given the matter of the loan any consideration, as he thought it was safe at the time he made it. Neither Charles W. Jenkins nor his son had applied to him for leave to sell the property, and it was not his intention to force a sale. He did not deposit the \$1,000 bill in bank, but had it changed into fractional currency for use.

It was proved that Copperthite was a man of considerable means, and that he gave his check for \$2,000 to Henry G. Jenkins on the Farmers' & Mechanics' National Bank of Georgetown, D. C., which was indorsed by the latter to Charles W. Jenkins and paid to him over the counter of the bank in two notes for \$1,000 each.

The circuit court held that the deed from Charles W. Jenkins to Henry G. Jenkins was not made for a bona fide and adequate consideration, and was fraudulent and void as to the plaintiffs' debts, and that Copperthite before and at the time of the execution of the deed of trust for his benefit was chargeable with notice and had knowledge of the fraud of both Charles W. Jenkins and Henry G. Jenkins, and participated therein, and that neither he nor his trustees were purchasers for value without notice. It was, therefore, decreed that both deeds were null and void as to the debts of the plaintiffs.

The fraud in this transaction, so far as Charles W. Jenkins and Henry G. Jenkins are concerned, is so flagrant that it is not and cannot be denied, and it is only necessary to consider that branch of the case as tending to affect Copperthite with notice of the fraud which invalidated the title of his immediate grantor.

Generally, "when a defendant can, by his own testimony, throw light upon matters at issue necessary to his defense, and peculiarly within his own knowledge if the fact exists, and fails to go upon the witness stand, the presumption is raised, and will be given effect to, that the facts do not exist." *Bastrop St. Bank v. Levy*, 106 La. 586, 31 South. 164; *Aragon Coffee Co. v. Rogers*, 105 Va. 51, 52 S. E. 843.

It is true the force of this implication, with respect to the failure of Copperthite to testify is to some extent weakened by the circumstance that he voluntarily furnished counsel for the appellees with a signed statement of his version of the transaction, which was filed by them in the case, and was thus entitled to its natural probative effect. *Wilkinson v. Jett*, 7 Leigh, 115, 30 Am. Dec. 493; *Hubbard v. Allyn*, 200 Mass. 166, 86 N. E.

356; *Damon v. Carrol*, 163 Mass. 404, 40 N. E. 185. Nevertheless the fact remains that the record contains no denial *under oath* by Copperthite of any of the grave charges affecting his character and the bona fides of his conduct in this regard. Nor has any effort been made to relieve the situation by proving his general character and standing in the community in which he lives, or that of his attorney, Miller, or of the trustees of his own selection, one of whom was so illiterate that he made his mark in lieu of signature to the deed of trust. It was by the instrumentality of these parties alone that the perpetration of this fraud was made possible, and it was incumbent upon them to repel the unfavorable inferences to be drawn from the incriminating circumstances surrounding the transaction by showing their good faith and ignorance of the misconduct of Charles W. Jenkins and his son.

There is no *direct evidence* that Copperthite had positive knowledge of the intent of the elder Jenkins to delay, hinder, or defraud his creditors, or of the fraud rendering void the title of his grantor, nor is such actual knowledge necessary. In law, means of knowledge and the duty of using such means is tantamount to actual knowledge. The rule in this state is well settled that "a knowledge of facts sufficient to excite the suspicions of a prudent man and put him on the inquiry, or to lead a person of ordinary perception to infer fraud, or the means of knowing by the use of ordinary diligence, amounts to notice, and is equivalent to actual knowledge in contemplation of law. The nature and circumstances of the transaction may sometimes be such as must apprise the grantee of its character and object. * * * *Res ipsa loquitur*. * * * If he has notice sufficient to put him on the inquiry, he cannot be deemed a bona fide purchaser.

This statement of the principle in *Bump on Fraud. Con.* (4th Ed.) § 184, is quoted with approval by *Riely, J.*, in delivering the opinion of this court in *Ferguson v. Daughtrey*, 94 Va. 308, 312, 26 S. E. 822. See, also, *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131; *American v. Mayo*, 97 Va. 182, 33 S. E. 523; *Fischer v. Lee*, 98 Va. 159, 35 S. E. 441; *Newberry v. Bank*, 98 Va. 471, 36 S. E. 515; *Anderson v. Mossy Creek, etc., Co.*, 100 Va. 420, 41 S. E. 854; *University v. Snyder*, 100 Va. 567, 42 S. E. 337; *Flook v. Armentrout*, 100 Va. 638, 42 S. E. 686. For other Virginia cases on the subject of fraudulent conveyances, see monographic note to *Cochran v. Paris*, 11 Grat. 348, Va. R. Ann. 149.

The following are some of the significant circumstances tending to arouse suspicion in a man of ordinary prudence and to put him on inquiry as to the bona fides of the transaction between Jenkins and his son, to which we invite attention: The father was a man advanced in life, with a large family dependent upon him for support; and, without explanation sought or given, in the midst of

the crop year, he deprives himself of the means of fulfilling his contract with his landlord by an absolute sale of nearly all his property, including his interest in the growing crops, to an inexperienced and impecunious son, who had but recently attained his majority, for about one-half its value. Jenkins and his family, including his son, Henry, lived in Loudoun county, Va. Copperthite, his attorney, Miller, and the two trustees, were residents of the city of Washington. The business was transacted in that city, the deed of bargain and sale and the deed of trust were both prepared by Copperthite's counsel, and he was fully apprised of the source of the son's title, the perfection of which, even between the parties, depended wholly upon him. The property, which was perishable in its nature, was not present for inspection, but was in a foreign jurisdiction, many miles distant. There was no delivery of the possession of the property by the father to the son—indeed, the latter had no use for the property, no provision for the sustenance of the live stock, and no place in which to bestow it. Copperthite was acting under the advice of counsel, and knew that property on leased premises was liable to the landlord for rent. Yet he made no inquiry of the landlord concerning the rent, or as to what share of the growing crops the tenant was entitled. He knew that the property was liable to be incumbered by other liens, which the records in the clerk's office of Loudoun county would disclose, but made no examination of that office, though dealing with a comparative stranger, who lived in a foreign jurisdiction. He made no specific denial in his answer of the allegation that the \$2,000 gotten on his check was placed under the control of himself, his agent, or trustees, and, as before observed, that sum was paid by the bank in two bills, of the denomination of \$1,000 each. It was shown that the day after the bill was filed the son paid Copperthite a \$1,000 note, which was claimed to be the proceeds of sale of part of the property included in the trust deed. It is probably not an unusual circumstance that a city bank should have paid Copperthite's check in notes of the denomination of \$1,000; but it is highly improbable that Henry G. Jenkins should have received a \$1,000 bill from the indiscriminate sale of personalty of the character included in the trust deed. In this connection, also, it may be remarked that Copperthite's explanation of his motive in becoming a party to the transaction was to effect a 12 months loan of \$2,000 at 6 per cent. Yet we find him collecting one-half of the debt, *ten months* before it was due and *one day* after the bill was filed, in a single note of \$1,000.

In view of all the circumstances, we are of opinion that the circuit court was warranted in reaching the conclusion that the appellant,

Henry Copperthite, was not a purchaser of the property in controversy for value and without notice of the fraud, rendering void the title of his immediate grantor.

The decree appealed from must therefore be affirmed.

Affirmed.

HARRISON, J., absent.

(111 Va. 32)

CHESAPEAKE & O. RY. CO. v. WILLS.

(Supreme Court of Appeals of Virginia. June 9, 1910.)

1. NEGLIGENCE (§ 56*)—"PROXIMATE CAUSE."

The "proximate cause" of an injury is that act which directly produced, or concurred directly in producing, the injury in a natural and continuous sequence unbroken by any new cause.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5758-5769; vol. 8, p. 7771.]

2. CARRIERS (§ 339*)—INJURIES TO PASSENGERS—NEGLIGENCE—PROXIMATE CAUSE.

The act of a passenger who boarded the wrong train through the actionable negligence of the carrier failing to inform passengers of the movements and destination of trains, in alighting while the train was in motion, without being directed, advised, or encouraged so to do, by the trainmen, was the act of a responsible agent intervening between the negligence of the carrier and the injury sustained while alighting, precluding a recovery therefor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1353; Dec. Dig. § 339.*]

3. APPEAL AND ERROR (§ 1175*)—DISPOSITION OF CASE ON APPEAL.

Where plaintiff filed on his own motion an amended declaration after the court had improperly overruled a demurrer to the original declaration, and therein restated his cause of action in the light of the objections urged to the original declaration, the court will presume that plaintiff has made the strongest presentation of his case which the facts permit, and that it could not be bettered if leave were given to amend, and, entering the judgment which the trial court should have entered, will sustain the demurrer and enter judgment for defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4587; Dec. Dig. § 1175.*]

Error to Circuit Court, Orange County.

Action by J. Reid Wills against the Chesapeake & Ohio Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed and rendered.

Williams & Browning, for plaintiff in error. F. W. Simms, for defendant in error.

KEITH, P. The defendant in error brought suit against the plaintiff in error to recover for an injury sustained in alighting from one of its trains. There was a demurrer to the declaration and to each of its three counts, which the court overruled, and upon a trial before a jury there was a verdict and judgment in favor of the plaintiff, to which a writ of error was awarded.

The only error assigned which we shall find it necessary to consider is to the ruling

of the court upon the demurrer to the declaration.

The first declaration filed was demurred to, grounds of demurrer were assigned and argued, and the judge of the court entered an order overruling the demurrer. Thereupon the plaintiff, upon his own motion, was permitted to amend the declaration, and the defendant demurred to the amended declaration and each count, which demurrer was also overruled by the court.

The first count states that the plaintiff, on the 13th of July, 1907, was a passenger on the defendant's railway, to be carried from its station at Gordonsville to Louisa, in this state, for a certain fare which was paid; that it was the duty of the defendant, with due and proper care and reasonable diligence, to carry the plaintiff safely; but that it so carelessly and negligently managed its passenger trains that it misled the plaintiff and caused him to get upon a train that was not bound in the direction that he wished to go, but in an opposite and contrary direction; and that immediately upon getting on board said train the defendant then and there started it and wrongfully carried the plaintiff away from his true destination on a journey different from that upon which it was the duty of the defendant to carry him; whereupon, immediately upon the starting of the train, the plaintiff perceived that he was being carried by defendant away from his destination, and he ran at once to the exit of the passenger coach in which he was, and when the train had not attained any speed, but was moving very slowly, the plaintiff then and there attempted to alight therefrom, and did not apprehend, nor would any ordinary, careful, and prudent man have apprehended, under like circumstances, any danger from alighting; and while thus attempting to alight the plaintiff was thrown under the train by the careless and negligent conduct and management of the defendant in carrying him away from his destination, by reason whereof one of the legs of the plaintiff was crushed and broken so that amputation became necessary.

The second and third counts state the same cause of action, and enter into details setting out the manner in which the plaintiff had been misled into taking a train going in the opposite direction to that in which he desired to go, carrying him, in fact, to the west, when his point of destination was directly to the east. When it comes, however, to narrate what occurred when he discovered that he was being taken away from his true destination, his own conduct is described in the second and third counts substantially as was done in the first count.

It may be conceded, in the view that we take of this case, that the railroad company was guilty of actionable negligence in permitting such confusion in the movement of its trains to exist at Gordonsville as misled the plaintiff, acting with reasonable prudence and caution, into entering the wrong train.

It may be conceded that it was the duty of the defendant to exercise reasonable care and caution so to inform passengers as to the movement and destination of its trains as to enable those wishing to entrain to enter the train which would take them to the point they wished to reach. It may be further conceded that for the failure to perform that duty the railroad company was responsible for whatever loss or damage the passenger sustained, which could be reasonably expected to result from such negligent act. When, therefore, the plaintiff found himself moving in a direction the opposite of that in which he wished to go, he had, in the case supposed, a complete right of action against the defendant company to recover the damages flowing from the breach of the duty owed to him by the railroad company.

But that is not the injury for which this suit was brought. The plaintiff, finding himself moving from instead of toward his home, went at once to the door of the car and undertook to alight from the train while in motion, and suffered the injury which resulted in the amputation of his leg. It does not appear from the declaration that the defendant directed, requested, encouraged, or suggested that the plaintiff should step from the car while in motion. It does not appear from the declaration that the defendant was advised in any manner of the situation in which the plaintiff found himself. He acted solely upon his own responsibility in alighting from the train, and that act was the proximate cause of the injury which he received, and the negligent conduct of the railroad company in causing him to enter the wrong train, conceding that it was guilty of negligence, was the remote cause.

In *Shearman & Redfield on Negligence*, § 26, it is said: "The proximate cause of an event must be understood to be that which in a natural and continuous sequence, unbroken by any new, independent cause, produces that event, and without which that event would not have occurred. Proximity in point of time or space, however, is no part of the definition. That is of no importance, except as it may afford evidence for or against proximity of causation; that is, the proximate cause which is nearest in the order of responsible causation."

At section 28, the same author says: "Very great difficulty has been found in determining what damages should be considered as flowing, in a 'natural and continuous sequence,' from an act of negligence, especially when it is not a matter of contract liability. On the one hand, it has been maintained that, in cases of tortious negligence, the defendant should be held responsible for all damages which do in fact result from his wrongful acts, whether they could have been anticipated or not. On the other hand, it has been maintained that he should not be held responsible for any damages except such as he could, in the exercise of reasonable foresight, have foreseen

as the probable consequence of his act. As a middle ground, it has been asserted that he should be made responsible for such damage as is known by common-experience to usually follow such a wrongful act. The weight of authority seems to be decidedly against holding the defendant liable for all the actual consequences of his wrongful acts, when they are such as no human being, even with the fullest knowledge of the circumstances, would have considered likely to occur; and, on the other hand, the best authorities seem to be quite opposed to the theory that he should be held liable only for such consequences as he ought himself to have foreseen. So much difficulty, indeed, has been felt in attempting to lay down a rule to cover all possible cases, that some of the ablest judges have declined to state any fixed rule, and have indicated a disposition to leave all doubtful cases to the jury. The practical solution of this question appears to us to be that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed (whether they could have been ascertained by reasonable diligence or not), would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind."

In 32 Cyc. p. 745, several definitions of "proximate cause" are given, among them as follows: "An act which directly produced or concurred directly in producing the injury; that from which the effect might be expected to follow without the concurrence of any unusual circumstances; that which immediately precedes and produces the effect, as distinguished from a remote, mediate, or predisposing cause; that which in a natural and continuous sequence, unbroken by any new cause, produced that event, and without which that event would not have occurred."

In 8 Am. & Eng. Ency. L. p. 571, it is said:

"In the law of damages the proximate cause of an injury may in general be stated to be that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another, where, had it not happened, the injury would not have been inflicted, notwithstanding the latter. Where an efficient producing cause for injuries is found, it will be considered the proximate cause, unless another cause or causes, not incident to but independent of it, are shown to have intervened and produced the injury. The question must always be, therefore, whether there was any intermediate cause disconnected from the primary act and self-operating, which produced the injury; an inquiry to be answered in accordance with common understanding. Where this question can be answered in the affirmative, the independent and intervening cause will be regarded as the proximate cause, and the author of the original act discharged. * * *

"The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments. It is not essential, therefore, for a plaintiff to show that an act, claimed to have been the proximate cause of a certain result, was the only cause. It is sufficient if it be established that the defendant's act produced or set in motion other agencies, which in turn produced or contributed to the final result. Where, however, the connection is not immediate between the injurious act complained of and the consequence, such nearness in the order of events and closeness in the relation of cause and effect must subsist that the influence of the injurious act predominates over that of other causes and concurs to produce the consequence."

These principles are in accordance with the decisions of this court.

In *Fowlkes v. Southern R. Co.*, 96 Va. 742, 32 S. E. 464, it was said: "That the defendant was guilty of negligence is conceded, and that it is liable in damages for the direct consequences of that negligence is also conceded. * * * It is not only requisite that damages, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is that in law the immediate, and not the remote, cause of any event is regarded. In other words, the law always refers the injury to the proximate, not to the remote, cause. If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. To the proximate cause we may usually trace consequences with some degree of assurance, but beyond that we enter a field of conjecture where the uncertainty renders the attempt at exact conclusions futile. If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action."

And in *Scheffer v. Railroad Co.*, 105 U. S. 249, 26 L. Ed. 1070, Mr. Justice Miller said: "To warrant the finding of negligence, or an act not amounting to wanton wrong, as the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

In *Jammison v. Chesapeake, etc., R. Co.*, 92 Va. 327, 23 S. E. 753, 53 Am. St. Rep. 813, it was held that, if a passenger train fails to stop at a station to which a passenger has purchased a ticket, it is the duty of

the passenger to retain his seat until he arrives at the next station at which the train stops; and, if he feels aggrieved, to institute his action against the company for any loss or injury he may have sustained by reason of the failure to stop the train at the proper station. But if he fails to do this, and, in passing from one coach to another in search of the conductor to get him to stop the train, he is thrown from the train and injured, his negligence is the proximate cause of the injury, and he cannot recover damages of the company therefor.

In this case the negligence of the railroad company consisted in such acts of omission and commission alleged in the declaration as resulted in the plaintiff getting upon the wrong train, and upon the authority of the case just cited there was an ample remedy for whatever wrong he had sustained by reason of the defendant's negligence. The direct and efficient cause of the injury for which this suit was brought was the alighting from the train while in motion. In that act the railroad company had no part. As we have seen, the declaration does not aver that any agent of the company directed, advised, encouraged, or even had knowledge of the plaintiff's intention to alight from the train; so that, between the negligent act of the railroad company and the injury suffered by the plaintiff, there was the intervening act of a responsible agent, that responsible agent being the plaintiff himself. While the plaintiff as a result of the defendant's negligence had taken the wrong train, but was in a place of safety and of his own accord alighted from the train, it cannot be said that the injury which he then received was the natural and continuous sequence, unbroken by any new or independent cause, of the negligence of the defendant which caused him to enter the wrong train.

For these reasons, we are of opinion that the demurrer to the declaration and each count thereof should have been sustained; and, in view of the fact that the plaintiff filed a declaration to which the defendant demurred and the court overruled the demurrer, and that the plaintiff then, of his own motion, filed an amended declaration, in which he restated his cause of action, in the light of the objections which had been urged to his original declaration, it is to be presumed that he has made the strongest presentation of his case which the facts permit, and that it could not be bettered if leave were given to amend; and this court, entering such judgment as the circuit court ought to have rendered, will sustain the demurrer and enter a final judgment for the plaintiff in error.

Reversed.

BUCHANAN, J., absent.

WHITTLE, J. I concur in the result reached by the President in this case. But I am of opinion that neither the original nor amended declaration states a case of actionable negligence against the defendant.

(111 Va. 41)

CHESAPEAKE & O. RY. CO. v. PARIS' ADM'R.

(Supreme Court of Appeals of Virginia. June 3, 1910.)

1. CARRIERS (§ 304*)—CARRIAGE OF PASSENGERS—CARE AS TO PERSONS ACCOMPANYING PASSENGER.

One who, according to a custom, goes to a railway station to assist a passenger in entering or leaving a train, is an invitee to whom the carrier owes the duty of ordinary care and, if he enters the train and his purpose is known, the carrier must give him a reasonable time within which to leave the train; but if his purpose is not known, and there are no circumstances to put the carrier upon notice, the carrier is not bound to hold the train until he has had time to alight, nor to notify him before the train starts.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1104, 1110-1114, 1124, 1242; Dec. Dig. § 304.*]

2. APPEAL AND ERROR (§ 1002*)—REVIEW—FINDINGS—CONFLICTING EVIDENCE.

A verdict upon conflicting evidence cannot be disturbed on writ of error, if there is sufficient evidence to sustain it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8965-8937; Dec. Dig. § 1002.*]

3. CARRIERS (§ 339*)—INJURY TO INVITEE ALIGHTING FROM CAR—NEGLECTANCE.

Where a person accompanying his daughter to a train upon which she was a passenger, though the carrier negligently started the train before he had time to alight, its negligence in such respect had ceased to operate when he attempted to alight from the moving train of his own accord, and his voluntary act in doing so was the proximate cause of his resultant injury, and the carrier was not liable therefor, though the brakeman in attempting to restrain his alighting may have unbalanced him and thereby contributed to his injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1353; Dec. Dig. § 339.*]

4. NEGLIGENCE (§ 136*)—QUESTION OF LAW AND FACT.

Negligence, whether contributory or otherwise, is a mixed question of law and fact, if the facts are doubtful, or about which reasonable men may differ; their determination being for the jury, but, if undisputed, the question being for the court.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

Buchanan and Whittle, JJ., dissenting.

Error to Circuit Court, Augusta County.

Action by James R. Paris' administrator against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

R. L. Parrish and J. M. Perry, for plaintiff in error. Charles & Duncan Curry and Harry St. Geo. Tucker, for defendant in error.

KEITH, P. This is the second time this case has been before this court. In the opinion upon the former writ of error, the circumstances under which the death of the plaintiff's decedent occurred, as they then appeared from the record, are stated, and upon the case then made it was held that the verdict of the jury against the railway company could not be sustained, and the cause was remanded for a new trial. See 107 Va. 408-411, 59 S. E. 398. Upon the next trial there was a demurrer to the evidence and judgment for the plaintiff again. To that judgment this writ of error was awarded.

The duty of a railway company to a person who, in conformity to a custom acquiesced in by the carrier, goes to a railway station to assist a passenger in entering or leaving the train, is declared. It was held that such a person is an invitee to whom the carrier owes the duty of ordinary care to see that he is not injured, and that, if he enters the train and his purpose is known, it is the duty of the carrier to give him a reasonable time within which to leave it; but if his purpose is not known, and there are no circumstances to put the carrier upon notice, then the carrier is not bound to hold the train till he has had time to alight, or to notify him before the train starts.

Upon the former writ it was not shown that the railway company had notice that the deceased was merely assisting his daughter on the train when he entered the car. The want of such notice, direct or circumstantial, was held on the former writ to relieve the railway company from the charge of negligence in starting its train before the plaintiff's decedent had gotten off. Upon the last trial, on this point the case was different. Two witnesses testified that the plaintiff's decedent, when he entered the car, inquired of a brakeman if he would have time to take his daughter's dress suit case into the car, set it down, and get off before the train started, and was told that he would, to "go ahead." That it had such notice, or that there was any such inquiry made, is denied by the railway company, and the preponderance of evidence, direct and circumstantial, is in favor of its contention; but on a demurrer to evidence the testimony of the two witnesses to the contrary must be taken as true. The evidence of the plaintiff tended further to prove that the deceased, when he assisted his daughter upon the train, found her a seat about the middle of the car, placed the dress suit case on the seat with her, told her good-bye, and started to leave the train, but was delayed in getting off because of the crowded condition of the car and the narrow passage through which he had to or did pass in making his way to the platform of the car; that when he reached the platform it was crowded, and persons were still getting on the train with bundles; that he asked the brakeman not to start the train until he could get off; that he was diligent in his effort to

get off; that the day of the accident was Saturday before Christmas, which came on Monday; that the train was a local train, crowded when it reached Staunton, many of whose passengers were getting off; that a large crowd there boarded the train; that the train's usual stop at that station was five minutes; that it only stopped the usual time that day; that, although the train was moving slowly when the deceased got on the steps to alight, he could have done so successfully but for the interference of a brakeman, who grabbed him and then let him go, unbalancing him, and thus preventing him from alighting safely.

Upon all material points the evidence of the railway company is directly in conflict with that of the plaintiff, and upon most of them preponderates. While upon the whole evidence the jury, as it seems to us, ought to have found a verdict for the defendant, yet, as the evidence was conflicting, the verdict of the jury cannot be interfered with, if there was sufficient evidence to sustain it.

We do not think the act of the brakeman, as testified to by the plaintiff's witnesses, makes out a case of negligence against the railway company. As was said in the opinion of the court on the former writ of error, it was the brakeman's duty to have attempted to protect the plaintiff's intestate from damage incident to his stepping off a moving train, and, if perchance disaster attended his efforts in that regard, the master cannot be held answerable in damages for the fortuitous result.

The case made by the evidence, it may be conceded, shows that the railway company was negligent in failing to give Paris a reasonable time within which to leave the train. The fact remains, however, that in attempting to alight from a moving train he was the author of his own wrong.

Negligence, whether contributory or otherwise, is a mixed question of law and fact. If the facts be doubtful, or about which reasonable men may differ, their determination becomes a question for the jury; but, where the facts are undisputed, the law applicable to them is a question for the court.

The decided cases with reference to alighting from moving trains are almost without number. Many of them deal with passengers alighting from street cars, and it is almost universally held that to alight from a slowing moving street car is not negligence per se. Where a passenger is invited to alight by an officer of the train, or is told that he may do so in safety, the cases hold that circumstance to justify his action, provided the train has not attained such a speed that the danger would be obvious; if he is induced to leap from the train by a well-founded apprehension of peril to life or limb, induced by occurrences which might have been guarded against by the utmost care of the carrier, he is entitled to recover for any injury he may have sustained there-

by, although no injury would have occurred if he had remained quiet; and we admit that there are cases which have held the carrier responsible where there was no invitation extended, no assurance given, and no peril apprehended. But we are of opinion that the just and proper rule of decision is that which we understand to prevail in this state.

In *Richmond & Danville R. Co. v. Morris*, 31 Grat. 200, it appears that it was night when the train arrived at the station B.; that Morris had fallen asleep, and when approaching the station the conductor awakened him, telling him that they were at B. The train went a short distance beyond the freighthouse and reception room without stopping, and when the engine reached the frog on the west side of the freighthouse and reception room it stopped, and the conductor, seeing Morris still in the caboose asleep, again aroused him. The train stopped about a minute, and Morris could then have gotten off whilst the train was not in motion. The conductor then went to the other end of the car, and, looking back, saw that Morris did not get up. He returned, shook Morris, and told him to get up, or get off; he was at B. Immediately after waking Morris the last time, the conductor went out at the end of the caboose with his lantern in his hand and stood on the stationary platform about two and a half feet from the platform of the car. The train commenced backing, and Morris got up and walked out to the end of the car and jumped off, not knowing, as he said, which way the car was going, and the caboose car and several others passed over him, injuring him severely. The point where Morris jumped off was opposite the platform, which extended 35 steps west and a much greater distance east of the pump-house, and was that part of the platform at which passengers going east got off, and was in good condition. It was a dark, drizzly night, and the only lights at the station were two lanterns, one in the hands of the conductor and the other in the hands of a servant of the company at the station. Upon these facts this court held that: "The company was guilty of culpable negligence, and this negligence was the proximate cause of Morris' injury; that the conductor should not have put the train in motion until Morris could leave the car, or, if put in motion, he should have cautioned him not to attempt to get off until the train was stopped. Instead of this he told him to get off, and the train immediately commenced backing. The company was also in fault in not having stationary lights at the place, and this made it all the more incumbent on the conductor to exercise more than usual care and caution in letting off passengers. But whilst the injury sustained by M. is directly traceable to the culpable negligence of the company, the negligence or absence of ordinary prudence and caution on the part of M. contributed to his injury; and he is not entitled to recover of the company

damages for the injury he sustained. One who by his negligence has brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and common law. A plaintiff in such cases is entitled to no relief."

It is obvious, we think, that the case just cited was a far stronger one in behalf of the passenger than the one under consideration. The court rightly characterized the conduct of the conductor as culpable negligence, and held that this negligence was the proximate cause of the injury to Morris; but Morris was in a place of safety, and in attempting to alight from a moving car was held to have brought the injury upon himself, and was therefore not entitled to relief. Judge Burks, who delivered the opinion of a unanimous court, cites the case of *Railroad Co. v. Aspell*, 23 Pa. 147, 62 Am. Dec. 323, and quotes with approval the following language of Chief Justice Black: "It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual fault of both parties. When it can be shown that it would not have happened except for the culpable negligence of the party injured concurring with that of the other party, no action can be maintained. A railroad company is not liable for an accident which the passenger might have prevented by ordinary attention to his safety, even though the agents in the train are also remiss in their duty. * * * From these principles it follows very clearly that, if a passenger is negligently carried beyond the station where he intended to stop and where he had a right to be let off, he can recover compensation for the inconvenience, the loss of time, and the labor of traveling back, because these are the direct consequences of the wrong done to him. But if he is foolhardy enough to jump off without waiting for the train to stop, he does it at his own risk, because this is gross negligence, for which he can blame nobody but himself. If there be any man who does not know that such leaps are dangerous, especially when taken in the dark, his friends should see that he does not travel on a railroad."

Continuing, Judge Burks says further: "It is to be borne in mind, however, that if a passenger is induced to leap from the carriage, whether by coach or railway, by a well-founded apprehension of peril to life or limb, induced by occurrences which might have been guarded against by the utmost care of the carriers, he is entitled to recover for any injury he may sustain thereby, although no injury would have occurred if he had remained quiet."

In *Jammison v. Chesapeake, etc., R. Co.*, 92 Va. 327, 23 S. E. 758, 53 Am. St. Rep. 813, it was held that, if a passenger train fails to stop at a station to which a passenger has purchased a ticket, it is the duty of the passenger to retain his seat until he arrives at

the next station at which the train stops; and, if he feels aggrieved, to institute his action against the company for any loss or injury he may have sustained by reason of the failure to stop the train at the proper station. But if he fails to do this, and, in passing from one coach to another in search of the conductor to get him to stop the train, he is thrown from the train and injured, his negligence is the proximate cause of the injury, and he cannot recover damages of the company therefor.

The person injured in this case was upon the train where he had the right to be as an invitee. He was in a place of safety. Had he elected to remain upon the train, his right of action was complete for whatever inconvenience he had suffered, or might suffer, as the direct consequence of the railroad company's negligence. But when he undertook to alight from the train, the negligence of the railroad company had ceased to operate, and it was the voluntary act of Paris which became the proximate cause of his injury.

As was said by this court in *C. & O. Ry. Co. v. Wills*, 111 Va. —, 68 S. E. 395: "The direct and efficient cause of the injury for which this suit was brought was the alighting from the train while in motion. In that act the railroad company had no part."

If it were conceded that Paris was not guilty of negligence in alighting from the train, we do not perceive that his case would be strengthened, for his act of alighting was the proximate cause of the injury. In order to recover, he must show negligence upon the part of the railroad company as the proximate cause of the injury for which he sues. He cannot recover merely because he was not guilty of a negligent act; and in this case the negligence of the railroad company had ceased to operate—was exhausted—and his alighting from the train, whether under conditions that convict him of negligence or not, is immaterial. If the act of the railroad was a mere condition and not the proximate and efficient cause of the injury, and if Paris in alighting from the train, under the circumstances disclosed in this record, was free from fault and guilty of no negligence, then the occurrence must be classed as an accident for which there can be no recovery.

It has often been held that the act of a responsible agent, intervening between the negligence of the railway company and the injury sued for, relieves the railway company of responsibility. If the intervening act of a third person has that effect, how much more where the person injured was himself the author of his own wrong.

But it is said that if this view prevail, and a person injured while leaving a moving train under circumstances similar to those under consideration is denied the right to recover for such injury, and is left to compensation for damages for the inconvenience, loss of time, and the labor of traveling back,

which are the direct consequences of the act of the railroad company, the recovery in many instances would not adequately redress the wrong suffered. To this we reply that experience does not warrant the apprehension that courts and juries may not safely be trusted to do full justice to the citizen in such controversies; and that, even if this were not so, the difficulty or the inability to obtain full compensation for an admitted wrong cannot be made the basis for a recovery against a railroad company in excess of just compensation for the injury which its negligence had occasioned, measured by the ascertained and established rules of law in such cases.

There is another view, which we think is not without merit. Where an injury is inflicted by a negligent act, it is the duty of the party injured by reasonable care to diminish the consequences of the wrong he has suffered, in the interest of the wrongdoer. This is not merely good law but good morals, and flows from that rule which has the highest possible sanction, that we should do unto others as we would have others do unto us.

Where a passenger has been wrongfully carried beyond his station, or has not been given a reasonable time to leave a train, this principle requires him to submit for the time to the situation, secure in his right ultimately to recover for the inconvenience he may suffer, but forbids him to step from a moving train, thereby imperiling his life and limb, and then turn around and ingraft the consequences of his own rash act upon the antecedent negligence of the railroad and recover for both.

For a full discussion of the doctrine of remote and proximate cause, we refer to *C. & O. Ry. Co. v. Wills*, supra, and the authorities there cited. As was said in that case, there is no evidence that any agent of the company directed, advised, encouraged, or even had knowledge of the intention of plaintiff's intestate to alight from the train, except the brakeman, whose conduct was held not to fix negligence upon the railroad company. There was in this case, as in that, the intervening act of a responsible agent, that agent being the plaintiff's intestate himself; and, while the railroad company was guilty of negligence in not giving a sufficient time for Paris to alight from the train, it cannot be said that the injury for which he sues was the natural and continuous sequence, unbroken by any new and independent cause, of that negligent act.

For these reasons we are of opinion that the judgment of the circuit court should be reversed, and this court will proceed to enter such judgment as the circuit court ought to have rendered.

Reversed.

BUCHANAN, J. (dissenting). I cannot concur in the opinion of the court, in so far as it holds that the plaintiff's intestate in attempt-

ing to get off the train was guilty of contributory negligence, as a matter of law; nor in the general rule laid down in that opinion that it is per se negligence in every case for a person to attempt to get off a moving train, except under the circumstances pointed out in the opinion. Whether or not the conduct of plaintiff's intestate, under the circumstances disclosed by the record, was negligence constituting the proximate cause of his death, was, in my opinion, a question for the jury, to be determined from all the facts and circumstances of the case. It is a mistaken view, as it seems to me, to take the single act of stepping off the moving train, and inquire if it alone constituted the proximate cause. The combined effect of the act of the plaintiff's intestate and the wrongful and unlawful conduct of the railroad company, which caused or induced him to attempt to step off the train after it was in motion, ought all to be considered in determining the question of proximate cause. Negligence and contributory negligence are mixed questions of law and fact, and are ordinarily questions for the jury and not for the court.

It is the province of the jury, as was said in *B. & O. Ry. Co. v. Griffith*, 159 U. S. 603, 611, 16 Sup. Ct. 105, 108, 40 L. Ed. 274, "to note the special circumstances and surroundings of each particular case, and then to say whether the conduct of the parties in the case was such as would be expected of a reasonably prudent man under a similar state of facts."

"Negligence," said Judge Burks in *Carlington v. Ficklin*, 32 Grat. 670, 676, 677, "cannot be conclusively established by a state of facts upon which fair-minded men may well differ."

I do not understand, as stated in the majority opinion, that it is per se negligence in this state to get on or off of a moving train, except in cases under the circumstances pointed out in that opinion. Neither the *Jammison Case*, 92 Va. 327, 23 S. E. 758, 53 Am. St. Rep. 813, nor the *Morris Case*, 31 Grat. 200, cited as settling the rule in this state, involved that question. In the first-named case, the plaintiff was not injured in attempting to get on or off a moving train. The *Morris Case* was a case of gross negligence on the part of the passenger, and, while there may be language used in both cases broad enough to sustain the statement in the majority opinion, such language was unnecessary for a decision of those cases, and not binding in a case like this, where the facts are entirely different; for the language of an opinion must always be construed in the light of the facts of the case in which it was rendered, and is not binding as a precedent in a subsequent case unless the case called for its expression. *Griffin v. Woolford*, 100 Va. 473, 41 S. E. 949.

In the *Morris Case*, the court says that time sufficient was given the person "according to the proof to leave the car while the

train was standing; and after he was cautioned the last time, if he had at once followed the conductor, who stepped onto the platform with the lantern in his hand, he might have reached the platform with equal convenience and safety, or if, on tarrying longer and finding the train in motion, when told to get off he should either have declined, as he had the right to do, to obey the direction, or if he chose to take the risk of getting off under the circumstances, he should have gotten off on the stationary platform, which, as shown, was alongside of the train. Such would have been the dictates of common prudence. He did not heed them, but, according to his statement, he got up, walked to the end of the car, and 'jumped off,' not knowing, nor seeking to know, in which direction the train was moving. This would seem to be something more than the want of ordinary prudence and caution. It appears to be gross negligence—extreme recklessness."

It is clear that a case like that did not call for any expression of opinion which would control a case like this.

Neither did the opinion of the Supreme Court of Pennsylvania in the *Aspell Case*, 23 Pa. 147, 62 Am. Dec. 323, cited and relied on in the majority opinion in this case and in the *Morris Case*, require a decision of the question involved in this case. In that case, when the passenger, as Judge Black says in his opinion, "was about to jump, the conductor and the brakeman entreated him not to do it, warned him of his danger, and assured him that the train should be stopped and backed in the station. If he had heeded them, he would have been safely let down at the place he desired to stop at, in less than a minute and a half. Instead of this, he took a leap which promised him nothing but death; for it was made in the darkness of midnight, against a wood pile close to the track, and from a car going probably at the full rate of 10 miles an hour."

Not only was the language used in that case not necessary to its decision, but in a later case in the same court (*Johnson v. West Chester, etc., Ry. Co.*, 70 Pa. 337), where the passenger attempted to get on a moving train, in which the trial court had instructed the jury that, "If the train was distinctly running on the track when the plaintiff attempted to enter, he was guilty of negligence and could not recover," that instruction was held to be erroneous, and that "it was for the jury to say whether the danger of boarding the train when in motion was so apparent as to make it the duty of the passenger to desist from the attempt." The language of Judge Agnew in delivering the unanimous opinion of the court in that case is so apt I cannot do better than quote it as expressing my views, especially as the earlier decision of that court in the *Aspell Case* is quoted and relied on to sustain the majority opinion in this case.

In that case the plaintiff had not been giv-

on sufficient time to get on the train before it began to move. "Now, though the train," says the court, "was distinctly in motion, so that a bystander, cool and unconcerned, could see it visibly running on the track, are we to say, as a matter of law binding on the jury, that a passenger, having a right to go on the train, and seeing himself about to be left improperly by the wayside, is guilty of culpable negligence if he should essay to reach his destination, no matter how slow the motion in running might be or how little danger was apparent to him? He may be guilty of negligence, but of this the jury should judge under the circumstances. He may not set his life or limbs on the hazard of a leap at the running train, as the judge emphatically said, and doubtless if such were the character of the attempt it would be negligence. The expression 'leaping at a running train' denotes a higher effort and less consideration on the part of the traveler than merely attempting to board a car under way. * * *

In discussing the conduct of the passenger, we are not to lay out of sight the wrong of the company in its influence upon his mind and act. He may have strong motives to reach his destination. Indeed, no man but must feel, and feel strongly, at being left by the wayside; he is conscious of his right to go aboard, and naturally becomes excited at the sight of the moving train, perhaps is alarmed, and in some degree confused. If the train is running slowly, and the danger is not apparent to him, what so natural as that he should hurry to reach the train and get aboard? But if we lay down the inexorable rule for this and every other case that, whenever the train can be seen distinctly running, it is legal negligence to attempt to get on, we set a premium on the wrong of the company which influenced the very act itself. To say that, whenever the motion of the train is so distinct that bystanders can see it running along the track, the passenger is to be as cool and unconcerned as they, fold his arms, and say to himself, 'I'll sue you for this breach of contract in leaving me here,' is to him bitterness itself. He may be a stranger and know not where to find accommodation; the severity of the winter may surround him, or the heat of summer oppress him; the elements may war against him, and night or approaching darkness may heighten his alarm; or, if no stranger, his business may be urgent, his family may require his presence, his health may be poor, his means limited, his desire to reach his destination overpowering, and a hundred reasons may influence him to go on. Now, are we to say that the wrong which has caused his mind to be excited and aroused his fears, which confuses him, and has made him less cool and calculating than those who are standing by and can look upon the departing train without emotion, is not to be taken into the account in considering his act? What caused his state of mind? Not his own care-

lessness or breach of duty as a passenger, but the illegal and wrongful act of the carrier. Surely it does not lie in the mouth of the railroad company to say to him: 'The law will take no account of our breach of duty in its effect upon you. You ought not to have suffered it to move you; but, if you saw our train was moving along the track, the slack taken up, the train stretched out, and the cars under way, so that any one else could distinctly see it running, you ought to have looked upon our leaving you on the wayside with perfect coolness, made no effort to go, and sued us for our breach of the contract of carriage. No matter how slow the motion of the train was, nor how little danger in getting on was apparent to you, or what the state of your mind caused by our wrongful act, it is not a question for the jury under the circumstances, but the law holds you guilty of culpable negligence in the attempt to board the train, and we are allowed to go free.' This is too stringent a rule for the case. Culpable negligence is the omission to do something which a reasonable, prudent, and honest man would do, or the doing of something which such a man would not do under all the circumstances surrounding the particular case. *Shearman & Redfield on Negligence*; *Kay v. Penna. Railroad Co.*, 65 Pa. 273 [3 Am. Rep. 628]. Instead, therefore, he should have left it to the jury to say, under all the circumstances in evidence, whether the danger of boarding the train, when in motion, was so apparent as to have made it the duty of the plaintiff to desist from the attempt. There is no objection to the court assisting the jury in the performance of their duty by reminding them of the danger of boarding a train in motion, and the caution and care that passengers should use, as well as of the duties of the carriers and the influence of their wrongful acts in producing the catastrophe. But railroad companies are bound to remember that they owe duties to the public, for whose benefit their charters have been granted, and, therefore, should not be lightly loosed from the effects of their own wrongful acts."

In *Filler v. N. Y. Central R. Co.* (a steam railroad) 49 N. Y. 47, 10 Am. Rep. 327, cited with approval by this court in the case of *Newport, etc., Co. v. McCormick*, 106 Va. 517, 521, 59 S. E. 281, in which last-named case it was held that it was not per se negligence to step from a moving street car, it was said by the Court of Appeals of New York: "That there was more hazard in leaving a car while in motion, although moving very slowly, than when it is at rest, is self-evident. But whether it is imprudent and careless to make the attempt depends upon circumstances; and where a party by the wrongful act of another has been placed in circumstances calling for an election between leaving the cars or submitting to an inconvenience and further wrong, it is a proper

question for the jury whether it was a prudent and ordinarily careful act or whether it was a rash and reckless exposure of the person to peril and hazard."

The rule laid down in those cases seems to me to be the correct one, sustained by the better reason, and in accord with the weight of authority. See *New York, P. & N. Ry. Co. v. Coulbourn*, 69 Md. 360, 16 Atl. 208, 1 L. R. A. 541, 9 Am. St. Rep. 430; *Doss v. M., K. & T. R. Co.*, 59 Mo. 27, 37, 21 Am. Rep. 371; *Strand v. C. & W. R. Co.*, 64 Mich. 216, 219, 31 N. W. 184; *Cent. Railroad, etc., v. Miles*, 88 Ala. 276, 261, 262, 6 South. 696; *Cumberland Valley R. Co. v. Maugans*, 61 Md. 53, 60-63, 48 Am. Rep. 88; *Carr v. Eel River, etc., R. Co.*, 98 Cal. 366, 33 Pac. 213, 21 L. R. A. 354; *Mills v. Railway Co.*, 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497; *L. & N. R. Co. v. Crunk*, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443; *Atchison, etc., Ry. Co. v. Holloway*, 71 Kan. 1, 80 Pac. 31; *Sanders v. Southern Ry. Co.*, 107 Ga. 132, 32 S. E. 840.

The plaintiff's instate in this case, according to the plaintiff's evidence, had the right to be upon the train; he was told that the train would remain there long enough for him to find his daughter a seat and deposit her baggage and get off; he was diligent in what he had to do on the train, and in his effort to leave it. He was going down the steps of the coach almost in the very act of getting off on the station platform, in the daytime, when the train, by the wrongful and unlawful act of the defendant, began to move slowly. Whether, under these circumstances, it was negligence to attempt to get off of the train, was, in my judgment, a question about which reasonably fair-minded men might differ, and was therefore a question for the jury, and not for the court.

WHITTLE, J., concurs.

(111 Va. 153)

POTOMAC, F. & P. R. CO. v. CHICHESTER.†
(Supreme Court of Appeals of Virginia. June 15, 1910.)

1. MASTER AND SERVANT (§§ 101, 102*)—SAFETY OF PLACE OF WORK—EMPLOYER'S DUTY.

An employer must use ordinary care to provide a reasonably safe place of work for his employes, considering the character of the work, and is liable for injuries resulting from failure to use such care; but he may choose any reasonably safe method, being not required to adopt the newest and the best.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§ 112*)—RAILROADS—SAFETY OF PLACE OF WORK—SWITCHES AND Y'S.

As affecting the safety of employes, the location of a railway siding or switch for freight purposes, as to its curves and grades, is ordinarily an engineering question, which the company is entitled to settle for itself.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 213-223; Dec. Dig. § 112.*]

3. MASTER AND SERVANT (§ 112*)—RAILROADS—SAFETY OF PLACE OF WORK—Y'S.

As affecting a railway company's liability for the death of a brakeman, who was unable to stop a car he was handling on a Y by gravity, the Y was not negligently constructed, though the curves at one point were so sharp that locomotives could not run over it, and the grades were heavy, where the Y had been so maintained for 15 years without injury to any one.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 213-223; Dec. Dig. § 112.*]

4. MASTER AND SERVANT (§§ 137, 217*)—RAILROADS—CONSTITUTIONAL AND STATUTORY PROVISIONS—EFFECT.

Const. 1902, § 162 (Code 1904, p. cclix), and Code 1904, § 1294k, providing that a railway employe's knowledge of defects in appliances shall not bar recovery for injury caused by them, does not prevent a railway company from adopting any reasonably safe methods in conducting its business or constructing its switches, nor do they change the rule that any risk due merely to the character of a switch is one of the risks of employment.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. §§ 137, 217.*]

5. MASTER AND SERVANT (§ 137*)—RAILROADS—NEGLIGENCE—HANDLING CARS ON Y.

A railway company was not negligent in handling its cars on a switch by gravity, where that method was reasonably safe, and had been used for many years without injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 269-278; Dec. Dig. § 137.*]

6. MASTER AND SERVANT (§ 236*)—RAILROADS—DEATH OF BRAKEMAN—NEGLIGENCE—JURY QUESTION.

In an action against a railway company for the death of a brakeman while moving a freight car by gravity, held, under the evidence, a jury question whether the car was dangerously overloaded.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 236.*]

7. WITNESSES (§ 94*)—COMPETENCY—INTEREST.

A witness' credibility, but not his competency, is affected by the fact that he has received more than his services are worth, and is to receive an additional sum on one of the parties succeeding.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 249-257; Dec. Dig. § 94.*]

8. WITNESSES (§ 37*)—KNOWLEDGE OF SUBJECT.

In a personal injury case against a railway company, testimony of a witness that one link in a chain was longer than others was not incompetent because witness had little knowledge upon some matters to which he testified.

[Ed. Note.—For other cases, see *Witnesses*, Dec. Dig. § 37.*]

9. TRIAL (§ 96*)—EVIDENCE—MOTION TO STRIKE.

Evidence will not be stricken on a general motion, where part of it is admissible.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 248; Dec. Dig. § 96.*]

Appeal from Circuit Court, Orange County.

Action by one Chichester, administrator, against the Potomac, Fredericksburg & Piedmont Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied September 15, 1910.

St. Geo. B. Fitzhugh, for plaintiff in error.
E. H. De Jarnett, Jr., for defendant in error.

BUCHANAN, J. This is an action to recover damages from the Potomac, Fredericksburg & Piedmont Railroad Company for the death of Charles S. Waller, an employé of the defendant company, caused by its alleged negligence.

The grounds of negligence relied on for a recovery are in substance: (1) That the switch or Y upon which the accident occurred was not properly constructed as to its grades or curves; (2) that the method adopted for handling the cars upon the switch or Y was dangerous; (3) that the brake on the car from which the plaintiff's intestate fell or was thrown was out of repair; and (4) that the said car was overloaded.

The defendant company operated a narrow-gauge railroad between Fredericksburg and Orange courthouse. At Tinder's, one of its stations on the road, there was a switch in the shape of a Y. On the east leg of this Y freight cars were loaded with timber and lumber and brought down to or near the main track by hand. In February, 1908, there was standing on the east leg of the Y one of the defendant company's cars loaded with lumber. Upon the arrival of one of its trains at that station, the conductor directed the plaintiff's intestate and another brakeman to bring the car down towards the main track, so that it could be attached to the train and carried to Fredericksburg. Both of the brakemen ran toward the car; but the plaintiff's intestate reached it first, boarded it, released the brakes, and started it down the grade. After the car had run a short distance, he applied or attempted to apply the brakes; but, finding that the speed of the car was not much checked, in a further effort to apply the brakes, or in the act of jumping off to avoid a collision with another car a short distance below (it does not clearly appear which), he slipped and fell in front of, and was run over by, the car (No. 12), which caused his death.

The most material matter involved in the case, and one of much importance, is as to the action of the court in submitting to the jury the question whether or not the switch or Y, as to its grades and curves, was properly constructed. It is not contended that the switch or Y was out of repair, but that the manner in which it was constructed and operated rendered it unsafe and dangerous.

The curves in the east leg of the Y, where the cars were brought down by hand, or by gravity, were sharp, so much so that the engines then in use upon the road could not run over it to the point where car No. 12 was loaded and standing. The grades upon this part of the Y were heavy—at some points between 4 and 5 per cent. This had been substantially the condition of the east leg of the Y for more than 15 years. During that time cars had been brought down by hand

almost every day, or at least several times a week, and frequently two or three at one time, by one brakeman, without personal injury to any one, though on several occasions those in charge of such cars had lost control of them, or were unable to prevent them from running against or into other cars standing on the Y. The evidence shows that the Y could have been constructed with curves less sharp and grades less heavy, and that plans for a new Y had been made by the defendant's engineer some 6 or 7 years before, and the west leg of the Y rebuilt according to that plan.

It is a general principle of law that the master shall use ordinary care to provide a reasonably safe place in which his servant is to work, considering the character of the work in which the servant is engaged, and the master will be held liable for injuries to the servant which result from failure to exercise such care. But the right of selection among reasonably safe methods for doing his work rests with the master. He is not required to adopt the newest and the best, but he performs his duty if he adopts those which are reasonably safe. *N. & P. Traction Co. v. Ellington's Adm'r*, 108 Va. 245, 249, 250, 61 S. E. 779, 17 L. R. A. (N. S.) 117, and cases cited.

The general rule seems to be that the location of a siding or switch for freight purposes, as to its curves and grades, is ordinarily an engineering question, which a railway company is entitled to settle for itself.

In the case of *Tuttle's Adm'r v. Detroit, etc., Ry. Co.*, 122 U. S. 189, 7 Sup. Ct. 1166, 80 L. Ed. 1114, one of the grounds of negligence relied on for recovery was that the railway company in the construction of a "boot-jack" siding, negligently and unskillfully constructed the same with so sharp a curve that the drawheads of the cars failed to meet and passed each other, thereby causing the death of the plaintiff's intestate while coupling the cars. In discussing that ground of alleged negligence, the court said: "We have carefully read the evidence presented by the bill of exceptions, and, although it appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved, much less that it should be left to the varying and uncertain opinions of juries to determine such an engineering problem. * * * The interest of railroad companies themselves is so strongly in favor of easy curves as a means of facilitating the movements of their cars that it may well be left to the discretion of their officers and engineers in what manner to construct them for the proper transaction of their business in yards, etc. It must be a very extraordinary case, indeed, in which

their discretion in this matter should be interfered with in determining their obligation to their employees."

The rule of law announced by the Supreme Court of the United States in that case was approved by this court in *N. & W. Ry. Co. v. Cromer*, 101 Va. 667, 671, 44 S. E. 898. In that case it was said: "Courts and juries cannot dictate to railway companies a choice between methods, all of which are shown to be reasonably adequate for the purposes intended to be subserved. Thus to subject them to the varying and uncertain opinions of juries in questions of policy, and to substitute the discretion of the latter for their discretion, would be wholly impracticable, and would prove alike disastrous to the public and the companies." See, also, generally, *Boyd v. Harris*, 176 Pa. 484, 35 Atl. 222, 223; *C. & E.*, etc., *R. Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921-923; *Bethlehem Iron Co. v. Weiss*, 100 Fed. 45, 40 C. C. A. 270; *Gilbert v. Burlington, etc., Ry. Co.*, 128 Fed. 529, 63 C. C. A. 27.

We are of opinion, therefore, under the facts of this case, that the court erred in submitting to the jury the question whether or not the defendant company was negligent in the method it had adopted for constructing the switch upon which the injury occurred.

The constitutional and statutory provisions (Const. 1902, § 162, [Code 1904, p. cclix]; Va. Code 1904, § 1294k) do not affect this question. The effect of those provisions was not to take away from the railroad company the right to carry on its business in its own way and to adopt any method of constructing its switches it might prefer, which were reasonably safe; nor do they change the rule that any risk that was due merely to the character of the switch was one of the risks of the employment. The effect of those provisions, as was held in *Cheatwood's Case*, 103 Va. 356, 49 S. E. 489, was merely to abrogate the previously existing rule, which forbade the servant's recovery if he knowingly used defective machinery, etc., and to declare that such knowledge, of itself, should not bar a recovery.

We are of opinion also, that the court erred in submitting to the jury the question whether or not the defendant was negligent in the method of handling cars on the switch. That method was proved to be reasonably safe, and had been used for many years without personal injury to any one, and was in common use.

"Absolute safety," as was said by the court in *Norfolk, etc., Co. v. Ellington's Adm'r*, supra, "is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence, and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. * * * The test of negligence in the employer is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say

that the usual and ordinary way commonly adopted by those in the same business is a negligent way for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct; but they cannot be allowed to set a standard which shall in effect dictate the customs or control the business of the community."

There was no error in the action of the court in submitting to the jury, as was done in plaintiff's instruction No. 9, the question whether or not the car No. 12 was dangerously overloaded, or its brakes were defective, and, if so, whether or not such dangerous overloading or defective condition of the brakes was the proximate cause of the death of plaintiff's intestate. There was evidence tending to prove that the car was overloaded with the knowledge and consent of the defendant company, and that the brakes were in a defective condition.

Another error assigned is to the action of the court in refusing to exclude the evidence of Cave Anderson, one of the plaintiff's witnesses, on the ground that the witness had acknowledged that he had been paid \$10 by the plaintiff's attorney to make a trip to Fredericksburg to examine the condition of the brakes of the car which ran over the plaintiff's intestate, and was to receive \$30 more if the plaintiff made a recovery in the case.

The fact that the witness had received more than his services were worth, and was to receive an additional sum in the event the plaintiff was successful, went to the witness' credibility, and not to his competency.

The court refused to exclude the evidence of Shannon, another witness of the plaintiff, because his answers to questions asked him showed that "he was a perfect ignoramus as far as any knowledge of the brake machinery" on the car was concerned.

Although the witness upon some matters as to which he testified seems to have had little knowledge, he testified positively and clearly that one link in the brake chain was longer than the others. This was competent evidence tending to sustain the plaintiff's contention as to the condition of the brake chain, and was admissible. The motion to strike out was properly overruled.

Where evidence is offered, a portion of which is admissible and the other not, and the objection to it is general, the motion to strike out must be overruled. *Washington, etc., Ry. Co. v. Lacey*, 94 Va. 460-463, 23 S. E. 834.

Other errors are assigned; but it will be unnecessary to notice them in detail, as they are not likely to arise upon the next trial, or are controlled by what has been said in disposing of the errors particularly considered.

The judgment complained of must be reversed, the verdict set aside, and the cause remanded for a new trial, to be had not in conflict with the views expressed in this opinion.

(111 Va. 184)

**TURNER'S ADM'R v. CITIZENS' BANK
OF NORFOLK.†**

(Supreme Court of Appeals of Virginia. June 9, 1910.)

**1. LIFE ESTATES (§ 27*)—VOID SALE DURING
LIFE ESTATE—REMEDY OF REMAINDERMEN.**

Where land subject to a remainder interest was sold under a void decree during the life estate, the proceeds being deposited in bank to await the death of the life tenant, the remaindermen, at the death of the life tenant, could elect to receive the funds so deposited, which would be an acceptance of the benefit of the void decree and estop them from asserting any claim to the land, or they could decline to accept the fund and elect to take the land in specie.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 49-53; Dec. Dig. § 27.*]

**2. WILLS (§ 744*)—ALIENES OF DEVISEES—
FUNDS IN COURT.**

Where a remainder interest in land was sold under a void decree pending the life estate, the proceeds being deposited in bank to await the death of the life tenant, and the remainder interest was devised by the purchaser, and the remaindermen, upon the death of the life tenant, elected to take the land instead of the fund deposited, alienes of the devisees were entitled to be subrogated to the deposit, and the testator's personal representative was not entitled to it as part of the testator's estate; there being no equity intervening, nor circumstance which should intercept the enforcement of their demands.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1911-1917; Dec. Dig. § 744.*]

Appeal from Circuit Court of City of Norfolk.

Bill by W. H. Turner's administrator against the Citizens' Bank of Norfolk. Decree of dismissal, and plaintiff appeals. Affirmed.

This case is the sequel to the cases of *Turner v. Barraud*, 102 Va. 324, 48 S. E. 818, and *Suburban Company v. Turner*, 105 Va. 458, 54 S. E. 29.

We cannot present the facts which led up to the present case better than by adopting the statement of this court in the last-named case. That statement is as follows:

"In the year 1867 D. C. Barraud, Sr., died in the city of Norfolk, leaving a will by which, among other things, he gave to his grandson, D. C. Barraud, Jr., a life estate in a farm containing 100 acres, known as 'Barron's,' with remainder to his lawful issue, if he should die leaving any, and, if he should die without such issue, then the remainder was to pass, under the residuary clause of the will, to the persons named therein.

"Upon the death of the testator the life tenant took possession of the 'Barron's' farm, and subsequently incumbered his estate by deeds of trust and judgments.

"In the year 1874 D. C. Barraud, Jr., and others, united as complainants in a chancery suit against R. C. Marshall and others. The object of the suit, as stated in the bill, was 'to construe the said will, to fix and

determine the rights and interests of the various parties interested therein, to protect and provide for the annuities, and to make partition in kind of the real estate so devised by the said D. C. Barraud, deceased, to and among the parties entitled thereto, according to their respective shares and interests, so that the part or share of your orator, the said D. C. Barraud, therein, may be set apart in kind, if practicable, and so far as practicable, and sold for the benefit of the creditors under the said deeds of trust and judgment creditors aforesaid.'

"In the year 1875 a decree was entered directing the sale of the 'Barron's' farm, remainder as well as the life estate. In the year 1878 a consent decree was entered confirming a private sale of the farm to William H. Turner. This decree also ascertained the remainder interest in the proceeds of that sale to be \$1,150.10, and directed it to be deposited in the Citizens' Bank of Norfolk, bearing compound interest, to await the death of the life tenant; and at the same term of the court a final decree was entered striking the case from the docket.

"In the year 1885 William H. Turner, the purchaser at the sale mentioned, died, leaving a will by which he devised the 'Barron's' farm to his son, Henry L. Turner, during his life, and the remainder in fee to his grandson, William H. Turner, Jr. In the year 1891 the said Henry L. Turner and William H. Turner, Jr., conveyed to the Northeast Norfolk Land Company the whole of the 'Barron's' farm, with covenants of general warranty; but in the year 1894 the said land company reconveyed to Henry L. Turner for life, and the remainder in fee to William H. Turner, Jr., about 30 acres of the said farm. The residue of the 'Barron's' farm, about 70 acres, is now owned by, or is subject to the liens of, the appellants, except the Citizens' Bank of Norfolk.

"In the year 1901 Henry L. Turner, the life tenant of the 30 acres of the 'Barron's' farm, and the heirs of the remainderman, William H. Turner, Jr., deceased, instituted a suit against the children of D. C. Barraud, Jr., to remove a cloud upon the title to the said 30 acres of land growing out of the claim of the children of the said D. C. Barraud, Jr., that they were not parties to, nor bound by the decrees entered in, the cause of Barraud v. Marshall, heretofore referred to. Upon a hearing of the said cause of *Turner v. Barraud*, the circuit court of the city of Norfolk held that the action of the court in selling the remainder interest of the children of D. C. Barraud in the 'Barron's' farm was not binding upon them, and that the decrees and other proceedings in the cause of Barraud v. Marshall, so far as they affect the rights of the said children in and to the land in controversy were null and void. Upon appeal that action of the cir-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied September 15, 1910.

cult court was affirmed. The history of the case and the reasons for this court's decision are fully set out in the opinion of the court in the report of the case, which is found in 102 Va. 324-388, 46 S. E. 318.

"After the affirmance of the decree appealed from in that case, the personal representative of William H. Turner, deceased (the purchaser of the 'Barron's' farm in the case of Barraud v. Marshall) instituted his suit in the circuit court against the Citizens' Bank of the City of Norfolk and others, to compel that bank to pay or turn over to him the said sum of \$1,150.10 (and its interest), deposited with that bank under decree of the court in the case of Barraud v. Marshall, as above stated."

The plaintiff rested his right of recovery of the money in bank upon the allegation that his testator only acquired an estate in the "Barron's" farm for the life of D. C. Barraud, Jr., by virtue of decrees in Barraud v. Marshall, and that a trust arose to refund to him the fund on deposit (the purchase price of the remainder interest in the "Barron's" farm), the right to which on the death of Turner devolved upon him as personal representative.

The circuit court granted the relief prayed for in the bill, but upon appeal the decree was reversed. The court, at page 461 of 105 Va., page 30 of 54 S. E., observes: "Treating, however, the sale of the remainder in the 'Barron's' farm in the case of Barraud v. Marshall as a nullity so far as it affected the rights of the issue of D. C. Barraud, Jr., it does not follow that it was a nullity as to the heirs of D. C. Barraud, Sr. They were parties to that suit and consented to the decree, which confirmed the sale of the 'Barron's' farm, which included the remainder as well as the life estate. This being so, they would not be heard to object that the sale as to them was not valid and binding, and upon the death of D. C. Barraud, Jr., without issue, as it is possible, the heirs of D. C. Barraud, Sr., would be entitled to the fund deposited in the Citizens' Bank, and the title to the remainder interest in the 'Barron's' farm would be perfected in those who have acquired the rights of William H. Turner, Sr., the purchaser in the case of Barraud v. Turner."

Consequently, the court held that the fund in bank could not be properly disposed of until after the death of D. C. Barraud, Jr., and the bill was accordingly dismissed, but without prejudice.

Jas. E. Heath, for appellant. W. W. Old & Son, Jeffries, Wolcott, Wolcott & Lankford, Garnett & Garnett, W. L. Williams, Cutchins & Cutchins, and John B. Jenkins, for appellees.

WHITTLE, J. (after stating the facts as above). D. C. Barraud, Jr., died in the year 1908, leaving "lawful issue" surviving him. Whereupon the personal representa-

tive of William H. Turner, Sr., filed another bill in the circuit court of the city of Norfolk to recover the money deposited in the Citizens' Bank under the decree in the case of Barraud v. Marshall (which we shall hereafter designate as the "court fund"), as an asset belonging to the estate of his testator. All parties in interest were convened in that suit, and the children of D. C. Barraud, Jr., having disclaimed and renounced all interest in the court fund, the circuit court, upon the pleadings and an agreed statement of facts, passed the decree under review, denying the prayer of the bill, and, after deducting certain costs, attorney's fees, and taxes, awarded the court fund to the parties in possession of the "Barron's" farm (at the time of the death of the life tenant, D. C. Barraud, Jr.), as alienees of the devisees of William H. Turner, Sr., deceased, in proportion to their respective holdings.

By the terms of the certificate the court fund was deposited to the credit of the suit of Barraud v. Marshall, for the benefit of such persons as might be entitled to the same under the will of the testator, D. C. Barraud, Sr., and the children (the "lawful issue") of D. C. Barraud, Jr., having survived their father, became entitled to the fund, provided they should elect to receive it.

On the death of D. C. Barraud, Jr., either one of two courses was open to the children: They could have elected to receive the court fund, which would have been an acceptance of the benefit of the void decree in the original suit, under which their remainder interest was sold, and estopped them from asserting any claim to the land; or they could have declined to accept the court fund, and have elected to take the land in specie. The effect of the former course would have inured to the benefit of the appellees, and confirmed their title to the land; the effect of the latter was to oust the appellees of their title to the land, and, as the learned circuit court held, entitled them to be subrogated to the rights of the children to the court fund.

The concrete question, therefore, for our determination, is whether the devisees of William H. Turner, Sr. (or rather their alienees), who have been disappointed of what they would otherwise have been entitled to retain (the land devised) by the election of the Barraud children to take land instead of the court fund (the purchase price of the land), are entitled in equity to resort to the court fund to make good the benefits intended to be bestowed upon them by the testator's will.

The general doctrine of subrogation and the kindred principles of substitution, compensation, and election, have repeatedly received consideration at the hands of this court, and in no jurisdiction has that doctrine been more liberally applied to meet the exigencies of particular cases than in this state.

In a note to *Dering v. Earl of Winchelsea*, 1 L. C. in Eq. pt. 1, 140, it was said that in *Powell v. White*, 11 Leigh, 309, "the Virginia practice was vindicated against the authority of Lord Eldon, with distinguished and convincing ability."

In *Enders v. Brune*, 4 Rand. 438, Judge Carr observes: "But the doctrine of substitution is governed by principles wholly different. It has nothing of form, nothing of technicality, about it; and he who, in administering it, would 'stick in the letter,' forgets the end of its creation, and perverts the spirit which gave it birth. It is the creature of equity, and real essential justice is its object."

In *American Bonding Co. v. National Mechanics' Bank of Baltimore*, 99 Am. St. Rep. 466, Judge Freeman, in note (page 478), says: "Legal subrogation is not founded upon contract or privity or strict suretyship. It is born of equity, and results from the natural justice of placing the burden where it ought to rest. It does not flow from any fixed rule of law, but rather from principles of justice, equity, and benevolence. It is a purely equitable result, depending, like other equitable doctrines, upon the facts and circumstances of each particular case to call it forth. It is a device adopted or invented by equity to compel the ultimate discharge of a debt or obligation by him who in good conscience ought to pay it."

It is a very ancient maxim of the law that "he who bears the burden ought also to derive the benefit." *Broom's Max.* 712.

In *Sheldon on Subrogation* (2d Ed.), the learned author, at section 35, says: "The purchaser from a devisee, whose purchase money has been applied in payment of debts of the testator, will be subrogated to the rights of the creditors whose demands he has thus satisfied." *Gibson v. McCormick*, 10 Gill & J. (Md.) 65. See, also, Judge Freeman's note to *American Building Co. v. Nat., etc., Bank*, supra, 99 Am. St. Rep., at page 529; *Sheldon on Subrogation*, § 86a; *Pease v. Egan*, 181 N. Y. 262, 30 N. E. 102.

At section 218, Mr. Sheldon says: "Beneficiaries under a will, who have, by the election of another legatee, been disappointed of what they would otherwise have received, will be allowed compensation for their loss out of what the latter would by a different election have taken under the will"—citing *Pickersgill v. Rodger*, 5 Ch. Div. 163; *Wilkinson v. Dent*, L. R. 6 Ch. 339, 341; *Reeve v. Reeve*, 1 Vern. 219; *Welby v. Welby*, 2 Ves. & B. 187, 190; *Bor v. Bor*, 3 Bro. P. C. 167; *Dean v. Hart*, 62 Ala. 308; *Key v. Griffin*, 1 Rich. Eq. (S. C.) 67; *Timberlake v. Parish*, 5 Dana (Ky.) 345.

The reason of the rule is stated in *Bor v. Bor*, supra, as follows: "Where a testator, making provision for the different branches of his family, gives a fee-simple estate to one and a settled estate to another, imagining that he had power so to do, a tacit condition

is implied, to be annexed to the devise of the fee-simple estate, that the devisee thereof shall permit the settled estate to go according to the will, and if in that respect he should disappoint the will, what is devised to him shall go to the person so disappointed; it being presumed that, if the testator had known his defect of power to devise the settled estate, he would out of the estate in his power have provided for that branch of his family who was not entitled to the settled estate, and have declared that no person should enjoy a legacy or devise who controverted his power as to any benefit given to another." See, also, *Sheldon on Subrogation*, sec. 219.

It must be remembered that the present case is supplemental merely to the original suit of *Barraud v. Marshall*, and that the court possesses the same power of direction and disposition with respect to the court fund that could be exercised in the original case if the same were still pending. It will be also noted that there is no suggestion, either in the pleadings or agreed statement of facts, of the intervention of any equity or the existence of any circumstance which should intercept the enforcement of the meritorious demand of the appellees to the court fund. They have confessedly been deprived of property which produced this identical court fund, by the election of parties whose right to have appropriated it in exoneration of that property cannot be questioned; and impotent, indeed, would be the processes of a court of equity, if it could devise no remedy for applying the "court fund" in reimbursement of the loss to which the appellees, without fault on their part, have thus been subjected.

Says Pomeroy, in his work on *Equity Jurisprudence* (2d Ed., § 109): "Equitable remedies . . . are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is, in fact, no limit to their variety and application. The court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties."

With all the parties and the subject-matter before it, and with the ultimate destination of the fund, as it seems to us, plainly in sight, there could be no justification for a court of equity to relinquish its administration of the court fund in favor of a personal representative, on the theory that it is an asset of the estate, to the administration of which he is exclusively entitled.

This view of the case renders the consideration of the remaining assignment, with respect to the payment of costs, attorney's fees, and taxes, unnecessary.

For these reasons, the decree of the circuit court must be affirmed.

Affirmed.

HARRISON, J., absent.

(111 Va. 95)

JOHNSON v. WILLIAMS et al.

(Supreme Court of Appeals of Virginia. June 9, 1910.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 275*)—ACTIONS BY ASSIGNEE—NECESSARY PARTIES.

In a suit by trustees for the benefit of creditors, in which neither the creditors nor an ostensible partner of the assignor were parties, the court cannot determine whether the latter is personally liable to the assignor's creditors on the ground of estoppel.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 819-823; Dec. Dig. § 275.*]

2. PARTNERSHIP (§ 34*)—OSTENSIBLE PARTNERS—LIABILITY.

One who holds himself out as a partner in an ostensible firm, and causes the creditors of such firm to give a credit, is personally liable to such creditors, though he has a right of action over against the real debtor for money so paid out.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 49; Dec. Dig. § 34.*]

3. PARTNERSHIP (§ 34*)—OSTENSIBLE PARTNERS—ESTOPPEL TO DENY LIABILITY—ESTOPPEL INTER SE.

No equitable estoppel can exist between parties who were not misled by each other's conduct, so that the members of an ostensible firm are not estopped as between themselves from denying the partnership, though they would be as to third persons.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 49; Dec. Dig. § 34.*]

4. PARTNERSHIP (§ 180*)—APPLICATION OF ASSETS TO LIABILITIES—OSTENSIBLE FIRMS—RIGHTS OF INDIVIDUAL AND FIRM CREDITORS.

Since partnership creditors have no right to have their debts satisfied out of partnership assets, except through the equities existing between the partners themselves, creditors of an ostensible firm are not entitled to have the property in the possession of that firm applied to the satisfaction of their debts prior to the individual creditors of the real debtor, so that the claim of a chattel mortgagee under a mortgage executed by the real debtor on property owned by him in conducting a business as a firm would have priority over a subsequent general assignment for his creditors; the creditors of the ostensible firm having no right of priority over the general creditors to have their debts satisfied out of the assets of the ostensible firm.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 180.*]

Appeal from Circuit Court, Isle of Wight County.

Suit by one Williams and others, trustees, against G. H. Johnson. From a judgment for plaintiffs, defendant appeals. Reversed and remanded, for further proceedings as directed.

Jno. N. Sebrell, Jr., for appellant. R. W. Withers, Jas. U. Burges, Geo. F. Whitley, and E. H. Williams, for appellees.

BUCHANAN, J. It appears from the facts agreed that G. H. Johnson was the sole owner of a hardware business in the town of Smithfield, which was conducted under the name of G. H. Johnson & Co. He was also

the sole owner of an undertaking business, conducted in the same town, but at a different house, under the name of Johnson & Seward. Seward owned no part of the business, received none of the profits, but occasionally worked in the undertaking establishment, for which he received pay for the time he worked. With Seward's knowledge his name appeared on the sign in front of the house in which the undertaking business was conducted, also on letter heads, bill heads, and stationary generally. Orders for goods for the undertaking business were signed "Johnson & Seward," and notes evidencing indebtedness therefor were signed in the same manner; Johnson making the orders and the notes.

On February 1, 1908, Johnson, being indebted to W. E. Johnson in the sum of \$1,500 for money advanced and suretyship undertaken, executed a writing in form of a bill of sale, but in fact a chattel mortgage, on all the goods and stock in the undertaking business to W. E. Johnson to secure the said indebtedness, which paper was duly recorded on the same day. On the 20th of the same month, Johnson, being insolvent, executed a deed of assignment to E. H. Williams and two other persons as trustees, conveying all his property of every kind for the benefit of all his creditors pro rata.

The trustees in the deed of assignment filed their bill, asking to administer the trust under the direction of the court, making G. H. Johnson, their grantor, and W. E. Johnson, the chattel mortgagee, parties defendant. Neither Seward nor the creditors of Johnson were made parties.

Upon a hearing of the cause the trial court held that the chattel mortgage, although prior in time to the general assignment, was subordinate to that assignment, and that the chattel mortgagee was entitled to receive nothing under it until all the creditors of G. H. Johnson, trading as Johnson & Seward, had been paid in full, directed the trustees to so distribute the proceeds of the undertaking business and dismissed the bill. From that decree this appeal was taken.

The second error assigned (and in the view we take of the case the only one that it is necessary to consider) is that the trial court erred in holding that the creditors of Johnson in the undertaking business had a lien on the assets of that business superior to the chattel mortgage of W. E. Johnson.

Assuming (and we cannot do more in this case, as neither Seward nor the creditors are parties to this suit) that Seward was and is personally liable to the creditors of Johnson in the undertaking business, as ostensible partner, on the ground of estoppel, does that have the effect of giving the creditors of the ostensible firm the right to have the property which was in the possession and use of that firm applied to the satisfaction of their

debts in priority to the claim of W. E. Johnson, the individual creditor of G. H. Johnson?

The cases are not in harmony upon this question. Some support the view that the creditors of the ostensible partnership have such priority (see *Kelly v. Scott*, 49 N. Y. 595; *Hillman v. Moore*, 3 Tenn. Ch. 454; *Thayer v. Humphrey*, 91 Wis. 276, 64 N. W. 1007, 30 L. R. A. 549, 51 Am. St. Rep. 887, and cases cited; *Van Kleeck v. Hammell*, 87 Mich. 599, 49 N. W. 872, 24 Am. St. Rep. 184; *Adams v. Albert*, 155 N. Y. 356, 49 N. E. 929, 63 Am. St. Rep. 679); others that they have no priority (see *Kerr v. Potter*, 6 Gill [Md.] 404; *Reese v. Bradford*, 13 Ala. 346; *Scull's Appeal*, 115 Pa. 141, 7 Atl. 588; *Broadway Nat. Bank v. Wood*, 165 Mass. 312, 43 N. E. 100, and cases cited). The weight of authority seems to be in favor of the latter view. 30 Cyc. 395; *Broadway Nat. Bank v. Wood*, supra.

While the question seems to be one of first impression in this jurisdiction, the principles by which it is to be determined are, as it seems to us, well settled.

In *Shackelford v. Shackelford*, 32 Grat. 481, 503, President Moncure gives the reason why the social creditors of an actual partnership have priority over the individual creditors of the partners in the distribution of the social assets. He says: "We know that ordinarily a partnership estate is liable to the payment of the debts of the firm in preference of the individual debts of the partners. This is the right of the individual partners inter se. The creditors of the partnership have no such right of priority over the creditors of the partners individually, but only by substitution to the rights of the partners inter se. The partners may release this right, and the creditors of the partnership cannot complain; for it is not their right, except subject to the disposition and control of the partners themselves, to whom it belongs."

In *Robinson v. Allen*, 85 Va. 721, 729, 8 S. E. 835, 839, it was held that the right of the simple contract creditors of a partnership to have social assets specifically appropriated in equity to the payment of their debts in preference to the creditors of an individual partner was a derivative one—that it was "merely the right to be substituted to the equity the partners have inter se to have the property so applied. * * *

And in *Millhiser v. McKinley*, 98 Va. 207, 209, 35 S. E. 446, 447, Judge Riely, speaking for the court, says that ordinarily a partnership estate is liable to the payment of the debts of the firm in preference to the individual debts of the partners. "This is the right of the partners inter se. The creditors of the partnership have no such right of priority over the separate creditors of the partners, otherwise than by substitution to the rights of the partners inter se. The partners may release this right, and if they

do so bona fide the creditors cannot complain, for it is not their right, except subject to the proper disposition and control of the partners themselves."

The social creditors having no right to have their debts satisfied out of the social assets, except through the equities of the partners between themselves, it would seem to follow that if there be no partnership there are no equities to which such creditors can be substituted. If one holds himself out as a partner, or permits himself to be so held out when he is not a partner, and has no interest in the assets in the possession of the ostensible firm, out of what does his equities grow? The fact that his conduct caused the creditors of the ostensible firm to give it credit will make him personally liable to such creditors, and give him a right of action against the real debtor for any sum that he may have to pay; but it does not give him a lien therefor on that debtor's property. By his conduct he has become liable for the debts of the ostensible firm; but as between himself and the real debtor he is a mere surety, and with no higher rights than any other surety. As between him and the creditors of the ostensible firm, he is estopped from denying his liability as a partner; but this equity is between him and the creditors. Neither he nor the other members of the ostensible firm are estopped from denying the partnership as between themselves. Neither was misled by the other's conduct, for they knew from the beginning that there was no partnership. There can be no equitable estoppel between parties where neither has been misled by the conduct of the other. To hold, as some courts do, that they or either of the members of the ostensible partnership are estopped to deny that the property in the possession and use of the ostensible firm is partnership property, is to ignore, as it seems to us, the principles upon which the doctrine of equitable estoppel is based, and to declare equities between the ostensible partners which have no existence in fact.

If the creditors of an actual partnership have no independent right to have the social assets subjected to the payment of their debts in preference to the creditors of the individual partners, but their right to such priority is a derivative one, by substitution to the rights of the partners between themselves, the creditors of an ostensible partnership can only have this right of priority by a like substitution to the equities of the partners between themselves, unless the creditors of an ostensible partnership have rights superior to the rights of the creditors of an actual partnership. This, of course, cannot be so. Since, as we have seen, there are no equities between the ostensible partners, there being neither a partnership nor partnership property, there is nothing to which its creditors can be substituted.

In *Broadway Nat. Bank v. Wood*, supra, the court, in discussing the right of partners

to have partnership property first applied to partnership debts, said: "In applying the foregoing doctrine to cases where a person is ostensibly, but not actually, a member of a partnership, and is therefore under a personal estoppel to deny his liability, it follows that a creditor who, by reason of this estoppel, can maintain a personal action against him, cannot extend his estoppel so as to bind the property which was in possession and use of the actual partners. The ostensible partner himself has no equity to have the property applied to the payment of the claims upon which he is liable, and therefore the creditors holding those claims, who are merely subrogated to his rights and equities, have no such equity."

In *Bixler v. Kresge*, 169 Pa. 405, 32 Atl. 414, 47 Am. St. Rep. 920, the question was whether the creditors of an alleged partnership had priority over the individual creditor who levied an execution on the alleged firm property. It appeared in that case that one of the alleged partners was not in fact a partner, but had permitted himself to be held out as such when he was in fact a hired man working for wages. The court in its opinion, in discussing that question, said: "Between the partners themselves the assets of the firm constitute a fund for the payment of their liabilities, and each member has an equity which he can enforce to accomplish this result, and of consequence a lien on the property to that extent. When a creditor levies on the property of a firm, his execution fixes and attaches to this right to the same extent that it existed in the partners, and hence the preference over a separate execution creditor in the distribution. All this is predicable of a case of joint property only. But where there was no joint property the rule has nothing to operate on. The mere name is not enough in such a case. There must be an equity. As the equity never existed, a creditor's execution would not attach to any right amounting to a lien to have the assets appropriated to a partnership debt. * * * The appellant cannot work out his equities through the partners, for these as such did not exist inter se, and the individual owner could not give him this right of a prior execution against him individually."

And the same court, in *Scull's Appeal*, 115 Pa. 141, 7 Atl. 588, said: "The rule that joint creditors are entitled to priority over separate creditors in the distribution of a joint estate applies only where there is such a joint estate for distribution. Where there is no such joint estate, the creditor who first acquired a lien upon the property is entitled to the fund arising from a sale thereof in preference to subsequent creditors. See *Goldthwelt v. Janney*, 102 Ala. 431, 15 South. 560, 28 L. R. A. 161, 48 Am. St. Rep. 56; *Smith v. Smith*, 87 Iowa, 93, 54 N. W. 73, 43 Am. St. Rep. 370; *Glenn v. Gill*, 2 Md. 1, 15;

Doner v. Stauffer, 1 Pen. & W. (Pa.) 193, 21 Am. Dec. 370; 30 Cyc. 395, 396.

The creditors of Johnson, trading as Johnson & Seward, having no right to have the assets of the undertaking business subjected to the payment of their debts in preference to the individual creditors of Johnson, it follows that the chattel mortgage of W. E. Johnson, being prior in time, has priority over the general assignment of G. H. Johnson.

The decree appealed from must be reversed, and the cause remanded to the circuit court, to be proceeded with in accordance with the views expressed in this opinion.

Reversed.

HARRISON, J., absent.

(111 Va. 1)

CARNEGIE TRUST CO. et al. v. SECURITY LIFE INS. CO. OF AMERICA et al.†

(Supreme Court of Appeals of Virginia. June 9, 1910.)

1. CORPORATIONS (§ 65*) — PROPERTY IN SHARES—NATURE AND ELEMENT.

The three elements in the right of property—the legal title, beneficiary interest, and the right of control—are found in corporate stock.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 165-171; Dec. Dig. § 65.*]

2. CONTRACTS (§ 121*)—TRUSTS (§ 136*)—CONTROL OF CORPORATIONS—VALIDITY OF VOTING TRUST—DRY TRUST.

An agreement, under which certain named persons were to hold, as trustees, a specified amount of stock then owned by them in a corporation for 25 years and vote the entire amount as a majority of the trustees might determine, and other persons known as "subscribers" were to purchase an interest in the stock so held which should give them no voting right or any title thereto except to receive payments equal to dividends if any such are paid the trustees, until the expiration of the 25 years, when they were to receive stock in exchange for the trustees' certificates issued, is sustained by a sufficient consideration, is not invalid as in restraint of trade or as against public policy, and is not a dry trust.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 504; Dec. Dig. § 121.* *Trusts*, Cent. Dig. § 179; Dec. Dig. § 136.*]

3. CORPORATIONS (§ 190*)—VALIDITY OF VOTING TRUST.

The agreement is not invalid under Code 1904, § 1105e, providing that unless it shall have been otherwise provided in the charter or certificate of incorporation, or in an amendment or by-law, each person in whose name stock shall stand, on the books of a corporation, shall be entitled to one vote for each share of stock in his name, and that the right of any person holding stock in a representative capacity to represent such stock shall be as provided by any agreement made between such person and the beneficial owner, provided such agreement or copy thereof shall have been furnished to the corporation, and that, as between the pledgor and pledgee of capital stock pledged to secure a specific loan with a fixed period of maturity, the right to vote shall be determined by the written agreement of the pledgor and pledgee, or, in the absence of such agreement, the pledgor shall be held to be the owner and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied September 15, 1910.

entitled to vote, and that shares of stock of a corporation belonging to it shall not be voted, directly or indirectly.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 764; Dec. Dig. § 190.*]

Appeal from Chancery Court of Richmond.

Suit by the Carnegie Trust Company and others against the Security Life Insurance Company of America and others to have a certain voting trust agreement annulled. From a decree sustaining the validity of the agreement, petitioners appeal. Affirmed.

The voting trust agreement above referred to is as follows:

"This agreement, made this first day of February, 1907, by and between Jos. E. Otis, W. O. Johnson, W. T. Durbin, P. J. Kieran and Edward E. Duff, hereinafter called 'trustees,' parties of the first part, and the several persons whose names are hereunto subscribed, hereinafter called 'subscribers,' parties of the second part, witnesseth:

"Whereas, the trustees have agreed to purchase 30,000 shares of the capital stock of the Security Life & Annuity Company of America, hereinafter for convenience termed 'Security Company,' all of which stock has been issued and now stands on the books of said company in the name of the trustees; and

"Whereas, said subscribers have arranged to procure an interest in said shares so purchased, as hereinafter provided; and

"Whereas, all parties hereto, in order to promote and protect the value of said stock, and to secure the satisfactory management of said Security Company for a period of years, are desirous that the title to all of said stock shall at all times stand on the books of said Security Company in the name of the trustees during the continuance of this agreement, and that said stock shall be held together in one block and voted as the trustees, or a majority of them, may determine, for the period of twenty-five (25) years from February 1, 1907; and

"Whereas, said sale of said interest in said stock to the subscribers has been made by the trustees, and accepted by said subscribers, upon the express condition that the same should not vest in the subscribers any right to vote said stock, during the period of this agreement, or any title thereto, except such rights as are in terms conferred by the trustees' certificates, hereinafter provided to be issued by the trustees; and

"Whereas, said Otis, Johnson and Durbin, the three trustees first named above, now hold as trustees under a trust agreement, dated June 14, 1906, certain shares of the capital stock of said Security Company, and have issued under that trust agreement certain trustees' certificates to various parties;

"Whereas the said Otis, Johnson and Durbin have agreed to procure the exchange

of the trustees' certificates issued by them under said agreement of date June 14, 1906, in exchange for the trustees' certificates calling for a like amount of stock to be issued as hereinafter provided:

"Now, therefore, it is agreed by and between the parties hereto in consideration of the premises, and of their mutual covenants each with the other, as follows:

"First. Each subscriber hereto, or to any counterpart hereof, agrees to pay to the trustees upon the signing of this agreement the amount set opposite his respective name, and for each twenty-five (\$25.00) dollars so paid, such subscriber, his legal representative or assigns, shall be entitled to receive at the expiration of this agreement, one share of the capital stock of said Security Life & Annuity Company of America. The sums paid by the subscribers shall be used and retained by the trustees as their own property for the purchase price of the trustees' certificates to be issued to subscribers as hereinafter provided. Provided, however, that the subscribers to the trust agreement, dated June 14, 1906, who become parties hereto as provided in the succeeding clause hereof, shall not be required to pay any money to the trustees, the surrender of their trustees' certificates issued under said agreement of June 14, 1906, being accepted by the parties hereto in lieu of other payment.

"Second. The subscribers to the trust agreement, dated June 14, 1906, hereinbefore referred to, may become parties hereto by signing this agreement and by surrendering the trustees' certificates held by them under said trust agreement of date June 14, 1906, and upon such signature and surrender such parties shall be entitled to receive trustees' certificates issued hereunder as hereinafter provided, setting forth the number of shares of stock of said Security Company to which such subscribers will be entitled at the expiration of this agreement, which shall be the same number of shares as expressed in the trustees' certificates issued under said agreement of June 14, 1906.

"Said Otis, Johnson and Durbin, upon the surrender of all of the trustees' certificates issued as above described, under said agreement of June 14, 1906, will transfer all the shares represented in such certificates to the trustees herein named.

"Third. Upon full payment by each subscriber of the amount of his subscription, a certificate shall be issued to him by the trustees, setting forth the number of shares of stock of said Security Life & Annuity Company of America to which such subscriber will be entitled at the expiration of this agreement, which certificate shall be in substantially the following form, and which is herein referred to for convenience as a 'trustees' certificate':

"No. Shares.

"Trustees' Certificate under Agreement dated February 1, 1907.

"Security Life & Annuity Company of America.

"This is to certify that on the 1st day of February, 1932, will be entitled to receive a certificate, or certificates, for full paid shares of the par value of ten dollars (\$10.00) each, of the capital stock of the Security Life & Annuity Company, and in the meantime to receive payments equal to the dividends, if any, collected by the undersigned trustees, or their successors, upon a like number of such shares standing upon the books of said company in the name of the said trustees, or their successors, less expenses, if any, incurred by said trustees, under the agreement hereinafter referred to, and until after the actual delivery of such stock certificates the said trustees, or their successors, shall possess, and shall be entitled to exercise all rights of every name and nature, including the right to vote with respect to any and all such stock, it being expressly stipulated that no voting right passes by or under this certificate, or by or under any agreement, expressed or implied. This certificate is issued under and pursuant to the terms of a certain agreement dated February 1, 1907, entered into by and between Joseph E. Otis, W. O. Johnson, W. T. Durbin, P. J. Kieran and Edward E. Duff, as trustees, of the first part, and sundry other subscribers to said agreement, of the second part. This certificate is transferable only on the books of the undersigned trustees by the registered holder either in person or by attorney, duly authorized according to the rules established for that purpose by the trustees, and on surrender hereof; and, until so transferred, the trustees may treat the registered holder as the owner hereof for all purposes whatsoever, except that the delivery of stock certificates hereunder shall not be made without surrender hereof.

"In witness whereof, the said trustees have executed this certificate this of, A. D. 190...

"Joseph E. Otis,
"W. O. Johnson,
"W. T. Durbin,
"P. J. Kieran, and
"Edward E. Duff,
"Trustees.

"Countersigned:

"..... Trustee."

"Said trustees' certificate shall be transferable on the books of the trustees by the holder thereof in person or by attorney upon surrender thereof properly endorsed. Upon such assignment and surrender a new trustees' certificate shall be issued to the transferee by the trustees, and the person accepting such assignment, or accepting such new certificate shall be bound by the terms of this agreement as fully to all intents and pur-

poses as if he signed the same. Such trustees' certificates may bear the facsimile signatures of said trustees, provided they are countersigned by one of the trustees, or their successors.

"Fourth. On the first day of February, 1932, upon surrender of any trustees' certificate then outstanding hereunder, the trustees will in accordance with the terms thereof, deliver corresponding certificates or shares of the capital stock of said Security Company, such delivery to be made only out of, and from, certificates of stock heretofore or hereafter issued to, or standing in the name of, the said trustees or their successors.

"Fifth. Should any dividends be paid to the said trustees or their successors, on the shares of stock standing in their names, they shall, within a reasonable time after the receipt by them, of such dividends, distribute the moneys so received by them to the holders of the trustees' certificates issued hereunder in proportion to the number of shares named in the certificate or certificates of each holder. Provided, however, that the trustees may retain out of any such dividends any necessary expense to which they may be put by reason of the trusteeship hereby created. In making payment of such dividends the trustees, or their successors, shall be entitled to treat the persons in whose names such trustees' certificates stand upon the books of the trustees, as the owners thereof for all purposes, and shall not be affected by any notice to the contrary.

"Sixth. Each of the said trustees shall have power to appoint his own successor in trust, and to make such appointment at any time, either by deed or by will, and each successor in trust shall in turn have the same power of appointment of his successor. Such appointment shall become effective immediately upon the death, resignation, insanity or permanent removal from the United States of such trustee, and any such appointment may be revoked by the person making the same at any time prior to its actually becoming effective. Wherever in this agreement the trustees are referred to, such terms shall be held to embrace the trustees for the time being in office as such, whether original or successor.

"Seventh. In case of the failure of either of said trustees, or their successors, to appoint a successor in trust, then, upon the death, resignation, insanity, or permanent removal from the United States of such trustee or successor in trust, his successor shall be appointed by an instrument in writing signed by a majority of the remaining trustees hereunder, then in office, and in case they are unable to agree upon such successor in trust, the appointment shall then be made by the person who shall hold the office of president of the Western Trust & Savings Bank of Chicago, Illinois, or its successor or assigns.

"Eighth. Nothing herein contained shall

constitute the parties hereto partners, but this agreement shall bind and inure to the benefit of the trustees, and each of them, and their successor, or successors, and each of them, in the trust hereby created, and shall bind and inure to the benefit of the subscribers hereto and their legal representatives and assigns.

"Ninth. The trustees may, in their discretion, select some bank in Chicago to act as transfer agent for the trustees' certificates herein provided for. And in that event, no such trustees' certificate shall be valid until countersigned by such transfer agent.

"Tenth. Said trustees, or their successors in trust, from time to time, shall vote the shares of stock embraced in this agreement at all meetings, general or special, of the stockholders of said Security Company upon any matter, proposition or thing which may be submitted to any such meeting, and they shall possess in that respect the same powers as though they were the sole, unrestricted owners of such stock. The trustees may use said voting power in the election of any such trustees as officers or directors of said Security Company.

"The trustees shall not be liable for mistakes of law or fact, nor for errors of judgment in using such voting power, or otherwise in connection therewith, except for their own individual misfeasance, and no trustee shall be responsible for the acts or omission of any other trustee hereunder. All action to be taken by, and questions arising between the trustees from time to time, shall be determined by the decision of the majority of those then acting as trustees, either at a meeting, or by writing, with or without meeting, and in like manner the trustees may establish their rules of action.

"Any trustee hereunder may vote in person or by proxy to any other person, whether or not a trustee, and a proxy in writing signed by a majority of the trustees shall be sufficient authority to the person named therein to vote the stock held by all the trustees hereunder at any meeting, general or special, of the stockholders of the Security Company. Any proxy executed by the direction of a majority of the trustees, as herein provided, may be executed by such majority in the names of all the trustees.

"Upon the succession to office of a successor to any trustee hereunder, a majority of the trustees in office at the time of such succession are hereby irrevocably vested with full power should they deem it necessary or advisable to exercise it, to assign the shares of stock covered by this agreement to the trustees then in office, including such successor, to the end that a new certificate for such stock may be issued in the names of the trustees at that time duly appointed hereunder.

"Eleventh. An original hereof shall be signed by the trustees and retained by them, and counterparts may be signed by the subscribers, but all together shall be taken and deem-

ed one original instrument, and held by the trustees.

"In witness whereof, the trustees, parties of the first part hereto, have subscribed an original hereof, and the subscribers, parties of the second part hereto, have subscribed said original, or counterparts thereof as of the day and year first above written."

Wm. A. Keener, Wyndham R. Meredith, and Coke & Pickrell, for appellants. Montague & Montague, for appellee, Security Ins. Co. Braxton & Eggleston, Pam & Hurd, for trustees.

KEITH, P. The Carnegie Trust Company and Robert J. Davidson filed their bill in the chancery court of the city of Richmond, from which it appears that the Carnegie Trust Company is the holder and owner of certain voting trust certificates, representing 12,200 shares of the capital stock of the Security Life Insurance Company of America and 188 shares of the capital stock of that company; that Robert J. Davidson, trustee of the Guarantee Title & Trust Company of Pittsburg, is the holder of voting trust certificates representing 12,667 shares of the capital stock of said Security Life Insurance Company, a corporation organized and existing under the laws of the state of Virginia, with its principal office in the city of Richmond and its chief executive offices in the city of Chicago, state of Illinois; that the principal business of the insurance company is to do a general life insurance business; and that there have been legally issued and are now outstanding 50,000 shares of its capital stock, each of the par value of \$10. The bill then sets out in detail the negotiations entered into between certain named persons which resulted in what is known as the "February agreement" from which it appears that by an agreement made the 1st day of February, 1907, between Otis, Johnson, Durbin, Kieran, and Duff, parties of the first part, who are named as "trustees," and other parties of the second part, who are named as "subscribers," the trustees have agreed to purchase 30,000 shares of the capital stock of the Security Life Insurance Company of America, all of which stock had been issued and stands on the books of the company in the names of the trustees. "And whereas said subscribers have arranged to procure an interest in said shares so purchased, as hereinafter provided; and

"Whereas, all parties hereto, in order to promote and protect the value of said stock, and to secure the satisfactory management of said Security Company for a period of years, are desirous that the title to all of said stock shall at all times stand on the books of said Security Company in the name of the trustees during the continuance of this agreement, and that said stock shall be held together in one block and voted as the trustees, or a majority of them, may de-

termine, for the period of twenty-five (25) years from February 1, 1907; and

"Whereas, said sale of said interest in said stock to the subscribers has been made by the trustees, and accepted by said subscribers, upon the express condition that the same should not vest in the subscribers any right to vote said stock, during the period of this agreement, or any title thereto, except such rights as are in terms conferred by the trustees' certificates hereinafter provided to be issued by the trustees; and

"Whereas, said Otis, Johnson and Durbin, the three trustees first named above, now hold as trustees under a trust agreement, dated June 14, 1906, certain shares of the capital stock of said Security Company, and have issued under that trust agreement certain trustees' certificates to various parties; and

"Whereas, the said Otis, Johnson and Durbin have agreed to procure the exchange of the trustees' certificates issued by them under said agreement of date June 14, 1906, in exchange for the trustees' certificates calling for a like amount of stock to be issued as hereinafter provided;

"Now, therefore, it is agreed by and between the parties hereto, in consideration of the premises, and of their mutual covenants each with the other, as follows:

"First. Each subscriber hereto, or to any counterpart hereof, agrees to pay to the trustees upon the signing of this agreement the amount set opposite his respective name, and for each twenty-five (\$25.00) dollars so paid, each subscriber, his legal representative or assigns, shall be entitled to receive at the expiration of this agreement, one share of the capital stock of said Security Life & Annuity Company of America. The sums paid by the subscribers shall be used and retained by the trustees as their own property for the purchase price of the trustees' certificates to be issued to subscribers as hereinafter provided. Provided, however, that the subscribers to the trust agreement, dated June 14, 1906, who become parties hereto as provided in the succeeding clause hereof, shall not be required to pay any money to the trustees, the surrender of their trustees' certificates issued under said agreement of June 14, 1906, being accepted by the parties hereto in lieu of other payment."

It then provides that the subscribers to the trust agreement of June 14, 1906, may become parties to the agreement of February 1, 1907, by signing the last-named agreement and surrendering the trustees' certificates held by them under the agreement of June 14, 1906, and shall then be entitled to receive trustees' certificates issued under the agreement of February 1, 1907, in strict accordance with its terms; it being expressly stipulated upon the face of each certificate that: "No voting right passes by or under this certificate or by or under any agreement, expressed or implied. This cer-

tificate is issued under and pursuant to the terms of a certain agreement dated February 1, 1907, entered into by and between Joseph E. Otis, W. O. Johnson, W. T. Durbin, P. J. Kieran and Edward E. Duff, as trustees, of the first part, and sundry other subscribers to said agreement, of the second part. This certificate is transferable only on the books of the undersigned trustees by the registered holder either in person or by attorney, duly authorized according to the rules established for that purpose by the trustees, and on surrender hereof; and until so transferred, the trustees may treat the registered holder as the owner hereof for all purposes whatsoever, except that the delivery of stock certificates hereunder shall not be made without surrender hereof." Provision is then made in the trust agreement for the termination of the trust in 1932 upon the expiration of 25 years, and in the meantime for filling any vacancy that may occur among the trustees or their successors.

By clauses 9 and 10 of the "February agreement," it is provided (clause 9) that: "The trustees may, in their discretion, select some bank in Chicago to act as transfer agent for the trustees' certificates herein provided for. And in that event, no such trustees' certificates shall be valid until countersigned by such transfer agent." And (clause 10) that: "Said trustees, or their successors in trust, from time to time, shall vote the shares of stock embraced in this agreement at all meetings, general or special, of the stockholders of said Security Company upon any matter, proposition or thing which may be submitted to any such meeting, and they shall possess in that respect the same powers as though they were the sole, unrestricted owners of such stock. The trustees may use said voting power in the election of any such trustees as officers or directors of said Security Company."

The bill does not charge that the agreement dated February 1, 1907, and filed as an exhibit with the bill, was procured by fraud; it does not charge that it is fraudulent upon its face; and there is no charge of any fraudulent purpose or act upon the part of the trustees or any other person, natural or artificial, who is made a party to the bill. The true purpose and sole object of the bill is to attack the "February agreement" as creating what is known as a "voting trust," upon the grounds: (1) That the agreement was without consideration; and (2) that all such contracts are void as against the laws of this commonwealth, which, from motives of public policy, will not tolerate a separation of the voting power from the beneficial ownership of stock, but will set the seal of disapprobation upon all attempts to accomplish that result. This being the real issue presented by the pleadings, as we understand them, we have not deemed it necessary or proper to discuss the minor differences existing between the appellants and the appellees

as to what are to be deemed the facts proved as presented by the bill and answer, as we do not conceive them to be material to the questions to be discussed and decided.

We are of opinion that a sufficient consideration to support the "February agreement" is to be found in the mutual promises which it discloses; the promise of each being the consideration for the promise of the other. Such a consideration, as its very terms import, will support not only an executed but an executory contract as well. 1 Parsons on Contracts, 464; Machen's Mod. Law of Corp. vol. 2, § 1270.

If the "February agreement" were without consideration, that of course would end it. Although resting upon a valuable consideration, if it had been procured by fraud, or if it were being used to promote a fraudulent purpose, it would be voidable. But, as we have seen, fraud is neither charged nor proven. If it be contrary to the public policy of the state, it is nevertheless void, though resting upon a valuable consideration.

As we have seen in the statement of the case, each holder of a trustees' certificate issued under the "February agreement" took it with notice of every essential feature contained in that agreement—took it with notice declared upon the face of each certificate that it was issued under and pursuant to the terms of a certain agreement dated February 1, 1907, and that it was expressly stipulated that no voting right passed by or under it or by or under any agreement express or implied. If, therefore, the voting trust be unlawful, all who dealt with those certificates were apprised of its illegality, and it might be urged against them with much force that if such transactions involved a wrong they had by their voluntary act become participants in that wrong. But in this case we shall waive all such considerations.

In treating of the rule, "*in pari delicto potior est conditio defendentis*," this court, in the case of *Harris v. Harris' Ex'r*, 23 Grat. 757, said: "This rule operates only in cases where the refusal of the courts to aid either party frustrates the object of the transaction and takes away the temptation to engage in contracts *contra bonos mores*, or violating the policy of the law. If it be necessary, in order to discountenance such transactions, to enforce such a contract at law, or to relieve against it in equity, it will be done though both the parties are in *in pari delicto*. The party is not allowed to allege his own turpitude in such cases, when defendant at law, or prevented from alleging it when plaintiff in equity, whenever the refusal to execute the contract at law, or the refusal to relieve against it in equity, would give effect to the original purpose, and encourage the parties engaging in such transactions." *Starke v. Littlepage*, 4 Rand. 368.

We shall, therefore, place the appellants in the best position it is possible for them to occupy, permit them to assail without limit

a transaction to which they were themselves parties, and to defeat, if contrary to public policy, a contract into which they have voluntarily entered.

We have been referred to no case in this court, and we know of none, in which this question has arisen; it is of the first impression in this commonwealth.

It cannot be gainsaid that in the right of property there are three elements—the legal title to the property, the beneficial interest in it, and the right of control over it—and this is conformable to the definition of a "share of stock," which in 1 Cook on Corporations (6th Ed.) § 312, is defined as a right which its owner has in the management, profits, and ultimate assets of the corporation.

In the certificates under consideration, the management is reserved to the trustees; the profits, after charging them with a just proportion of expenses, pass as dividends to the certificate holders; while the ultimate assets, in this as in other corporations, are only to be distributed and enjoyed when the corporation is terminated.

There are doubtless cases which hold such an agreement as that of February 1, 1907, to be void as against public policy; but in many of them the purpose was unlawful, or there was an effort to achieve a lawful purpose by questionable means.

In *Cone v. Russell*, 48 N. J. Eq., at page 208, 21 Atl. 847, complainants as executors and trustees held certain shares of stock in an incorporated company; defendants held certain other shares therein, which, added to those held by complainants, constituted a majority of all the shares. Complainants on the one part and defendants on the other entered into a contract by which complainants agreed to execute, and in pursuance thereof did execute, a proxy, irrevocable for five years, to defendants to vote at all stockholders' meetings upon the complainants' shares; and defendants, in consideration thereof, agreed to so vote said shares as that one of the complainants should be continuously employed as manager of the corporation, at a salary of \$2,500 a year. It was held that such an agreement was void because against public policy, and because a breach of trust by complainants. It is not conceivable that any other conclusion could have been reached, without regard to the validity or invalidity of the voting trust.

In the case of *White v. Thomas Inflatable Tire Co.*, 52 N. J. Eq. 178, 23 Atl. 75, the contest was upon three grounds: First, that the original contract, by which a minority of stock was given the perpetual right to elect a majority of the directors, and thus control the affairs of the company, was contrary to public policy and, for that reason, void; and, second, that, conceding the contract to be valid and binding between the original parties so long as only 33 per cent. of the stock was issued, it nevertheless became nugatory and void as against the holders of the 17 per

cent. of new stock as soon as that was issued. In discussing these questions the court said that it did not find it necessary to determine certain questions bearing upon the first ground of contest stated, which had relation to the transfer of the certificates, because the court had come to the conclusion that the second position taken by the complainants was sound. "The contracts in question were not made a part of the certificate of organization or incorporated into the by-laws. Nor, in my judgment, did they, or could they, be fastened upon, or in any wise affect, the 17,000 shares of stock issued directly to the complainants. And I think this is so, whether the complainants had or had not notice of these contracts, since they did not enter into or form part of the contract between the company and complainants as holders of the new stock. As such holders they were entitled to have the other shares of stock in the company stand upon an equal footing, and to have the affairs of the company managed by a board of directors elected according to law, by a majority of all the stockholders. Unless, as the holders of the new issue of stock, they had such right, they would be deprived of a valuable right belonging to their stock, viz., the right to combine with other stockholders to elect a majority of the directors. In fact, they would be deprived of all voice in the management of the company and of the right which each stockholder has to the benefit of the fundamental and salutary rule that the best interests of the minority are found in a rule by the majority." From the statement of facts it appears that the negotiations for the purchase of the 17,000 shares of stock from the company were carried on by the complainant White, and there was evidence tending to show that before he made the purchase he had notice of the substance of the trust-voting agreement, but this was denied by him. While in the case before us there can be no doubt or question that whoever took one of the trust certificates took it with full notice of all the conditions and limitations attached to it.

In *Clowes v. Miller*, 60 N. J. Eq. 179, 47 Atl. 845, by a pooling agreement certain persons were to hold the certificates of stockholders for 2½ years, together with proxies authorizing them to vote on any question, and the stockholders by the agreement were not to sell their stock; the object being to finance and complete the enterprise. The court, in holding this agreement valid, suggested that: "No illegal purpose is manifest upon the face of this agreement, nor has any been alleged in the bill. It appears to be consistent with the purposes for which the company was created, and whose continuance appears to be necessary for the advantage of all who are interested in the development of the property. It is expressly declared to be for the benefit of all who join in it."

In *Chapman v. Bates*, 61 N. J. Eq. 658, 47

Atl. 638, 88 Am. St. Rep. 459, it was held that a proxy and power of attorney made by a stockholder in a corporation, giving voting powers and rights to deal with the stock in various ways, and to sell and exchange it, and conferring an interest, and, by its terms, irrevocable for a period less than three years, will not be revoked upon a bill filed by the maker for that purpose, unless it appears that the purposes are illegal, or in violation of some statute, or against public policy; and that what are known as pooling-agreements are not necessarily illegal, but each case will depend upon the objects to be attained. See, also, *Chapman v. Bates*, 60 N. J. Eq. 17, 46 Atl. 591.

It is impossible to discuss all the cases cited. Some of them are decided upon considerations as to the nature of irrevocable proxies; others turn upon the statute law of the state in which they are rendered; very many rest upon the fraudulent or otherwise objectionable character of the object to be attained; while others, it must be admitted, condemn a trust such as that under consideration as being contrary to public policy and for that cause null and void. In considering the cases, however, and the text-writers who have commented upon them, it is impossible not to be impressed with the change of opinion which has taken place with respect to the true nature of such contracts. In the early stages of the development of this idea, there was a strong sentiment against them which found expression in the opinions of judges and in the not always temperate language of distinguished commentators upon the law; but experience has demonstrated their usefulness, and the hostility evinced toward them has by degrees diminished.

This change of opinion appears nowhere more strikingly than in the very valuable work of Thompson on Corporations. In his first edition he places trust certificates beyond the pale of the law and declares that they should not be regarded as lawful instruments of commerce but be treated as "something in the nature of counterfeit money as securities which have been issued in violation of the law and in contravention of the public right." The second edition (which is not yet completed) in section 893 on Voting or Pooling Trusts uses the following language: "The fact that the earlier cases were practically unanimous in holding these pooling or voting trusts illegal and that some law-writers and perhaps some courts have broadly stated that all such contracts are void, must, in the light of subsequent cases, and the advancement and development of corporation law, be regarded as an application of a principle to all cases which was intended to fit but one. Under the recent and advanced decisions it may be asserted as the present prevailing doctrine that a pooling trust created by a deposit of stock certificates with a trustee for a specified period of time with the authority to vote the same for the

benefit of the owners and to the best interests of the corporation, and without an absolute separation of the voting power from the ownership of the stock, by an agreement which is not a restraint of the alienation of property, not in restraint of trade, not against public policy, and not a fraud upon other stockholders, is legal. This principle is recognized and the rule stated by one of the foremost writers on corporation law, after collecting and commenting on the leading cases on this subject, as follows: "The above decisions seem to lead to the conclusion that a deposit of certificates of stock with trustees for a specified period of time, either with or without a transfer of the same to the trustees, is legal, and is not in violation of the usual statute against the alienation of personal property, and is not opposed to public policy as a restraint upon trade, and is not an implied fraud upon stockholders who were allowed to participate, and is not an illegal separation of the voting power from the ownership of stock; provided always that no actual fraud is involved in the transaction. In other words, such a pooling of stock is not illegal in itself, but like all contracts may be illegal if actual fraud is involved."

Upon the subject of voting trusts, Beach on Private Corporations (Ed. 1891) § 855, says: "Such an agreement, so lawfully formed at the outset, and for a proper consideration, and for a limited period, is binding upon the holders of the trust certificates claiming only under and by virtue of the stock deposited in pursuance thereof, and all the terms of which are, by appropriate statement, made a portion of the trust certificates. Even if one of the motives which led to the creation of the trust was to enable either the trustee or the cestui que trust to vote in a given manner at an approaching election, that motive will not invalidate the transfer. Voting trusts, then, not being illegal upon any principle peculiar to corporation law, can be attacked only on the ground of public policy. What agreements are void as against public policy is very well defined in the law, and contracts which have been held to be so void arrange themselves in five classes: Those founded upon corrupt considerations or moral turpitude; those in violation of a public trust; those in restraint of trade; those in restraint of marriage; those to influence persons in authority."

If the agreement under consideration can be held to come within any of the enumerated classes, it must be that it is in restraint of trade. In what manner and to what extent it restrains trade is not apparent, and we think we are safe in saying that experience has shown that, so far from exercising an injurious influence upon trade, voting trusts have added efficiency, economy, and stability to the administration of corporate affairs.

In Machen's Modern Law of Corporations,

§ 1270, it is said: "Some authorities unquestionably tend to hold that all voting trusts are illegal and void" (citing for that proposition the cases relied upon by counsel for appellants—among them, *Harvey v. Linville Imp. Co.*, 118 N. C. 603, 24 S. E. 489, 32 L. R. A. 265, 54 Am. St. Rep. 749; *White v. Thomas Tire Co.*, 52 N. J. Eq. 178, 28 Atl. 75; *Kreissl v. Distilling Co.*, 61 N. J. Eq. 5, 47 Atl. 471; and the *Shepaug Voting Trust Cases*, 60 Conn. 553, 24 Atl. 32). "But others," continues the author, "supported, it is submitted, by sounder reasoning, hold that they are lawful if their object is lawful. A 'voting trust' properly so called may be illegal as an evasion of a statute which makes void all proxies more than a year old. Of course, if the object of a voting trust is the accomplishment of some illegal end—the restraint of trade, the formation of a monopoly, or the practical merger of two or more corporations in defiance of law—the courts will have no difficulty in holding the trust illegal. So where the sale by a shareholder of his vote, or the issue of a proxy for money or anything of value, is deemed illegal, a transfer of shares for valuable consideration which is absolute on its face, but which is really designed merely to confer on the transferee the power to vote on the stock for a period of three years, is also illegal, and the transferee acquires no right to vote. But although stock is put in trust for an illegal purpose, the intended cestui que trust is not precluded from compelling the intended trustee to retransfer the shares. Where the object of the trust is legitimate—for instance, to secure control of the company to its bondholders in order to prevent foreclosure and the utter ruin of all the shareholders—the trust should be upheld and carried out. Some authorities declare that the trust is not effective if supported by no other consideration than the mutual agreement between the shareholders to put their stock into the trust; but no reason is perceived for this conclusion. If the trust is valid, and the trustees have a discretion to determine when the condition of the company is such as to justify the termination of the trust, their discretion in that respect will not be overruled or controlled by the courts in the absence of clear proof that it has been abused."

In a note to the case of *Morel v. Hoge*, 16 L. R. A. (N. S.) at page 1140, speaking of voting trusts, it is said: "The plan or device now more commonly adopted for the purpose of procuring and continuing the control of the corporation is to procure the stockholders or some portion of them to deposit their stock, with power to the depositary for a definite period to vote the same, the title to the stock itself being usually, though not always, transferred to the depositary upon a trust for such purpose. This form of agreement has proven better adapted to withstand the legal attacks upon it than that which merely contemplates the procuring of ir-

revocable proxies. It is obvious, of course, that whatever the form of the agreement, and however skillfully it may be adapted to avoid legal objection, it will be held invalid if its purpose is to secure an illegitimate or improper advantage, to the detriment of the interests of the corporation and of the other stockholders. The practical question, then, is whether an agreement in this form is per se void, as contrary to public policy, or, if not void, whether, in spite of the attempt to make it irrevocable, it may be revoked at the pleasure of the stockholders who have become parties thereto." This is a very precise statement of the question before us, and the author of the note then goes on to give his view as to the present state of the law as applicable to the question: "Probably the prevailing tendency is toward the view that such an agreement is not per se void as against public policy; in other words, that the agreement cannot be declared void irrespective of the propriety of the ultimate purpose to be accomplished, merely because it seeks to accomplish that purpose by means of severing the voting power of the stock from the beneficial ownership thereof. The tendency also appears to be toward the view that such agreement, supposing that it is not void, and is by its terms irrevocable, may not be revoked at the pleasure of the stockholders who have become parties thereto."

In *Brightman v. Bates*, 175 Mass. 105, 55 N. E. 809, the plaintiff brought suit to recover compensation as the agent for the sale of stock to a syndicate, which was organized for the purpose of obtaining control of a corporation. There was a written agreement by the subscribers, reciting their desire to become members of the syndicate to the end that control of a corporation and advantage to them might be gained, and agreeing to buy the number of shares set opposite their names, and to enter into a pooling contract whereby all the syndicate stock "shall be voted at each annual meeting for a period of not less than three years for such board of directors as shall be named" by a committee of five of the subscribers, with power to the majority of them to fill any vacancy in the committee. The suit was defended upon the ground that the object for which the syndicate was organized was illegal, and that the covenant sued upon was so directly aimed at helping to bring the unlawful arrangement about that it must fall with the other, citing *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979. The court said: "Without deciding whether, if the covenant was dependent upon the rendering of further services, it was so closely connected with the syndicate agreement as to fall if the latter cannot be sustained, we pass to the question whether the latter agreement is unlawful on its face, bearing in mind that unless it is unlawful on its face it has the advantage of a find-

ing in favor of the plaintiff. In dealing with this question, it does not need to be said that combination of common interests is necessary, and constantly is taking place. It is as legitimate for a majority of stockholders to combine as for other people. The fact that they expect 'gain and advantage'—in the words of the syndicate agreement—to accrue to them does not make the syndicate unlawful. That expectation and intent would have that effect only if the gain was to be at the expense of the corporation, or in some way was intended to work a wrong on the other stockholders. No such intent appears, and, although it is impossible not to view such an arrangement with suspicion, it is also impossible to let suspicion take the place of proof. The only serious ground of objection is the agreement that the stock 'shall be voted at each annual meeting' for three years for a board of directors named by the committee. It is suggested that this was an unlawful attempt by the contracting parties to deprive themselves in advance of their deliberate power and duty as stockholders, and to submit themselves to the dictation of five men who in the future might not be even members of the corporation. Perhaps the notion upon which these suggestions are founded has been pressed somewhat further than would be warranted by more far-seeing views, but we have no occasion to discuss it in this broad form. The question before us is not whether it would be possible to carry out the contract in a way which would have made the contract bad if specified in it, but whether it was impossible to carry out the contract in a way which might lawfully have been specified in advance. We put the question in this form because there is no doubt that the subscribers might actually have done the things stipulated without giving any one a right to complain. That is to say, they might have held their stock and voted by previous understanding according to the advice of the committee, as long as they chose. The question is what they might contract to do; for this is supposed to be a case where a contract to do lawful acts is unlawful. * * * A stockholder has a right to put his shares in trust, whatever his motive. If the trust is an active one, he cannot terminate it at will, and the attempt to cut himself off by contract, instead of by the imposition of duties, from ending it, certainly is not enough to poison the covenant with the plaintiff. It might be held that the duty of voting incident to the legal title made such a trust an active one in all cases. * * * If the stockholders want to make their power felt, they must unite. There is no reason why a majority should not agree to keep together."

It is impossible to read the argument of counsel and the cases and text-writers cited without perceiving that the force of the attack upon such agreements as that under

consideration rests upon the proposition that the trustees are clothed only with the naked or dry trust, wholly separated, or "divorced," as it is sometimes described, from the beneficial interest in the stock. If the analysis of the elements of property in the ownership of a share of stock, given by Cook on Corporations (8th Ed.) § 312, be sound—and we think it cannot be controverted—then the right to vote the stock is, in itself, and of itself, a valuable right of property, and such a trust becomes by virtue of that right an active and not a passive or dry trust. If this view be correct, it of course answers the other branch of the proposition, and there would be no separation—certainly no complete separation—or "divorce," such as is contended for, of the ownership of the stock from the beneficial interest in it.

Passing from definitions, as given by writers upon the law of corporations, and considering it as a practical subject, does not common experience prove that the power to manage and control property is a valuable right; that the right to manage and control a great corporation, to direct its policies, involving in many cases the rightful levy and expenditure of vast sums of money, is in itself and of itself a right of great value? Is it not a matter of common knowledge that the common stock of many corporations which have never paid a dividend has a considerable market value, growing out of and dependent upon the right to vote the common stock, which is the power of control? It may be that the expression used by Mr. Justice Holmes, of the Supreme Court of Massachusetts, in *Brightman v. Bates*, supra, was in the particular case an obiter dictum, but his observation is none the less true that it might with propriety be held "that the duty of voting incident to the legal title makes such a trust an active one in all cases." So Mr. Justice Swayne, in *Warren v. Plin*, 66 N. J. Eq. 353, 59 Atl. 773, delivering one of the many opinions in that case, says: "The right to vote is, I think, a property right and is a valuable one, and I see no reason why the owner of such a right, having the legal title to the stock, has not also a beneficial interest in the stock itself. I think the owner of stock, even though his only beneficial interest is the right to vote thereon, must be held to have a beneficial interest in the stock itself."

Let it be remembered that in this case the trustees were the absolute owners of the stock, and that when they sold the trust certificates they agreed to sell, and the purchasers of those certificates only bought, the right to receive payments equal to the dividends upon the shares of stock, less the expense, if any, incurred by the trustees, and on the 1st of February, 1932, to call for certificates for full-paid shares of stock at their par value, and that in the meantime the right to vote remained in the trustees, in order to promote and to protect the value

of the stock and to secure the satisfactory management of the Security Company.

As we have said, there is no case in this state upon the subject, and upon an examination of the authorities elsewhere we are unable to say that the contract under consideration should be held violative of the public policy of this commonwealth.

This brings us to a consideration of the only statute which has any bearing upon the subject.

Clause 20 of section 1105e, Va. Code 1904, is as follows: "Unless it shall have been otherwise provided in the charter, certificate of incorporation, or in the articles of association, or in an amendment or by-law, each person in whose name stock shall stand upon the books of any corporation at any date fixed by the by-laws as prescribed by section eighteen of this chapter shall be entitled to one vote in person or by proxy for each share of stock appearing in his name on said books."

Clause 21: "The right of any person holding stock in a representative or in a fiduciary capacity, to represent such stock at meetings of any corporation, and to vote thereon, shall be as provided by any agreement heretofore or hereafter made between such person and the beneficial owner concerning such stock, or the right to vote thereon; provided, such agreement or a copy thereof shall have been furnished to the corporation."

Clause 22: "As between the pledgor and the pledgee of capital stock pledged to secure a specific loan with a fixed period or periods of maturity, the right to vote shall be determined as follows: (a) By the written agreement of the pledgor and pledgee. (b) In all other instances the pledgor shall be held to be the owner and entitled to the right to vote."

Clause 23: "Shares of stock of a corporation belonging to it shall not be voted, directly or indirectly."

A consideration of these clauses discloses: (1) That the Legislature had under advisement the right of a holder of stock to vote, which is secured to each person in whose name stock stands upon the books of any corporation "at any date fixed by the by-laws as prescribed by section eighteen of this chapter"; (2) the right of any person holding stock in a representative or fiduciary capacity to represent such stock at meetings of any corporation, and to vote thereon, which it provides "shall be as provided by any agreement heretofore or hereafter made between such person and the beneficial owner concerning such stock, or the right to vote thereon," as to which the only limitation imposed is that "such agreement or a copy thereof shall have been furnished to the corporation"; and (3) the right to vote, as between the pledgor and the pledgee of capital stock pledged to secure a specific loan with a fixed period or periods of maturity, which

it is provided shall be determined (a) by the written agreement of the pledgor and pledgee, and (b) in all other instances the pledgor shall be held to be the owner and entitled to the right to vote.

The Legislature must have known that it was dealing with a subject of the utmost importance, and one as to which there was great controversy and contrariety of opinion. It certainly cannot be said that the statutes to which we have referred contain any inhibition upon, or condemnation of, the separation of the ownership of stock from the right to vote upon it. We repeat, that this was the crux of the controversy. It is the point around which the whole contest had been waged before many courts; that it was in and of itself a violation of sound public policy to put the ownership of stock in the hands of one person and the right to vote upon that stock under the control of another; and yet the Legislature of this state, which it is impossible to consider ignorant of such a question, deals with the subject, regulates the right to vote upon stock under many varying aspects and conditions of ownership and representation, without a hint or suggestion that a voting trust is in violation of public policy, when, if it had been of that opinion, a line upon the subject would have put the whole controversy at rest. So far from condemning a voting trust, it may well be argued that clause 21 in fact approves them, at least in so far as it recognizes as lawful that which constitutes the principal ground upon which such trusts have been elsewhere disapproved, for it declares that the right of a person holding stock in a fiduciary capacity to represent such stock at the meetings of any corporation and to vote thereon shall be as provided by any agreement heretofore or hereafter made between such person and the beneficial owner concerning such stock, or the right to vote thereon; the only condition being that such an agreement or copy thereof shall have been furnished to the corporation.

As we have already said, the record in this case does not disclose any element of oppression, immorality, fraud, or bad faith as the actuating motive underlying the "February agreement." There is no averment or proof of a purpose to do any act beyond the limits of the corporate authority of the Security Company, "or to secure an illegitimate or improper advantage to the detriment of the interests of the corporation and of the other stockholders." As was said in *Brightman v. Bates*, supra, the question before us is not whether or not it would be possible to carry out the contract in a way which would have made the contract bad if specified in it, but whether it was impossible to carry out the contract in a way which might lawfully have been specified in advance. If in the future the trustees are guilty of a breach of

trust, or do any unlawful act to the prejudice of the interests of the corporation or its stockholders, a court of equity is always open to give such relief as the nature of the case may require.

The decree of the chancery court must be affirmed.

Affirmed.

HARRISON, J., absent.

(134 Ga. 644)

GRANT et al. v. DERRICK.

(Supreme Court of Georgia. June 22, 1910.)

(Syllabus by the Court.)

1. SPECIFIC PERFORMANCE (§ 121*)—EVIDENCE—SUFFICIENCY.

The suit was for specific performance of an alleged contract for the sale of land. The evidence introduced was insufficient to show the existence of a written contract.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 121.*]

2. SPECIFIC PERFORMANCE (§ 44*) — PAROL CONTRACT—PARTIAL EXECUTION.

There was evidence to show a parol contract for the sale of the land; but it was not of such character as to bring the plaintiff's case, which was for affirmative equitable relief, within the rule expressed in Civ. Code 1895, § 4037, and to entitle him to a decree for specific performance.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 44.*]

Error from Superior Court, Rabun County; J. J. Kimsey, Judge.

Action by J. H. Derrick against James R. Grant and others. Judgment for plaintiff, and defendants bring error. Reversed.

J. C. Edwards, Robt. McMillan, and H. H. Dean, for plaintiffs in error. W. A. Charters and W. S. Paris, for defendant in error.

ATKINSON, J. 1. J. H. Derrick instituted suit against James R. Grant to compel specific performance of an alleged contract for the sale of land. It was not alleged in the petition whether the contract was in writing or rested in parol, but on the trial it appeared that there were only two writings relating to the alleged sale. One of them consisted of a memorandum written out by hand, which recited that on the 21st day of September, 1906, the defendant had bargained to sell to the plaintiff the land in dispute, and that the plaintiff was allowed to retain out of the purchase price the sum of \$125 to be applied in discharge of a mortgage on the land. It also recited that the plaintiff was bound so as to apply the \$125 and to surrender any surplus therefrom (if it was more than sufficient to pay off the mortgage) to the defendant, and that "a lien is created on said land and said property for the said \$125, and I hereby waive and renounce all homestead and exemptions for myself and family." The memorandum was

signed by the plaintiff, but it did not state the amount of the purchase price. The other consisted of a typewritten sheet dated September 27, 1906, which recited that the plaintiff had bought the land in dispute for the sum of \$450, and also that: "Whereas, W. J. Ramey holds a mortgage on said property for \$85 principal, which said mortgage has been sued and a plea filed by said Grant disputing the amount claimed to be due thereon, and the litigation thereon is still pending, and I am desirous of protecting myself: Now, therefore, I have retained the sum of \$115 out of the purchase money of said land for the purpose of protecting myself against any judgment the said Ramey may obtain against said property, and after the termination of said lawsuit I am to pay off any judgment that Ramey may obtain, and am to pay to McMillan & Erwin, Clarkesville, Ga., for said grant, the balance due on the purchase of said land, together with interest at the rate of 8 per cent. per annum on the amount so retained." This writing was also signed by the plaintiff. Neither of the memoranda was signed by the defendant. The defendant admitted in his answer that the memorandum first above mentioned was written by him; but it was also alleged that no agreement was made between the parties, and that the plaintiff refused to sign and deliver the writing. It was alleged in the answer that, after the plaintiff refused to execute and deliver the paper first mentioned, the defendant, by his counsel, prepared "another paper or agreement for \$115, delivered same to said plaintiff to sign, and said plaintiff refused to sign and deliver same to defendant." The parol evidence showed that the second memorandum was prepared by defendant's counsel; but neither the plea of defendant, nor any written memorandum made by him, nor any admission which he made on the trial, showed that this was the paper referred to by the defendant in his answer. These writings, unsigned by the defendant, the person sought to be charged, were sufficient to constitute a written contract obligating him to sell the land.

2. There was evidence of a parol contract for the sale of the land, also evidence of partial payment of the purchase price; but there was no evidence that the plaintiff had taken possession, or had made valuable improvements, or had made full payment of the purchase price, accepted by the vendor. The admissions and allegations made in the defendant's plea relative to the two written memoranda which were introduced, either separately or when considered in connection with the plea as a whole, did not amount to an admission of the contract sued on. The plea alleged that there had been negotiations between the parties, but expressly denied that they had reached an agreement for the sale of the land. The plaintiff did not ex-

ecute the contract further than as indicated above. Under the provisions of Civ. Code 1895, § 4037, specific performance of a parol contract for the sale of land will be decreed only in two instances. One is where the defendant admits the contract. The other is where it is so far executed by the party seeking relief that if the contract be abandoned he cannot be restored to his former position. Full payment alone, accepted by the vendor, or partial payment accompanied with possession, or possession alone with valuable improvements, if clearly proved in each case to be done with reference to the parol contract, will be sufficient part performance to justify a decree. The plaintiff is seeking affirmative equitable relief, namely, specific performance of a parol contract for the sale of land. It is incumbent upon him to bring his case within the statute. This he has failed to do, and he is not entitled to recover. The judgment of the trial court on demurrer did not conclude the defendant upon the question as to the sufficiency of the evidence to require specific performance. On demurrer the contract was presumed to be in writing, as the law required it to be. *Crovatt v. Baker*, 130 Ga. 507, 61 S. E. 127. But on the trial the evidence showed affirmatively that it was not in writing. As the evidence was not sufficient to authorize a decree for specific performance, it is unnecessary to deal with the assignments of error based upon exceptions to the charge of the court.

Judgment reversed. All the Justices concur.

(124 Ga. 615)

BERRY v. VAN HISE.

(Supreme Court of Georgia. June 18, 1910.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 20*)—APPLICATION FOR LETTERS—RIGHT OF CAVEATOR TO OBJECT—TIME TO QUESTION.

In an application for letters of administration, where the caveator alleges certain facts as giving her a right to object to the grant of administration, if the applicant desires to challenge the caveator's right to object, he must do so by timely motion or other appropriate pleading. The applicant cannot litigate with his adversary in the trial court, and complain for the first time in this court that the caveator has no such interest as will entitle her to object to the grant of letters of administration.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 20.*]

2. EXECUTORS AND ADMINISTRATORS (§ 11*)—APPOINTMENT—ESTATE OF NONRESIDENT.

Letters of administration on the estate of a person, who at the time of his death was a non-resident of the state, will not be granted unless it is made to appear that such decedent has property in the county where the application is made, or has a bona fide cause of action against some person therein.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 25; Dec. Dig. § 11.*]

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Application by W. H. Van Hise for letters of administration on the estate of T. J. Barnard, to which Mrs. C. L. Berry filed a caveat. From a judgment for applicant, caveator brings error. Reversed.

J. C. Edwards, for plaintiff in error. J. H. Sutton and Robt. McMillan, for defendant in error.

EVANS, P. J. On September 27, 1902, Mrs. O. L. Berry sold and conveyed to T. J. Barnard a tract of land for \$3,000. On the same day Barnard executed to Mrs. Berry a mortgage to secure the purchase money, which was represented by nine notes for \$300 each and two notes for \$150. The sale of the land was consummated through the agency of J. H. Hicks, and in payment of his commissions Mrs. Berry delivered to him one of the \$150 notes with the following indorsement: "Pay the within note to the order of J. H. Hicks, without recourse upon me. Mrs. C. L. Berry." Hicks afterwards indorsed the note to Van Hise for value and before maturity. On September 3, 1904, T. J. Barnard reconveyed the land to Mrs. Berry by deed expressing a consideration of \$3,000. Mrs. Berry addressed the following note to the clerk of the superior court, which was attached to the mortgage: "Clarksville, Ga., Oct. 10, 1904. Mr. J. A. Erwin—Dear Sir: Please cancel mortgage from T. J. Barnard to myself, recorded in Book 8, folio 228, and oblige. Respect, Mrs. O. L. Berry." The words of this writing were entered upon the record book of the mortgage, and across the face of the original mortgage was entered: "Cancelled, October 10th, 1904." Van Hise brought suit against Mrs. Berry and Barnard, the character of which does not appear in the record. Pending the suit Barnard died, and Van Hise applied to the ordinary of Habersham county for letters of administration on his estate. In his application he represented that he was a creditor of Barnard, who at the time of his death was a nonresident of the state, but that he left real and personal property in the county of Habersham. Mrs. Berry filed a caveat to the grant of letters of administration, alleging therein that the applicant had filed a suit in the superior court of Habersham county, Ga., in which suit he was seeking to subject caveator's land for the payment of a certain note made by T. J. Barnard; that caveator denied liability on the note, or that her land was subject to pay it, but that, if the issue should be found against her, she was entitled to reimbursement from the estate of Barnard, and therefore was interested in the choice of an administrator on his estate; that at the time of Barnard's death he did not reside in the state of Georgia, neither did he have any property, real or personal, within the county of Habersham or state of Geor-

gia at the date of his death; that the sole object of the application is to have an administrator appointed for the purpose of making parties to a case in the superior court of Habersham county, in which case caveator is defendant; that Barnard was a resident of Jackson county, Mo., at the time of his death, and that the probate court of that county and state has jurisdiction of the granting of letters of administration. The case was appealed from the court of ordinary to the superior court, and on the trial the foregoing facts appeared from the evidence submitted. At the conclusion of the evidence on both sides the court directed a verdict in favor of the applicant for administration. A motion for new trial was made by Mrs. Berry, which being refused, she brings error.

In his brief counsel for defendant in error insists that Mrs. Berry had no such interest in the estate of Barnard as would entitle her to caveat an application for administration on his estate. There is nothing in the record before us to indicate that such point was either made or adjudicated in the trial court. She made certain allegations in her caveat, intended to show such interest in the estate of Barnard as would give her the right to caveat the application for administration. If the applicant desired to challenge her right to litigate over his appointment, he should by proper motion or other pleading have done so. After a trial in which both sides introduced evidence, which eventuated in a verdict, it is too late to raise for the first time the point in this court, and that, too, only in the argument. Before the ordinary can grant administration upon the estate of a person who was not a resident of the state at the time of his death, it must appear that such decedent has property in the county where the application is made, or a bona fide cause of action against some person therein. Civ. Code, § 4234; Neal v. Boykin, 129 Ga. 676, 59 S. E. 912, 121 Am. St. Rep. 237. The decedent had neither tangible property nor a bona fide cause of action against any person residing in Habersham county. It is immaterial for the purposes of this case whether, under the facts stated above, Mrs. Berry had a right to cancel the mortgage which Barnard had given to secure the purchase-money notes of the land, one of which was held by the applicant, Van Hise. Certainly no impediment existed to prevent Barnard from reconveying the land to Mrs. Berry in settlement of her debt, or upon any other valid consideration. By his conveyance he divested himself of all title to the property. We are not apprised of the character of the litigation in which Van Hise seeks to hold Mrs. Berry responsible on the note which she had indorsed without recourse. From the brief reference to it we gather that the whole object of obtaining letters of administration was to provide a

way, not for asserting or establishing a right in favor of the decedent's administrator, but of asserting and establishing a right against that representative. The purpose of appointing administrators is to administer estates; and if the nonresident decedent has neither property nor a cause of action in the jurisdiction of the court, it follows that the court has no power to appoint an administrator. *Patillo v. Barksdale*, 22 Ga. 356. The court erred in directing a verdict for the applicant.

Judgment reversed. All the Justices concur.

(134 Ga. 686)

CHISM v. WILKERSON.

(Supreme Court of Georgia. June 22, 1910.)

(Syllabus by the Court.)

BOUNDARIES (§ 52*)—ADJUDICATION—RIGHT TO OPEN AND CLOSE.

Under the ruling in *Rattaree v. Morrow*, 71 Ga. 523, where a protest is filed to the return of processions by the party notified, and on the trial evidence is introduced on both sides, the applicant for the proceedings is entitled to open and conclude the argument; and this is true, although he may introduce in evidence the entire proceedings duly returned, and thus make out a prima facie case.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 52.*]

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Petition for procession proceedings by J. O. Wilkerson against B. B. Chism. Judgment for petitioner, and defendant brings error. Affirmed.

Alexander & Gary, for plaintiff in error. Denmark & Griffin, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(134 Ga. 539)

TRAIN et al. v. EMERSON.

(Supreme Court of Georgia. June 16, 1910.)

(Syllabus by the Court.)

1. ARBITRATION AND AWARD (§ 55*)—DUTY TO RETURN AWARD.

Where a statutory submission is made to arbitrators, after making an award it is their duty to return it to the next term of the proper court.

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. §§ 276-279; Dec. Dig. § 55.*]

2. ARBITRATION AND AWARD (§ 55*)—FAILURE TO RETURN AWARD IN TIME—EFFECT.

Where a submission to arbitrators was made under the statute (Civ. Code 1895, § 4486 et seq.), and they made an award, but did not return it to the superior court to which it was properly returnable for 11 months, during which time three terms of court intervened, and 14 months thereafter the party in whose favor the award was made filed a motion to have a judg-

ment nunc pro tunc entered on it, there was no error in denying such motion.

[Ed. Note.—For other cases, see *Arbitration and Award*, Dec. Dig. § 55.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Arbitration proceedings between W. F. Train and others and C. A. Emerson. A motion to enter a judgment nunc pro tunc was denied, and W. F. Train and others bring error. Affirmed.

O'Byrne, Hartridge & Wright, for plaintiffs in error. Cann, Barrow & McIntire, for defendant in error.

LUMPKIN, J. On July 24, 1906, an agreement was made to submit a controversy to arbitrators under the statutory provision contained in the Code. On May 28, 1907, two arbitrators and an umpire (called also an arbitrator, though chosen by the other arbitrators) qualified. On the same day they made an award. This was not filed in the superior court until April 25, 1908. On June 24, 1909, the parties in whose favor the award was made filed a written motion to have it "now received, and that an order be passed authorizing the entry of a judgment nunc pro tunc." The other party to the award objected to the grant of the motion, on the grounds, among others, that the award was not returned to the superior court within the time prescribed by law, that the movants were guilty of laches in failing to move sooner, and that to permit a judgment to be now entered would be inequitable and work a hardship on the defendant. The presiding judge denied the motion to enter a judgment nunc pro tunc upon the award, and the movants excepted.

This was a statutory arbitration under Civ. Code 1895, § 4486 et seq. No litigation was pending. The question is whether the arbitrators were required to return the award to the next term of the superior court of the proper county. Section 4503. The provisions of the Code on the subject of such statutory awards are derived from the act of 1856 (Acts 1855-56, p. 222), amended by the act of 1876 (Acts 1876, p. 38). The former act provided that "after said arbitrators have made up their award they shall furnish a copy of the same to each of the parties, and shall return the original award to the next superior court of the county where the award is made," etc. This provision was codified in section 4242 of the Code of 1873. The act of 1876 stated in its title that it was "An act to define in what court awards provided to be entered on the minutes of the superior court under section 4242 of the Code of 1873 shall be entered." It declared that, "whenever a case of any kind, pending in any court in this state, shall be referred to arbitration, the award made upon the same shall be entered on the minutes of the superior court

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

where suit is pending; and in all cases where a matter of dispute not involved in litigation is referred to arbitration under section 4225 of the Code of 1873, the award upon the same shall be entered on the minutes of the superior court of the counties where the parties reside against whom the award is rendered if residents of the state, and if not such resident, in the counties where the award was made." It will be observed that the only purpose of this act was to provide in what court awards should be entered. It changed the provision for returning the award to the superior court of the county where it was made, and made another provision as to the court of the return; but it did not deal with the time when the return should be made to the proper court. *King v. Davidson*, 69 Ga. 708, 712. Under the act of 1856, the necessity for making the return to the next term of the superior court after the award was made was recognized in *Green v. Shields*, 37 Ga. 35; but it was held that, when an award was made the judgment of the court at an adjourned term after notice given to the defendant between the regular and the adjourned term, such notice was sufficient. In *Chisolm v. Cothran*, 40 Ga. 274 (decided in 1869), it was held that an award might be returned at the next superior court after it was made, whether such term was a regular or an adjourned term. In *Marshall v. Hicks*, 61 Ga. 73, the duty of making the return to the next superior court was again recognized; and the decision in *Tompkins v. Phipps*, 68 Ga. 157 (decided after the passage of the act of 1876, though not dealing with it), quotes from the opinion in the *Marshall Case*.

When the Code of 1882 was compiled, the provisions of the act of 1876 were embodied in section 4242a. Nothing was said in the section so made as to the time of the return. It is contended that the omission of a direct statement that the return should be made to the next term of the court operated as a repeal of that requirement. The Code of 1882 was not formally adopted by the Legislature; but that of 1895, which contains the same provision (section 4503) was adopted. Provisions in conflict with such section and not contained in the Code would give way to it; but the question remains whether the requirement of a prompt return of an award is in conflict with the section last cited. From what has been said above, it will be seen that it was not the intention of the Legislature by the act of 1876 to deal with the time of making the return, but only with the court to which it should be made, and section 4503 of the Code of 1895 does no more than this. Either there is some requirement as to when a return of an award should be made, or there is none. If it was the intention of the codifiers and of the Legislature, by the section to which reference has been made, to remove all restrictions or requirements as to the time of making the return,

then it might be made at any indefinite time after the award was agreed upon. If this was the legislative purpose, how could parties know when they would have to file exceptions? Section 4504 has as its subtitle the words "Frauds may be Suggested at the Return Term." These titular words would not operate to change positive law; but they throw some light upon the view entertained by the codifiers that the preceding section, which has as its subtitle the words "Award, Where Returned," did not destroy all requirements as to the time when the return should be made. Section 4504 declares that, when the award shall have been returned and entered on the minutes of the court, "either of the parties may suggest, on oath, at the term to which said award is returned, that the award was the result of accident, or mistake," etc. Here was a requirement that the objections to the award should be filed on oath at the term to which it was returned. But if there were no term to which it was returnable, the arbitrators might hold it in their possession for years, and the parties might be required to watch the records throughout each term of the court, lest at some time when they were off their guard the award might be filed and become conclusive by a failure on their part to file objections during the term.

There is no reason to believe that either the codifiers or the Legislature contemplated that any such result should arise from the act of 1876 and its codification, although it did not in express terms require the return to be made to the next term. An examination of the various sections of the Code on the subject of statutory awards will show that the Legislature contemplated promptness throughout, and did not anticipate that any indefinite delay should be made. In section 4489 it is declared that the arbitrators shall appoint a time and place of meeting, "which shall be as soon as practicable, consistent with a proper preparation of the case." Section 4493, in authorizing postponements by the arbitrators, states that "the arbitrators may postpone the hearing of the case to a future day, which day shall be as early as may be consistent with the ends of justice." Section 4504, after providing for objections to the award at the term when it is returned, also declares that, if they are made, the court shall cause an issue to be made up and tried, "which trial shall be had at the same term of the court at which the suggestion is made, unless good cause be shown for a continuance, when the same may be continued for one term only, except for providential causes." Thus the entire legislative scheme of statutory awards which shall become judgments binding upon the parties and enforceable by execution contemplates promptness, not delay. It would be extraordinary if they should intend that everything should be promptly done except the return of the award, and that by the adoption of a section

of the Code dealing with the court to which the return should be made they intended to repeal all requirements as to promptness in regard to its making. In *McMillan v. Allen*, 98 Ga. 405, 408, 25 S. E. 505, 507, Atkinson, J., said that the object designed to be accomplished by the Code in requiring that copies of awards should be furnished to each of the parties by the arbitrators was "to enable the parties, if for any reason dissatisfied with the award, to move promptly in the matter of attacking it and causing it to be set aside." But it is evident that such a purpose would avail little if the parties should be furnished with copies of the award, but the original should not be required to be returned into court promptly, so that they could promptly attack it. In *Savannah, etc., Ry. Co. v. Decker & Fawcett*, 94 Ga. 149, 21 S. E. 372, there was no question as to the time when the return should be made; but, having been made apparently in due time, it was held that a judgment *nunc pro tunc* might be entered at a term subsequent to the filing.

No question here arises as to what would be the rights or remedies of a party, if arbitrators should delay in returning the award, but such party should act promptly in seeking to require them to make the return. Nor is the question of the validity of a common-law award involved. Here there was a lapse of 11 months from the date of the award to its filing in the clerk's office (during which interval there were three terms of court), followed by an interval of 14 months before any motion was made in regard to it. The presiding judge did not err in declining to grant the motion made.

Judgment affirmed. All the Justices concur.

(134 Ga. 603)

ALACULSY LUMBER CO. v. GUDGER.

(Supreme Court of Georgia. June 17, 1910.)

(Syllabus by the Court.)

1. TAXATION (§ 351*)—COLLECTION OF TAXES—EXECUTION AGAINST WILD OR UNIMPROVED LANDS.

"The power of tax collectors of this state to issue executions against wild and unimproved lands, because of the nonpayment of taxes due thereon by the owner, is dependent upon a non-return of such lands for taxes by the latter; and it is therefore essential to the exercise of this power, and to the validity of the title of a purchaser of such land, acquired at a sale under and by virtue of an execution so issued, that it appear from the recitals in the execution, not only that the land against which the same was issued was wild and unimproved, but that it was likewise not returned for taxes by the owner."

(a) A paper, purporting to be a tax execution, issued by the tax collector against a specified lot of land, is fatally defective because of its omission to recite that the land was wild, or that it had not been returned for taxes, or set

forth any facts authorizing the issuance of a tax execution against the property in rem.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1319; Dec. Dig. § 651.*]

2. TRESPASS (§ 44*)—TO LAND—BURDEN OF PROOF.

In an action of trespass to land, the burden is on the plaintiff to show either title to or possession of the land at the time of the alleged trespass.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 112; Dec. Dig. § 44.*]

3. TRESPASS (§ 19*)—QUARE CLAUSUM FREGIT—TITLE TO SUPPORT ACTION—ESTOPPEL.

Estoppels in pais operate only upon existing rights. A plaintiff in an action of trespass *quare clausum fregit* must recover on proof of his title or possession at the time of the alleged trespass, and his defective title at that time will not be aided by the defendant's subsequent purchase of the land from one who may be estopped from denying the plaintiff's title, although the defendant may have notice of facts constituting the estoppel at the time of his purchase.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 22, 28; Dec. Dig. § 19.*]

Error from Superior Court, Murray County; A. W. Flite, Judge.

Action by R. M. Gudger and another against the Alaculsy Lumber Company. Judgment for plaintiff Gudger, and defendant brings error. Reversed.

W. O. Martin and C. N. King, for plaintiff in error. W. E. Mann, for defendant in error.

EVANS, P. J. R. M. Gudger and John Hampton brought an action in trespass against the Alaculsy Lumber Company to recover damages occasioned by the cutting and removal of certain timber and tanbark from a lot of land alleged to be the property of the plaintiffs. Hampton was stricken from the case, and the defendant in its answer denied that the plaintiff had title. The title relied upon by the plaintiff was a deed from A. T. Logan, sheriff, to R. M. Gudger, dated December 2, 1884, conveying lot of land No. 290 in the twenty-seventh district and second section of Murray county, under and by virtue of the following *fi. fa.*: "Georgia, Murray County. By W. R. Loughbridge, Tax Collector of Said County. To All and Singular Constables of Said County—Greeting: You are hereby commanded that of lot of land 290, 27th district and second section, you cause to be made the sum of thirty cents, the amount of tax due the state of Georgia and county for the year 1883 by reason of the nonpayment thereof as aforesaid, as appears to me from the tax returns, and the sum of fifty cents, the costs and charges incurred by the said delinquent in consequence of the nonpayment of the taxes as aforesaid. Fall not. This the first day of September, 1884. W. R. Loughbridge, Tax Collector."

The *fi. fa.* and deed were objected to when offered in evidence, upon the ground that the *fi. fa.* was not issued in the terms of the statute, in that it contained no recital that the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

land was unreturned for taxes, that it was wild land and unimproved, and that the owner was unknown. The court charged the jury that under the record evidence the plaintiff was entitled to recover the actual value of the tanbark and timber which the defendants had cut and carried away from the lot of land in dispute. The court was requested to charge "that, unless the plaintiffs show actual possession of the land in dispute—that is to say, *possessio pedis*—or actual legal title, then you should not find any amount of damages against the defendant." This request was refused. At the trial the plaintiff prevailed; and in the motion for new trial the defendant complains of the admission in evidence of the tax deed, the instruction of the court, and the refusal to give its written request in charge. A new trial was refused, and the defendant excepts.

1. The land upon which the trespass was alleged to have been committed was wild or unimproved land. It was such at the time of the alleged sale under the tax *fi. fa.* This tax *fi. fa.* was not issued in terms of the statute, in that the execution did not show upon its face that the land against which the same was issued was wild or unimproved land and had not been returned for taxes by the owner. A tax *fi. fa.*, issuing in rem and omitting such recitals, is fatally defective, and a sale of land thereunder is void. *Leonard v. Pilkinton*, 99 Ga. 739, 27 S. E. 753; *Southern Pine Company v. Kirkland*, 112 Ga. 216, 37 S. E. 362; *Pol. Code 1895*, §§ 821, 908. It was therefore erroneous to admit in evidence the *fi. fa.* and deed upon which the plaintiff relied as showing title to the land upon which the trespass was alleged to have been committed.

2. So far as the evidence discloses, the plaintiff was never in actual possession of any part of the land. In order to maintain an action of trespass to land, it is essential for the plaintiff to show title in himself or possession. The requested charge should have been given. *Ault v. Meager*, 112 Ga. 148, 37 S. E. 185.

3. The only record title introduced in evidence by the plaintiff was a tax deed from A. T. Logan, sheriff, to himself, dated December 2, 1884. The plaintiff testified that he had returned the land continuously for taxation since his purchase at sheriff's sale, and that the agents of the defendant, just before committing the trespass, made an effort to buy from him the timber upon the land in controversy, and that he refused to sell. The value of the timber and tanbark cut and removed by the defendant was shown. The defendant offered in evidence a deed from W. G. Harris, sheriff, to A. T. Logan, dated July 2, 1878, a deed from S. M. Logan, administratrix of A. T. Logan, to defendant, dated July 20, 1907, and the tax returns of A. T. Logan for the years 1883 and 1884, showing that he return-

ed the land for taxation during those years. It further appeared that all of the alleged trespasses by the defendant were committed prior to obtaining its deed from Mrs. Logan, administratrix of A. T. Logan. The defendant moved for the direction of a verdict, which the court refused. In his charge the court instructed the jury that under the record evidence the plaintiff was entitled to recover the actual value of the tanbark and timber which the defendant had cut and carried away from the premises, and limited the investigation of the jury to the amount of the damages. The title upon which the plaintiff based his right to recover was the tax deed from A. T. Logan, sheriff, to himself. As already pointed out, this deed conveyed no title, for the reason that the tax execution upon which it was based was invalid. If the plaintiff could recover at all, it would be because the defendant is estopped from denying his title. It may be conceded that if at the time of the alleged trespass the defendant was claiming title under A. T. Logan, and at the time of acquiring title it had notice that the land which was sold by Logan, sheriff, was his own land, an estoppel would arise against it from asserting Logan's individual title. But it appears that at the time the defendant cut the timber and tanbark from the land it had not purchased the land from the administratrix of A. T. Logan, and was not claiming under that title. Estoppels only operate against parties and their privies. They do not bind strangers. *Harris v. Amoskeag Lumber Co.*, 101 Ga. 643, 29 S. E. 302. When the defendant cut and removed the timber it was a stranger to the Logan title, and therefore was not estopped from attacking the plaintiff's title. Estoppels in pais operate only upon existing rights, not upon rights subsequently acquired. *Rorer on Judicial Sales*, § 473. Although A. T. Logan's administratrix might be estopped, under the facts developed in this case, from denying the title of the plaintiff, such estoppel could not affect the defendant, and render it liable for acts which were done when it had no connection whatever with the Logan title. The court, therefore, erred in his instruction that under the record evidence the plaintiff was entitled to recover.

Judgment reversed. All the Justices concur.

(134 Ga. 641)

HAGINS v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO.

(Supreme Court of Georgia. June 22, 1910.)

(Syllabus by the Court.)

MASTER AND SERVANT (§§ 155, 185*)—INJURY TO SERVANT—OBVIOUS DANGER—WARNING—NEGLIGENCE OF FELLOW SERVANT.

When a servant is engaged with others in pulling down by means of a rope attached there to a tree being felled in an open space, the

danger of his being injured by the fall thereof is an obvious one, and known, or should be known, to the servant, and in the absence of an express contract on the part of the master to give warning when the tree begins to fall, and in what direction it will fall, there is no duty on him to do so.

(a) The failure of foremen in charge of the details of such work (who at the time of the injury, because of the absence of other employes, are engaged with the servant who is injured in pulling on a rope to guide the direction of the fall of the tree) to warn the servant when it begins to fall, and in what direction it will fall, or to station themselves or others elsewhere to give such warning, cannot be charged against the master as negligence, entitling the servant to recover damages for injuries received by reason of the tree falling on him. There being no nondelegable duty resting on the master to thus warn the servant, the negligence of the foremen, if any, is that of a fellow servant.

(b) The court committed no error in dismissing the petition upon the general demurrer filed thereto.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 310, 385-421; Dec. Dig. §§ 155, 185.*]

Error from Superior Court, Effingham County; W. G. Charlton, Judge.

Action by Angus Hagins against the Southern Bell Telephone & Telegraph Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Gignilliat & Heidt and Travis & Travis, for plaintiff in error. Osborne & Lawrence, for defendant in error.

HOLDEN, J. The gist of the plaintiff's allegations may be stated as follows: With other servants of the master he was engaged in pulling down by means of a rope a tree which was being felled. The tree was to be so pulled as to fall within a space of about 80 feet between the wires of the defendant company on the one side and a railroad track on the other. The work was under the charge and direction of one who was a general foreman over several gangs, and another employé who was immediate foreman over the gang in which the plaintiff worked. Usually six men pulled the rope, but at the time of the injury for which suit is brought only four had hold thereof; two of them being the foremen above referred to. The tree, in falling, struck and injured the plaintiff. He claims the company is liable to him in damages because it was negligent in not warning him when it began to fall, and in which direction it was falling, which he alleges it was the duty of the foremen in charge of the work to do, and that their failure to do so was the sole cause of his injury; he being free from fault. He alleges that the immediate foreman was the alter ego of the company, and that he had a right to rely and did rely on receiving warning from him, or the other foreman, or the master, or some one by them provided for that purpose, when the tree began to fall, and in what direction it was falling, in time for him to escape in-

jury, for which reason, and the fact that he was engaged in pulling on the rope, he did not discover that the tree was falling until it was halfway down. The allegations above stated are amplified, but it is unnecessary to state them more in detail, as the plaintiff's right to recover depends upon whether the facts above set forth give him a cause of action.

A servant assumes the ordinary risks of his employment, whether or not such employment be of a dangerous character. One who is pulling on a rope fastened to a tree being felled in an open space, for the purpose of pulling the tree down and so guiding it that it may fall in some general direction, incurs an obvious danger of the tree falling on him, and he either knows of such danger, or is chargeable with knowledge thereof. Under such circumstances there is no hidden danger, but one which is as obvious to the servant as to the master. Such danger is an incident to the *very work* in which the servant is engaging, and does not come from an independent agency. A case of this character differs from that class of cases in which the danger arises from sources disconnected with the details of the work upon which the servant at the time is employed, as, for instance, where an employé is working in a mine, and the danger is occasioned by the firing of a blast by other fellow servants at irregular intervals in other parts of the mine.

Among the nonassignable duties of the master are those of furnishing the servant a reasonably safe place in which to work, and to give the servant warning of dangers incident to the employment unknown to the servant, of which the master knows or ought to know. When a tree being felled in an open space is guided in the direction in which it falls by a rope upon which the servant is pulling, there is no duty imposed upon the master to warn the servant when the tree begins to fall, and in what direction it is falling, in order that the servant may escape being injured by its fall. In this connection, see *Anderson v. Columbia Improvement Co.*, 41 Wash. 83, 82 Pac. 1037, 2 L. R. A. (N. S.) 840, and authorities cited in note; *Melton v. Jackson Lumber Co.*, 133 Ala. 580, 31 South. 848; *Allen v. Augusta Factory*, 82 Ga. 76, 8 S. E. 68; *Holland v. Durham Coal & Coke Co.*, 131 Ga. 715, 63 S. E. 290.

The petition alleges that it was the duty of the foreman in immediate charge of those engaged in the work of felling the tree to warn the latter when the tree began to fall, and in what direction it was falling. As there was *no duty* on the master to give such warning, the failure of the foremen to thus warn the servants, if any such duty rested on them, is not chargeable to the master, being an act of negligence by a fellow servant, for which the master is not responsible. *Moore v. Dublin Cotton Mills*, 127 Ga. 609, 56

S. E. 839, 10 L. R. A. (N. S.) 772; Dennis v. Schofield Sons' Co., 1 Ga. App. 489, 57 S. E. 925.

The court committed no error in dismissing the petition upon general demurrer thereto. Judgment affirmed.

(134 Ga. 610)

MENDEL v. L. F. MILLER & SONS.

(Supreme Court of Georgia. June 18, 1910.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF (§ 152*)—PLEADING—NECESSITY.

If a contract is of a character which, under the statute of frauds, is required to be in writing, and it does not meet the requirement of the statute in that regard, and suit is brought upon it, if the defendant in his answer admits the contract, without insisting on the statute of frauds, he will be treated as having renounced the benefit thereof. But if the defendant by his answer admits the agreement, but pleads and insists upon the benefit of the statute, he will be entitled to it, notwithstanding such admission.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 365; Dec. Dig. § 152.*]

2. FRAUDS, STATUTE OF (§ 154*)—PLEADING—AMENDMENT TO PLEAD STATUTE.

Under the liberal right of amendment in this state, and the right to file contradictory pleas, although a defendant may have in his original answer admitted a contract as alleged by the plaintiff, he is not prevented from amending, and setting up the statute of frauds, if applicable to the case.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 368; Dec. Dig. § 154.*]

3. FRAUDS, STATUTE OF (§ 131*)—OPERATION AND EFFECT—MODIFICATION OF WRITTEN INSTRUMENT.

If the contract for the sale of corn, as originally made, be treated as sufficient to answer the demand of the statute of frauds, but on cross-examination of a witness the defendant showed that there was a parol agreement between the witness and the defendant that sales by the former to the latter should be under the rules of a municipal board of trade, of which the defendant was not a member, and that in the absence of specification of time for shipment of goods prompt shipment was intended, and then showed by a rule of the board of trade that in case of orders for prompt shipment five days were allowed, this did not present such a case of a written contract specifying that shipments should be made in five days as to authorize the invoking against the plaintiff, upon an offer of parol evidence to show a waiver of time, of the rule that where a contract was required by the statute of frauds to be in writing, and was reduced to writing, parol evidence was inadmissible to show a binding executory modification of its terms.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Dec. Dig. § 131.*]

4. ERRONEOUS CHARGE.

The charge in some particulars did not clearly present the defenses raised by the original answer and the amendment thereto, and the case is accordingly returned for a new trial.

5. EVIDENCE IRRELEVANT.

The letter written by the purchaser to the seller in regard to another transaction was not relevant.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by L. F. Miller & Sons against Jonas Mendel. Judgment for plaintiffs, and defendant brings error. Reversed.

Osborne & Lawrence, for plaintiff in error. Oliver & Oliver, for defendants in error.

LUMPKIN, J. L. F. Miller & Sons brought suit against Jonas Mendel to recover damages for a breach of contract in refusing to receive a car load of corn purchased by him. They alleged that the corn had been shipped under bill of lading with draft attached, and had been held for some time at the request of Mendel, and on his promise to take up the draft, and that upon his final refusal the corn was sold; and suit was brought for the difference between what it brought and the contract price, together with certain storage charges. The plaintiffs recovered, and the case was brought to this court, after the refusal of a new trial. The judgment was reversed, because some of the instructions of the charge submitted to the jury issues which were not authorized by the evidence. *Mendel v. Miller*, 126 Ga. 834, 56 S. E. 88, 7 L. R. A. (N. S.) 1184. In the original answer the defendant admitted the purchase of the corn and its shipment as alleged by the plaintiff, but denied that the corn shipped was of the kind or quality ordered. When the case was returned to the trial court, the defendant amended his answer, by pleading that the subject-matter of the action was the sale of goods, wares, and merchandise to the amount of more than \$50, and therefore within the statute of frauds (Civ. Code 1895, § 2693, par. 7), and that no contract in writing was made, nor any memorandum thereof signed by the defendant, or by any one lawfully authorized by him, and also that the corn offered to him was not delivered within the time or in the manner ordered. The plaintiffs again recovered a verdict. Defendant moved for a new trial, and, after it was refused, excepted.

On behalf of the plaintiffs in the court below, the defendants in error here, it was contended that, inasmuch as the defendant in the trial court admitted in his original answer the making of the contract alleged by the plaintiffs, he could not afterwards by amendment set up and get the benefit of the statute of frauds. The right to amend pleadings in this state is very broad. Indeed, no exception was taken to the allowance of the amendment in this case. Contradictory defenses may be filed. Civ. Code 1895, § 5065: *Wade v. Watson*, 129 Ga. 614, 59 S. E. 294. If suit is brought upon a parol contract, which under the statute of frauds should be in writing, and the defendant in his answer admits the contract, without insisting on the statute of frauds, the court will consider that the defendant has renounced the benefit of the statute, and proceed according-

ly. But if the defendant by his answer admits the parol agreement, and yet pleads the statute and insists upon the benefit of it, he will be entitled to it, notwithstanding such admission. *Hollingshead v. McKenzie*, 8 Ga. 457; *Douglass v. Bunn*, 110 Ga. 165, 35 S. E. 339. This is a different thing from admitting all the facts which create liability, and yet denying the existence of such liability in general terms. When the amendment to the answer was allowed, it stood as if it were originally a part of the pleading. The defendant did not by reason of his original admission, preclude himself from setting up the statute of frauds.

We have experienced some difficulty in dealing with this case, because the trial proceeded, in part at least, on an erroneous basis. While the statute of frauds was pleaded, and certain rulings invoked in regard thereto, it was not contended in this court by counsel for plaintiff in error that the original contract fell within the statute of frauds. It was stated in the brief: "The original contract of sale was admitted. It was therefore without the statute. But this contract provided that the corn should be delivered within the stipulated time. The court permitted plaintiff to introduce parol evidence to show that this time limit had been waived, and instructed the jury that, if they found that the time limit had been waived, the defendant would be liable. * * * We insist upon the proposition that where a contract is by the statute of frauds required to be in writing, and is so made, the parties may not thereafter show a variation or alteration of this contract by parol testimony." The letters introduced in evidence and the statement of the contract in the plaintiff's petition did not set any definite limit to the time for delivery. The letter from Browder, the local broker, to Mendel, which Browder in his evidence called a "sale ticket," stated that "I have to-day sold you to arrive steamer for account of L. F. Miller & Sons, Philadelphia, Pa., one car sacked 2 white corn at 61½c. per bu. delivered." This did not name the date for delivery, and therefore, in the absence of anything else, would mean that the delivery should be in a reasonable time, considering the nature of the transaction. Civ. Code 1895, § 3724. While Browder was on the stand as a witness, on cross-examination, he testified as follows: "There was no time specified for the shipment of that corn. When no time is specified as to shipment, that means prompt shipment. This corn was sold under the rules of the Board of Trade of Savannah. In selling that specified car, I did not tell Mr. Mendel at that time that it was sold under the rules of the Board of Trade; but when Mr. Mendel went into the grain business, I told him I would only sell him grain under the rules of the Board of Trade. He said that he was not a member of the Board of Trade. I said: 'I will sell you grain, but whenever

there is a controversy between you and the shipper as to grade, whatever the certificate of the inspector of the Savannah Board of Trade calls for, you must abide by it, or I will not sell it to you.' It was sold under the rules of the Board of Trade. He did not buy it, except under the understanding had with him at that time."

This evidence did not undertake to show any custom of trade so universal as to become a part of the contract. It did not even show a definite agreement on the part of Mendel to be bound by all the rules of the Board of Trade, or to adopt the limitations placed by such board upon the time for delivery. The only thing specified by Browder as having been mentioned to Mendel was that, in case of a controversy as to grade, Mendel should abide by whatever the certificate of the inspector called for. There was no reference in the letters to the rules of the Board of Trade, the defendant did not mention them in his pleadings, and the plaintiff only passingly referred to them by saying that the corn was inspected by the official inspector of the board, and that the defendant paid for the service the inspection fee of 75 cents due under the rules. This evidence practically amounted to tacking on to the writing a parol agreement connecting it with the rule as to time; and a rule of the Board of Trade was introduced to show that, where goods were ordered for prompt shipment, five days were allowed. Thereupon the defendant contended that the written contract, required by the statute of frauds, limited the shipment to five days (or two days, if the shipment was to be "immediate"), and that the plaintiff should not have been allowed to show by parol evidence that, although the car was not shipped within that time, after its arrival Mendel waived that fact, and promised from time to time to take up the draft and receive the corn within a few days.

We do not deem it necessary to enter into a discussion of the rule that where a contract is required by the statute of frauds to be in writing, and is put in writing, executory modifications of it cannot be shown by parol, or the question of whether, by a request for a postponement of delivery and an assent thereto, there may be a waiver of strict performance in the nature of a mere voluntary forbearance, or of an estoppel, rather than an executory contract, or the extent of it. The defendant, not having stood on the written contract claimed to have been made by the "sale ticket" and to have been acknowledged by the letters, but having sought by parol to add other stipulations thereto, now complains that other parol evidence was admitted on the other side. The court also charged to the effect that if a contract was made that a thing should be delivered in a certain number of days, and if it arrived shortly after the expiration of the limited time, and the purchaser did not ob-

ject to the delay, but asked that the goods be kept for his convenience to a later date, he waived the time limit. This charge appears to deal with the rule of the Board of Trade as being a part of the written contract and fixing definitely the time within which the delivery should be made.

The presiding judge informed the jury that he did not charge them on the subject of the statute of frauds, because he did not consider that it was involved in the case, although the defendant contended that it was so. He added: "I do not consider, under the evidence in this case, we are concerned with the giving of that law in charge to this jury, as the contract seems to come within the exceptions of the statute of frauds, and not under the statute of frauds." We are not clear to which of the exceptions to the statute of frauds the learned presiding judge had reference. The exceptions stated in the Code are, when the contract has been fully executed, where there has been performance on one side, accepted by the other in accordance with the contract, and where there has been such part performance of the contract as would render it a fraud of the party refusing to comply, if the court did not compel a performance. Civ. Code 1895, § 2694. It is quite clear that the contract had not been fully executed, or there would have been no occasion for the present suit. When the case was previously before this court, a reversal was had partly because the presiding judge submitted to the jury the question of delivery, and explained to them the difference between actual and constructive delivery. We do not see that the evidence on the last trial established a delivery of the corn. Even were there evidence in such a case tending to show such a part performance by one party to a contract as would render it a fraud for the other party to refuse to comply, the court should not generally declare this as a matter of law.

If it should be determined that the plaintiffs were entitled to recover, but questions arise concerning loss by deterioration of the corn and the diligence of the plaintiffs in protecting it and preventing or reducing damages resulting from keeping or delay, they have been discussed in the former decision of this court. There was no error in admitting evidence on that subject. Nor was the criticism on the charge in regard to due care well taken.

The letter from the defendant to the plaintiffs in regard to another car load of corn, written after the order for this car load and before its arrival, does not appear to have been relevant. It was contended that certain statements therein as to the price of corn and the time for the delivery of that car threw light on the case; but the evidence did not disclose that the market price

was the same when that letter was written as when the car load of corn in controversy arrived, or that the contracts made in the two cases were similar. If offered to impeach the defendant's evidence, no foundation appears to have been laid for its introduction.

We think the case should be returned for another trial on the defenses set up in the original answer and the amendment thereto. Aside from the question of the statute of frauds, much of the law of the case was discussed in the former decision of it by this court.

Judgment reversed. All the Justices concur.

(134 Ga. 618)

NASHVILLE, C. & ST. L. RY. v. PEAHLER.
(Supreme Court of Georgia. June 18, 1910.)

(Syllabus by the Court.)

1. REVIEW ON APPEAL.

There was no error, requiring a reversal, in overruling the demurrer to the petition as amended.

2. EVIDENCE (§ 344*)—DOCUMENTARY EVIDENCE—COPY OF CITY CODE.

Where city ordinances were codified, and such codification was adopted by an ordinance, and the clerk of the council and keeper of the records copied and certified a section of such codification, and also copied and certified from the record a copy of the adopting ordinance, this was sufficient to authorize the admission in evidence of the copy of the section of the City Code. Metropolitan Street Railway Co. v. Johnson, 90 Ga. 500, 16 S. E. 49; Western & Atlantic R. Co. v. Hix, 104 Ga. 11, 30 S. E. 424; 8 Enc. Ev. 825, 826.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1293; Dec. Dig. § 344.*]

3. RAILROADS (§ 236*)—REGULATING SPEED OF TRAINS.

A municipal corporation, under what is commonly called the "general welfare" clause of its charter, may by ordinance make reasonable regulations as to the speed of railroad trains within its limits; and this power is not as matter of law confined to regulating the running of such trains in the streets or public squares of the city, or while crossing a street.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 749; Dec. Dig. § 236.*]

4. RAILROADS (§ 397*)—DEATH OF PERSON ON TRACK—ADMISSIBILITY OF EVIDENCE—CUSTOM.

Where suit was brought for the homicide of a workman employed in working on the piers of a bridge where one railroad crossed over another, by reason of being run upon, while temporarily standing on the track, during the passing of a train overhead, by a train on the lower road, which was alleged to have been carelessly run at a reckless speed and in violation of a municipal ordinance, there was no error in refusing to permit counsel for defendant to ask a witness introduced by him, "Do you know what the custom is, what the bridge gang does for the protection of approaching trains, when they are working on bridges?"

(a) This is true, although counsel stated that he desired to have the witness state, "if he knows the custom in railroad operations, where a bridge gang is at work on a bridge, what they

do or are required to do for the protection of approaching trains."

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 397.*]

5. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSIBILITY OF EVIDENCE.

Whether or not it was proper, over objection of the defendant, to permit the plaintiff's counsel to ask a witness whether the person injured could have heard a whistle if it had been blown at any time before the engine struck him, if done with a view to showing that no such whistle was blown, because he did not seem to have observed it, it will not cause a reversal that such question was allowed to be asked, where the situation, location, and circumstances were shown, and in answer to the question the witness, a co-employee on the same job with the injured person, and who had been engaged at similar work for the same company for some time, testified that, had the whistle been blown opposite to a certain described post, or between it and the point where the decedent was struck, the witness could have heard it at the place where he was standing, and that he did not hear it. *Pride v. State*, 133 Ga. 433, 66 S. E. 259; 3 *Wigmore on Evidence*, § 1976; *Southern Railway Co. v. Bonner*, 141 Ala. 517, 37 South. 702.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

6. RAILROADS (§ 397*)—DEATH OF PERSON ON TRACK—ACTIONS—ADMISSIBILITY OF EVIDENCE—NEGLIGENCE.

Where the question was whether a train was being run at a negligent or reckless rate of speed, and in violation of a municipal ordinance, at the time when it struck a man, it was not competent for the defendant to show that the speed was no greater than that at which other trains on former occasions had passed that point, as a means of negating the charge of negligence. *Central R. R. v. DeBray*, 71 Ga. 406 (14).

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1344; Dec. Dig. § 397.*]

7. RAILROADS (§ 397*)—DEATH OF PERSON ON TRACK—ACTIONS—ADMISSIBILITY OF EVIDENCE—REASONABLENESS OF SPEED ORDINANCE.

Where evidence was introduced by a plaintiff to show that a municipal ordinance prohibited railway trains from running faster than a certain specified speed within the corporate limits, it was not admissible for the defendant to show that some months after the injury the ordinance was changed, so as to exclude certain portions of the city from its operation. The making of such an amendment did not show that the original ordinance was void for unreasonableness.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 397.*]

8. REVIEW ON APPEAL.

No exception was taken to the submission to the jury of the question of the reasonableness of the ordinance as applied to the place of the injury, and the charge and refusal to charge on that subject do not require a new trial.

9. RAILROADS (§ 381*)—INJURIES TO PERSON ON TRACK—ORDINARY CARE.

In an action against a railroad company for a personal injury done to a person not an employee of the defendant, where it is claimed that the injured person could have avoided the consequences to himself of the defendant's negligence, if it was negligent, by the use of due care, the measure of care so due is ordinary care.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1285-1293; Dec. Dig. § 381.*]

10. NEGLIGENCE (§ 4*)—ORDINARY CARE.

What ordinary care requires a person to do depends on the circumstances surrounding him at the time.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 6; Dec. Dig. § 4.*]

11. GROUNDS FOR NEW TRIAL INSUFFICIENT.

In the light of the evidence and the entire charge of the court, none of the grounds of the motion for a new trial are such as to require a reversal.

Error from Superior Court, Floyd County; Price Edwards, Judge.

Action by M. L. Peavler against the Nashville, Chattanooga & St. Louis Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

Tye, Peebles & Jordan and Dean & Dean, for plaintiff in error. Lipscomb, Willingham & Doyal, for defendant in error.

LUMPKIN, J. At a certain point within the corporate limits of Rome the Southern Railway crossed over the track of the Nashville, Chattanooga & St. Louis Railway by means of a bridge. Peavler was a member of a bridge gang of the former company, and was at work with others on the piers of the bridge beside the track of the latter railroad. A train of the former company passed over the bridge. It was contended that it was dangerous to remain under it, and the hands stepped out to one side of it; that on account of the high embankments on each side, and of water alongside the track caused by a recent rain, they stood on the track of the other company; and that a train of such company, running at a high and reckless speed and in violation of a municipal ordinance on the subject, and without the exercise of due care on the part of the agents in charge of it, struck Peavler and killed him. His widow sued for the homicide. She recovered a verdict. A new trial was refused, and the defendant excepted.

The general welfare clause of the charter of the city of Rome is expressed in broad and comprehensive language. Acts 1882-83, p. 430. Under such authority, in the exercise of its police power, a municipal corporation may pass a reasonable ordinance regulating the rate of speed at which the cars propelled by steam may be run within the corporate limits. 3 *Abbott, Mun. Corp.* § 854; *McQuillan, Mun. Ord.* §§ 473, 474; *Western & Atlantic R. Co. v. Young*, 81 Ga. 397, 417, 7 S. E. 912, 12 Am. St. Rep. 320; *Bluedorn v. Missouri Pacific Ry. Co.*, 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615; *Prewitt v. Missouri, Kansas & T. Ry. Co.*, 134 Mo. 615, 36 S. W. 667. The authority to pass such ordinances is not limited to places where a railroad track runs along or across a street, or over ground belonging to the municipality. Generally it has been held that the reasonableness of a municipal ordinance regulating the

nied liability under the contract, for the reason that it was obtained by the fraudulent representation of the plaintiff as to the condition of the books, and that was an issue in the case. The effect of this evidence was to afford a possible inference that the defendants would not have offered to pay a sum under a contract obtained from them by fraud, and therefore the illegal testimony operated to their injury.

Judgment reversed. All the Justices concurred.

134 Ga. 637

FLINT RIVER LUMBER CO. v. SMITH
et al.

(Supreme Court of Georgia. June 22, 1910.)

(Syllabus by the Court.)

1. REVIEW ON APPEAL.

The evidence submitted preliminary to the introduction of the certified copy of the deed was sufficient to authorize the court to find that the original deed was lost.

2. CORPORATIONS (§ 444*)—DEEDS—VALIDITY.

The deed executed in 1850 by the president and cashier of the Bank of Milledgeville was, under the charter of the bank (Acts 1835, p. 36), a good conveyance of the land.

(a) The deed to which the above ruling applies was not rendered void because the grantee, taking as an individual, was one of the officers who acted for the bank.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1779; Dec. Dig. § 444.*]

3. EVIDENCE (§ 343*)—CERTIFIED COPY OF RECORD OF DEED—INSTRUMENT NOT ENTITLED TO RECORD.

A deed to land, executed in this state on the 29th of April, 1850, purporting in its caption to be executed in a designated county, and to be attested by a justice of the inferior court of a different county, there being no aliunde evidence to show that it was in fact executed in the county for which the official witness was commissioned, was not entitled to record, and a certified copy thereof from the records of the county in which the land was situated was inadmissible in evidence, over appropriate objection, although sufficient cause was shown for the nonproduction of the original.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1825; Dec. Dig. § 843.*]

4. DEEDS (§ 207*)—APPEAL AND ERROR (§ 854*)—SUFFICIENCY OF EVIDENCE—REVIEW—NONSUIT.

On the issue of forgery, where a witness testified that previous to the trial he had compared the original signature of the grantor in a deed attacked as a forgery with other writings of the grantor which were introduced in evidence, and which were proved by the testimony of another witness to be in the writing of the grantor, and that in the opinion of the first witness, from a comparison of the two papers which were before him at the same time, the signature to the original deed attacked as a forgery was the genuine signature of the grantor therein named, it was erroneous, after an accounting for the loss of the original, to refuse to admit in evidence a certified copy thereof, upon the ground that the evidence was insufficient to authorize a submission of the issue of forgery to the jury. But, for reasons stated in the opinion, the judgment granting a nonsuit will not

be disturbed on account of the error above mentioned.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 614, 615; Dec. Dig. § 207.* Appeal and Error, Cent. Dig. §§ 3410, 3413, 3418; Dec. Dig. § 854.*]

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by the Flint River Lumber Company against G. O. Smith and others. Judgment of nonsuit, and plaintiff brings error. Affirmed.

The Flint River Lumber Company instituted suit against G. O. Smith and the Smith Lumber Company, a firm composed of J. W. White and J. F. M. Smith, for the recovery of a tract of land, and damages on account of trespasses committed thereon. The plaintiff based its right to recover on an alleged grant from the state and an unbroken chain of title from the state's grantee to itself. On the trial the plaintiff offered in evidence a certified copy of a deed from the bank of Milledgeville to James U. Horn, alleged to be one of the deeds in its chain of title. The material parts of the deed were as follows: "Georgia, Baldwin County. This indenture made the 29th day of April, in the year of our Lord 1850, between the Bank of Milledgeville, located in the city of Milledgeville, in the county and state aforesaid of the one part, and James U. Horn, of the same place, of the other part, witnesseth: That the said Bank of Milledgeville, for and in consideration of the sum of \$1,000 in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, etc., unto the said James U. Horn, his heirs and assigns," the lot of land in dispute and other lands. "To have and to hold the said described lots of land," etc., "to the said James U. Horn, his heirs, executors, administrators, and assigns, in fee simple; and the said Bank of Milledgeville for itself, and assigns the said bargained premises unto the said James U. Horn, his heirs and assigns, will warrant and forever defend the right and title thereof against himself and against the claims of all other persons whatever. In witness whereof, Walter H. Mitchell, president, and James U. Horn, cashier, of the Bank of Milledgeville, on the day and year therein mentioned, signed the name and affixed the seal of said corporation thereto, and delivered the foregoing deed as the act of the Bank of Milledgeville. [Signed] W. H. Mitchell [L. S.] President, James U. Horn [L. S.] Cashier. Signed, sealed and delivered in the presence of: A. M. Nisbet, James Jackson, J. I. C. W. C." Counsel for the defendants objected to the admission of this deed in evidence, upon the following grounds: "(1) Because the preliminary proof in reference to the loss of the original was not sufficient; (2) because the deed purports to be a deed between the Bank of Milledgeville and James U. Horn, and is

not signed by the Bank of Milledgeville, but is only signed by W. H. Mitchell [L. S.] President, James U. Horn [L. S.] Cashier; (3) because there is no corporate seal attached to the deed, and there is no seal or scroll represented to be the seal of the Bank of Milledgeville attached to the deed; (4) because it is a deed of James U. Horn, cashier, to James U. Horn individually, and is a void conveyance as between these parties; (5) because W. H. Mitchell, president, had no authority to convey the property of the bank—that the bank could only convey property through the authority of its directors; (6) because the deed appears to have been executed in Baldwin county before the judge of an inferior court of another county, and was therefore not entitled to be recorded.” Upon the introduction of allunde evidence, the court ruled that the preliminary proof of the loss of the original was sufficient, but excluded the deed on the ground that it was not properly executed, and that no corporate seal of the bank was attached to it so as to authorize the presumption that it was executed by authority of the bank. The plaintiff excepted and assigned error on the ruling. After the exclusion of the deed from evidence, the plaintiff's counsel announced to the court that under the court's ruling it would be impossible for the plaintiff to make out its case, but with the court's permission, and in order that all questions relating to the plaintiff's title might be decided by the Supreme Court, it would proceed with its evidence only in so far as it related to its chain of title. Defendant's counsel interposed no objection to this, and the court remarked that in his opinion this would be the proper way in which to proceed with the case in order that all questions relating to the title might be settled. Plaintiff's counsel thereupon introduced further evidence for the purpose of making proof of the remaining deeds in its alleged chain of title. One of the alleged deeds was from Simon W. Nicholls to Samuel T. Beecher. The defendants had filed an affidavit of forgery to this deed, and the issue of forgery was, by consent, tried with the other issues in the case. The original deed was lost, but the plaintiff introduced a certified copy from the records of the county in which it was recorded, and in connection with it an original deed from Luke G. Weeks to Simon W. Nicholls, which was proved by the interrogatories of a witness to have been in the handwriting of Simon W. Nicholls. In connection with the original deed just mentioned the plaintiff also introduced a witness who testified, in effect, that he had previously compared the signature of Simon W. Nicholls to the lost original deed with the writing in the deed from Luke G. Weeks to Simon W. Nicholls, having them both before him at the same time, and that the writing was the same, and in his opinion the signature to the lost deed was the genuine signature of Simon W. Nicholls. After this evidence was introduced, the judge sustained the objection of

defendant's counsel to the admission of the certified copy of the deed from Simon W. Nicholls to Saml. T. Beecher, upon the ground that the execution of the deed had not been sufficiently shown by the evidence to entitle the plaintiff to go to the jury on the issue of forgery, the court holding that the testimony of the two witnesses was not sufficient to authorize the submission of the question as to the execution of the deed to the jury. Upon the close of the evidence the court awarded a nonsuit. The plaintiff excepted to these rulings.

Donalson & Donalson and J. R. Pottle, for plaintiff in error. Albert H. Russell and T. S. Hawes, for defendants in error.

ATKINSON, J. 1. The ruling announced in the first headnote does not require elaboration.

2. The objections (2 to 5, inclusive) which were interposed to the admission of the deed from the Bank of Milledgeville to James U. Horn were without merit. This results from a construction of the charter of the bank and the application of the ruling of this court made in the case of *Veasey v. Graham*, 17 Ga. 99, 63 Am. Dec. 228. The act incorporating the Bank of Milledgeville, among other things, declared: “That the bills obligatory and of credit, notes, and other contracts whatsoever in behalf of the said corporation shall be binding upon the company; provided, the same be signed by the president and countersigned by the cashier of said corporation.” Acts 1835, p. 39, § 9. Similar language was contained in the charter of the Bank of Hawkinsville. Acts 1831, p. 43, § 8. Construing and applying that language it was held in the case of *Veasey v. Graham*, supra, that a deed executed like the present was sufficient in point of form, and was *prima facie* a good deed. This meets objections 2, 3, and 5. As to the fourth objection it may be added that the fact that James U. Horn, who as cashier was one of the officers who signed for the bank, was, in his individual capacity, the grantee named in the deed, did not render it void. *Veasey v. Graham*, 17 Ga. 99, 63 Am. Dec. 228.

3. Another objection to the deed from the Bank of Milledgeville to James U. Horn was that it appeared to have been executed in Baldwin county before the judge of an inferior court of another county, and therefore was not entitled to be recorded. The deed appears to have been executed on the 29th day of April, 1850, and the manner and sufficiency of its execution to authorize its record depends upon the law which was in force at the time of its execution and record. An examination of all the published acts and digests prior to the Codes of 1861 discloses that the law in force at the time of the execution of the deed in question, regarding the attestation of deeds in this state by notaries public, judges of the superior courts, justices of the inferior courts and justices of the peace

was the act approved December 20, 1827. By section 3 of that act it was provided: "Every deed of conveyance or mortgage, on either real or personal property, hereafter to be made, may upon being executed in the presence of and attested by a notary public, judge of the superior court, justice of the inferior court, or justice of the peace (and in cases of real property by one other witness), be admitted to record and made evidence in the different courts of law and equity of this state as though the same had been executed, proved, and attested as heretofore required by the laws of this state in cases of deeds to real property." Prince's Dig. pp. 165, 166; Cobb's Dig. p. 172. Under this law one of the requirements for the proper execution of a deed to land was that it should be attested by one of the officers designated. The act does not purport to give them extra-territorial jurisdiction for the purpose of attesting deeds. The caption of the deed under consideration was, "Georgia, Baldwin county." It was not stated in the attestation clause, or elsewhere in the deed, that it was in fact executed in another county, and there was no aliunde evidence to that effect. The presumption is that the situs of its execution was Baldwin county. *Rowe v. Spencer*, 132 Ga. 426, 64 S. E. 468. The deed was attested as follows: "Signed, sealed, and delivered in the presence of: A. M. Nisbet, James Jackson, J. I. C. W. C." There was no official seal attached, nor anything to show the official character of the witness, except the letters which follow the name of the witness James Jackson. At that time there were justices of the inferior courts of the various counties of the state, who were authorized, among other things, to attest deeds. If the letters which follow the name of James Jackson characterize the witness as the official witness who attested the deed, and the letters be held to indicate that the witness was a justice of the inferior court of some county, the name of which commenced with the letter "W," it will be a different county from that of Baldwin, where the caption of the deed prima facie showed the situs of its execution to be. Thus it appears that the evidence relied upon to show the official character of the witness would show the officer to be such only in a different county from that where he purported to act. In 1850 James Jackson, as the justice of the inferior court of a different county from the county of Baldwin, did not have authority, under the law, to attest deeds in Baldwin county. The inferior courts were first established by the act approved December 23, 1798, § 36, et seq. (Watkin's Dig. p. 389), and their jurisdiction and the jurisdiction of the judges thereof defined. The law with regard to justices of the inferior courts and their jurisdiction was amended from time to time. Watkin's Dig. pp. 480, 619; Cobb's Dig. pp. 206, 1121, et seq.; Prince's Dig. pp. 180, 181, 433, 910. Sections 4 and 6 of article 3 of the Constitu-

tion of the state, adopted May 13, 1798 (Watkin's Dig. pp. 39, 40), provided that the justices of the inferior courts should be appointed by the General Assembly and commissioned by the Governor, to hold their commissions during good behavior, or as long as they should reside in the counties, respectively, for which they should be appointed, unless removed in a manner designated, and provided that the powers of the court of ordinary or register of probate should be vested in the inferior courts. These several changes in the law occurred prior to the execution of the deed under consideration. Subsequently to that time the law relating to inferior courts was embodied in the Code of 1863, §§ 276 to 287, and the Code of 1867, §§ 336 to 347, and sections 4052 to 4057. But the jurisdiction of the justices of the inferior courts of the several counties of the state always related to the performance of official acts within the respective counties for which they were commissioned. While the judges were authorized to attest deeds, they were authorized to do so only in the counties of their appointment. They were county officers, and had no official authority outside of the counties for which they were commissioned. The official attestation of a deed being an official act, it could not be exercised beyond the limits of the county for which the justice was commissioned. In this connection, see remarks of Nisbet, J., in *Fain v. Garthright*, 5 Ga. 6, 12, as approvingly cited in *Hammond v. Wilcher*, 79 Ga. 421, 5 S. E. 113. The plaintiff in error insists that the inferior courts were courts of record, and being such, under Civ. Code 1882, § 2706, as construed and applied in the case of *Gress Lumber Co. v. Coody*, 99 Ga. 775, 27 S. E. 169, the witness James Jackson, as judge of the inferior court, had authority to attest deeds anywhere in the state, and it became immaterial that he was not commissioned as a justice of the inferior court of the county of Baldwin. In the case cited it was said: "Under section 2706 of the Code, a judge of a court of record may attest a deed in any county in this state. That section declares that if executed in this state it must be attested by a judge of a court of record of this state, or a justice of the peace, or notary public, or clerk of the superior court in the county in which the 'three last-mentioned officers, respectively, hold their appointments,' etc. It will be seen, therefore, that while the statute requires that a deed, when attested by one of the three last-mentioned officers (namely, a justice of the peace, or a notary public, or a clerk of the superior court), shall be attested in the county where such officer holds his appointment, it expressly excepts from this requirement an attestation by a judge of a court of record." It will be observed that this ruling was based on a construction of the provisions of the Code which contained an exception with regard to judges of courts of record, who were put in one class,

while justices of the peace, notaries public, and clerks of courts of record were put in another class; and it was held, as the latter were expressly restricted in the matter of acting as attesting witnesses to deeds to the counties in which they respectively held office, while there was no such restriction as to the former, that judges of courts of record could attest deeds in any county in the state. The first appearance in this state of the classification and exception above stated was in the Code of 1863, § 2868. Prior to that time, while justices of the inferior courts could attest deeds, they did so under the statute which authorized them, as such, to do so, and could only act in the territory of the county in which they held office. But, as was said in the case of *Gress Lumber Co. v. Coody*, supra, the section of the Code above mentioned changed the law as it stood prior thereto. "the whole subject having been fully considered by the codifiers, and it being manifestly their intention to revise and alter the existing law." After the adoption of the Code the statute no longer designated judges of the superior courts as authorized to attest deeds, but declared generally that the judge of a court of record might so act, and expressly named the class of officers whom it declared might act only in the county in which they held office. Though the inferior courts might have been courts of record, the ruling made in the case of *Gress Lumber Co. v. Coody*, supra, is not authority for holding that a justice of the inferior court was authorized to attest a deed beyond the limits of the county for which he was commissioned at the date of the deed now under consideration, while the act of 1827 was in force, and long before the adoption of the Code of 1863. It follows that the deed was improperly admitted to record, and there was no error in excluding from evidence a certified copy thereof on the objection urged thereto by the defendants in error.

4. Another assignment of error complains of the refusal of the judge to admit a certified copy of a deed from Simon W. Nicholls to Saml. T. Beecher. The deed was attacked by an affidavit of forgery, and the issue thus made was, by consent, on trial with the issues involved in the main case. Evidence was admitted, without objection, tending to show that a different deed was in the handwriting of Saml. W. Nicholls, the original of which was also admitted without objection. There was still further evidence, which was admitted without objection, that a witness had before the trial compared the writing contained in the original deed admitted in evidence, and shown to be the writing of Saml. W. Nichols, with the signature of Simon W. Nicholls to the deed which was lost. The witness who compared the writing had the two original deeds before him at the same time, and, after having so compar-

ed them, testified that the signature to the lost deed was, in his opinion, the genuine signature of Simon W. Nicholls. The court excluded the copy deed from evidence, on the ground that its execution had not been sufficiently shown to entitle the plaintiff to go to the jury on the issue of forgery. It thus appears that the question which the court ruled upon was as to the sufficiency of the proof made to entitle the plaintiff to submit his case to the jury on the issue of forgery and that the ruling was not as to the admissibility of evidence offered to show the genuineness of the deed under consideration. Independently of the question whether it was proper to permit the witness, over appropriate objection, to testify as to his opinion touching the genuineness of the signature of Simon W. Nicholls to the lost deed, evidence to that effect having been admitted, it was sufficient to authorize the plaintiff in error to go to the jury on the issue of forgery, and it was error on that account for the judge to exclude the certified copy of the deed. But the judgment granting a nonsuit will not be reversed on account of this error, it being recited in the bill of exceptions that after the ruling of the court excluding the deed, counsel announced to the court that under that ruling it would be impossible for the plaintiff to make out its case, and he would only introduce further evidence, with the court's permission, in order "that all questions relating to the title might be settled," and there being no contention in the brief of counsel for plaintiff in error before this court that the judgment granting a nonsuit was erroneous if the ruling of the trial court in excluding the deed from the Bank of Milledgeville to James U. Horn should be sustained. We have seen that several of the objections to the deed last mentioned were insufficient, while one of them was sufficient, which requires an affirmance of the ruling excluding the certified copy of that deed from evidence. Hence it follows that the judgment of the court below will be affirmed.

Judgment affirmed. All the Justices concur.

(124 Ga. 636)

BULLARD et al. v. WYNN et al.

(Supreme Court of Georgia. June 22, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 336*)—PARTIES—AMENDMENT.

A motion to dismiss a writ of error having been made for want of certain necessary defendants in error, who were parties in the trial court, as shown by the record, and a motion having been made to amend the bill of exceptions by making them parties, and they having waived service and agreed that the hearing proceed, the latter motion is sustained. and the

former overruled. Civ. Code 1895, §§ 5570, 5547, par. 3.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 336.*]

2. WILLS (§ 355*)—SETTING ASIDE PROBATE—NECESSARY PARTIES TO MOTION.

To a motion to set aside a judgment the party in whose favor it was rendered, or, if dead, his legal representative, is a necessary party.

(a) A motion was made in the court of ordinary to set aside the probate of a nuncupative will. The propounder, who was the husband of the testatrix and the nominated executor, was dead. It was alleged that the probate was procured by fraud, no will having in fact been made, and the signatures of witnesses to a form of affidavit having been obtained by misrepresentation, and without any oath being administered, and also that no legal service was made on minor heirs, but an attempted service by a private person. It was further alleged that the executor died insolvent, and that the children, who were parties to the motion (three of them being movants and one being made a respondent), were his only heirs. *Held*, that the judgment of probate could not be set aside in the absence of a representative of the father's estate as a party, and the fact that no administrator had been appointed upon his estate did not alter this requirement.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 355.*]

3. WILLS (§ 355*)—SETTING ASIDE PROBATE—NECESSARY PARTIES TO MOTION.

The motion to set aside the judgment of probate, in view of the allegations made and the parties thereto, was demurrable, and there was no error in dismissing it.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 355.*]

4. WILLS (§ 425*)—PROCESS TO SUSTAIN—JUDGMENT VOID ON FACE OF RECORD.

If the judgment probating the nuncupative will in solemn form was void for want of legal service and because the minor heirs were not served and made parties as required by law, and this appeared upon the face of the record, the judgment would not be conclusive upon them.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 425.*]

5. WILLS (§ 355*)—SETTING ASIDE PROBATE—MOTION—PROPER PARTIES.

Where a will was probated, which conferred upon the executor power to sell the property of the testatrix, and subsequently a motion to set aside the judgment of probate was made by the heirs of the decedent, a person who had purchased property from the executor under the authority contained in the will was properly allowed to intervene and oppose the motion.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 355.*]

Error from Superior Court, Pulaski County; E. J. Reagan, Judge.

Action by Ruby Bullard and others against J. M. Wynn and others. Judgment of dismissal, and plaintiffs bring error. Affirmed.

In 1908 Mrs. Ruby Bullard, Mrs. Hennie Thompson, and Watts Morgan, by his next friend, filed their petition in the court of ordinary of Pulaski county, seeking to have revoked and set aside the probate of a nuncupative will of Mrs. Emma V. Morgan. The petitioners alleged as follows: Mrs. Emma V. Morgan died in Pulaski county November 28, 1892. At the time of her death she left

as her only children the petitioners, Mrs. Lola Speer, and another child who died in infancy. Her husband, the father of the petitioners, died on May 19, 1907, leaving no heirs except the children. At the time of the death of their mother Mrs. Speer was 19 years old, Mrs. Thompson was 15, Mrs. Bullard was 10, and Watts Morgan was 4 years of age. About March 6, 1893, their father, Y. H. Morgan, made application to the court of ordinary for the probate of what he alleged to be a nuncupative will of their deceased mother. It was prayed that citation issue to the minor children. On such citation there purports to be an affidavit made by one R. J. Morgan, dated April 10, 1893, setting forth that he had personally served each of the children with a true copy of the citation. At the April term of the court the ordinary appointed a guardian ad litem for the minors, and he accepted the appointment. The will was admitted to probate upon the affidavit or a purported affidavit of R. J. Morgan, Lola Morgan, and Emeline Jordan, and Y. H. Morgan qualified as executor under an alleged appointment contained in such will. Petitioners learned about July, 1907, of the fact that the alleged nuncupative will had been set up and admitted to probate and that in point of fact no such will was ever made and began this proceeding to set aside the probate within three years of the time knowledge of the fact came to them. They were first put on inquiry by a letter written to them about some property in Atlanta. They learned that in fact no nuncupative will was made; that neither of the attesting witnesses ever testified by affidavit or otherwise "properly sworn to," that such a will had been made; that such witnesses did not know the contents of the alleged affidavit which they signed and the paper was simply prepared and presented to the witnesses who were told that it was merely a matter of form which they had to sign, and they signed it without knowing the facts contained in it and without being sworn. The papers were prepared by an attorney at the instance of their father, and the signatures were made at the instance and by the procurement of the latter. The purported will was gotten up entirely after the death of Mrs. Morgan by her husband and the father of the petitioners, who desired to have the property in such shape that he could take care of it and dispose of it as he saw fit without giving bond as in the case of administration. While the record purports to contain an affidavit of R. J. Morgan to the effect that he served the parties named in the citation, yet in point of fact no such service was made and the purported affiant did not testify that he made such service, but signed the affidavit merely upon the statement that it was a matter of form necessary in order that Y. H. Morgan could be made the guardian of his children

The person named as guardian ad litem was not informed that he was to act for the petitioners or Lola Morgan, but that his services were desired as guardian ad litem for the infant since deceased, and he did not know until recently that the establishment of the will depended in any way upon any action of his in his capacity as guardian ad litem. Mrs. Lola Speer is the only other surviving heir besides the petitioners. They prayed that citation issue and be served upon her, and upon the alleged witnesses to the will and the person who was appointed guardian ad litem in that proceeding for the minor children of Mrs. Morgan.

The nuncupative will which was probated appointed the husband of the testatrix her executor, with full power to take charge of her entire estate, and manage it as in his discretion seemed best, to sell, convey and reinvest the proceeds of any sale as he deemed best without any order from the court of ordinary for that purpose, and without being required to make any return. It recited that the testatrix had entire confidence in his judgment and discretion to manage the property for the best interests of their children without any interference from the court of ordinary, and gave him power "to manage without restriction all her said property, leaving it to him when and how to divide it among their children, or to keep it together as long as he lived, or until the youngest child became of full age before any division thereof, or make division earlier, or at any time that he saw fit, and in the manner that he thought best; that her said executor should not be made to account for the management or disposition of her property or the proceeds thereof, but should have absolute and untrammelled control of her entire estate during his life without any liable [liability] therefor; and at his death the estate then in his hands should be divided equally between her children, share and share alike; but should the executor make any advances to any child during his or her life as his or her said child's distributive share in the estate of testator, then such advances so made shall be [accounted] for by such child in the distribution among the children of testator." In the court of ordinary J. M. Wynn asked leave to intervene and resist the petition to set aside the judgment of probate, alleging that in reliance upon it he had purchased certain property from the executor, and still owned it. He was allowed to intervene, and filed a demurrer and answer. The ordinary rendered a judgment granting the prayer of the petition and setting aside and annulling the probate of the will. An appeal was taken to the superior court by Wynn. When the case came on for trial, the petitioners demurred and moved to strike the intervention and the pleadings of Wynn on the ground that he was not a party defendant in the petition and had no right to be heard. The motion was overruled, and the demurrer

of Wynn was sustained, and the petition dismissed. The petitioners excepted to each ruling.

Haygood & Cutts and H. F. Lawson, for plaintiffs in error. O. J. Wimberly, Hall & Hall, and W. L. & Warren Grice, for defendants in error.

LUMPKIN, J. (after stating the facts as above). If the will was of force, the estate left at the death of the testatrix passed to the children. If the judgment of probate should be set aside, and the will be declared of no effect, the children would inherit as heirs of their mother and of another child who died in infancy. The father, who had been appointed executor, would also have been an heir, and they would claim as his heirs. As in the one instance they would take the entire estate left at the death of the executor, and in the other would claim partly as heirs of their mother and partly as heirs of a deceased child and of their father, it may readily be inferred that the substantial purpose to be accomplished by the motion to set aside was to repudiate the sales and transactions of their father as executor, and to seek to recover property which had been disposed of by him as such. Most outrageous fraud was charged against him in procuring the probate of the will. He was dead, and no legal representative was made a party. The movants were three of the children who would benefit by setting aside the judgment. As respondents they named a fourth child, who would also be benefited pecuniarily by the grant of the motion, the three witnesses to the alleged will, and the person who had been appointed by the ordinary as guardian ad litem for the children in the proceeding to probate it. The four last-mentioned respondents had no interest in the matter. Practically the case stood for determination between the four children, all of whom were interested on the same side. If the motion prevailed, their father would be adjudged to have procured the judgment by fraud. In that event also he would rank as an heir. It was alleged that he was insolvent, and there was no administration. But the children could not ignore him, procure a judgment stamping him with fraud and setting aside the former judgment obtained by him, overlook the creditors of his insolvent estate, and take his share as heirs. To a motion to set aside a judgment the person in whose favor it was rendered was a necessary party. If he is dead, a legal representative for him is a necessary party. *Grier v. Jones*, 54 Ga. 154; *Tarver v. New England Mortgage Security Co.*, 96 Ga. 536, 23 S. E. 507; *Whitley Grocery Co. v. Jones*, 128 Ga. 791, 58 S. E. 623. If in some cases on account of the fact that there is no estate to administer, an administrator cannot be appointed, this may be a matter for legislative consideration as to whether that body will make proper provision

for such a contingency. But the fact that a man obtains a judgment and afterwards dies without leaving an estate will not authorize the adverse party to move to set aside the judgment with no party respondent.

A person who had purchased land from the executor asked to intervene and make defense against the motion to set aside the judgment probating the will and appointing the executor, under whom he obtained his title. The children opposed his application, but it was granted. There was no error in this. *Walker v. Equitable Mortgage Co.*, 114 Ga. 862 (3), 40 S. E. 1010. Having effected an entrance into the litigation, he demurred to the petition. His demurrer was sustained. It was distributed over 17 grounds. We do not deem it necessary to discuss each separately. Some of them were good, and some of them were not. Suffice it to say that, with the parties before the court and under the allegations of the petition, it was properly dismissed.

In one ground, among other things, it was contended that in 1893, when the probate was had, the children were minors; that they were not served and made parties as required by law but the only service attempted was by an unofficial person; and that these facts appeared on the face of the record. If the children were not served or made parties so as to be lawfully before the court, they were not concluded by the judgment of probate. Civ. Code 1895, § 3282. If the judgment was a nullity and this appeared from the record, it could be treated as void. *Hobby v. Bunch*, 83 Ga. 1, 10 S. E. 113, 20 Am. St. Rep. 301; Civ. Code 1895, § 4987. A motion to set aside the judgment in such a case would seem to be unnecessary, though perhaps it would be a legitimate mode of attack. In sustaining the judgment dismissing the motion to set aside, the validity of the judgment of probate is not adjudicated, nor is the status of a purchaser from the executor decided. Whether the judgment of probate was valid or invalid, the motion to set aside was properly dismissed.

Judgment affirmed. All the Justices concur.

(124 Ga. 677)

CAVERLY v. STOVALL

(Supreme Court of Georgia. June 24, 1910.)

(Syllabus by the Court.)

1. BOUNDARIES (§ 52*)—PROCEEDINGS TO ESTABLISH—PROCEDURE.

In order for the owner of a tract of land to have the lines around the same surveyed and marked anew by processioners under the Civil Code, § 3244, et seq., he must make application in writing to the processioners of the district

in which a portion, or all of the land, is situated. *Ballard v. Haines*, 115 Ga. 847, 42 S. E. 218.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 253-263; Dec. Dig. § 52.*]

2. BOUNDARIES (§ 52*)—PROCEEDINGS TO ESTABLISH—PROCEDURE.

It is proper that one application be addressed to all three processioners; but the proceedings will not be unlawful if the applicant addresses a separate application to each of the processioners.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 52.*]

3. BOUNDARIES (§ 52*)—PROCEEDINGS TO ESTABLISH—PROCEDURE.

It is sufficient if such applications are sent to the processioners and received by them through the United States mails.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 52.*]

4. BOUNDARIES (§ 52*)—PROCEEDINGS TO ESTABLISH—RETURN OF PROCESSIONERS—PRESUMPTIONS.

Where the processioners in their return, which, with the plat of the surveyor, was filed with the ordinary, recite that they were "applied to by S. C. Stovall [the applicant] to trace and mark anew the lines around a certain tract of land," etc., the presumption is that a proper application in writing was made to them by the applicant before they acted in the premises, and in the absence of proof that no such application was thus made, a motion by the protestant to dismiss the proceedings should be denied.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 52.*]

5. BOUNDARIES (§ 52*)—PROCEEDINGS TO ESTABLISH—FILING OF APPLICATION.

It is proper that the processioners file the application to them, together with their report and the plat of the surveyor, with the ordinary; but a failure to thus file such application will not afford a good ground upon which to dismiss the proceedings.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 52.*]

6. BOUNDARIES (§ 52*)—PROCEEDINGS TO ESTABLISH—SUFFICIENCY OF PLAT.

The plat was not inadmissible in evidence on the ground that the survey of the tract of land containing less than 200 acres was laid down by a scale of 200 feet to the inch, instead of a scale of 10 chains to the inch, as required by rule 56 of the superior court; as such rules do not apply to surveys made by the county surveyor acting with processioners under an application of the owner of land to the processioners to have the lines around the same surveyed and marked anew.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 52.*]

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action between C. E. Caverly and S. C. Stovall. From the judgment, Caverly brings error. Affirmed.

C. W. Smith and Hines & Jordan, for plaintiff in error. Kontz & Austin and D. K. Johnston, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(7 Ga. App. 797)

WARE v. STATE. (No. 2,582.)

(Court of Appeals of Georgia. June 14, 1910.)

*(Syllabus by the Court.)***CRIMINAL LAW (§ 112*)—VENUE.**

Where a husband voluntarily and willfully separates from his wife in one county, leaving with her provisions, money, and clothing sufficient for the temporary support and maintenance of their minor child, and thereafter continues the desertion of his wife and the abandonment of his child, and the wife, on account of such desertion and abandonment, is compelled to take the child and seek a home with her brother in another county, and the child in the latter county subsequently becomes dependent, the abandonment still continuing, the venue of the offense should be laid in the county where the condition of dependency first arose during the continued abandonment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 220, 230; Dec. Dig. § 112.*]

Error from Superior Court, Coffee County; T. A. Parker, Judge.

W. O. Ware was convicted of abandonment of a child, and brings error. Reversed.

Levi O'Steen, for plaintiff in error. J. H. Thomas, Sol. Gen., for the State.

HILL, C. J. Ware was convicted, in the superior court of Coffee county, of a violation of section 114 of the Penal Code, as amended by the act of 1907 (Acts 1907, p. 57), in that he "did willfully and voluntarily abandon his child, leaving her in a dependent condition." The only question to be decided is one of venue. Was the venue properly laid in Coffee county? The uncontroverted evidence shows that the defendant left his wife at their home in Coffee county, and went to the state of Florida. At the time he left home the child was temporarily absent, having been placed by him with an uncle of the child in Jeff Davis county for the purpose of attending school. Four days after the father left home the child was brought back into Coffee county to her mother, and the mother and child remained in Coffee county for about two weeks when they left home and went to the home of the mother's brother in Jeff Davis county, where they were living at the time of the trial. When the father left his wife in Coffee county, according to her testimony, he left with her "plenty of clothes and other necessities of life for herself and the child as long as they remained in Coffee county"; and she further states that the child "never became dependent on any one while they were in Coffee county," as during that time she cared for the child with the money and other property which the father had left with her for the purpose. When the father left home the child was not dependent in Jeff Davis county; for, according to the testimony of the uncle, with whom the child was boarding, the father had made arrangements with him for the child's sup-

port for five months and had made proper provision for it while attending school.

It is clear, therefore, that when the father left home to go to Florida, leaving his wife in Coffee county and his child in Jeff Davis county, the child was not in a condition of dependency, and this condition did not arise, if it ever did arise under the evidence, until after the mother took the child from Coffee county and went with it to the home of her brother in Jeff Davis county. Under these facts we think the venue should have been laid in Jeff Davis county. Where a husband voluntarily and willfully separates from his wife in one county, and during this period of separation the wife, because of such separation, is compelled to leave home and go to another county, and she takes their minor child with her, and while living in the latter county the child becomes dependent, the father would be indictable in the latter county for the abandonment of the child (*Bennefield v. State*, 80 Ga. 107, 4 S. E. 869); for in that county the condition of dependency first arose, and the father was continuing to abandon and desert his child. The willful desertion of the husband authorized the mother of the child to have the control of it and to take it with her to the place where the exigencies of her condition required her to go after such desertion and during its willful continuance. For these reasons, we think the venue should have been laid in Jeff Davis county.

Judgment reversed.

(7 Ga. App. 825)

SPENCE v. STATE. (No. 2,573.)

(Court of Appeals of Georgia. May 12, 1910.
On Rehearing, July 5, 1910.)

*(Syllabus by the Court.)***1. CRIMINAL LAW (§§ 972, 974*)—MOTIONS IN ARREST—TIME—GROUNDS—"FACE OF THE RECORD."**

A motion in arrest of judgment in a criminal case must be made during the term at which the trial was had and the sentence was imposed and it must be predicated on some defect which appears on the face of the record or pleadings. In a criminal case a defect "on the face of the record" exists when there is some inadequacy in the allegations of the indictment, not cured by the verdict, or where the verdict does not conform to the charge in the indictment. Relatively to a motion in arrest of judgment, the "face of the record" does not include the charge of the court or the brief of the evidence approved and filed as a part of the record in a motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2423, 2471, 2473; Dec. Dig. §§ 972, 974.*]

For other definitions, see Words and Phrases, vol. 3, p. 2636.]

2. CRIMINAL LAW (§ 887*)—VERDICT—INSTRUCTIONS—CONVICTION OF LESSER OFFENSE.

On the trial of an indictment for murder, the jury may convict of any lesser grade of homicide; and a verdict for voluntary man-

slaughter, in accordance with the evidence, would be a legal verdict, although the court did not instruct the jury on the law of voluntary manslaughter. The validity of a verdict is to be tested by the law as it is written, and not by the law as it is given in charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2094; Dec. Dig. § 887.*]

3. HOMICIDE (§ 342*)—WRIT OF ERROR—RIGHT TO COMPLAIN.

The evidence in this case demanded a verdict of murder. The statement of the defendant, if true, did not show justifiable homicide. As the verdict of voluntary manslaughter was more favorable to him than was authorized by the evidence and the law applicable thereto, he is not in a position to demand another trial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 722; Dec. Dig. § 342.*]

Error from Superior Court, Mitchell County; Frank Park, Judge.

J. H. Spence was convicted of voluntary manslaughter on a charge of murder, and he brings error. Affirmed.

Pope & Bennet, Spence & Bennet, Stanley S. Bennet, S. A. Roddenbery, J. J. Hill, and Cox & Peacock, for plaintiff in error. W. E. Wooten, Sol. Gen., F. A. Hooper, and O. H. B. Bloodworth, for the State.

HILL, C. J. J. H. Spence was indicted for murder, and on his trial was convicted of voluntary manslaughter. During the term of court at which he was tried, he filed a motion for a new trial, which was heard and overruled in vacation at the time to which the hearing had been duly adjourned by the court. Sentence was pronounced on the defendant during the term of the court in which he was tried. In vacation, on the day of the hearing of the motion for new trial, the defendant for the first time filed a motion in arrest of judgment, which the court overruled, and the defendant excepted. The motion in arrest of judgment attacks the validity of the verdict on two grounds: (1) Because the only charge in the indictment was murder, and the court did not submit to the jury any issue as to whether defendant was guilty of manslaughter, and no part of the law of manslaughter was charged in the case; and for this reason the verdict of manslaughter was wholly illegal and amounted to an acquittal of the defendant on the charge of murder. (2) Because the evidence in the case did not in any view sustain a verdict of voluntary manslaughter, and the court and counsel for both sides took the position that there was no manslaughter in the case. The motion in arrest of judgment further recited that it was filed after the brief of the evidence and the charge of the court had both been approved and filed and had become parts of the record in the case.

1. We think the court did right in overruling the motion in arrest of judgment. In the first place, a motion in arrest of judgment was not the proper procedure, if there was any merit in the objection made to the

verdict. A motion in arrest of judgment will reach any defect apparent on the face of the record, not cured by the verdict, to which a general demurrer could have been successfully interposed before arraignment. It is also proper procedure where the verdict is for some offense not covered by the charge made in the indictment. As used in this connection, the expression "the face of the record" means, in a criminal case, the indictment and the verdict; a defect on the face of the record exists when there is any inadequacy in the allegations, not cured by the verdict, or where the verdict does not conform to the charge in the indictment. It is not, in our opinion, broad enough to reach the charge of the court or the brief of the evidence. These are parts of the record subsequent to the trial; and if the verdict is contrary to the charge of the court for any reason, or contrary to law for any reason, or is without evidence to support it, it is ground for a new trial, and not for arrest of judgment. But, even if we are not correct in the position just taken, the motion in arrest of judgment was filed too late. A motion in arrest of judgment "must be made during the term at which such judgment was obtained." Civ. Code, § 5363. In this case the motion was not filed in term, with an order taken to hear it in vacation, as might probably have been done. It was not filed until vacation, and until after sentence had been imposed by the court. This motion should properly be made before sentence. 1 Bishop on Criminal Procedure, § 1284. As the judgment or sentence of the court is in the breast of the court and subject to be changed by it during the term, the motion in arrest may probably be made after sentence has been actually passed; but it cannot be made after the sentence has been passed (unless it relates to the sentence itself) and after the court has adjourned. The court has no power over the judgment after the term in which it was rendered has passed.

2. The objections made to the verdict by the motion in arrest of judgment constitute one of the grounds in the motion for new trial. We think the contention that the verdict is illegal because the court did not charge the law of voluntary manslaughter is unsound. It is true the indictment was for the offense of murder; but the higher charge, as is well settled, includes every lesser offense embraced therein. The indictment, therefore, was not only for murder, but was for all the lesser grades of homicide. While it is well established that the jury, although judges of the law and the facts in criminal cases, must take the law from the court, yet it has been frequently held by the Supreme Court that if the trial judge should erroneously instruct the jury as to the law, and the jury should nevertheless find a correct

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

verdict under the evidence and the law applicable thereto, the verdict will stand. In other words, the validity of the verdict is to be tested, not by the law as given in charge, but by the law as it is. Where the verdict is right in itself, as being in accordance with the evidence and the law applicable thereto, it ought not to be set aside on account of an erroneous instruction given by the court to the jury. Much less should it be disturbed because the court did not fully instruct the jury as to the law applicable to every phase of the evidence or reasonable theory deducible therefrom. *Johnson v. State*, 14 Ga. 55; *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329. An exception to the verdict because contrary to the charge of the court is immaterial, unless it is also contrary to law. If the jury can disregard an erroneous instruction, a fortiori it has the prerogative to find a verdict in accordance with the evidence, although the judge may fail to instruct as to the law applicable to that theory of the evidence which the jury finds to be the truth. In this case the court charged fully the law of murder and justifiable homicide in self-defense. The defense relied upon was justifiable homicide in self-defense. The contentions of both sides were fairly submitted. But the jury did not agree with either contention. What was the jury to do? They could not conscientiously convict of murder, or acquit. They could have asked the court for instructions on the law of manslaughter; but, if they believed that a verdict of voluntary manslaughter was the only just and true solution of the question of fact, why could they not so find? And if this finding is authorized by the evidence, it would be a palpable perversion of the purpose of a trial by jury to hold that a righteous verdict in accordance with the evidence should be set aside as illegal because the jury found the truth unaided by court or counsel, or even contrary to the views of the law entertained by both.

The foregoing remarks are based on the assumption that the facts warranted a verdict of manslaughter. But from a study of the evidence and the defendant's statement we are convinced that the law of manslaughter was not really involved. It is conceded that the evidence for the state demanded a verdict of murder. There was no evidence for the defendant. It is insisted that his statement to the jury made a case of justifiable homicide in self-defense. We do not think his statement makes a case of self-defense, actual or apparent. Construed in connection with the evidence, or considered alone, the statement shows that the killing was caused by opprobrious words. Whisky and abusive language aroused ungovernable rage, and murder was the result. There was no menace or threat accompanying the vile epithets used by the deceased to the defendant. There was nothing in the conduct of

the deceased in connection with his abusive language to justify a reasonable fear on the part of the defendant that his life was in danger, or that a serious personal injury was about to be committed on him; nor was there any "appearance of imminent danger." Passion was aroused by words alone, without threats, menaces, or any manifest intention to inflict bodily injury. The statute declares that "words," even when accompanied by "threats, menaces, or contemptuous gestures, shall in no case be sufficient to free the person killing from the crime of murder." Pen. Code, § 65. What we here hold is not intended to controvert the doctrine announced in the *Cummings Case*, 99 Ga. 662, 27 S. E. 177, and frequently applied by this court, that while words, threats, menaces, or contemptuous gestures may not be sufficient to mitigate a homicide from murder to manslaughter, yet these things may, in some cases, arouse that reasonable fear which will justify the killing.

The facts of the homicide, as narrated by the defendant in his statement to the jury, in no substantial particular distinguish this case from *Malone v. State*, 49 Ga. 217. See, also, *Fallon v. State*, 5 Ga. App. 663, 63 S. E. 806. We do not deem it necessary to give the evidence or the statement in detail. It is enough to state our conclusion. The evidence demanded a verdict of murder; and the statement of the defendant, even if believed by the jury, shows no fact, or reasonable inference from facts, to justify or warrant an acquittal. The defendant, therefore, is not in a position to demand another trial. He cannot be heard to complain of a verdict strongly on the side of mercy, and more favorable to him than was authorized by law, under the evidence or his statement. *Robinson v. State*, 109 Ga. 506, 34 S. E. 1017. The opinion of the evidence expressed above makes it unnecessary to consider or decide any of the objections made to the charge of the court. If there were any inaccuracies, they were harmless.

Judgment affirmed.

On Rehearing.

POWELL, J. At the rendition of the original opinion in this case, I intended to mark myself as specially concurring, but neglected to do so. While I do not fully agree to all that is there said, I cannot escape the conclusion that the judgment of affirmance is correct; and it is deemed expedient that I express on the application for rehearing the views which to my mind seem controlling in the case. And I am authorized to state that my colleagues agree with me as to the principles here announced.

The reason that this court should not grant a new trial in this case is, not that the record does not show error, but because, in our sincere opinion, the error shown is, so far as the complaining party is concerned, harmless. The jury in every case ought to fol-

low the charge of the court as to the law. It is error for them not to do so; but whether a party will be allowed successfully to claim a new trial on account of the jury's delinquency in this respect depends upon whether any legal hurt was to him thereby occasioned. If the jury's departure from the law as given in charge has been solely and unequivocally in the direction of favoring the complaining party, it is not only fair and proper that he should not be allowed successfully to assign error therefor, but we are sure that the uniform usage of the courts forbids that he should do so.

In this case, if there were any fair theory of the evidence or of the defendant's statement upon which an upright and intelligent jury could acquit him under the law, the verdict of manslaughter should be set aside. But there are only three classes of homicide—murder, manslaughter, and justifiable or excusable homicide. There is no contention that there was not a homicide; and in our judgment there was no rational view of the evidence (including the defendant's statement) from which it could be said that the killing was justifiable or excusable. The verdict was for manslaughter. As an upright and intelligent jury could not acquit under the most favorable view of the facts as applied to the law, it follows from logical necessity, that unless the defendant was guilty of manslaughter (the offense of which he was convicted) he was guilty of murder, and that the only result flowing from the error of the jury in finding manslaughter, when they had not been given that offense in charge, was that the defendant was found guilty of the lower of the two offenses remaining in the case; and we cannot concede that he should be allowed successfully to assert such an error as a reason for sustaining his motion for a new trial. It cannot reasonably be the duty of the court to order a new trial of the case to see if another jury would acquit, when, under the law and the facts, no such verdict could properly be rendered. The end and object of courts is to give opportunity that justice may be judicially administered. In our opinion they have no duty resting upon them of taking any affirmative step, even in favor of a defendant in a criminal case, which could have no other apparent object than to give the party an opportunity to see if the jury could not be induced to render a verdict which neither the law nor any reasonable construction of the facts would authorize.

We understand that in all cases an error (however egregious) pertaining to the trial of the case is to be considered as harmless when, if the error had not been committed, the complaining party could not, under the application of the law to the most favorable theory of the evidence (including the defendant's statement in a criminal case), have been properly awarded a more favorable verdict. The suggestion of able counsel for the plain-

tiff in error is that this is in effect what was held in Perry's Case, 102 Ga. 365, 30 S. E. 903, and Luby's Case, 102 Ga. 633, 29 S. E. 494, both of which cases were overruled in Glover v. State, 128 Ga. 1, 7, 57 S. E. 101. We heartily agree with them that the Glover Case correctly states the law, and that the Luby Case and the Perry Case were so strikingly wrong in principle as to cause their prompt overruling when they were subsequently reviewed. But we are not willing to concede that the present ruling is any reiteration of the erroneous features of the two cases criticised. In each of those cases the evidence was conflicting, and, while it was sufficient to authorize the conviction of murder and the assessment of the death penalty, did not demand that verdict, and on an errorless trial the defendant might, under the law and the evidence, have been properly awarded a more favorable verdict. Hence the errors in those cases were not harmless within the rule above announced.

Able counsel for the plaintiff in error, in their strenuous motion for a rehearing, take as a text, so to speak, the following questions, which they place upon the title page of their written motion, as filed: (1) "Can a legal verdict be rendered on the disputed issue, when no charge of the court is given?" If the word "legal" is used in contrast to "erroneous," we answer, "No;" but, if used in absolute or formal sense, we answer, "Yes." (2) "In other words," they ask, "are jurors night-riders, Ku-Klux Klans, or vigilance committees, each enforcing his own idea of justice, regardless of the law of the land?" And to this question we answer, "Undoubtedly, no." And then they ask: (3) "When no charge whatever is given to control the jury in their deliberations on the disputed issue, and when not even a *definition* of the offense of which they convicted the man is given to the jury, either in the indictment or charge of the court, will the appellate court refuse a new trial, merely because the judges think the evidence supports the verdict?" Again we answer, "No." But we do unhesitatingly say that, while the judges of the reviewing court have no power whatever to decide disputes of fact, they nevertheless have the undoubted power, and, when the case authorizes it, the duty, of ascertaining whether a given state of facts is sufficient, taken in its strongest view, to authorize this or that legal result. It is also within the province of the reviewing court to examine the evidence, to see whether any alleged error was or was not harmful to the complaining party; for error without possibility of injury will not justify a reversal by a reviewing court, however limited its power over the facts. And lastly they ask: "In other words, can the appellate court make a verdict—try the case—or is its duty confined to the 'correction of errors in law and in equity' in the court below? Does the appellate court give judgment on the case

itself, or does it give judgment on the question whether the lower court *properly* tried the case?" The Constitution limits the jurisdiction of this court to "correction of errors in law," and gives it no jurisdiction over the issues of fact; but these powers are to be exercised in accordance with the established rules of judicial procedure, and one of these rules is that error without injury will not work a reversal. We do not understand the Constitution to mean that we must order a retrial of every case wherein we find that some abstract error has been committed.

The very earnestness with which counsel have presented their points in the application for rehearing, our knowledge of their personal and professional fairness and ability, and our belief in the perfect sincerity with which they insist that our judgment is wrong, have caused us to carefully look into the matter again. Law and common sense both seem to support us in the proposition that if the state's testimony showed unequivocally that the homicide was murder, and the defendant set up no facts showing legal justification, he cannot complain of a verdict of voluntary manslaughter, though that verdict was erroneous, because contrary to the charge of the court. But it is insisted that the evidence was not in this condition—that under the defendant's statement the jury might have found him justifiable. If this were so, there ought to be a new trial. The evidence for the state, as well as the statement of the defendant (for he introduced no evidence), showed much moral mitigation for the homicide. The deceased evidently did much to provoke the killing, by his unreasonably abusive and taunting language addressed to the defendant; but, under the law, none of these things justify a homicide.

Under the defendant's statement, he and another man had had a difficulty in the store of the deceased. The other man went off for a weapon. The defendant went out to his buggy in front of the store, and put shells into his double-barreled gun, and brought it inside the store, and set it down near the door. The deceased told the defendant to get out. The defendant took his gun and went out. The deceased began to curse the defendant, employing very vile and abusive language. The defendant remonstrated with him, begging him to desist from his abuse, and telling him: "I don't want to hurt you. I am a friend to you. I didn't load my gun to hurt you." An outsider intervened, and, putting his hand on the shoulder of the deceased, asked him to quit cursing the defendant. The deceased, who was walking with a crutch, drew it back as if he would hit this outsider, and then turned to the defendant, saying: "You God damn cowardly son of a bitch, you needn't bother about shooting any one else; here, shoot me!" As to what then occurred, we quote the defendant's statement literally: "And he changed his crutch to the

other hand, and put his hand in his pocket. I grabbed my gun and shot him. When I shot him, I had a carbuncle on my neck, and I couldn't get my neck around. I had on my overcoat and everything when I shot him. I just took and threwed my gun down, and cocked the other barrel, and shot him again. I didn't know whether I hit him the first time or not. I was looking for him to shoot me every minute. I knew he had a pistol at the time. He had it in the store. He carried it to town with him, and he carried it back with him; and when I shot the second time, saw him drop the crutch right inside the door, I saw the crutch fall."

Did this set up a case of justifiable homicide? The deceased used abusive language; and the placing of his hand in his pocket may be construed as a menace. Compare *Malone v. State*, 49 Ga. 217. But words and menaces alone do not justify. The deceased in fact had no pistol, but the defendant thought that he had one. He therefore relied upon the doctrine of apparent self-defense—a perfectly sound defense when the facts justify it. Words and menaces, while not sufficient per se to justify, may under peculiar circumstances constitute such an apparent state of danger as to arouse reasonable fears. But as was said in the leading case on this subject, as to reasonable fears generated by words or menaces, justifying a homicide: "There must be more than mere verbal threats. The means of inflicting the threatened injury must apparently be at hand, and there must be some manifestation of an intention to inflict the injury presently." *Cumming v. State*, 99 Ga. 662, 664, 27 S. E. 177. In the present case the deceased was not threatening to shoot. He did not draw. He did not manifest a present intention of shooting. He merely put his hand to his pocket, where the defendant thought he had a pistol, and invited the defendant to shoot him—the act and the word probably constituting an apparent invitation from the deceased to the defendant to engage in a combat with deadly weapons. As the defendant accepted the apparent invitation, the writer thinks that in this view of the evidence the homicide was manslaughter. See *Roberts v. State*, 65 Ga. 431, 436 (bottom page). As is said in the *Roberts Case*, supra: "The mere show of a deadly weapon, without more, would not produce an exigency to justify a homicide," and much less would it produce such an exigency for the deceased merely to put his hand into his pocket, and upon a weapon there (for we may treat the case as if the deceased actually had the weapon), not with a threat that he would shoot the defendant, but with an invitation to the defendant, who was presently possessed with a loaded gun, to begin the shooting. The *Malone Case*, supra, the *Roberts Case*, supra, the *Fallon Case*, 5 Ga. App. 663, 63 S. E. 806, besides others, seem to justify us in saying that as a matter of law the defendant

did not set up a state of facts which justified him, and, on the contrary, admitted such a state of facts that the jurors were under their oaths bound to convict him of either murder or manslaughter. We all agree that the defendant, throughout the whole transaction, except in his final act of homicide, acted in much better spirit than did the deceased. He was much provoked, but not legally justified.

Nothing herein conflicts with the oft-repeated proposition that if the evidence of the state shows murder, and that of the defendant shows justification, or denies the homicide, and there is no middle ground, a verdict of manslaughter will not be allowed to stand. This case is within the rule announced in *Carver v. State*, 105 Ga. 461, 30 S. E. 433, a case differing from this one only in the fact that the error there consisted in the court's submitting manslaughter to the jury, while the error here is that the jury acted without the instruction. In that case it was held: "Though a charge upon the law of voluntary manslaughter was barely warranted, the fact that such a charge was given does not, in the present case, present any reason for granting the accused, who was convicted of this offense, a new trial; for the state's evidence made against him a case of murder, and there was no testimony which would have justified an acquittal. The homicide being manifestly felonious, and the verdict being the most favorable to the accused which could, in any view of the case, have been rendered, he was not injured by an instruction which afforded the jury an opportunity to thus grade the crime."

We feel it our duty to deny the rehearing.

(7 Ga. App. 839)

LANHAM v. PRESLEY. (No. 2,314.)

(Court of Appeals of Georgia. June 14, 1910.
On Motion for Rehearing, July 5, 1910.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 588*)—REVIEW—BRIEF OF EVIDENCE.

There being no legal brief of the evidence, the errors cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2607-2610; Dec. Dig. § 588.*]

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action between J. H. Lanham and L. U. G. Presley. From the judgment, Lanham brings error. Affirmed.

Dean & Dean, Nathan Harris, and Mundy & Mundy, for plaintiff in error. Lipscomb, Willingham & Doyal and Maddox & Doyal, for defendant in error.

POWELL, J. It is with no little reluctance that we give this case the turn we are about to give it. It involves at least two pretty

points, not new points in the strict sense, for they are merely old acquaintances in new dress, and yet attractive. Judges are human, of course, and when we see a pretty point, and have studied it, we feel a disappointment in being deprived by any reason from the privilege of having our say on the subject. So, if we justly could refuse to do so, we would not notice the condition of the so-called brief of the evidence; but the prime, cardinal essential of juridic justice is expressed in the homely colloquialism, "Feed everybody out of the same spoon," and to apply the same law to this case that we have been applying to others constrains us to hold that there is no legal brief of the evidence, and that, therefore, the exceptions and the interesting questions made in them cannot be considered. Of what is called the brief of the evidence in the record, the portion relating to wholly immaterial matters is the major part. The history of a transaction wholly foreign to the points presented is set out in full, is repeated, and then reiterated time and again. Other immaterial matters are set out at great length. Hidden in all this mass of surplusage, the evidence that elucidates the points may be found, if diligent search is made. It is plain that counsel, instead of making such a brief of the evidence as is required by section 5488 of the Civil Code of 1895, took the stenographer's report of the trial and added to it a brief of the documentary evidence.

There is nothing difficult in complying with the law on this subject. This court is not enforcing the statute captiously. It is not mere length that offends against the statute. We have had before us this week a record in which the brief of the evidence extends through more than 100 pages of compact typewritten matter, and yet that brief of the evidence substantially complies with the law in letter and in spirit. We have been attempting in several recent cases to stress the fact that we cannot, without violating the law, waive the failure of counsel to brief the evidence. In the present instance the neglect to comply with the statutory requirement is palpable. See, on the subject generally, *Southern Ry. Co. v. Wafford*, 7 Ga. App. 652, 67 S. E. 831; *Powers v. Central of Georgia Ry. Co.*, 7 Ga. App. 673, 67 S. E. 831; *General Accident Corp. v. Turner*, 7 Ga. App. 679, 67 S. E. 832; *Johnson v. Douglass Co.*, 6 Ga. App. 681, 65 S. E. 719, and citations; *Oconee Oil Co. v. Planters' Oil Co.*, 6 Ga. App. 413, 65 S. E. 144; *Knox v. Terminal Ry. Co.*, 6 Ga. App. 385, 64 S. E. 1134; *Huntley Mfg. Co. v. Nixon*, 6 Ga. App. 46, 64 S. E. 279; *Albany & N. R. Co. v. Wheeler*, 6 Ga. App. 270, 64 S. E. 1114; *Charleston Ry. Co. v. Attaway*, 7 Ga. App. 231, 66 S. E. 548; *Mayor of Cordele v. Williams*, 7 Ga. App. 445, 67 S. E. 116.

Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

On Motion for Rehearing.

For the special reasons shown in the motion for a rehearing, we would ordinarily be inclined to grant the rehearing. However, it is the precedent not to grant a rehearing where the judgment, irrespective of the applicability of the particular reason given in the original decision, would be the same. *Carreker v. Thornton*, 1 Ga. App. 508, 511, 57 S. E. 988. In this case, on a consideration of the merits, we had reached the conclusion that the case should be affirmed, before we decided to affirm it for the technical reason expressed in the opinion.

Therefore the rehearing is denied.

(7 Ga. App. 841)

DEARISO et al. v. FIRST NAT. BANK OF SYLVESTER. (No. 2,335.)

(Court of Appeals of Georgia. June 14, 1910.
Rehearing Denied July 5, 1910.)

(Syllabus by the Court.)

1. EXECUTION (§ 154*) — FORECLOSURE OF CHATTEL MORTGAGE—FORTHCOMING BOND—SATISFACTION.

Two mortgages of different dates held by the same mortgagee covered the same three mules. The mortgagee foreclosed the senior mortgage and had the three mules seized under execution. An affidavit of illegality was interposed by the defendant in the mortgage *fi. fa.*, and upon his giving a forthcoming bond the sheriff left the three mules in his possession. Subsequently the mortgagee foreclosed the junior mortgage and had the sheriff to seize under execution two of the mules, take them from the possession of the defendant, and sell them; and the proceeds were applied as a credit on the junior mortgage *fi. fa.* Held, that the act of the mortgage creditor amounted to a satisfaction of the bond as to the production of the two mules, but the bond still remained binding as to one mule, and the sureties thereon were liable *pro tanto* for a breach thereof.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 421, 424; Dec. Dig. § 154.*]

(Additional Syllabus by Editorial Staff.)

2. PRINCIPAL AND SURETY (§ 110*) — DISCHARGE OF SURETY.

Both at common law and under the express provisions of Civ. Code 1895, § 2972, any act of the creditor, either before or after judgment against the principal, which injures the surety, or increases his risk, or exposes him to greater liability, will discharge him.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 223; Dec. Dig. § 110.*]

Error from City Court of Sylvester; J. B. Williamson, Judge.

Action by the First National Bank of Sylvester against R. L. Deariso and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Polhill & Foy and R. S. Foy, for plaintiffs in error. Claude Payton and C. E. Hay, for defendant in error.

HILL, C. J. The First National Bank of Sylvester held two chattel mortgages cover-

ing the same property, viz., three mules. It foreclosed the senior mortgage and caused a *fi. fa.* issued thereon to be levied upon the three mules. The defendant in the mortgage *fi. fa.* filed an affidavit of illegality, and on his giving a forthcoming bond for the property levied upon the sheriff left the property in his possession. Subsequently the bank caused its junior mortgage to be also foreclosed, and under the *fi. fa.* issued thereon two of the three mules were seized by the sheriff and sold, and the proceeds were applied as a credit on the junior mortgage *fi. fa.* The affidavit of illegality having been dismissed, the sheriff advertised the three mules for sale, under the levy made by virtue of the execution issued on the foreclosure of the senior mortgage, and, on failure of the principal and the sureties on the forthcoming bond to produce any one of the mules at the time and place of sale as required by the terms of the bond, the present suit was brought on the bond by the bank against both principal and sureties.

On the trial it was contended by the sureties that the act of the mortgage creditor, the bank, in foreclosing the junior mortgage and seizing and selling two of the mules that were covered by the forthcoming bond and applying the proceeds of the sale, not to the senior mortgage, but to the junior mortgage, increased their risk as sureties on the forthcoming bond, and released and discharged them from all further liability thereon. The view entertained by the trial court was that the acts of the mortgage creditor only released the sureties *pro tanto*—that is, to the extent of the value of the two mules which had been seized and sold under the foreclosure of the junior mortgage—and that it did not release the principal in the forthcoming bond and his sureties from their obligation to deliver according to the terms and condition of their bond the third mule at the time and place of sale. The only question in the case, therefore, is whether this view of the court was correct, or whether the conduct of the mortgage creditor above stated did not fully release the sureties from the obligation of the forthcoming bond.

Section 2972 of the Civil Code provides (and this is the general law on the subject) that "any act of the creditor, either before or after judgment against the principal, which injures the surety or increases his risk or exposes him to greater liability, will discharge him." The mortgage creditor had the right to foreclose the junior mortgage and to sell the property covered thereby, although it had been previously seized under the foreclosure of the senior mortgage and was left in the possession of the defendant subject to his forthcoming bond. But when he had the sheriff to take from the possession of the defendant two of the mules and sell them under the junior mortgage *fi. fa.*, he made it

*For other cases see same topic and section NUMBER in Dec. & Am. Digs: 1907 to date, & Reporter Indexes

impossible for the principal in the bond to comply with its terms in so far as a production of the two mules was concerned at the time and place of sale, or when required by the sheriff. This amounted to a satisfaction of the bond as to the two mules; but it was still binding upon the principal and the sureties as to the third mule, and a breach of the bond as to this mule would render the sureties liable pro tanto—that is, to the extent of the value of the one mule.

The jury found a verdict against the defendants for the proven value of this one mule, and we think this verdict was in accordance with the spirit, if not with the letter, of the Code section, supra.

Judgment affirmed.

(7 Ga. App. 778)

WATTERS v. WELLS. (No. 2,347.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

ATTORNEY AND CLIENT (§ 186*)—LIEN—WAIVER.

A. sued B. in a justice's court, and pending the suit C. garnished B., requiring him to answer what he owed A. B. answered, denying indebtedness to A., and C. traversed the answer. A. subsequently obtained a judgment against B., and A.'s attorneys instructed the justice to enter a judgment in favor of C. against B. for the amount of the judgment which A. had obtained against B., and B. paid C.'s judgment. Held: (1) The payment by B. of C.'s judgment discharged him from liability on the judgment against him in favor of A. (2) The judgment in favor of A. against B. having been satisfied, the execution issued thereon could not be enforced against B. for the benefit of A.'s attorneys. (3) A.'s attorneys having directed that judgment be entered in favor of C. against B. for the full amount of the judgment which A. had recovered against B., they were estopped from enforcing A.'s judgment against B. for fees.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 186.*]

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by C. H. Wells against A. W. Watters. Judgment for plaintiff, and defendant brings error. Reversed.

R. A. Denny and Nathan Harris, for plaintiff in error. Geo. A. H. Harris & Son, for defendant in error.

HILL, C. J. An execution from a justice's court in favor of Wells against Watters was levied on personal property. Watters filed an affidavit of illegality, setting up payment of the fl. fa. Upon the trial it appeared that, pending the suit brought by Wells against Watters in the justice's court, and before judgment had been obtained therein against Watters, Doss had garnishment proceedings served on Watters, requiring him to answer what he owed Wells. Watters answered the garnishment, denying indebtedness, and this answer was traversed by Doss. Subsequent-

ly a judgment was entered in the suit by Wells against Watters for \$71.93. After this judgment, which concluded the issue on the garnishment in favor of the traverse, Wells' attorney instructed the justice of the peace to enter a judgment in favor of Doss, garnishing creditor, against Watters, for the full amount of the judgment in favor of Wells and against Watters, and judgment was thereupon entered in favor of Doss against Watters for \$71.93. After this payment the fl. fa. of Wells against Watters was levied for "the purpose only of prosecuting the levy for the attorney's fees in the case, and the court instructed the jury to find for Wells, for the use of his attorneys, the sum of \$20, and Watters' motion for a new trial was overruled, and he excepts.

Watters, having paid the principal and interest on the Doss judgment, claimed that it satisfied the principal and interest of the Wells judgment. In other words, he insisted that there had been no settlement by him of the fl. fa. with Wells, but that the payment of the judgment in favor of the garnishee by him fully satisfied the judgment in favor of Wells against him; or to express it differently, he claimed that he had simply set off one judgment against the other, and that this he had a right to do. He also insisted that, as the judgment in favor of the garnishee was entered against him by direction of Wells' attorneys, the attorneys were estopped from enforcing the judgment in favor of Wells against him for their fee. Section 2814 of the Civil Code of 1895 prohibits the settlement of a fl. fa. or judgment by the defendant with the plaintiff in fl. fa., so as to defeat the fees of the attorneys for the plaintiff; but under the facts of this case it seems to us that Watters, defendant in fl. fa. in the suit of Wells, did not settle the fl. fa. with Wells. Watters owed wells, and Wells owed Doss. Watters, by consent of Wells' attorneys, paid the debt which Wells owed to Doss, garnishing creditor. Under the facts of this case, Watters, the defendant in fl. fa., was compelled at his peril to settle the garnishment debt, and the payment by him of the judgment for that debt was a complete satisfaction of the judgment in favor of Wells, the original plaintiff in fl. fa. We think the case is controlled by the principle, announced in Langston v. Roby, 68 Ga. 406, that "while parties cannot settle a judgment, so as to avoid the lien of the plaintiff's attorney for his fee, yet the right of setting off one judgment against another is conferred by express statute, and may be exercised, although the practical result may be an extinguishment of such judgment in whole or in part, and thereby the attorney may lose the power of enforcing it for his fee." See, also, Smith v. Evans, 110 Ga. 536, 35 S. E. 633.

We think, also, that the attorney for Wells

was estopped from prosecuting the *fi. fa.* against Watters for his fee, because he had himself directed the justice to enter judgment in favor of Doss, the garnishing creditor, against Watters, for the full amount due from Watters to Wells. This was in effect a payment by Watters of the Wells *fi. fa.* against him under the direction of Wells' attorney. The judgment in favor of Wells against Watters having thus been paid by Watters, in the payment by him of Doss' claim against Wells, the *fi. fa.* issued thereon could not be prosecuted for any purpose. Judgment reversed.

(7 Ga. App. 700)

SHEPPARD v. DANIEL MILLER CO.
DANIEL MILLER CO. v. SHEPPARD.
 (Nos. 2,281, 2,327.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

1. GUARANTY (§ 7*)—ACCEPTANCE.

Where the terms of a proposed guaranty contemplates acceptance thereof only by an extension of credit, and, relying thereon, the credit is actually given, the contract becomes complete and binding, and no notice of acceptance of the guaranty is necessary.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 9; Dec. Dig. § 7.*]

2. GUARANTY (§ 53*)—SCOPE OF LIABILITY.

Where an absolute promise to become responsible for a certain amount becomes binding by acceptance, the promisor will be bound to the extent of his guaranty, although the creditor during the existence of the contract may have extended credit to the original debtor in an amount greater than the sum named in the guaranty.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 64; Dec. Dig. § 53.*]

3. GUARANTY (§ 36*)—RECOVERY OF ATTORNEY'S FEES.

Where the undertaking of the guarantor is to pay for goods sold by the creditor to the debtor to the extent of a specified sum, and in addition to pay 10 per cent. on the indebtedness as attorney's fees in the event of suit, the amount stipulated as attorney's fees is recoverable from the guarantor on giving the statutory notice.

[Ed. Note.—For other cases, see Guaranty, Dec. Dig. § 36.*]

4. APPEAL AND ERROR (§ 839*)—REVIEW—CROSS-BILL OF EXCEPTIONS.

Where this court has jurisdiction of the writ of error on a main bill of exceptions, it will consider and decide all questions properly made by a cross-bill of exceptions although such questions may be interlocutory in character, where, under the judgment of this court, the case is to be again tried in the court below.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 839.*]

Error from City Court of Calhoun; H. M. Calhoun, Judge.

Action by the Daniel Miller Company against E. S. Sheppard. From the judgment, defendant brings error; plaintiff filing cross-exceptions. Affirmed on main bill of exceptions, and reversed on cross-bill.

The Daniel Miller Company, a corporation, sued Sheppard on the following writing:

"For goods delivered and to be delivered to Fain & Weaver, of Edison, Ga., debtor, and for other valuable considerations, the undersigned agrees to pay to Daniel Miller Company, a corporation, a sum not exceeding fifteen hundred dollars as guarantor for any sum or sums that may now be due or may hereafter become due by said debtor to the said corporation, this being also a continuing guaranty for such goods as the Daniel Miller Company shall sell and deliver (and it shall have the exclusive right to determine what and when it shall deliver), or for any credit it may extend to the said debtor, at any time from the date hereof and as long as this guaranty shall be in force and not revoked in writing. And the said guarantor agrees to pay on demand, without offset or delay, to the said Daniel Miller Company any part of said indebtedness hereby guaranteed remaining unpaid at maturity according to the terms thereof; and the guarantor hereby waives notice of nonpayment of said bill or bills or other indebtedness by said debtor, and also waives notice of future purchases as long as this guaranty is in force, and further waives any right to require said corporation to sue said debtor and to exhaust his assets before demanding payment under this guaranty. And the said guarantor hereby agrees to pay 10 per cent. in addition to the sum due by said debtor to cover costs of collection and attorney's fees, with waiver of exemption and homestead in favor of Daniel Miller Company. Witness our hands and seals this March 7, 1907.

"[Signed] E. S. Sheppard. [Seal.]

"Received March 11, 1907.

"[Signed] Daniel Miller Company."

The petition alleges an indebtedness of \$1,500, principal and interest, and \$150 as attorney's fees, on the above-stated written obligation; that the petitioner complied with the terms of the obligation on its part, and furnished and sold to the firm of Fain & Weaver merchandise in the sum of \$1,500 upon the said written obligation (a bill of particulars being attached to the petition); and it also alleges the statutory notice as to attorney's fees.

The defendant demurred on the grounds that the petition set forth no cause of action, as the contract relied upon was unilateral, and not binding on the defendant; that the writing sued upon was a mere proposal of guaranty, calling for a timely acceptance, and that no acceptance is alleged; and that, if the contract ever became binding at all, the guarantor was released therefrom by the act of the plaintiff in furnishing to the original debtor merchandise exceeding the sum of \$1,500, thereby increasing the risk of the guarantor as contemplated by the instru-

ment. And a further ground of demurrer was urged against the right to recover attorney's fees.

The court overruled the demurrer, except as to attorney's fees, and both plaintiff and defendant excepted to the rulings against them respectively; the plaintiff filing a cross-bill of exceptions.

Pottle & Glessner, for plaintiff in error.
Smith & Miller, for defendant in error.

HILL, C. J. (after stating the facts as above). 1, 2. The questions made by the main bill of exceptions are so fully and clearly covered by the decision of Judge Russell, speaking for this court, in the case of *Sheffield v. Whitfield*, 6 Ga. App. 762, 65 S. E. 807, and the decisions there cited, that it would seem superfluous to go over the ground therein covered, or to cite any other authorities. As stated by Mr. Brandt: "All courts recognize the principle that it is necessary to the completion of a contract that the minds of both contracting parties shall meet. The conflict is as to when they have met. They all hold that a mere offer to guaranty, the same as any other offer, is not binding unless accepted. The conflict is as to whether the guarantor must be notified of the acceptance of the guaranty, and whether the writing amounts to an offer to guaranty or to a completed guaranty." 1 Brandt on Suretyship and Guaranty (3d Ed.) § 216. As was said by Judge Russell in the *Sheffield Case*, supra: "An offer may be accepted, either by a promise to do a thing contemplated therein, or by an actual doing of the thing."

In the present case the allegation of the petition is that the goods had actually been sold and furnished to the original debtor by the plaintiff; in other words, the offer was accepted by the plaintiff in the manner contemplated by the guaranty, to wit, the furnishing of goods to the extent of \$1,500. The act of furnishing the goods was acceptance of the guaranty, and this made the contract complete as between the guarantor and the guarantee. The guaranty in question covered, not only goods that were to be sold, but goods that had already been sold. It is absolute in its terms, and there could be no stronger or higher acceptance by the plaintiff than by making sales in reliance thereon. As to any future sales that might be made under the guaranty, notice to the guarantor was also expressly waived by its terms. But, as above intimated, we think any extended discussion on the subject is rendered wholly unnecessary by the decision of this court in the *Sheffield Case*, supra, following the decisions of the Supreme Court, especially in the case of *Sanders v. Etcherson*, 36 Ga. 405, and *Manry v. Waxelbaum*, 108 Ga. 14, 33 S. E. 701.

As to the point that the plaintiff had violated the contract of guaranty by extending to the original debtor a credit in excess of

the \$1,500, and thereby released the guarantor from liability, it is ruled adversely to the contention of the plaintiff in error in the case of *Small Co. v. Claxton*, 1 Ga. App. 83, 57 S. E. 977. It could not concern the maker that other goods were sold to the debtor, as in no event could his liability exceed the sum of \$1,500, the payment of which he had absolutely guaranteed. The limitation is not of the credit of Fain & Weaver, but of the extent of the guarantor's liability. The guarantor will be held liable to the extent of his guaranty, notwithstanding credit may have been given by the guarantee to the debtor greater than the sum named in the guaranty. *Manry v. Waxelbaum*, 108 Ga. 14, 33 S. E. 701. We are satisfied that the judgment of the trial court in overruling this part of the demurrer should be affirmed.

3, 4. As to the cross-bill of exceptions: A motion was made in this court to dismiss the writ of error as to the cross-bill of exceptions, on the ground that it was premature; that the judgment excepted to was only interlocutory in character; and that, even if a decision had been rendered as claimed by the plaintiff in error in the cross-bill, this would not have been a final disposition of the case, or final as to some material part thereof. We do not think there is any merit in the motion to dismiss. The rule as to the final disposition of a case in the court below, which applies to cases brought to this court by main bill of exceptions, does not apply to questions made by a cross-bill of exceptions, and whenever the case is to be tried again in the court below, it is the duty of this court to decide all questions made by the cross-bill. Civ. Code, §§ 5527, 5535.

We think the court erred in holding in effect that the plaintiff was not entitled to recover 10 per cent. as attorney's fees. The right to attorney's fees upon giving the statutory notice, it seems to us, is expressly promised by the guarantor in his written obligation: "And the said guarantor hereby agrees to pay 10 per cent. in addition to the sum due by said debtor, to cover costs of collection and attorney's fees." In other words, the maker of this guaranty said to the guarantee: "Whatever goods you may sell to Fain & Weaver, of Edison, Ga., debtors, I will pay, up to \$1,500; and in addition to the sum which they, Fain & Weaver, may owe you for goods so furnished, whether it be less than \$1,500 or up to \$1,500, I will also pay 10 per cent. on the amount of that indebtedness as attorney's fees." The contract is not to pay in any event only \$1,500, this to exclude attorney's fees, but the contract is to pay, in addition to the \$1,500, 10 per cent. on this amount as attorney's fees. We do not see how the contract to pay attorney's fees in this case differs from the stipulations as to attorney's fees in any other written obligation of in-

debtedness, and we are clear that the only rational construction of the contract on this subject is that the guarantor obligated himself to pay 10 per cent. as attorney's fees, in addition to the amount that he might be called upon to pay under the guaranty, to the limit specified therein.

Judgment on the main bill of exceptions affirmed; on cross-bill, reversed.

(7 Ga. App. 848)

BROWDER-MANGET CO. v. EDMONSON.
(No. 2,370.)

(Court of Appeals of Georgia. June 14, 1910.
Rehearing Denied July 5, 1910.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 128*)—IMPLIED WARRANTIES.

In a lease contract, where there is no stipulation to the contrary, the lessor impliedly warrants that the leased premises shall be open to entry by the lessee at the time fixed for taking possession. But the law does not impose upon the lessor the duty of putting the lessee in possession of the leased premises. It demands only that the possession shall not be withheld when the lessee seeks it under the contract.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 448; Dec. Dig. § 128.*]

2. LANDLORD AND TENANT (§ 233*)—ACTION FOR RENT—SUFFICIENCY OF EVIDENCE.

There are inferences fairly deducible from the evidence and from the testimony which the court improperly excluded that uncontroverted would have entitled the plaintiff to recover, and therefore the judgment of nonsuit was erroneous.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 941, 942; Dec. Dig. § 233.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by the Browder-Manget Company against George R. Edmonson. Judgment of nonsuit, and plaintiff brings error. Reversed.

The Browder-Manget Company leased from the Georgian Company a storehouse, No. 23 West Alabama street, Atlanta, for a term of 25 months, and the Browder-Manget Company subleased to George R. Edmonson space in the storehouse, 15 by 57 feet, for two years, commencing April 1, 1909, and ending March 31, 1911. The rental was \$100 per month for the first year, and \$125 per month for the second year, payable in advance. The lease was in writing, dated February 26, 1909, and duly executed. On March 18, 1909, the Browder-Manget Company wrote a letter to Edmonson, notifying him that the Georgian Company would be delayed in vacating the storehouse, and asking him if it would be convenient for him to delay taking possession until April 15th, and stating that if the delay was inconvenient to him they would have the Georgian Company remove and give him possession

by April 1st as stated in the contract. In reply to this letter Edmonson on the same day wrote a letter consenting to the delay requested, and saying that he would wait until April 15th for the lease to become effective. It was further shown that the storehouse and basement in question, exclusive of the space which had been rented to Edmonson, was placed by the Browder-Manget Company in the hands of real estate agents for subrenting beginning April 15th, at which time it was expected that the Georgian Company would vacate. It was also shown that the space rented to Edmonson was placed by him in the hands of an agent to sublet. The evidence does not clearly show when Edmonson employed the agent to sublet the space, but it was some time prior to April 15th, when, under the terms of the lease as amended, he was to have possession. Several conversations were also had between Mr. Edmonson and his agents in reference to subletting this space; Mr. Edmonson desiring to sublet it for a "near-beer" saloon, and the landlord and the agent both objecting to this character of tenant.

On April 15th no notice was given by the lessor to the lessee that the rented space was ready for him and that he could take possession thereof, nor did the lessee make any demand on the lessor for possession, or come to the storehouse for the purpose of taking possession. On May 8th the lessor wrote to Edmonson that the space was ready for him. Edmonson, after the receipt of this letter, did not take possession of the premises, unless the placing of a rent card by his agent in the place could be considered as equivalent to possession, and the letter of May 8th, which the lessor had written to him notifying him that he could take possession, was not answered until May 20th, when he wrote the following letter: "In reference to the lease of the store, 23 West Alabama street, beg to say that, owing to the fact that I was unable to obtain possession of the store according to the terms of the lease and the amended lease, and in view of the fact, as you know, I rented the property for other people, and could not give them possession as agreed upon, they had to make other arrangements, annulling agreements they made with me. On May 11th, I stated to you, through your Mr. Wynne, that you had the right to rent the entire building, and that it was subject to your order. * * * Therefore the lease that I made with you I have already treated as void, owing to the fact that the party to whom I rented the place has left the city because I could not deliver the property to him according to the terms of my contract." It was further shown that the property of the Georgian Company, from whom the Browder-Manget Company had rented the

store, was until May 8th on the space which had been rented to Edmonson, that this property consisted of a counter and several desks, and that it would require about two hours to remove them from the space. Edmonson never asked that this property be removed from the space.

The plaintiff also offered to prove that the Georgian Company had been informed by the Browder-Manget Company that this space had been sublet to Edmonson, and that their furniture should be removed whenever Edmonson desired the space, and that arrangements had been made with the Georgian Company to remove these articles of furniture whenever Edmonson desired to take possession of the premises which he had subrented from the Browder-Manget Company. The court refused to allow evidence of these facts, and the plaintiff excepted to this ruling. In the letter of May 8th, written by Browder-Manget Company to Edmonson, the following language was used: "The Georgian has vacated that part of their building which we leased to you, and same is ready for occupancy. Please send us your check Monday for two-thirds of the month of May, \$68.67, so as to make it due thereafter on the 1st of each succeeding month." Edmonson refused to pay the rent, and suit was brought against him in a justice court for \$100 rent under the lease contract from April 15 to May 15, 1909.

The case was appealed to a jury in the superior court, and, after the introduction of the testimony for the plaintiff as above substantially stated, the court awarded a nonsuit, to which the plaintiff excepted.

Saml. D. Hewlett and Nathan Harris, for plaintiff in error. Thos. L. Bishop, for defendant in error.

HILL, C. J. (after stating the facts as above). The authorities on the question as to whether it is the duty of the lessor to deliver possession of the leased premises, or whether it is the duty of the lessee to demand possession at the time specified in the lease, are in conflict. The English rule seems to be that the duty is upon the lessor to notify the lessee that the leased premises are ready for his possession; and to "clear the possession" for the lessee. In the case of *Coe v. Clay*, 5 Bingham, 440, it is held that he who lets agrees to give possession, and if he fails to do so the lessee may recover damages against him. The American courts generally hold that it is the duty of the lessee to take possession of the leased premises when the lease begins, and if possession is wrongfully withheld the lessee may repudiate the contract, and the lessor cannot recover rent, as the date fixed for possession is of the essence of the contract of lease. *Gear, Landlord & Tenant*, § 163.

We think the conflict between the authorities is more apparent than real, and that the

true rule on the subject is that, where the lease contains no stipulation to the contrary, there is an implied covenant on the part of the lessor that the premises shall be open to entry by the lessee at the time fixed by the lease for him to take possession, and if possession is then wrongfully withheld from the lessee he can maintain an appropriate action against the lessor, or can at his option repudiate the contract and bring an action for damages for its breach. 24 Cyc. 1049, and cases cited. In other words, the lessee has the right of entry at the time fixed by the lease for him to take possession, but he must do something towards exercising this right. He must go to the leased premises and see whether they are ready for his possession, and see whether there is any obstacle in the way of his taking possession. He has the right to assume, and to act upon the assumption, that the premises will be ready for him to take possession at the time specified in the lease. If he finds that the leased premises are still in the possession of the lessor, or in the possession of a third person, and he is refused possession, he is not obliged to bring an action to obtain possession of the premises; but he may repudiate the contract and sue the lessor for its breach.

An entry by the lessee, however, is not necessary to give effect to a lease contract. The lease takes effect upon its execution, and while the possession and enjoyment of the leased property is a condition precedent to the right of the lessor to recover the rent, yet, before the lessee can repudiate the contract on the ground that possession and enjoyment are wrongfully withheld from him, he must do something to show that he desires possession. After the execution of the contract he cannot remain wholly inactive in reference to possession and justly claim that he is excluded therefrom by the wrongful act of the lessor.

Apply these general rules to the facts of this case. The time for the lessee to take possession under the lease as amended by consent was April 15th. The lessor had by implication notified him that on that day the premises would be vacated by the Georgian Company and would be ready for him. The lessor was not required to give him notice on April 15th that he could take possession of the leased premises. Any notice then would have been simply the reiteration of information given by the lease. He had the right to assume that he could do so, and it was his duty to go and take possession, and if he saw that the premises were not then ready for his possession he should have called the attention of the lessor to the matter and demanded of him that possession be given. If he had gone on April 15th to take possession of the rented premises, he would have found the property of the Georgian Company occupying the space which had been rented to him. If the property was of such character as could be readily removed, and in-

licated a mere casual and temporary occupancy, it would have been his duty to request his lessor to have the property removed. He did not do this. He made no request that the property of the Georgian Company be removed from the space which was leased to him. He did not even object to its being there, or call the attention of the lessor to the fact that it was occupying his space, and he could not have repudiated his contract, unless it was apparent that the lessor or some one else intended to exclude him from the possession, or that the occupancy of the leased premises was of such a character as to justify the conclusion that possession was wrongfully withheld.

The occupancy by the Georgian Company of the space rented by him was equivocal in character. It was subject to explanation, and if it was shown, as above intimated, that this furniture could have been readily and speedily removed, and interposed no serious obstacle to possession, and was not intended as an impediment, he could not set up the fact that it was occupying the space rented by him as a reason of sufficient materiality or gravity to justify him in repudiating his contract. We do not think the court, under the facts of this case, was warranted in holding as matter of law that possession was wrongfully withheld by the lessor or by the Georgian Company from the lessee, and that, therefore, he was entitled to repudiate his contract; but this question should have been submitted to the jury.

Judgment reversed.

(7 Ga. App. 835)

BATSON et al. v. HIGGINBOTHAM.
(No. 2,235.)

(Court of Appeals of Georgia. June 14, 1910.
Rehearing Denied July 5, 1910.)

(Syllabus by the Court.)

1. COURTS (§ 163*)—JURISDICTION—"RESPECTING TITLES TO LAND."

A suit to recover damages for trespass to land is not one "respecting titles to land," within the meaning of the Constitution, conferring upon the superior court exclusive jurisdiction of suits "respecting titles to land," although the title to the land in question may be incidentally or collaterally involved.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 410, 411; Dec. Dig. § 163.*]

2. TRESPASS (§§ 56, 57*)—INSIGNIFICANT INJURY—DAMAGES.

Proof of a tortious invasion of one's property rights, where the injury inflicted is small and insignificant, will warrant a recovery of only nominal damages, and in some cases of punitive damages.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 141, 144; Dec. Dig. §§ 56, 57.*]

(Additional Syllabus by Editorial Staff.)

3. DAMAGES (§ 87*)—"PUNITIVE DAMAGES."

Damages for aggravating circumstances in actions of tort, to deter the wrongdoer, or as compensation for wounded feelings, given by

Civ. Code 1895, § 3906, are called "punitive damages."

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 188-192; Dec. Dig. § 87.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5851, 5852; vol. 8, p. 7775.]

4. DAMAGES (§ 14*)—"NOMINAL DAMAGES."

"Nominal damages" is defined as some small amount, sufficient to cover and carry the costs.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 356; Dec. Dig. § 14.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4815, 4816; vol. 8, p. 7732.]

Error from City Court of La Grange; Frank Harwell, Judge.

Action by W. B. Higginbotham against W. C. Batson and others. Judgment for plaintiff, and defendants bring error. Reversed.

B. H. Hill and A. H. Thompson, for plaintiffs in error. Hatton Lovejoy and E. T. Moon, for defendant in error.

HILL, C. J. Mrs. Higginbotham brought suit against W. C. Batson and three others in the city court of La Grange to recover damages for trespass to her real estate. She sued for \$1,000 as general damages and \$500 as punitive damages, and the jury gave her a verdict for \$350 as general damages and \$180 as punitive damages against W. C. Batson and one of the other defendants, W. H. Huguley; a nonsuit having been granted as to the other two defendants. A motion for a new trial was made by the two defendants, which was overruled, and they excepted. Defendants filed also a demurrer to the petition, on the ground that the city court of La Grange was without jurisdiction, as the suit was one respecting title to land, of which the superior court of the county had exclusive jurisdiction by the Constitution of the state. The court overruled the demurrer and exceptions pendente lite were filed.

The suit arose on the following facts, briefly stated: Plaintiff alleged that she held title to a described lot of land in the city of West Point, Ga., and that she had been in the quiet, peaceable, and uninterrupted possession of this land, under a fee-simple title, for a period of more than 30 years, having it inclosed by a fence for that length of time; that on September 11, 1908, it was entirely inclosed by a wire fence; that on that date the defendants went to it in person, with a force of hands, and instructed them to tear down the plaintiff's fence around the lot and take possession of a strip of the lot, 24 feet in width and 173 feet in length, for the purpose of opening a street or alley, and in pursuance of these directions and instructions they did tear down the fence, took possession of this strip of land from the lot, leveled it off, and converted it into a street or alley of the city. She alleges that these acts were without her consent, and constituted a willful and malicious trespass.

The defense relied upon was that the land

In question was not the property of the plaintiff, and was not in her lawful possession; that it was a street or alley of the town of West Point, and had been used as a street or alley for many years; that the plaintiff, without authority, had taken possession of this street or alley, and had placed a fence around it; that the city council, of which the defendants were members, composing the street committee of the council, had directed them to have the fence removed, as an obstruction to the public street or alley of the city; and that they had removed the fence and opened up the street or alley in pursuance of their authority as members of the street committee of the council, and in obedience to instructions given to them by the mayor and council of the city of West Point. There was no evidence as to the value of the strip of land in question, either before or after the alleged acts of trespass. It was shown that the value of the wire fence taken down, with the cost of restoring the same, was about \$12.

The view that we entertain of this case makes it unnecessary to decide many of the numerous assignments of error raised by the record, and we will confine ourselves to a decision of the question of jurisdiction, made by the demurrer to the petition, and of the question as to the character of damages recoverable under the facts and the law applicable thereto.

1. The suit is not one "respecting titles to land." The title to the land was not necessarily involved; but, if involved, it was only incidental or collateral to the main issue. The suit was brought to recover damages for trespass to real estate. In the case of *Smith v. Bryan*, 34 Ga. 53, it is said that "cases respecting title to land, in the intendment of the Constitution, are cases in which the plaintiff asserts his title to the land in question, and depends for a recovery upon his maintenance of it, or to supply a link in the chain, wanting by reason of accident or other cause." The plaintiff specifically alleges in her petition that she is not suing to recover the land, or any mesne profits thereof; but her suit is for damages resulting from a trespass to the real estate and injury to the possession. This question has been repeatedly ruled by the Supreme Court, and the court was right in overruling the demurrer to the petition. *Black v. Fritz*, 98 Ga. 32, 25 S. E. 188; *Robins v. McGehee*, 127 Ga. 436, 56 S. E. 461; *Bivins v. Bivins*, 37 Ga. 347; *Moore v. O'Barr*, 87 Ga. 205, 13 S. E. 464.

2. There is much conflict in the evidence on the issue as to whether the title to and possession of the strip of land in question was in the plaintiff, or whether it had been used by the city as a public street or alley. But this question has been settled by the verdict of the jury in favor of the plaintiff, and any discussion of the evidence on this issue would be profitless. Irrespective of this question, it may be conceded that the defendants, as offi-

cials of the city had no right arbitrarily and summarily to take possession of the strip of land in question and to remove therefrom the fence which the plaintiff had put around it. The law provides for an orderly procedure appropriate to such matters, and municipalities, as well as individuals, must adopt this procedure, and not assert their rights, even if they have any, *vi et armis*. If in fact one or more of the defendants were guilty of the wrongs complained of, the plaintiff, as the owner of the premises described in her petition (and the jury, under the evidence, found that she was the owner), was entitled to recover damages as compensation for the injury done. If special damages resulted from the tortious act, the plaintiff would be entitled to recover this class of damages, if she alleged and proved them.

General damages may be recovered without proof of any amount. Civ. Code, § 3910. This does not mean that the jury, in giving general damages for a tortious act, shall be permitted to act arbitrarily in the matter, and find any amount; but they must observe the cardinal rule of law, which is that damages are given only as compensation for the injury done. "If the injury be small, or the mitigating circumstances be strong, nominal damages only are given." Civ. Code, § 3905. In the case now under consideration there was no evidence of any actual injury to the land, or any diminution in value by reason of the trespass. The only actual injury shown by the evidence was the cost of restoring the fence which the defendants had removed from around the property. The property still belonged to the plaintiff. Neither her title nor her right to possession of the property was in the slightest affected by the tortious acts complained of, and there is nothing to prevent her from retaking possession, with or without legal procedure. She has a right to recover general damages, even without proof of any amount of injury; but, unless she proves some actual injury, or if the injury be small, these general damages should be only nominal in amount. As said by the Supreme Court in *Swift v. Broyles*, 115 Ga. 885, 42 S. E. 277, 58 L. R. A. 390: "Proof of a tortious invasion of one's property rights cannot, unless supplemented by evidence disclosing the extent of the loss thereby inflicted upon the injured party, afford a basis for the recovery by him of more than nominal damages." One whose property rights have been invaded by a tortious act can, without proof of any amount of damage, recover a nominal amount for the purpose of vindicating his right. If he seeks to recover more than this nominal amount as general damages, he must show by evidence some actual injury.

Now, in this case, as has been stated, the only actual injury shown is the cost of restoring the fence. A verdict for \$350 general damages as compensation for this injury would, under the law, be excessive. Under

the facts and the law applicable thereto, this is a case for the recovery of nominal damages, as the jury believed that there had been an illegal invasion of property rights, although the actual damage resulting therefrom was insignificant. What would be the proper amount as nominal damages is not a question for this court, but is a question for the jury under all the facts and circumstances of the case, bearing in mind the definition given by the Supreme Court of what is meant by nominal damages—"some small amount sufficient to cover and carry the costs." *Ransone v. Christian*, 58 Ga. 351 (6).

What we have said applies only to the question of damages compensatory in character. "In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may find additional damages either to deter the wrongdoer, or as compensation for the wounded feelings of the plaintiff." Civil Code of 1895, § 3906. This character of damage is called "punitive," and, if aggravating circumstances are proved, may be given, even where the actual injury is small. It is always exclusively a question for the jury to determine when such additional damages should be allowed, as well as the amount of such damages. The jury in this case found punitive damages in addition to general damages, and it is earnestly insisted that there was no evidence authorizing a finding of punitive damages. As there will be another trial, we do not care to consider and decide that question. We leave it for the determination of the jury, under the evidence that may be submitted on the subject at the second trial.

Judgment reversed.

(3 Ga. App. 25)

COHEN v. AMERICAN LAUNDRY MACHINERY MFG. CO. (No. 2,421.)

(Court of Appeals of Georgia. July 5, 1910.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The law applicable to the issues made by the pleadings and evidence was fully, fairly, and correctly given in charge, and the evidence supports the verdict.

Error from City Court of Savannah; Davis Freeman, Judge.

Action between A. M. Cohen and the American Laundry Machinery Manufacturing Company. From the judgment, Cohen brings error. Affirmed.

P. W. Meldrim, Edwin A. Cohen, and Osborne & Lawrence, for plaintiff in error. O'Byrne, Hartridge & Wright, for defendant in error.

HILL, C. J. Judgment affirmed.

(3 Ga. App. 32)

BAILEY v. STATE. (No. 2,498.)

(Court of Appeals of Georgia. July 5, 1910.)

(Syllabus by the Court.)

1. WEAPONS (§ 17*)—CARRYING WEAPONS—INSTRUCTIONS.

The evidence authorized the conviction of the defendant, and the assignments of error were not supported by the answer of the trial judge. Consequently there was no error in overruling the certiorari.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. § 29; Dec. Dig. § 17.*]

(Additional Syllabus by Editorial Staff.)

2. CRIMINAL LAW (§ 784*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

Where, on a trial for carrying a concealed weapon, witnesses swore that defendant had a pistol, and that for a portion of the time it was so concealed that they could not see it, and defendant testified that he had no pistol, an instruction on circumstantial evidence was properly refused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1883; Dec. Dig. § 784.*]

Error from Superior Court, Fulton County; W. D. Elles, Judge.

Fred Bailey was convicted of carrying a concealed pistol, and brings error. Affirmed.

C. B. Rosser, Jr., for plaintiff in error. C. D. Hill, Sol. Gen., D. K. Johnston, and Lowry Arnold, Sol., for the State.

RUSSELL, J. Bailey was convicted in the criminal court of Atlanta of carrying a pistol concealed. He sued out a certiorari in the superior court of Fulton county, which was overruled. There are six assignments of error in the petition for certiorari.

The first is that the verdict of the jury is contrary to law, contrary to the evidence, decidedly and strongly against the greater weight of the evidence, and without evidence to support it. Except as involving the consideration of the evidence, the assignment that the verdict is contrary to law is not sufficiently specific to present for our consideration any error of law which may have been prejudicial to the plaintiff in error. After considering the evidence in the case, it is plain that the testimony amply supports the conviction of the defendant; for several witnesses testified that they saw the defendant approaching his store with a pistol, and that he concealed the pistol in his pocket until he was almost immediately in their presence, when he took it from his pocket and handed it to a negro woman. We cannot concur in the argument of the learned counsel for the plaintiff in error that this testimony is intrinsically so improbable and unreasonable as that the jury should have classed it with such statements as that "a cow jumped over the capitol," or "a jack rabbit whipped an English bulldog." The acts of the defendant, in connection with the pistol, as stated by the witnesses, were possible. The probability or

actual fact of the occurrence was for the determination of the jury.

In the second assignment of error it is alleged that the court intimated an opinion that the defendant had a pistol at the time in question; and it was argued that the ruling in *Jenkins v. State*, 2 Ga. App. 626, 58 S. E. 1063, is directly in point and requires a reversal. So far from the trial judge intimating the opinion that the defendant had a pistol, and that the only question was whether or not he had it concealed, the charge in the record appears to be to the contrary. The court told the jury explicitly that "the defendant sets up the plea, not that he had the pistol openly and exposed to view, but that he did not have it at all."

The third exception is that the evidence required a charge on the law of circumstantial evidence. The evidence introduced by the state was all direct. The witnesses swore that the defendant had a pistol, and that for a portion of the time it was so concealed that they could not see it. The testimony of the defendant was to the effect that he had no pistol. In such a case, as we held in *Bivins v. State*, 5 Ga. App. 434, 63 S. E. 523, the judge should not have charged upon the subject of circumstantial evidence.

The fourth and fifth exceptions to the charge of the court are eliminated by the answer of the trial judge.

The sixth is not sufficiently specific to point out any error.

Judgment affirmed.

(8 Ga. App. 27)

BARBOUR v. STATE. (No. 2458.)

(Court of Appeals of Georgia. July 5, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 881*)—REVIEW—CONSTRUCTION OF VERDICT.

A verdict is to be given a reasonable intendment, and, when ambiguous, may be construed in the light of the issues actually submitted to the jury under the charge of the court; and if, when so construed, it expresses with reasonable certainty a finding supported by the evidence, it is to be upheld as legal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2069, 2098; Dec. Dig. § 881.*]

(Additional Syllabus by Editorial Staff.)

2. CRIMINAL LAW (§ 878*)—VERDICT—CONSTRUCTION.

An accusation contained four counts not numbered. The second and third counts were abandoned, and the jury informed that no testimony would be submitted under them. The court charged on the remaining two counts, and a verdict was returned as follows: "We, the jury, find the defendant * * * guilty on the second count." Held, that "second count," as used in the verdict, referred to the second count submitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2098-2101; Dec. Dig. § 878.*]

Russell, J., dissenting.

Error from City Court of Savannah; Davis Freeman, Judge.

Andrew Barbour was convicted of violating the liquor law, and he brings error. Affirmed.

Robt. L. Colding, for plaintiff in error. W. O. Hartridge, Sol. Gen., for the State.

POWELL, J. The accusation contained four counts. The first charged the sale of liquor; the second, the giving away of liquor to induce trade; the third, the keeping and furnishing of liquor at a public place; the fourth, the keeping on hand of liquor at the defendant's place of business. These counts, though set out in separate paragraphs, were not numbered. On the trial, and before the introduction of any of the testimony, state's counsel abandoned the second and third counts as they are set out above, and the jury was informed that no testimony would be submitted under these counts. The court, in his instruction to the jury, told them that the state had abandoned the charges as to giving away liquor, and as to keeping it at a public place, and further instructed them that only two counts of the accusation remained in issue before them—the one charging the sale, the other the keeping on hand at the defendant's place of business. The judge did not refer to these various counts by numbers, but by subject-matter. However, in instructing the jury as to the charges in issue before them, he always spoke first of the count charging the sale, and then of the count charging the keeping on hand. The verdict was in the following form: "We, the jury, find the defendant, Andrew Barbour, guilty on the second count." Primarily, such a verdict would be construed as finding the defendant guilty of the offense charged in the count of the accusation which came second in order as originally set out. If the counts had been actually numbered, this would probably have been the only fair construction. But as the counts were not numbered, and as the count which came second in order in the accusation as drawn had been formally abandoned by state's counsel, and as the jurors did not have this count before them for consideration, the expression "Second count," as used in the verdict, manifestly referred to the second count that was submitted to them by the judge. A verdict is to be given reasonable intendment, and, when ambiguous, may be construed in the light of the issues actually submitted to the jury under the charge of the court; and if, when so construed, it expresses with reasonable certainty a finding supported by the evidence, it is to be upheld as legal. Pen. Code 1895, § 1033; *Arnold v. State*, 51 Ga. 144; *Wilson v. State*, 62 Ga. 167; *Dennard v. State*, 2 Ga. 137; *Martin v. State*, 25 Ga. 494; *Cook v. State*, 26 Ga. 593 (6), 602; *Walston v. State*, 54 Ga. 242; *Bernhard v. State*,

76 Ga. 613 (1); *Thurmond v. State*, 55 Ga. 599.

Judgment affirmed.

RUSSELL, J., dissents.

(3 Ga. App. 43)

STEPHENS v. McNAUGHTON. (No. 2,604.)
(Court of Appeals of Georgia. July 5, 1910.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 270*)—DISTRESS FOR RENT—EFFECT OF REPLEVIN BY DEFENDANT.

Where a defendant in a distress warrant has replevied the property, the process is converted into an ordinary action for rent, and a motion to dismiss because of an insufficiency of description in the entry of levy will not lie.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 1146; Dec. Dig. § 270.*]

2. JUSTICES OF THE PEACE (§ 116*)—GROUNDS FOR NEW TRIAL—IRREGULARITIES IN SELECTING JURY IN JUSTICE COURT.

Mere irregularities in the selection of the jury in the justice's court will not authorize the grant of a new trial, where it is apparent that no injustice or prejudice resulted to the complaining party.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 869-871; Dec. Dig. § 116.*]

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Action by Mrs. M. C. Stephens against W. J. McNaughton. A justice's judgment for plaintiff was reversed on certiorari, and plaintiff brings error. Reversed.

Williams & Bradley, for plaintiff in error.
Saffold & Larsen, for defendant in error.

POWELL, J. Mrs. Stephens caused a distress warrant to be issued against McNaughton. He replevied. To an adverse verdict in the justice's court the defendant brought certiorari. No complaint was made that the verdict was contrary to the evidence. The petition in certiorari contained only two specific assignments of error: (1) That the court erred in not dismissing the levy for insufficiency of description; and (2) that the justice of the peace, over objection of the defendant, put upon him an illegally impaneled jury and forced him to trial. The judge of the superior court sustained the certiorari and ordered a new trial in the justice's court, and to this ruling plaintiff excepts. There being in the certiorari no assignment of error that the verdict is contrary to the evidence, the first grant of a new trial by the judge of the superior court is reviewable, and stands without the aid of any presumption dependent upon the breadth of judicial discretion. The case must stand or fall upon the legal sufficiency of the two assignments made. When the defendant in distress warrant replevies the property, the levy becomes functus, and the proceeding is converted into an ordinary action for rent,

with the bond standing as security in the event of a judgment for the plaintiff. At the trial of the issue thus raised, a motion to dismiss the levy will not lie, for the very plain reason that the levy has already become functus.

2. The real point in the case is as to the method of selecting the jury. A jury was drawn and served for the regular court day, which was February 8th, but the case was not tried on that day, as by consent of the parties it was continued until February 13th; and the court was adjourned until that date. Of the jurors regularly drawn and summoned to attend on February 8th, only three responded on that day, and two of these, being related to the parties in the case, were excused from further attendance. It seems that each of the parties to the suit had a great many relatives in the district. Seeing that on this account it would be difficult to get a qualified jury, the justice of the peace retained on the panel the single qualified juror who had responded, and directed the constable to summon talesmen to fill the panel. He also took the list of jurors for the district, and went through it, and ascertained that, of the jurors whose names were on this list, there were only 16 who were qualified, the rest of them being related to one or the other of the parties. He gave this list of 16 to the constable, and told him to summon them to be present on the 13th, the day to which the case had been continued. On the 13th only nine qualified jurors responded, and, this being the exact number required by law for the panel in a justice court, the justice of the peace ordered that they be impaneled, and caused the parties to strike from the list thus made up. There is no suggestion that there was any irregularity so far as the original drawing of the jury was concerned. Indeed, it is stated in the record that 9 men were regularly drawn and summoned to be present on February 8th, the day on which the court met. Section 4143 of the Civil Code of 1895 provides that if there should be a deficiency of jurors at the trial in a justice's court, "from cause or absence," the constable, by direction of the court, shall complete the jury by talesmen. It is undoubtedly regular that the justice of the peace should not in advance tell the constable what particular persons to summon, the discretion in this respect being vested in the constable, and not in the justice of the peace. However, it is not improper that the justice of the peace should exhibit to the constable the list of the jurors of the district, or that he should tell him not to summon disqualified jurors. When the justice gave the list of 16 men to the constable, he had no right to tell him which 8 of these 16 he should summon in order to fill the panel. But as he did not choose among them, but told the constable to sum-

mon all of them, and as the constable did summon all of them, and only 8 attended, so that the panel was thus exactly filled, it is plain that no injustice resulted to either party; for if the constable had served only 8 originally, and some of these had not attended, it would have been his duty to keep serving others of the qualified jurors of the district until he did complete his panel, so that it should number 9. In other words, the court seems to have reached indirectly the same result that would have been reached directly, and to have reached it by a perfectly fair method that worked no harm to either party. The doctrine that there must be injury as well as error to authorize the grant of a new trial applies with special force to these small cases tried in justice's courts. The judge of the superior court should not have granted a new trial on certiorari.

Judgment reversed.

(8 Ga. App. 34)

BELCHER v. MASSEY BROS. (No. 2,503.)
(Court of Appeals of Georgia. July 5, 1910.)

(Syllabus by the Court.)

COSTS (§ 260*)—ON APPEAL—DAMAGES FOR DELAY.

In this case there was no appearance for the plaintiff in error, and this court, complying with the request of counsel for the defendant in error, opened the record, and, after considering the character of the errors assigned, is satisfied that the writ of error was sued out for delay only. The judgment is therefore affirmed with 10 per cent. damages on the amount of the judgment in the court below. Civ. Code 1895, § 5594; *Craton v. Hackney*, 91 Ga. 192, 17 S. E. 124.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 983; Dec. Dig. § 260.*]

Error from City Court of Quitman; J. G. McCall, Judge.

Action between C. T. Belcher and Massey Bros. From the judgment, Belcher brings error. Affirmed.

J. U. Merritt, for plaintiff in error. Branch & Snow, for defendant in error.

HILL, C. J. Judgment affirmed.

(8 Ga. App. 28)

WILBURN v. STATE.
(No. 2,492.)

(Court of Appeals of Georgia. July 5, 1910.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 223*)—OFFENSES—PROSECUTIONS—ALLEGATIONS AND PROOF.

The verdict was supported by the evidence. Nor was there a fatal or even a material variance between the allegations of the indictment and the proof. Proof of the sale of corn liquor is sufficient to support an allegation that the defendant unlawfully sold alcoholic, spirituous, malt, and intoxicating liquor.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 265, 271; Dec. Dig. § 223.*]

2. INTOXICATING LIQUORS (§§ 223, 224*)—ILLEGAL SALE—PROSECUTING—SUFFICIENCY OF EVIDENCE—"LIQUOR"—"CORN LIQUOR."

The word "liquor" is collective, and its significance includes the plural as well as the singular. A conviction may be supported by proof of the sale of liquor which is either alcoholic, spirituous, malt, or intoxicating in its quality, without proof of the fact that it possesses more than one of these qualities. In the absence of any evidence to the contrary, "corn liquor" will be presumed to be an intoxicating liquor.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 265, 271, 275; Dec. Dig. §§ 223, 224.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4180-4182.]

3. INTOXICATING LIQUORS (§ 223*)—ILLEGAL SALE—SUFFICIENCY OF EVIDENCE.

While it is true that where the sale of intoxicating liquor is alleged to have been made by an individual, the proof must correspond in this respect with the allegation, nevertheless evidence that another person furnished part of the money with which the intoxicating liquor in this case was paid for did not create any variance between the allegation and the proof; for the reason that the jury were authorized to infer that if any money was furnished by a person other than the alleged buyer, it might have been a loan of money; and for the further reason that there was no evidence tending to show that the seller had any knowledge of the participation of any other person than the alleged buyer, or that any other than he participated in the actual purchase.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 274; Dec. Dig. § 223.*]

Error from City Court of Monticello; A. S. Thurman, Judge.

Alice Wilburn was convicted of selling intoxicants, and she brings error. Affirmed.

Eugene M. Baynes, for plaintiff in error. Greene F. Johnson, Sol., for the State.

RUSSELL, J. The defendant in the court below was convicted of the offense of misdemeanor. In the presentment it was charged that she had sold and bartered, for valuable consideration, alcoholic, spirituous, malt, and intoxicating liquor to Croff Brewer. The sale was alleged to have taken place on the 15th of December, 1908, and the presentment was returned to the August term, 1909, of the Jasper superior court. The case was transferred to the city court of Monticello for trial; and it is insisted that the judge of the city court erred in overruling the motion for new trial. Special assignments of error complain that the court erred in stating to the jury the contentions of the state, in that he did not limit the time to which the evidence of the alleged sale should be confined nor limit the inquiry to the person to whom the liquor was sold, and particularly that the instructions of the judge made it appear to the jury that the indictment charged the sale of different kinds of liquors, whereas the indictment charges the sale of only one kind of liquor, to wit, alcoholic, spirituous, malt, and intoxicating liquor. Exception is also taken to the charge

of the judge upon the subject of reasonable doubt, wherein the judge told the jury that "a reasonable doubt is just what the words themselves mean—a reasonable doubt—a doubt that grows out of the testimony or out of the want of testimony." It was contended that this was error because doubt might arise, not merely from testimony or the want of testimony, but from the defendant's statement, which the judge failed to refer to, and that what the judge said upon the subject limited sections 986, 987, of the Penal Code of 1895 to the prejudice of the defendant. It is also insisted that the court erred in charging that the jury would be authorized to convict in case they should find and believe that the defendant sold any of the liquors named in the indictment. There is no merit in the exceptions to the charge upon reasonable doubt. The succinct definition given by the trial judge was much less apt to confuse the jury than a labored attempt to elaborate a term which is more easily understood when considered from the standpoint of its ordinary significance in the everyday affairs of life.

Treating all the other exceptions together, they really raise but two points for our consideration, or, rather, the single point that there was a fatal variance between the allegation of the presentment and the proof submitted in its support, and that this variance existed as to two material matters necessary to be established. It is contended that the instructions to which exceptions are taken were not authorized, because not in harmony with the evidence, when considered with a view to its applicability to the presentment. For instance, it is insisted that the verdict is contrary to evidence, and also that the judge erred in charging the jury that if they found any of the liquors were sold to Croff Brewer, as alleged in the indictment, the jury would be authorized to convict, and that the evidence shows that the sale was not made to Croff Brewer alone, as alleged in the presentment, but to Croff Brewer jointly with Phenie Benton. Upon this subject it is only necessary to say that the record shows that Phenie Benton testified that she never bought any intoxicating liquor from the defendant, and Croff Brewer testified that he purchased the liquor in question, and that he himself handed over the money with which to pay for it. It is true he also testified that Phenie helped him to pay for it, he contributing 25 cents and Phenie 10 cents, but he does not testify that Phenie participated in the purchase. Though Phenie may have loaned him 10 cents of the money, or may have contributed 10 cents to the purchase price, this does not prevent Croff Brewer from being the sole purchaser. So far as the defendant is concerned, the sale was made by the defendant to Croff Brewer without any knowledge of Phenie Benton's interest in the matter. Certainly there is no evidence tending to show that Phenie did more than furnish a part of

the money, and none to show that she personally participated in the direct purchase. It is insisted that there is a fatal variance between the allegation of the presentment and the proof, in that the only evidence tending to show that the liquor purchased was alcoholic, spirituous, malt, or intoxicating was that of the state's witness, who testified that he bought corn liquor from the defendant. We think that this was sufficient, in the absence of anything to the contrary, to authorize the inference on the part of the jury that the liquor sold was corn whisky and intoxicating. Considering the nature of the case being tried, as well as the ordinary acceptance of the term "corn liquor," it would hardly be reasonable to assume that the jury could have inferred that the witness meant anything else than corn whisky when he stated he bought "corn liquor." In *Carswell v. State*, 7 Ga. App. 198, 66 S. E. 488, this court held that the testimony of the witness to the effect that he bought "liquor" from the defendant was sufficient to authorize the inference, in the absence of any testimony to the contrary, that the liquor in question was intoxicating, and in the present case, while recognizing the fact that the word "liquor" has a generic as well as a specific meaning, we are compelled to hold that as there is nothing to show that the liquor alleged to have been sold was blood or buttermilk, or other nonintoxicating liquid, the stating of the case was such as to attach to the word "liquor" its specific meaning, and in this sense it refers only to intoxicants. It was insisted that inasmuch as the accusation alleged the sale of "liquor," instead of "liquors," the charge could only refer to one kind of liquor, and, therefore, that the conviction was not authorized, unless the proof showed that the liquor sold possessed all of the qualities ascribed to it in the presentment; that is, that it must have appeared that the liquor sold was alcoholic, and also that it was spirituous, and malt, and intoxicating. If the word "liquor" could only refer to a single liquid, the point might be well taken. But it must be borne in mind that the word "liquor" is collective in its significance, and may include in its broader meaning any number of liquids. It includes the plural as well as the singular, and, for that reason, to charge that one has sold alcoholic, spirituous, malt, and intoxicating liquor is to charge that he has sold "liquor" of each of these kinds. If we are correct in this view, then, under the ruling in *Eaves v. State*, 113 Ga. 749, 39 S. E. 318, and *Hubbard v. State*, 123 Ga. 17, 51 S. E. 11, proof of the sale of liquor of any one of the kinds described would be sufficient to authorize the conviction. It certainly cannot be said that if the indictment had charged that the defendant sold an intoxicating "liquor," the indictment would be defective; for the Code requires that the statute shall be so interpreted as that the singular shall include the plural, and vice versa. And though the word

"liquors" is employed in the general prohibition law of 1907, certainly an indictment cannot be held to be defective which charges the sale of a certain intoxicating liquor as such (using the singular number in the charge), instead of using the exact phraseology of the statute. If an indictment charging that the defendant sold an intoxicating liquor would be good, and would be supported by proof that the defendant sold corn liquor, then, under the ruling in the Eaves and Hubbard Cases, *supra*, in a case in which the defendant was charged with the sale of alcoholic liquor, and spirituous liquor, and malt liquor, and intoxicating liquor, proof of the sale of any one of these liquors would authorize a conviction.

Judgment affirmed.

(7 Ga. App. 349)

JOSEPH GOLDSMITH & CO. v. M. MARCUS & BRO. (No. 2,047.)

(Court of Appeals of Georgia. July 5, 1910.)

(Syllabus by the Court.)

1. EVIDENCE (§ 410*)—PAROL EVIDENCE—WRITTEN CONTRACT.

While a written instrument, although not signed, will, if orally assented to by the parties, constitute the agreement, and its terms not be subject to be varied by parol evidence, still, to dispense with the signature of the party sought to be charged thereby, it must first be made to appear that the terms of the writing were understood and assented to as containing all of the stipulations of the contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1846-1854; Dec. Dig. § 410.*]

2. EVIDENCE (§ 410*)—PAROL EVIDENCE—UNSIGNED WRITTEN AGREEMENT.

The evidence in the present case authorized the conclusion that the defendant did not assent to the contract as written. In a case in which there is conflict as to whether an unsigned writing truly represents the agreement of the parties, parol evidence as to the terms and conditions of the alleged contract is properly admissible and may be considered, if it is found that the writing was not in fact assented to by one of them.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1846-1854; Dec. Dig. § 410.*]

3. REVIEW ON APPEAL.

The evidence authorized the verdict rendered, and the assignments of error which were not abandoned on the argument were not of sufficient materiality to authorize the grant of a new trial.

Error from City Court of Atlanta; A. M. Calhoun, Judge.

Action by Joseph Goldsmith & Co. against M. Marcus & Bro. Judgment for plaintiffs, and defendants bring error. Affirmed.

Smith, Hastings & Ransom, for plaintiffs in error. Walter W. Visanska, for defendants in error.

RUSSELL, J. The plaintiffs in error brought a suit upon an open account against the defendants in error. The defendants admitted the purchase of the bill of goods sued

on, but pleaded that the goods were bought under special parol contract, made with the plaintiffs at the time of the purchase; that they were bought by sample, upon the positive assurance of the seller that the goods to be shipped were to correspond with the samples; that the clothing in question was sold and purchased in separate lots, and that it was verbally agreed between the plaintiffs and the defendants that the defendants would have the right to retain all goods that came up to sample, and return those which did not come up to sample, provided they were returned in unbroken lots; that upon receipt of the goods certain lots were found not to come up to the samples; that in compliance with the agreement the defendants immediately returned to the plaintiffs, in unbroken lots, those that did not come up to the samples; and that the lots that did come up to the samples were retained by the defendants, and the amount due upon the lots so retained was tendered to the plaintiffs. The plaintiffs admitted the return of goods as claimed by the defendants, in unbroken lots, and the tender of payment for the lots retained by the defendants, but denied that any such contract as that insisted upon by the defendants was made, insisting that the memorandum of the order taken by their salesman contained all of the agreements or undertakings of both parties.

The decision in the case really turns upon whether the memorandum order written by the salesman of Goldsmith & Co., the plaintiffs, should have been treated as a written contract, the terms of which would not be subject to be varied by parol evidence, although it was not signed by the defendants, who were sought to be charged thereby. The gravest exception among the numerous assignments of error in this case is that the judge erred in admitting parol evidence which was contradictory to the terms set out in the order prepared by Goldsmith's salesman. We think the judge ruled correctly. It is, of course, true that if the conduct of the parties shows that a particular writing was expressly adopted as their contract signature thereto becomes unnecessary, for signature is merely evidence of assent. This rule is thus expressed by Wigmore: "If a single document is finally drawn up to replace them [the prior negotiations] and to embody their net effect, and is signed or otherwise adopted by the parties, this document will now alone represent the terms of the act." 4 Wigmore on Evidence, 3409.

The doctrine that a signature is not essential to bring a contract within the parol-evidence rule is also stated in 17 Cyc. and in 21 American and English Enc. of Law (2d Ed.) 1119. In *Farmer v. Gregory & Stagg*, 78 Ky. 475, the specific question was passed upon, and it was ruled that an unsigned contract which had been adopted by the parties

could not be varied by parol testimony; and this case was cited with approval in *Cohen v. Jackobice*, 101 Mich. 409, 59 N. W. 665, and there are few other cases in which the same ruling has been made. In both of these cases, however, there was no dispute as to the fact that both parties expressly agreed to the terms of the unsigned writing and treated it as the embodiment in writing of the conclusion of their negotiations. In the present case, however, it is not admitted that the parties agreed to the terms of the order, and certainly not admitted that the memorandum contained all of the material agreements, stipulations and conditions of the contract of purchase. It does not bear on its face evidence that there were no other conditions which were not reduced to writing, such as are adverted to in the case of *Imperial Portrait Co. v. Bryan*, 111 Ga. 99, 36 S. E. 291. As appears from the record, the copy handed to the defendants is not identical with the original, as produced by the plaintiffs.

For these reasons the trial judge was confronted with a case in which it was his duty first to pass upon the admissibility of the writing as evidence of the contract between the parties. Instead of admitting it as a contract, the effect of his rulings was to hold primarily (we think, correctly) that the paper in question was a mere sales memorandum taken down by the seller for his own convenience to which the buyer was no party. This placed upon the plaintiffs the burden of proving by parol that the defendants assented to the terms of the contract, and likewise permitted the defendants to deny that they assented. Under the ruling in *Delaware Insurance Co. v. Penna. Insurance Co.*, 126 Ga. 389, 55 S. E. 330, it is doubtful whether a paper which has not been signed by either party interested in the subject-matter can be held, in this state, to be such a writing as cannot be explained or varied by parol. But even under the rule stated by Chief Justice Simmons in *Kidd v. Huff*, 105 Ga. 209, 31 S. E. 430, the trial judge was not required to exclude parol evidence as to the terms and conditions of the present contract of purchase when it had not been shown that the terms of the writing were assented to by Marcus & Bro. "A written instrument, although not signed, will, if orally assented to by the parties, constitute the agreement. Such instrument, however, will not be admissible in evidence until it is shown *prima facie* that the terms were assented to." *Kidd v. Huff*, *supra*. The execution of a writing which has been signed must, except in certain instances, be proved; and proof of the signature supplies proof of assent to the terms of the instrument. Certainly proof of assent to a writing by which it is sought to bind one who has not even signed it, should be express and manifest. If, in the present case, the trial judge had been satisfied, from the proof,

that the writing submitted by the plaintiffs was expressly assented to by the defendants, as containing all of the terms of the contract, we might, perhaps, not be prepared to rule that he erred, but it is very plain, from the subsequent rulings of the judge, as well as from his charge, that he was not satisfied that the defendants assented to the written order, which they had not signed; and we concur with him in this opinion. In any case where it is insisted that a writing which is not signed by the parties sought to be charged thereby does not embody the contract, and that it does not contain the stipulations and mutual agreements of the parties, it would seem to be the correct rule to allow the jury to pass upon the issue, as the judge did in the present case.

Judgment affirmed.

(3 Ga. App. 25)

HUFF v. WHITNER, MANRY & CO.

(No. 2,435.)

(Court of Appeals of Georgia. July 5, 1910.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 148*)—APPEAL—JUDGMENT BY CONFESSION.

In cases in a justice's court where an appeal will lie, the appeal can be made from a confession of judgment without any formal entering up of judgment by the justice on the confession.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 502; Dec. Dig. § 148.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Whitner, Manry & Co. against W. E. Huff. An appeal from a justice court judgment for plaintiff was dismissed, and defendant brings error. Reversed.

Anderson, Felder, Rountree & Wilson and E. D. Thomas, for plaintiff in error. J. Caleb Clarke, for defendant in error.

HILL, C. J. This was an appeal from a confession of judgment in a justice's court. The judge of the superior court sustained a motion to dismiss the appeal, because it did not affirmatively appear that the appeal was entered within four days from the confession of judgment by the defendant, and this judgment of dismissal constitutes the only error assigned. The appeal was from the following confession of judgment: "Whitner, Manry & Co. v. W. E. Huff. No. 19935, Fulton Superior Court. Suit on account in J. P. Court, 1362 district G. M. Amount, \$52.50. Comes now the defendant in the above-stated case, and, in pursuance to § 5361 of the Code of 1895, enters this his confession of judgment, and, as provided in said section, enters this his appeal to a jury in the superior court, and, being dissatisfied with said judgment, and having paid all the costs which have accrued in the case up to the time of enter-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing this appeal, and within the time allowed by law, enters this his appeal to a jury in the superior court. And the said W. E. Huff, as principal, and J. D. Sisson, as security, hereby acknowledge themselves bound unto the appellee herein for the eventual condemnation money in said cause. Witness our hands and seals this 6th day of November, 1909. [Signed] W. E. Huff, Principal. J. D. Sisson, Security, J. N. Langston, J. P. Approved and filed, 11/6/09." "Now comes the defendant, after paying cost and making bond, appeals to jury in superior court. Appeal entered. Nov. 6. 1909. J. N. Langston, J. P."

Section 5361, *supra*, provides that either party has the right to confess a judgment without the consent of his adversary, and to appeal from such confession without reserving the right so to do, in cases where an appeal is allowed by law. It is manifest from the date of the confession of judgment and the date of the appeal from such confession that both the confession of judgment and the appeal were entered the same day. But it is insisted that this confession of judgment is not a judgment of the court, from which an appeal could have been entered. The statute above quoted expressly provides that an appeal can be entered from a confession of judgment. There is no law requiring a justice to enter up a formal judgment on a confession of judgment before the right

of appeal would accrue. In fact it is well settled that an appeal by consent may be entered without any judgment whatever and this is the general practice. We therefore conclude that the judge of the superior court erred in dismissing the appeal on the ground that it was insufficient in law. We think the confession of judgment and the appeal set forth are in exact compliance with the statute. See, also, sections 4138, 4453.

Judgment reversed.

(8 Ga. App. 17)

TOUCHSTONE v. STATE (No. 2262.)

(Court of Appeals of Georgia. July 5, 1910.)

(*Syllabus by the Court.*)

REVIEW ON APPEAL.

There is no complaint of any error of law either in the charge of the court or in rulings during the trial. The evidence, though weak, authorized the conviction of the defendant, and there was no error in refusing a new trial.

Error from City Court of Griffin; J. J. Flynt, Judge.

Bob Touchstone was convicted of crime, and brings error. Affirmed.

Thos. W. Thurman, for plaintiff in error.
W. H. Beck, Sol., for the State.

RUSSELL, J. Judgment affirmed.

(36 S. C. 253)

DENNIS v. ATLANTIC COAST LINE R. CO.
(Supreme Court of South Carolina. July 6, 1910.)

1. JUSTICES OF THE PEACE (§ 39*)—JURISDICTION—SUITS AGAINST CORPORATIONS.

Const. art. 5, § 21, and Code Civ. Proc. § 71, giving magistrates jurisdiction of civil actions for injury to person or property if the damages do not exceed \$100, include suits against corporations.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 135; Dec. Dig. § 39.*]

2. CORPORATIONS (§ 503*)—DOMESTIC CORPORATIONS—ACTIONS AGAINST—VENUE.

A domestic corporation may be sued in any county where it maintains an agent and transacts its corporate business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1935-1946; Dec. Dig. § 503.*]

3. JUSTICES OF THE PEACE (§§ 39, 40*)—FOREIGN CORPORATIONS—ACTIONS AGAINST—VENUE.

Under Code Civ. Proc. § 146, providing that actions are to be tried in the county where defendant resides, magistrates may have jurisdiction of a suit against a foreign corporation, and plaintiff may elect in which county to sue.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 135-145; Dec. Dig. §§ 39, 40.*]

4. JUSTICES OF THE PEACE (§ 61*)—JURISDICTION—TEST.

The methods proper to secure testimony of witnesses in magistrate's court cannot be the test of jurisdiction.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 61.*]

5. JUSTICES OF THE PEACE (§ 84*)—JURISDICTION—APPEARANCE—WAIVER.

The question of jurisdiction relates to the person, and is waived by general appearance and contest on the merits.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 266-278; Dec. Dig. § 84.*]

Appeal from Common Pleas Circuit Court of Berkeley County; Robt. Aldrich, Judge.

Action by W. M. Dennis against the Atlantic Coast Line Railroad Company. Plaintiff had judgment in a magistrate's court which was affirmed on appeal to the circuit court, and defendant appeals. Affirmed.

Octavus Cohen, for appellant. E. J. Dennis, for respondent.

JONES, C. J. This action was begun before a magistrate in Berkeley county to recover of defendant damages for the negligent killing of a cow by an engine of the defendant in Charleston county. Defendant appeared and contested the case upon its merits, and, so far as appears, raised no question as to the jurisdiction of the magistrate.

On appeal to the circuit court exception was taken that the magistrate was without jurisdiction, the cause of action arising in Charleston county, and the magistrate of Berkeley county had no power to compel the attendance of witnesses from such county. This contention was overruled by the circuit court and the judgment of the magistrate

was affirmed, because the railroad line of defendant lies through Berkeley county and defendant maintains an agent and transacts its business in Berkeley county.

Appellant's exception to this judgment is without merit:

First. Because magistrates have jurisdiction of an action for damages for injury to rights pertaining to the person, or the personal or real property, if the damages claimed do not exceed \$100. Section 71, subd. 2, Civ. Code Proc., pursuant to article 5, § 21, of the Constitution. This necessarily involves suits against corporations. If the defendant is a domestic corporation the suit may be brought in any county where it maintains an agent and transacts its corporate business. *Tobin v. Railroad*, 47 S. C. 387, 25 S. E. 283, 58 Am. St. Rep. 890; *McGrath v. Insurance Co.*, 74 S. C. 69, 54 S. E. 218; *Nixon & Danforth v. Insurance Co.*, 74 S. C. 440, 54 S. E. 657. Magistrates may have jurisdiction even in a suit against a foreign corporation. *Best v. Railway*, 72 S. C. 497, 52 S. E. 223, and in such cases the plaintiff may elect in which county to sue under section 146 of the Code of Procedure. The methods proper to secure testimony of witnesses in magistrate's court cannot be the test of jurisdiction.

Second. The question of jurisdiction relates to the person, which is waived by general appearance and contest on the merits, as in this case. *Jenkins v. Atlantic Coast Line R. R. Co.*, 84 S. C. 348, 66 S. E. 409.

The judgment of the circuit court is affirmed.

HYDRICK, J., did not hear this case.

(36 S. C. 160)

KELLY et al. v. TINER.

(Supreme Court of South Carolina. June 28, 1910.)

INJUNCTION (§ 175*)—TEMPORARY INJUNCTION—MOTION TO DISSOLVE.

Where a temporary injunction has been granted without notice, it is error to refuse to entertain a motion to dissolve, based on the answer of the defendant and his proposed affidavits; but they should be considered in determining whether the injunction was reasonably essential for the protection of defendant's rights pending the litigation.

[Ed. Note.—For other cases, see Injunction, Cent. § 388; Dec. Dig. § 175.*]

Appeal from Common Pleas Circuit Court of Darlington County; John S. Wilson, Judge.

Suit by Elias Kelly and another against John Tiner. From an order refusing to dissolve a temporary injunction, defendant appeals. Reversed.

Miller & Lawson, for appellant. McLaughlin & Tatum, for respondents.

GARY, A. J. This is an appeal from an order refusing to dissolve a temporary injunction. The question raised by the exceptions, upon which the others are dependent, is whether his honor, the circuit judge, erred in ruling, that, under the case of *Cudd v. Calvert*, 54 S. C. 457, 32 S. E. 503, he was without authority to entertain the motion to dissolve the injunction.

In the case of *Cudd v. Calvert*, 54 S. C. 457, 32 S. E. 503, upon which the circuit judge based his ruling, the court uses this language: "It seems to us that where, as in this case, the action is brought solely for the purpose of obtaining an injunction, and where, if the facts alleged in the complaint are found to be true, a proper case for injunction would be presented, it is error to dissolve a temporary injunction upon a mere motion, heard upon affidavits, as that would deprive the plaintiff of his legal right to have the facts determined in the manner provided by law, instead of by affidavits—a most unsatisfactory mode of eliciting the truth." Section 246 of the Code of Civil Procedure of 1902 is as follows: "If the injunction be granted by the court, or a judge thereof, without notice, the defendant, at any time before the trial, may apply upon notice to the court, or a judge thereof, in which the action is brought, to vacate or modify the same. The application may be made upon the complaint and the affidavits, on which injunction was granted, or upon affidavits upon the part of the defendant, with or without the answer."

The rule is thus stated in *Marion Company v. Tilghman Company*, 75 S. C. 220, 55 S. E. 337, and affirmed in *Boyd v. Trexler*, 84 S. C. 51, 65 S. E. 936: "When the sole purpose of an action is for an injunction, and a temporary injunction is essential to the assertion and preservation of a legal right, if established as alleged in the complaint, it would be error to refuse or set aside a temporary injunction. *Alderman v. Wilson*, 69 S. C. 159, 48 S. E. 85, and cases cited therein. This, however, does not mean that a right to a temporary injunction pendente lite follows automatically, if the complaint states a cause of action for injunction. The court should consider the showing made in opposition thereto, and must determine, in view of all the circumstances, subject to review by this court, whether the injunction is reasonably essential to protect the legal right of plaintiff pending the litigation, as was done in *Northrop v. Simpson*, 69 S. C. 554, 48 S. E. 613." Thus showing that the circuit judge should have entertained the motion, and should have considered the answer of the defendant and his proposed affidavits in determining whether the injunction was reasonably essential to the protection of the plaintiff's rights pending the litigation.

It is the judgment of this court that the order of the circuit court be reversed.

(86 S. C. 162)

McCALLUM v. GRIER.

(Supreme Court of South Carolina. June 28, 1910.)

1. REFERENCE (§ 100*)—REPORT—EXCEPTIONS—SUFFICIENCY.

An exception to the overruling of exceptions to the master's report and in not holding that the master should have sustained a specified motion, "referred to in this exception, and made a part hereof," was not in proper form, for not containing within itself the proposition of law to be reviewed.

[Ed. Note.—For other cases, see Reference, Dec. Dig. § 100.*]

2. APPEAL AND ERROR (§ 1032*)—HARMLESS ERROR—BURDEN TO SHOW—PREJUDICE FROM ERROR.

An exception to the ruling of the court on exceptions to the master's report will not be sustained on appeal where appellant fails to satisfy the Supreme Court that the ruling of the trial court was prejudicial to his rights.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.*]

3. EQUITY (§ 141*)—PLEADING—ISSUES.

Greater latitude is allowed in stating the issues in equitable than is allowed in legal actions.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 313, 323-330; Dec. Dig. § 141.*]

4. APPEAL AND ERROR (§ 1022*)—FINDINGS OF MASTER—REVIEW.

An exception to the master's findings of fact, which have been confirmed by the trial court, will be overruled on appeal where the findings are sustained by the testimony of one of the parties and by the testimony of a witness for the party complaining.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.*]

5. PRINCIPAL AND AGENT (§ 33*)—REVOCA-TION OF AUTHORITY.

The authority of an agent to represent his principal is revocable at any time unless coupled with an interest, even where the authority of the agent is declared to be irrevocable, though the principal may subject himself to a claim for damages, by revocation contrary to agreement, express or implied.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 54-56; Dec. Dig. § 33.*]

6. BROKERS (§ 10*)—EMPLOYMENT—REVOCA-TION.

The employment of an agent to procure a purchaser for the real estate of the owner is revocable at the will of the owner.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 11; Dec. Dig. § 10.*]

7. BROKERS (§ 100*)—CONTRACTS WITH THIRD PERSONS—VALIDITY.

A broker employed to procure a purchaser is a special agent, so that a third person deals with him at his peril and where the owner revoked the authority of the agent the latter could not make a binding contract for the sale of the land, though the purchaser did not know of the revocation.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 142, 143; Dec. Dig. § 100.*]

8. BROKERS (§ 32*)—EMPLOYMENT—REPRE-SENTING ADVERSE INTEREST.

A broker employed to procure a purchaser of real estate cannot act for a purchaser where

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the interests of the owner and the purchaser are conflicting.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 25; Dec. Dig. § 32.*]

9. TRUSTS (§ 198*)—TRUSTEES—MANAGEMENT OF ESTATE.

A trustee may not buy at his own sale, and all purchases by him may be vacated by the cestui que trust without regard to whether a purchase was in good faith and at full price, or was fraudulent.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 258-265; Dec. Dig. § 198.*]

10. BROKERS (§ 32*)—CONTRACTS—VALIDITY.

Where a company through its secretary was employed as agent to procure a purchaser of real estate, the president of the company sustained towards the owner a fiduciary relation, and a contract between the company and the president for his purchase of the property was voidable at the option of the owner.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 32.*]

Appeal from Common Pleas Circuit Court of Sumter County; Thos. S. Sease, Judge.

Action by J. L. McCallum against Kate B. Grier. From a judgment for defendant, plaintiff appeals. Affirmed.

L. D. Jennings, for appellant. Lee & Moise, for respondent.

GARY, A. J. The facts are thus stated in the decree of his honor the circuit judge: "This action was brought for specific performance of an alleged contract of sale, by McCallum Realty & Insurance Company, as agent of the defendant, through its secretary and manager, D. R. McCallum, Jr., to J. L. McCallum, the president of the company, the same bearing date September 12, 1907. And the court is asked to require the defendant, to specifically perform the alleged contract. The case was referred to the master upon all of the issues, and the master found that the contract was binding, and should be enforced. This brings up the case upon all the evidence in the cause. The evidence shows that D. R. McCallum, Jr., acting for his company, requested the defendant to list her property for sale with his agency. She was about to leave the city of Sumter, for the benefit of her health, was exceedingly feeble and in a nervous condition, and sent for the said D. R. McCallum, Jr., for the purpose of having her property insured in his company. After the insurance was arranged, the agent requested the defendant to allow him to list her property with the company for sale, which she did, claiming, however, to have signed a blank authority with nothing written thereon. The paper obtained at the time, authorizing the sale of the property, is a printed form filled out and witnessed by D. R. McCallum, Jr. He left no copy with the defendant. No sale was made in fact, until after the return of the defendant from Charleston. She left her home for Charleston on the 19th

day of August, 1908, and returned about September 2d, at which time Mr. D. R. McCallum, Jr., called upon her in the interest of the plaintiff, and with instructions from the plaintiff, 'to try and get her to take less than twelve hundred and fifty dollars,' and with instructions to offer less. His first offer was eleven hundred dollars, which the defendant declined. He then stated, 'I think I have about found a man who will give you twelve hundred.' The defendant declined the offer. Further negotiations were carried on by the agent of the company with the defendant, all resulting in a refusal of the defendant to make the sale. Without repeating all of the testimony it is sufficient to say that it appears therein that when the defendant returned to her home in September no sale of her property had been effected, and she declined to allow the McCallum Realty & Insurance Company to make the sale of the land referred to in the contract, except upon certain terms, which the company did not agree to, in consequence of which disagreement there was a clear abrogation of the authority to make the sale of the land in accordance with the contract. It further appears from the testimony that the McCallum Realty & Insurance Company, acting through its secretary and manager, acted in a dual capacity in undertaking to negotiate a sale with the president of the company at a price less than that fixed by the defendant. It further appears from the testimony that the agent of the defendant undertook to bind the defendant to a sale of property referred to to its own president, and this without disclosing the name of the purchaser to the seller."

The first of the appellant's exceptions raises a question of practice, and is as follows: "It is respectfully submitted, that his honor erred in overruling the plaintiff's exceptions to the master's report, and in not holding that the master should have sustained the plaintiff's motion to strike from the complaint all of the allegations referred to in the plaintiff's motion to strike out, all of which are referred to in this exception and made a part hereof, and it is respectfully submitted that his honor erred in not sustaining the motion, on each and every ground therein stated."

In the first place, the cases of *Jumper v. Bank*, 89 S. C. 296, 17 S. E. 990, *Holtzclaw v. Green*, 45 S. C. 494, 28 S. E. 515, and *Tucker v. Ry.*, 51 S. C. 306, 28 S. E. 943, show that the exception is not in proper form, as it does not contain within itself the proposition of law to be reviewed. But, waiving such objection, it cannot be sustained, for the reason that the appellant has failed to satisfy this court that the ruling of the presiding judge was prejudicial to his rights. It must be remembered that greater latitude is allowed in stating the issues in

equitable than in legal actions. *Smith v. Smith*, 50 S. C. 54, 27 S. E. 545.

The appellant filed exceptions to the findings of fact hereinbefore set out, but these exceptions must be overruled, as the findings of fact are fully sustained, not only by the testimony introduced in behalf of the defendant, but by the testimony of D. R. McCallum, Jr., a witness for the plaintiff.

The next question that will be considered is whether the defendant had the power to revoke the authority of her agent during the time fixed for the continuance of her contract with the agent. "As between principal and agent, authority is revocable at any time, if not coupled with an interest. The authority of an agent to represent the principal depends upon the will and license of the latter. It is the act of the principal which creates the authority; it is for his benefit, and to subserve his purposes, that it is called into being; and unless the agent has acquired with the authority an interest in the subject-matter, it is in the principal's interest alone that the authority is to be exercised. The agent, obviously, except in the instance mentioned, can have no right to insist upon a further execution of the authority, if the principal himself, desires it to terminate. It is the general rule of law, therefore, that as between the agent and his principal, the authority of the agent may be revoked by the principal at his will at any time, and with or without good reason therefor, except in those cases where the authority is coupled with sufficient interest in the agent. And this is true, even though the authority be in express terms, declared to be 'exclusive' or 'irrevocable.' But although the principal has the power thus to revoke the authority, he may subject himself to a claim for damages, if he exercises it, contrary to his express or implied agreement in the matter. An agency is sometimes said to be irrevocable, when it is conferred for a valuable consideration. It is believed, however, that this is only another form of stating the general rule, that it must be coupled with an interest." *Mechem on Agency*, § 204.

"A power of attorney constituting a mere agency, is always revocable. It is only when coupled with an interest in the thing itself, or the estate which is the subject of the power, it is deemed to be irrevocable, as where it is a security for money advanced, or is to be used as a means of effectuating a purpose necessary to protect the rights of the agent or others. A mere power, like a will, is in its very nature revocable, when it concerns the interest of the principal alone, and, in such case, even an express declaration of irrevocability will not prevent revocation. An interest in the proceeds, to arise as mere compensation for the service of executing the power, will not make the power irrevocable. Therefore, it has been held, that a mere employment to transact the business of the principal is not irrevocable with-

out an express covenant founded on sufficient consideration, notwithstanding the compensation of the agent is to result from the business to be performed, and to be measured by its extent. In order to make an agreement for irrevocability, contained in a power to transact business for the benefit of the principal, binding on him, there must be a consideration for it, independent of the compensation to be rendered, for the services to be performed." *Blackstone v. Buttermore*, 53 Pa. 268.

"It is not denied by the plaintiff that, in this case, it was within the power of the defendant to put an end to his agency by revoking his authority. Indeed, this is a doctrine so consonant with justice and common sense, that it requires no reasoning to prove it. But he contends that it is a maxim of common law that every instrumentality must be revoked by one of equal dignity. It is true an instrument under seal cannot be released or discharged by an instrument not under seal or by parol, but we do not consider the rule as applicable to the revocation of powers of attorney. The authority of an agent is conferred at the mere will of the principal, and is to be executed for his benefit; the principal, therefore, has the right to put an end to the agency, when the confidence at first reposed in him is withdrawn." *Brookshire v. Brookshire*, 30 N. C. 74, 47 Am. Dec. 341.

As a broker is a special agent a third party deals with him at his peril. Therefore, after the defendant revoked the authority of her agent, D. R. McCallum, Jr., could not enter into a contract binding on her for the sale of the land, even though the plaintiff was not then aware that the agent's authority had been revoked. The foregoing authorities dispose of all the exceptions, relative to the power of revocation.

The next question is whether the relations existing between the defendant, the plaintiff McCallum Realty & Insurance Company, and D. R. McCallum, Jr., were such as to prevent the latter from entering into a contract with J. L. McCallum for the sale of the land that would be binding upon the defendant against her wishes. The McCallum Realty & Insurance Company was the agent of Mrs. Grier, and of course J. L. McCallum, its president, and D. R. McCallum, Jr., its manager, also sustained towards her a fiduciary relation, yet we find that one fiduciary (J. L. McCallum) not only seeks to purchase the property from the other fiduciary (D. R. McCallum, Jr.), but that the plaintiff constituted D. R. McCallum, Jr., his agent to negotiate the purchase of the property from the defendant, although her interests were antagonistic to those of the plaintiff.

"A broker cannot act as the agent of both parties, where their interests are conflicting. Thus, a broker employed to sell cannot act at the same time as the agent of the purchaser, for in that case the duty he owes to one

principal to sell for the best price obtainable is essentially inconsistent with, and repugnant to, the duty he owes to the other to buy at the lowest price possible, and there would, necessarily, be danger that the right of one principal would be sacrificed to promote the interests of the other. A broker employed to sell goods for his principal cannot buy them for himself, nor can a broker employed to buy, buy his own goods unless the principal, with full knowledge of the facts, assents to the transaction. This rule is inflexible, and it is immaterial that the broker acts in good faith, and works no injury to his principal, or even that the transaction is more advantageous to the principal than if had with a stranger. The reason of the rule is that, if the broker were permitted to buy from or sell to himself, there would be combined in him the incompatible relation of purchaser and seller, and an interest adverse to that of his principal would be created such as would ordinarily lead to a violation of his duty as agent." 4 Enc. of Law, 966; 19 Cyc. 207.

"It is a well-established principle that a trustee cannot buy at his own sale. He cannot be the vendor and vendee at the same time of trust property; that is, he cannot make a binding contract with himself in the purchase of the trust property under his control. On the contrary, all such purchases are subject to be vacated and set aside by the cestui que trust at his option, and this, too, without regard to the fact whether said purchase was made in good faith, at full price, or was fraudulent and delusive. This doctrine has been long settled, both in England and in this country, and it is a wise and wholesome principle. It strikes, at once, at the root of danger, and destroys it. It removes from the trustee the temptation to do wrong, and guarantees the faithful execution of his trust in the sale of the property of his cestui que trust." This language is quoted with approval in *Mortgage Co. v. Clowney*, 70 S. C. 229, 49 S. E. 569. See, also, *Verner v. Simpson*, 68 S. C. 459, 47 S. E. 729, and *Duncan v. City Council*, 60 S. C. 558, 39 S. E. 265.

These authorities conclusively show that it was a violation of the plaintiff's duty to attempt to purchase from an agency of which he was a member, and that he is not in a position to demand specific performance of his contract, which was voidable, at the option of the defendant.

Judgment affirmed.

(124 Ga. 621)

LANE et al v. HYAMS.

(Supreme Court of Georgia. June 21, 1910.)

(Syllabus by the Court.)

JUDGMENT (§ 743*)—RES JUDICATA—MATTERS CONCLUDED.

A person having a policy of insurance on his own life, payable to himself, "his execu-

tors, administrators, or assigns," sought to sell it; and an agent or broker for him procured a purchaser, had the insured to make an assignment, blank as to the name of the assignee, filled this in, received \$4,768 from the assignee, and paid \$695.22 to his principal. After the death of the insured, his executors claimed the proceeds of the policy, and, under a bill of interpleader filed by the insurance company in the federal court, pleaded that the assignment was a wagering contract, contrary to public policy, and void, and obtained a decree for the balance of the proceeds of the policy after reimbursing the transferee for the amount paid for the assignment and his expenditures for premiums and on account of a loan by the company to the insured (they conceding that such reimbursement should be made). Held that, in a subsequent suit by the executors to recover balance received by the agent or broker from the assignee over and above what he had paid to his principal, and which should have been so paid, the plaintiffs were not debarred from recovering by the litigation and decree in the United States court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1275, 1277; Dec. Dig. § 743.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by M. B. Lane and others, executors, against M. Hyams, Jr. There was a directed verdict for defendant, and plaintiffs bring error. Reversed.

John R. Young held an insurance policy on his own life for the sum of \$50,000 in the Mutual Life Insurance Company of New York, on which policy he had borrowed \$4,000. M. Hyams, Jr., was an employé in the office of the agent of the insurance company at Savannah. Young expressed a desire to sell his policy, and Hyams undertook to negotiate the sale. Hyams testified that he told Young that he could obtain \$695.22 net for him, and Young signed an assignment in blank, which recited the consideration to be \$1 and other valuable considerations. Hyams completed the assignment to one Alexander, receiving from him \$4,768, of which he paid to Young \$695.22 and retained the balance for himself as a "commission." After Young died both his executors and Alexander claimed to be entitled to the amount of the insurance due. The company filed a bill of interpleader in the United States court. In their answer the executors of Young averred "that said alleged assignment to said Max Alexander was and is null, void, and of no effect; that the taking and procuring thereof by said Max Alexander was a wager and speculation, and a wagering and speculating contract; that said Max Alexander, at the time of said alleged assignment, had no insurable interest of any sort whatever in the life of said John R. Young, and does not now claim to have any such insurable interest; that said alleged assignment was immoral, contrary to public policy, and void." The executors recovered a decree. In the opinion filed by the presiding judge it was stated that the executors admitted that Alexander might equitably re-

cover such sums as he had paid out for or on account of the policy, with interest on the same, and that, "in view of this concession, decree will be taken accordingly," which was done. The executors then brought suit against Hyams in the superior court of Chatham county to recover the balance of the \$4,768 which Alexander had paid to him for the assignment of the policy, less \$695.22 which Hyams had paid to Young. On the hearing counsel for each of the parties moved that the court direct a verdict for the side represented by them, respectively. The judge directed a verdict for the defendant. The plaintiffs excepted.

Hitch & Denmark, for plaintiffs in error.
Osborne & Lawrence, for defendant in error.

LUMPKIN, J. In the equity case tried in the United States court a decree was rendered reimbursing Alexander for the various amounts expended by him, including the amount paid to Hyams, as representing the insured, for the assignment of the policy, the amount of premiums paid by the assignee for keeping up the policy, with interest thereon, and certain other amounts paid by him on account of the loan made by the company to the insured. It is true the presiding judge, in the opinion filed by him, stated that counsel for the executors conceded that Alexander should be repaid for such expenditures, and said: "In view of this concession, decree will be taken accordingly. He will, therefore, suffer no loss. He will have his whole outlay, with 7 per cent. interest." We do not understand, however, that it was thereby held that these amounts were not properly allowable to Alexander. Whether placed in the decree by virtue of a concession, or by virtue of a view that they should properly be allowed, the fact is that Alexander has under the decree received out of the proceeds of the policy the amount which he paid therefor to Hyams, and which was thus treated as paid to Young so far as Alexander was concerned. The judge of the superior court took the view that, as it was declared that the assignment of the policy of insurance was contrary to public policy and void, it was entirely void; that the executors of Young were not obliged to repay the amount thus paid on a wagering contract; and that if, from motives of expediency, they conceded such repayment, they did not have any right of action against Hyams. As to the premiums necessary to keep the policy in force, which were paid by Alexander, the judge stated in the opinion filed by him that he could see a difference, as they were necessary to keep the policy in life and produce the fund which was in controversy after the death of the insured.

If the right of an assignee of a policy to have returned to him his expenditures in keeping the policy in life were placed by the courts of the United States, not on the partial validity of the assignment, but on the ground that one thus producing or aiding to

produce a fund for distribution in a court of equity should be reimbursed for his expenditures in so doing, or that if beneficiaries of a policy go into a court of equity and seek to have the assignment set aside, they should do equity and reimburse the assignee, the position of our learned Brother of the superior court bench would have weight. The United States District Judge, presiding in the Circuit Court, who passed upon the equity cause involving the assignment and distribution of the proceeds of the policy, relied to a considerable extent upon the decision in *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924. In that case a person, on procuring an insurance upon his life, entered into an agreement with a firm whereby the latter was to pay all fees and assessments payable to the underwriters on the policy, and to receive nine-tenths of the amount due thereon at his death. Pursuant to the agreement, he executed an assignment of the policy, and the firm paid the fees and assessments. On his death they collected from the underwriters nine-tenths of the amount due on the policy, and his administrator sued the firm therefor. It was held that the administrator was entitled to the money so collected, with interest thereon, less the sums advanced by the firm. In the opinion delivered by Mr. Justice Field it was said: "To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy." Again he said: "It was lawful for the association to advance to the assured the sums payable to the insurance company on the policy as they became due. It was also lawful for the assured to assign the policy as security for their payment. The assignment was only invalid as a transfer of the proceeds of the policy beyond what was required to refund those sums, with interest." Still further, referring to the issuing of a policy to one having no insurable interest in the life of the assured, and the assignment of a policy to such a person, he said: "The same ground which invalidates the one should invalidate the other—so far, at least, as to restrict the right of the assignee to the sums actually advanced by him." In discussing the decision in *Cammack v. Lewis*, 15 Wall. 643, 21 L. Ed. 244, he said: "The case being brought to this court, it was held that the transaction, so far as the creditor was concerned, for the excess beyond the debt owing to him, was a wagering policy, and that the creditor, in equity and good conscience, should hold it only as security for what the debtor owed him when it was assigned, and for such advances as he might have afterwards made on account of it; and that the assignment was valid only to that extent." These excerpts indicate that an assignment of a life insurance policy is not deemed by the Supreme Court of the United States to be necessarily wholly void because it includes a wagering element, but that it may be treated

as valid for the amount of an indebtedness existing when it was made, or for advances made on account of it afterwards, with interest thereon, and only void as to the excess over and above such amounts.

In *Manhattan Life Insurance Co. v. Hennessy*, 99 Fed. 64, 70, 39 C. C. A. 625, Judge Shelby, speaking for the Circuit Court of Appeals of the Fifth Circuit, referred to this subject, and his decision was cited in the opinion of the United States judge in the case arising under the bill of interpleader. In that case the question of the right to recover the amount paid for the policy, if the assignment were held void generally, was not discussed. In *Russell v. Grigsby*, 168 Fed. 577 (9), 94 C. C. A. 61, the question was directly involved. The policy was payable to the executors, administrators, and assigns of the insured. Before the third premium fell due, having met with financial misfortune, he was unable to meet it. He also needed a surgical operation, but was without means to obtain the services. In this condition he assigned the policy to another in consideration of \$100 in money and an engagement by the assignee to pay the premium then past due and future premiums, which the latter did. At the time of the assignment the assignee was neither a relative nor creditor of the insured. It was held by the Circuit Court of Appeals of the United States for the Sixth Circuit that the assignment was void for want of an insurable interest in the assignee, and that he was only entitled to receive from the proceeds of the policy the amount actually paid and advances for subsequent premiums. Judge Lurton, who has since been elevated to the Supreme Bench, after a full discussion of the case, said: "The conclusion of the whole matter is that the assignment is valid to the extent of the money actually paid for it as well as for all advances for premiums subsequently made. Beyond this it is a gambling contract and not enforceable." Thus the amount of money paid to the insured, and thereby inuring to his benefit, seems to have been considered as standing on a like basis with a debt already existing or one subsequently arising by virtue of advances afterward made. Apparently it was not thought to make any material difference whether the money was loaned before the assignment, or at the time of the assignment, or agreed to be and actually advanced after the assignment, or paid to the assignor for the assignment, so far as the right of reimbursement and the partial validity of the assignment for that purpose was concerned.

We are not now considering the question of the assignability of the policy as an original proposition, either on principles of general law or with reference to a construction of a section of our Code. See, in this connection, *Rylander v. Allen*, 125 Ga. 206, 53 S. E. 1082, 6 L. R. A. (N. S.) 128. Neither are we

discussing the question of dealing with a single assignment as infected with a wagering element, yet good in part and bad in part. The rights of the executors of the insured and of the assignee have been decreed by a court having jurisdiction of the parties on the subject-matter. Under that decree the assignee was reimbursed the amount paid for the policy, treating the payment by him to Hyams as equivalent to a payment to Young, the insured. The question we have to deal with in the present case, so far as it is affected by the litigation and decree in the United States court in the former case, is: What is the status between the executors of the insured and Hyams, whom they claim was the agent of the insured, received money for him, and unlawfully retained a portion of it? If, under the decisions of the United States courts (in one of which that case was tried), the assignment was not absolutely void, but was valid to the extent of the money paid for it and subsequent advances, and if Hyams received such money as the agent of the assured, and the executors of the insured have had to account for the amount so paid, it is not easy to see why he should be allowed to illegally retain a part of it from his principal or the executors of the latter. Hyams was not a party in the former litigation; but it was claimed that he was the agent of the insured, whose executors were parties, and that through him the contract was made. If an agent received money for his principal, and such payment was in law a payment to the principal, and the resulting assignment of the policy was valid to the extent of the amount of such payment and other advances, and the principal accounted for it under a decree in a litigation with the other party to the contract, the agent ought not to be allowed to pocket a portion of the money thus received and defend himself on account of the decision declaring the assignment generally void. If we have correctly apprehended the decisions of the United States courts, as above discussed, then the executors of Young did not merely give away this sum to Alexander, or concede it to him as a matter of grace, but as matter of right under such adjudications; and in that event their concession did not operate as a release to Hyams, as indicated in the opinion filed by the judge of the superior court.

It is not necessary to deal with the evidence of Hyams as to what his real relation to the insured was, or in regard to his conduct in the transaction, or as to the agreement of Young in regard to receiving a "net" amount. The presiding judge directed a verdict for the defendant because of the former litigation and its results. We cannot concur in the view that such a verdict was demanded.

Judgment reversed. All the Justices concur.

(134 Ga. 660)

DAUGHARTY v. S. L. & C. O. DRAWDY.

(Supreme Court of Georgia. June 23, 1910.)

*(Syllabus by the Court.)***1. EXECUTORS AND ADMINISTRATORS (§ 124*)—POWERS UNDER WILL—EXECUTION—EXECUTOR'S DEED.**

The plaintiffs filed their equitable petition to enjoin the defendant from cutting the timber on certain land, and to recover damages and the possession of such land, attaching to the petition an abstract of title. In this abstract, and upon the trial of the case in October, 1908, the plaintiffs relied, as one of the links in their chain of title, upon a deed dated May 11, 1878, made by an executor. Upon the trial it appeared that the testator in his will gave his executors power to sell, publicly or privately, certain lands, including the tract undertaken to be conveyed in the executor's deed referred to, and that another besides the maker of the deed qualified as executor. *Held*:

(a) Under the power in the will authorizing the executors of the testator to sell at private sale, both of the executors should have joined in the deed made under such power. *Board of Education of Glynn County v. Day*, 128 Ga. 156, 57 S. E. 359; *Hosch Lumber Co. v. Weeks*, 123 Ga. 336, 51 S. E. 439; *Dowdy v. McArthur*, 94 Ga. 577, 21 S. E. 148; *Civ. Code 1896*, § 3317.

(b) Where a deed by one of such executors was offered in evidence, it was error, over appropriate and timely objections, to admit it in evidence as conveying title to the property described therein.

[*Ed. Note.*—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 496-507; Dec. Dig. § 124.*]

2. TRIAL (§ 191*)—EVIDENCE (§ 383*)—ANCIENT DEED—EFFECT OF ADMISSION—INSTRUCTION ASSUMING DISPUTED FACT.

The plaintiffs introduced in evidence a deed purporting to have been executed more than 30 years prior to the time of trial, and the court charged the jury in reference thereto as follows: "I charge you that this deed that purports to have been made from Smith to White, and being what is called an ancient document, being over 30 years old, the presumption of law is that it is genuine, and, when that deed is attacked as a forgery, the burden is upon the party attacking it to satisfy you that it is a forged instrument. If they have carried that burden, and satisfied you that it is a forgery, then you would find in favor of the defendant Daugharty in this case." *Held*:

(a) As the defendant, who contended and offered testimony to show that the alleged deed was a forgery, introduced evidence that the alleged deed was not 30 years old, it was error to instruct the jury in the words "Being what is called an ancient document" and "being over 30 years old."

(b) The fact that a deed is admitted in evidence under *Civ. Code 1896*, § 3610, does not prevent the jury from finding that it is a forgery, from the face of the deed and the entries thereon, without resort to aliunde evidence. *Pridden v. Green*, 80 Ga. 737, 7 S. E. 97; 1 Enc. Ev. 884, 885.

[*Ed. Note.*—For other cases, see *Trial*, Cent. Dig. §§ 420-431; Dec. Dig. § 191.* *Evidence*, Cent. Dig. §§ 1660-1677; Dec. Dig. § 383.*]

3. DEPOSITIONS (§ 64*)—SUBJECT-MATTER OF EXAMINATION—INTERROGATORIES AS TO ATTACHED AFFIDAVITS.

Defendant sued out interrogatories for non-resident witnesses, to obtain their testimony to be used upon the final trial of an application for

injunction and other relief, and attached thereto affidavits made by the witnesses to be used upon the hearing before the presiding judge for an interlocutory injunction. In such interrogatories questions were propounded to the witnesses, wherein they were asked if they made such affidavits, and if the statements therein contained were true, to which questions the witnesses answered in the affirmative. When the interrogatories were submitted to opposing counsel, they made thereon and signed, as counsel for the plaintiffs, objections that "the attached affidavits cannot be rendered admissible in evidence upon the trial of said case by proving the execution of same and that the statements made therein are true," and "all questions propounded to either of said witnesses based upon the statements made in said affidavits are likewise illegal, irrelevant, and inadmissible in evidence." *Held*, that the court upon the trial committed no error in refusing to allow the answers to such questions to be admitted in evidence for the defendants. *Richardson v. Golden*, Fed. Cas. No. 11,782; 4 Enc. Ev. 363; 1 Wigmore on Evidence, § 787.

[*Ed. Note.*—For other cases, see *Depositions*, Cent. Dig. § 138; Dec. Dig. § 64.*]

Error from Superior Court, Clinch County; T. A. Parker, Judge.

Action by S. L. & C. O. Drawdy against J. N. Daugharty. Judgment for plaintiffs, and defendant brings error. Reversed.

Wilson, Bennett & Lambdin, for plaintiff in error. R. G. Dickerson and J. L. Sweat, for defendants in error.

HOLDEN, J. Judgment reversed. All the Justices concur.

(134 Ga. 660)

HOLTON et al. v. CITY OF CAMILLA et al.
(Supreme Court of Georgia. June 14, 1910.)*(Syllabus by the Court.)***1. CONSTITUTIONAL LAW (§§ 82, 87, 278*)—POWERS OF MUNICIPALITY—PROPERTY RIGHTS—DUE PROCESS OF LAW.**

The act of the General Assembly (Acts 1907, p. 505) chartering the city of Camilla provided in the twenty-eighth paragraph of section 21 that the city should have the power "to acquire by purchase or otherwise, own and equip ice plants and cold storage plants, in connection with waterworks system of said city or otherwise, and to do and perform all acts in connection with ownership and operation of and conduct of same, ordinarily incident to the operation and conduct of the same, and to issue bonds of said city, for the purpose of acquiring, owning, and equipping or operating said plants."

An ordinance passed by the municipal authorities calling an election for the purpose of having determined the question whether or not bonds of the municipality should be issued provided: "Said bonds to be issued for the purpose of procuring the sum of \$12,000, which sum is to be used as follows: The same to be used in acquiring, equipping, enlarging, and repairing the electric and waterworks plant and system, and acquiring additional real estate upon which to locate and operate said plant; and in acquiring, establishing, equipping, and operating an ice plant in connection with the waterworks and electric lights and other public utilities of the city of Camilla." *Held*, the operation of an ice plant by the municipal authorities of the city of Camilla, in connection with the

electric light and waterworks plant, for the purpose of furnishing ice to the inhabitants of the city, is not in violation of paragraph 2, § 1, art. 1, or of paragraph 3, § 1, art. 1, or of paragraph 25, § 1, art. 1, of the Constitution of this state, or otherwise illegal; and the issuance of bonds by such municipality to raise money to establish and operate such ice plant was not illegal, where the assent of two-thirds of the qualified voters of the city had been obtained at an election held for the purpose of determining whether or not such bonds should be issued.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. §§ 82, 87, 278.*]

2. MUNICIPAL CORPORATIONS (§ 917*)—BONDS—VALIDATION—ATTACK ON JUDGMENT.

After a judgment was rendered confirming and validating the issuance of the bonds in proceedings had under the validation act of 1897 (Acts 1897, p. 82), citizens and taxpayers of the municipality could not for the first time attack the judgment on the ground that the money to be raised from a sale of the bonds was to be used for different purposes, and "neither said ordinance, nor the published notice of the election published in pursuance thereof, provided or gave the voters of said city any opportunity to vote for or against the bonds for each of said specified purposes separately, and hence said ordinance and said notice did not call and give notice of respectively as to each of said debts and purposes of an election 'for that purpose,' as required by the Constitution of the state of Georgia, embodied in Code, § 5893."

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 917.*]

3. PREVIOUS CASE REAFFIRMED.

Upon a review of the case of *Lippitt v. Albany*, 131 Ga. 629, 63 S. E. 33, the rulings therein made are reaffirmed.

Error from Superior Court, Mitchell County; Frank Park, Judge.

Action by S. J. Holton and others against the City of Camilla and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

The plaintiffs in error, as citizens and taxpayers of the city of Camilla, filed their equitable petition against the city and its mayor and aldermen to enjoin the issuance and sale of certain bonds which had been authorized to be issued at an election held for that purpose. A judgment confirming and validating the issuance of the bonds had previously been rendered in proceedings had under the act of 1897 (Acts 1897, p. 82). In the equitable petition for an injunction the plaintiffs attacked the constitutionality of this act. They further contended that the judgment validating the bonds was illegal for various reasons, even if the act of 1897 was constitutional. To the order of the court refusing an interlocutory injunction, the plaintiffs excepted.

The ordinance calling the election for the purpose of having determined the question whether or not bonds should be issued provided: "Said bonds to be issued for the purpose of procuring the sum of \$12,000 which sum is to be used as follows: The same to be used in acquiring, equipping, enlarging, and repairing the electric and waterworks

plant and system, and acquiring additional real estate upon which to locate and operate said plant, and in acquiring, establishing, equipping, and operating an ice plant in connection with the waterworks and electric lights and other public utilities of the city of Camilla." One of the grounds upon which the plaintiffs sought to enjoin the issuance and sale of the bonds was that the city could not engage in the enterprise of operating an ice plant. The defendant contended that the city had such power under the act of the General Assembly approved August 27, 1907 (Acts 1907, p. 505), under the provision of paragraph 28 of section 21, appearing on page 512; that in this paragraph and section of the city's charter the Legislature expressly gave it authority to engage in the business of operating an ice plant and to levy a tax for that purpose, and that the act giving this authority was constitutional and valid, especially as the city was only undertaking to operate an ice plant in connection with the plant operating its waterworks and electric light system, and merely as an incident thereto, and not as an independent business.

This ground on which an injunction was sought against the issuance and sale of the bonds is more elaborately set out in the petition, as follows: "Because one of the purposes for which said bonds are to be issued is 'to acquire, establish, equip, and enlarge an ice plant in connection with the waterworks and electric light plant and system and other public utilities of the city of Camilla, and such purpose is illegal, for the reason that the said city has no right to embark in a purely private and commercial business of manufacturing or dealing in a common commodity of commerce, such as ice, and therefore the use of public funds raised by taxation for that purpose will be illegal, and it does not appear how much of the proceeds of said bonds shall be used for that illegal purpose, and how much for other purposes which might be legal, and therefore the whole issue will be illegal, as said purposes are inextricably commingled and confused; petitioners contending that subsection 28 of section 21 of the new charter of Camilla, embraced in Acts 1906, p. 505 et seq., said subsection purporting to authorize said city to purchase or otherwise own and equip an ice plant and cold storage plants, etc., is unconstitutional and void, because in contravention of paragraph 2, § 1, art. 1, of the Constitution of Georgia (Civ. Code 1895, § 5699), because by said paragraph the right of private property and the paramount duty of the government to impartially and completely protect the same are recognized and guaranteed, and the right to apply public funds, raised by taxation, to the carrying on of an ordinary business of manufactur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ing and dealing in an ordinary commodity of commerce, in connection with the right of eminent domain, need not be exercised—a business in no wise in the nature of a public utility—is inconsistent with the complete and impartial protection of private property, inasmuch as such right to raise by taxation and so apply public funds could be applied not only to the purposes of government, and to matters properly coming into the scope of public affairs, but also to every private business and every business of every nature, and thereby the government could take upon itself the conduct and control of all manufacturing, commercial, and other private businesses, and the form of government would be transformed from its present basis of individual ownership of property to the socialistic basis, wherein private property could not exist. And said subsection of said charter of said city is also unconstitutional as being in contravention of paragraph 3, § 1, art. 1, of the Constitution of Georgia (Civ. Code 1895, § 5700), inasmuch as its effect is to permit a citizen to be deprived of his property other than by due process of law, to wit, by taking such property under the guise of taxation and applying the same to the carrying on of a common private manufacturing and commercial enterprise, wholly unrelated to any governmental purpose. And said subsection of said charter is in contravention of paragraph 25, § 1, art. 1, of the Constitution of said state (Civ. Code 1895, § 5722), inasmuch as its effect is to deprive citizens of the United States resident in Georgia of the full enjoyment of the rights, privileges, and immunities due to such citizenship, and especially the right of private property existing under the republican form of government established by the Constitution of the United States, with the right of private property as one of its basic and fundamental features. And said subsection of said charter is in contravention of other provisions of the Constitution of Georgia and of the United States."

The defendants, in their answer, set up, among other allegations, the following: "That it is not intended that said money shall be used simply to embark the city in a purely private and commercial business of manufacturing and dealing in ice, independent of said city's other businesses; but said city has already established and in operation a waterworks and electric light plant, operated by steam power, and that, by reason of the large power generated in said plants, and the large amount of water constantly distilled in the boilers of said steam plant, it will be profitable to said city to operate, not as an independent enterprise, but solely in connection with, and as an incident to, the operation of said electric lights and waterworks plant, an ice machine and plant, for the reason that much of the labor and machinery necessary for the operation of such ice plant are already owned

by said city in the operation of its electric light and waterworks plant, and must necessarily be continued by said city in the operation of said electric light and waterworks plant, and said ice plant could be operated largely with the same labor already used in the waterworks and electric light plants, the same labor being able to attend to said ice plant between the intervals of its employment in said electric light and waterworks plant, and said operation of said ice plant will require only a small additional expense in the form of labor and machinery, not more than one-half of what the expense of labor and machinery would cost to operate an ice plant independently, and therefore said city is in a position peculiarly advantageous for operating said ice plant in connection with its said waterworks and electric light plants, at a much less expense than such ice plant could be operated by any one else and independent of such plants as said city's waterworks and electric light plants; and said city proposes to operate said ice plant solely as an incident to its said waterworks and electric light plants and at a small additional expense, and with large profits to said city and its taxpayers. In addition to the foregoing, these defendants say that in the hot climate in which said city is located ice is, for several months in each year, almost a necessity for persons who use the water from the pipes of said city's waterworks system, they being a great majority of the citizens of said city, and a great deal of ice has to be used by the said citizens in the water and other beverages which they drink, and it is highly important that such citizens use ice that is free from disease-producing germs, and there is danger to the citizens of said city in using ice manufactured outside of said city, by private individuals, free from any inspection by the public, in that such ice may be made of water not properly purified, and may contain dangerous disease germs; whereas, the ice proposed to be manufactured by the city of Camilla in connection with its said electric light and waterworks plant, will be carefully manufactured, under public inspection and proper and sanitary rules, and it will tend to preserve the health of the citizens of said city for the ice used by them in connection with said city's waterworks system to be thus manufactured under public supervision in a proper sanitary manner."

The judgment validating and confirming the issuance of the bonds showed on its face the purpose for which the election was held and the bonds were to be issued.

Pope & Bennet, for plaintiffs in error. M. C. Bennet, for defendants in error.

HOLDEN, J. (after stating the facts as above). 1. One of the grounds upon which the plaintiffs sought to enjoin the issuance and sale of bonds of the municipality was that one of the purposes for which the mon-

ey arising from the sale was to be used was the establishment and operation of an ice plant, which plaintiffs contended would be illegal, for reasons set forth in the preceding statement of facts. In 1 Cooley on Taxation, 217, the author says: "The propriety and necessity of provision by taxation for a supply of water for the extinguishment of fires, and for the general use of the inhabitants of large towns, is not disputed. * * * Cities may also be authorized to construct gasworks in order to furnish their citizens with light as well as to supply the corporate needs." And in 10 Am. & Eng. Enc. Law (2d Ed.) p. 865, it is said: "It is generally agreed that the Legislature has the power to authorize a municipality to own and operate an electric light plant, which shall furnish not only the lights needed by the municipality for lighting the streets and public places, but lights to the inhabitants for their private purposes." There are decisions of many courts to the effect that municipal corporations have the right to furnish to their inhabitants in their homes and places of business water and electric lights. In *Pond on Municipal Control of Public Utilities*, p. 28, it is said: "The courts are of the opinion that it is not only within the power of but that it is their duty to keep themselves free to accept for their own use and to provide for their inhabitants new inventions and superior agencies as they arise, and that cities are not to be restricted to the providing for the strict necessities of their citizens, but that they may also administer to their comfort and pleasure."

In *Hequembourg v. City of Dunkirk*, 49 Hun, 550, 2 N. Y. Supp. 447, the court stated: "What is or what is not a municipal purpose is, in many cases, doubtful and uncertain, and it is the duty of the court in such cases to give weight to the legislative determination, and not to annul its acts, unless it clearly appears that the act was not authorized. * * * Light in dwellings is as important and essential as upon the streets, and promotes the general comfort, safety, and welfare of the inhabitants; and when it is supplied in connection with that which is furnished by the municipality, under its duty to the public, we think it may be regarded as an incident thereto, and one of the purposes for which the municipality may properly contract." In the case of *Sun Publishing Ass'n v. Mayor*, 8 App. Div. 230, 238, 40 N. Y. Supp. 607, 611, affirmed 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788, the court employed the following language: "The true test is that which requires that the work shall be essentially public and for the general good of all the inhabitants of the city. It must not be undertaken merely for gain or for private objects. Gain or loss may incidentally follow, but the purpose must be primarily to satisfy the need or contribute to the convenience of the people of the city at large. Within that sphere of action, nov-

elty should impose no veto. Should some inventive genius by and by create a system for supplying us with pure air, will the representatives of the people be powerless to utilize it in the great cities of the state, however extreme the want and dangerous the delay? Will it then be said that pure air is not so important as pure water and clear light? We apprehend not."

In the case of *State ex rel. v. City of Toledo*, 48 Ohio St. 112, 134, 136, 137, 138, 140, 26 N. E. 1061, 1066-1069 (11 L. R. A. 729), the court said: "Taxation implies an imposition for a public use. * * * But what are public purposes is a question that must be left to the Legislature, to be decided upon its own judgment and discretion. Water, light, and heat are objects of prime necessity. Their use is general and universal. It is now well settled that the Legislature in the exercise of its constitutional power may authorize cities to appropriate real estate for waterworks. * * * What we have said in reference to waterworks is for the most part applicable to the erecting and maintaining of natural or artificial gas works. Heat being an agent or principle indispensable to the health, comfort, and convenience of every inhabitant of our cities, we do not see why, through the medium of natural gas, it may not be as much a public service to furnish it to the citizens as to furnish water. It is sufficient if every inhabitant who is so situated that he can use it has the same right to use it as the other inhabitants. The establishment of natural gas works by municipal corporations, with the imposition of taxes to pay the cost thereof, may be a new object of municipal policy; but in deciding whether in a given case, the object for which taxes are assessed is a public or a private purpose, we cannot leave out of view the progress of society, the change of manners and customs and the development and growth of new wants, natural and artificial, which may from time to time call for a new exercise of legislative power. And in deciding whether such taxes shall be levied for the new purposes that have arisen we should not, we think, be bound by an inexorable rule that would embrace only those objects for which taxes have been customarily and by long course of legislation levied." In this connection, see *Gray on Limitations on Taxing Power & Public Indebtedness*, §§ 173, 176, 177, 178.

If a city has the right to furnish heat to its inhabitants because conducive to their health, comfort, and convenience, we see no reason why they should not be permitted to furnish ice. The object in bringing, by means of a waterworks system, water in pipes from a distance for use in supplying the needs of a city, is not alone to obtain a sufficient quantity, but also to secure that which is freer from impurities than it is possible to obtain in the city itself. If, in the hot season of the year, the inhabitants of

the city must, for sanitary reasons, relinquish the cool draught from the well because, as has been demonstrated, wells of pure water cannot be maintained in populous communities, surely the city would have the right, were it practicable, to cool the water which it delivers through pipes as a substitute, and which oftentimes is scarcely drinkable in its heated condition. If not practicable to cool it in the pipes, and if it be necessary to the welfare, comfort, and convenience of the inhabitants that its temperature be lowered before being used for drinking purposes, why cannot the city provide for the delivery of a part of it in a frozen condition, to be used in cooling such part of the balance as is used for drinking purposes? Is the difference between water in a liquid and in a frozen condition a radical one? Upon what principle could the doctrine rest that liquid water may be delivered by the city to its inhabitants by flowage through pipes, but that water in frozen blocks cannot be delivered by wagons or otherwise? If the city has the right to furnish its inhabitants with water in a liquid form, we fail to see any reason why it cannot furnish it to them in a frozen condition. The answer of the defendant, which was introduced in evidence and considered upon the trial, states that in the hot climate in which the city of Camilla is situated ice is necessary for the comfort, health, and convenience of its inhabitants. If this is true, why should not the city be permitted to furnish ice to its inhabitants? And if the furnishing of ice to its inhabitants is conducive generally to their health, comfort, and convenience, it is certainly being furnished for a municipal or public purpose. It is a well-known fact that one of the main uses to which ice is put is the cooling of water for drinking purposes; and when it is used for this purpose, if impure, it is as apt to be deleterious to the consumer as any other impure water. Why, then, in the exercise of its police power, may not a city guard against impurities in the ice, as well as the water, used by its inhabitants.

Nor do we see any rational objection on the idea that the city will be engaging in a manufacturing enterprise. The city might perhaps equally as well be said to be manufacturing when by the use of a filtering process it changes impure water into that which is pure. When, in connection with its waterworks system; it produces ice, it merely, by certain processes, changes the form and temperature of a part of the water supplied by that system. We do not think the operation by the city of Camilla of an ice plant in connection with its waterworks system, for the purpose of furnishing ice to its inhabitants, is in violation of the sections of the Constitution referred to in the plaintiff's petition, or that it is illegal for any reason.

2. The ordinance calling the election, and

in pursuance of which it was held, to determine whether or not bonds should be issued, provided: "Said bonds to be issued for the purpose of procuring the sum of \$12,000, which sum is to be used as follows: The same to be used in acquiring, equipping, enlarging, and repairing the electric and waterworks plant and system, and acquiring additional real estate upon which to locate and operate said plant, and in acquiring, establishing, equipping, and operating an ice plant in connection with the waterworks and electric lights and other public utilities of the city of Camilla." One of the grounds upon which an injunction was sought states: "Each of said purposes being entirely separate, foreign, and distinct from the others, and neither said ordinance, nor the notice of the election published in pursuance thereof (a copy of which is hereto attached, marked 'Exhibit B'), provided or gave the voters of said city any opportunity to vote for or against the bonds for each of said specified purposes separately, and hence said ordinance and said notice did not call and give notice of respectively as to each of said debts and purposes of an election 'for that purpose,' as required by the Constitution of the state of Georgia, embodied in Civ. Code 1895, § 5893; and said ordinance, and the notice of this election published in pursuance thereof, were and are each illegal and void for the reason that neither of them permitted the voters to express their opinion on each of said questions as to authorizing and incurring of each of said debts separately, but required the voters by one ballot to express their opinion upon all said separate and distinct questions at once, precluding the voters from voting on each of said questions submitted to them, so that they might pass upon each freely and untrammelled by any other consideration as to each of said debts than the question as to whether said debt should be incurred for the separate purpose named, and, as to each of said debts and purposes, so combined and mingled with the question of assent thereto with other questions wholly foreign to the same, as to make the whole illegal."

In *Rea v. La Fayette*, 130 Ga. 771, 61 S. E. 707, it was ruled: "Where several distinct and independent propositions for the issuing of bonds by a municipality are submitted to the qualified voters of a town or city, provision should be made in the submission for a separate vote upon each. They cannot be lawfully combined and submitted to the voters as a single question." In that case the election was held under a municipal ordinance providing that the election was to be held "to determine the question whether said city will issue bonds in the aggregate sum of forty thousand dollars, * * * said sum to be expended as follows, to wit: For the purpose of establishing and maintaining a system of waterworks, twenty-five thousand dollars. For the purpose of establishing and maintaining a system of electric lights, ten

thousand dollars. For the purpose of extending and improving the public school of said city, and providing adequate accommodations for school patrons and children of said city, five thousand dollars." The questions ruled upon in that case were made by the plaintiffs at the hearing in the proceedings to validate the bonds had under the validation act of 1897. It appears from the record in the case of *Lippitt v. Albany*, 131 Ga. 629, 63 S. E. 33, that this identical question was raised in that case, where an injunction was sought against the issuance of the bonds under the judgment of the court validating them; and it was there held that objections of this character to the issuance and sale of bonds could not be raised after a judgment validating and confirming them was had under the act of 1897, and the judgment of the court below refusing an interlocutory injunction was by this court affirmed. In the case of *Cain v. Smith*, 117 Ga. 902, 44 S. E. 5, there was under consideration an act of the Legislature providing for the submission to the voters of two questions. One was whether or not they would adopt a charter for the town; the other, whether they would incur a debt for the purpose of purchasing sites and erecting schoolhouses thereon. It was held that under the provisions of the Constitution hereinbefore referred to, embodied in Civ. Code 1895, § 5893, the act was void. It was there held that the constitutional provision above referred to contemplated that the question as to whether or not a debt should be incurred for a particular purpose should not be submitted to the voters in such way that they could not vote for or against it without voting for or against another separate and distinct proposition foreign to the question as to whether or not they would incur a debt for a specified purpose.

The ordinance under which the election was called in the case which we are considering did not provide that the voters should pass upon any question except the one of incurring a debt for a specified amount. It is true that the ordinance provided that the money raised from the issuance of the bonds was to be used in connection with the electric light and waterworks plant and system, and in establishing, maintaining, and operating an ice plant in connection therewith and other public utilities of the city; but there was no question submitted to the voters, except that of incurring a bonded debt in one specified amount for this purpose. There was no effort to provide for an issue of bonds, except for one fixed sum, though the money arising from the sale thereof was to be used for the purposes above stated; the amount to be used in connection with the electric light and waterworks system and the amount to be used in connection with the ice plant not being specified. The electric light and

waterworks system appears to be operated from one power house by steam, and as one plant, and the manufactory for ice is to be operated in connection with and as a part of the waterworks plant. Whether the mode of having the question in regard to the issue of bonds voted upon was a proper one was one of the questions to be determined upon the hearing before the court as to whether or not the bonds should be validated. Jurisdiction of the subject-matter of validating bonds was conferred on the court by the general validating act of 1897. The court, having jurisdiction of such subject-matter under this general act, had power to determine, on proper proceedings, whether a given municipality seeking to issue bonds had complied with all of the prerequisites for that purpose. Included among the matters which it could determine was whether or not the proper method of submitting to the voters the question as to whether or not the bonds would be issued had been pursued. Such a matter does not affect the jurisdiction of the court over the subject of validating bonds, and this was a question to be determined by the court, in the exercise of that jurisdiction, upon the hearing on the question of validation. Even if the method provided for having the question of whether or not bonds should be issued voted upon was an irregular and an improper method, we do not think the plaintiffs could take advantage of this after the judgment of validation was rendered in proper proceedings under the act of 1897 by injunction proceedings to prevent their issuance and sale. See, in this connection, *Baker v. Cartersville*, 127 Ga. 221, 56 S. E. 249. If after a hearing has been accorded to persons interested, and a formal judgment confirming an issue of bonds has been obtained pursuant to the provisions of the act, questions of this kind were permitted to be raised, the main purpose of the act would be defeated.

3. There were grounds other than those hereinbefore specially named upon which an injunction was sought. Some of them involved attacks upon the constitutionality of the validation act of 1897. Others involved attacks on the judgment by which the bonds were declared validated, and on the regularity of the proceedings upon which such judgment was based. These attacks are set forth at length in the record; but we deem it unprofitable to here repeat them, as all of the questions there made are controlled by former adjudications of this court. We are asked to review and overrule the decision in the case of *Lippitt v. Albany*, supra; but after careful consideration we decline to do so. The court committed no error in refusing the interlocutory injunction.

Judgment affirmed. All the Justices concur.

(134 Ga. 714)

WARD v. WARD et al.

(Supreme Court of Georgia. June 30, 1910.)

*(Syllabus by the Court.)***NEW TRIAL (§ 132*)—DISMISSAL OF MOTION—BRIEF OF EVIDENCE.**

Under the facts disclosed by the record, the trial judge did not abuse his discretion in dismissing the motion for new trial, upon the ground that no brief of evidence had been duly filed.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 132.*]

Error from Superior Court, Walker County; Moses Wright, Judge.

Action between F. M. Ward and J. A. Ward and others. From the judgment, F. M. Ward brings error. Affirmed.

Payne & Payne and R. M. W. Glenn, for plaintiff in error. Jas. P. Shattuck and L. W. Copeland, for defendants in error.

FISH, C. J. This case was tried at the August term, 1908, of the superior court of Walker county, and a verdict rendered in favor of the defendants. During the same term the plaintiff moved for a new trial, and an order was passed setting the hearing of the motion for the first Monday in October, 1908, and giving the movant "until the final hearing of the motion to prepare and present for approval of the court a brief of the evidence in said case." On October 5, 1908, the hearing of the motion was continued until November 10, 1908, to be then heard at Rome. For some reason the motion was not heard at that time, and it was called, in its order, on March 5, 1909, at the February term, 1909, of the court. Counsel for defendants then moved to dismiss the motion for a new trial, upon the ground that no brief of evidence had been filed. Movant's counsel insisted that the brief of evidence could not be prepared, because there were some interrogatories which were used upon the trial which he could not get from the clerk of the court. After argument upon this motion to dismiss, the judge withheld his decision thereon until April 20, 1909, when the case came up for final order. Movant's counsel then tendered a brief of evidence for approval, stating that a brief could not be completed earlier, for the reason that the clerk of the court, who had had possession of certain interrogatories used on the trial, had declined to deliver them to counsel for movant; that all the other portions of the brief had been completed for presentation prior to the February term, 1909, but a complete brief could not be made until April 19, 1909, the clerk not having delivered the interrogatories to counsel until Saturday, April 17th.

It will be seen, from the above statement of facts, that the last order, continuing the hearing of the motion for a new trial until a later date than that which had been previ-

ously fixed, was passed on October 5, 1908, and continued the hearing until November 10, 1908. As the motion was not heard on the last-mentioned date and no order setting the hearing for a later date was then passed, and it does not appear that the failure to hear the motion at that time was attributable to laches on the part of the movant, the motion went over, by operation of law, to the next term of the court, to be then called in its order and passed upon. Civ. Code 1895, § 5485. The next term of the court was the February term, 1909. On March 5th, during this term, the motion was called in its order, and no order was passed continuing the hearing until a later date, but a motion was made to dismiss the motion for a new trial, upon the ground that no brief of evidence had been filed, and this motion was argued, and, after argument, the judge simply withheld his decision upon the same until a later date, to wit, April 20, 1909, when he announced his decision sustaining the motion to dismiss. No brief of evidence was presented for approval until April 20, 1909, the date upon which the judge was to announce his decision upon the motion to dismiss. It is obvious that the time allowed the movant in the motion for a new trial in which to prepare and present for approval a brief of the evidence, which was "until the final hearing of the motion" for a new trial, had then expired. The final hearing for the motion for a new trial was on March 5, 1909, when it was regularly called, in term, for a hearing, and no order of continuance or postponement was passed. The mere holding up of the decision of the court upon the motion to dismiss could not have the effect of continuing the hearing of the motion for a new trial from the time when it was regularly called, in its order in open court, for determination until a later date. The time for the final hearing of the motion for a new trial had arrived, and had passed when the brief of evidence was presented. When it was presented, the court was not sitting for the purpose of hearing the motion for a new trial, but merely for the purpose of announcing its decision upon the motion to dismiss. The mere failure or refusal of the clerk of the court to deliver to counsel for movant in the motion for a new trial certain interrogatories, which had been used upon the trial of the case, afforded no legal reason which required the court to further postpone the final hearing of the motion, in order to give the movant more time in which to prepare and present for approval a brief of the evidence. *Boatright v. State*, 91 Ga. 13, 16 S. E. 101; *Eason v. Americus*, 106 Ga. 179, 32 S. E. 106; *Western & Atlantic R. Co. v. Callaway*, 111 Ga. 889 (1), 36 S. E. 967; *Lambert Holsting Engine Co. v. Bray*, 127 Ga. 452, 56 S. E. 513; *Brewer v. New England Mortgage Security Co.*, 130 Ga. 761, 61 S. E. 712.

Judgment affirmed. All the Justices concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(134 Ga. 678)

HUTHNANCE v. MACON RY. & LIGHT CO.
(Supreme Court of Georgia. June 24, 1910.)*(Syllabus by the Court.)***INSTRUCTIONS—REVIEW.**

Many exceptions are taken to segments of the charge, but, when the excerpts criticised are considered in respect to their relation in the charge, the criticisms are without merit. The evidence authorized the verdict, and the court did not abuse his discretion in refusing a new trial.

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by Elizabeth Huthnance, by her next friend, against the Macon Railway & Light Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Claud Estes, for plaintiff in error. R. Ellis, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(134 Ga. 677)

COHEN v. MANGUM, Sheriff.
(Supreme Court of Georgia. June 24, 1910.)*(Syllabus by the Court.)***HEARING ON HABEAS CORPUS.**

Under the ruling in the case of Loeb v. Mangum, 134 Ga. —, 67 S. E. 882, there was no error in refusing to discharge the prisoner on the hearing of the application for habeas corpus.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Application of Morris Cohen for writ of habeas corpus against C. W. Mangum, Sheriff. From an order denying the writ, Cohen brings error. Affirmed.

F. M. Hughes and Morris Macks, for plaintiff in error. Daley, Chambers & Smith, D. K. Johnston, C. D. Hill, and Lowry Arnold, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(134 Ga. 695)

BELL & COGGESHALL v. SLADE & STARR.
(Supreme Court of Georgia. June 28, 1910.)*(Syllabus by the Court.)***AUDITOR'S REPORT.**

Under the pleadings and evidence in this case, there was no error on the part of the presiding judge, to whom it was submitted on both law and facts without a jury, in overruling the exceptions to the auditor's report and sustaining the finding of the auditor.

Error from Superior Court, Pike County; E. J. Reagan, Judge.

Action between Bell & Coggeshall and Slade & Starr. From the judgment, Bell & Coggeshall bring error. Affirmed.

C. J. Lester, for plaintiffs in error. E. F. Dupree, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(134 Ga. 696)

LUPO v. GRANTHAM.
(Supreme Court of Georgia. June 29, 1910.)*(Syllabus by the Court.)***1. TAXATION (§ 788*)—TAX SALES—EXCESSIVE LEVY—TAX DEED.**

Where a tract of 10 acres of land was levied upon and sold under two tax executions aggregating \$5.60, and at the time the tax deed made in consummation of such sale was offered in evidence, upon the trial of a case involving the title to such land, no testimony had been introduced in regard to the value of such land at the time of the sale, and from the pleadings and evidence there was enough to be drawn to indicate that the land was not readily capable of division, it was error to exclude such deed from evidence, on the ground of excessiveness of the levies. This is true, although, at a later stage of the trial, a witness testified that in the year in which the sale took place the land was worth \$25 or \$30 per acre.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1561; Dec. Dig. § 788.*]

2. TRIAL (§ 252*)—INSTRUCTIONS—EVIDENCE TO SUSTAIN.

There was no evidence that the deed under which the defendant sought to prescribe was a forgery, or that there was any actual fraud, and it was erroneous to charge on those subjects in their relation to prescription.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596, 607; Dec. Dig. § 252.*]

Error from Superior Court, Pulaski County; B. T. Rawlings, Judge.

Action between R. N. Lupo and J. A. Grantham. From the judgment, Lupo brings error. Reversed.

M. H. Boyer, W. L. & Warren Grice, and Olin J. Wimberly, for plaintiff in error. Herbert L. Grice, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(134 Ga. 717)

WATTS v. PHENIX INS. CO. OF BROOKLYN, N. Y.
(Supreme Court of Georgia. June 30, 1910.)*(Syllabus by the Court.)***INSURANCE (§ 328*)—CONDITIONS OF POLICY—CHANGE OF OWNERSHIP.**

A fire policy on a storehouse recited that it was made subject to the following stipulations and conditions, among others: That the entire policy should be void "if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if any change, other than by death of the insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or voluntary act of the insured, or

otherwise." When the policy was issued the insured was the sole owner, in fee, of both the building and the land upon which it was situated. Subsequently, and without the consent of the insurance company, he sold and conveyed, in fee, to another, an undivided one-half interest in the land upon which the building was situated; the deed reciting that the grantor reserved "full title to the storehouse now on said lot, with the right to remove the same without let or hindrance from" the grantee. Such was the status of affairs when, during the life of the policy, the building was destroyed by fire. *Held*, that such sale and conveyance constituted such a change in the interest of the insured in the building as voided the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 796, 798; Dec. Dig. § 328.*]

Error from Superior Court, Butts County; E. J. Reagan, Judge.

Action by J. M. Watts against the Phoenix Insurance Company of Brooklyn, N. Y. Judgment for defendant, and plaintiff brings error. Affirmed.

Jno. R. L. Smith, for plaintiff in error. Slaton & Phillips, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(134 Ga. 717)

SMITH v. RICHARDSON.

(Supreme Court of Georgia. June 30, 1910.)

(Syllabus by the Court.)

INJUNCTION (§ 147*) — INTERLOCUTORY INJUNCTION—CONFLICTING EVIDENCE.

The judge did not abuse his discretion in granting, on conflicting evidence, the interlocutory injunction of which complaint is made.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 322; Dec. Dig. § 147.*]

Error from Superior Court, Walker County; A. W. Fite, Judge.

Action by J. W. Richardson against J. W. Smith. From an order granting an interlocutory injunction, defendant brings error. Affirmed.

H. P. Lumpkin, for plaintiff in error. Paul D. Wright and Barry Wright, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(134 Ga. 678)

FUTCH v. JAMES.

(Supreme Court of Georgia. June 24, 1910.)

(Syllabus by the Court.)

DIRECTING VERDICT.

Under the pleadings and evidence in this case, there was no error in admitting the evidence complained of and in directing a verdict for the defendant.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by J. A. Futch, administratrix, against J. E. James. Judgment for defendant, and plaintiff brings error. Affirmed.

B. L. Strange and B. B. McCowen, for plaintiff in error. J. R. Lamar and Lamar & Callaway, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(134 Ga. 696)

JOHNSON et al. v. COLEMAN et al.

(Supreme Court of Georgia. June 29, 1910.)

(Syllabus by the Court.)

DEEDS (§§ 68, 78*)—VALIDITY—WEAKNESS OF MIND.

Proof of weakness of mind, not amounting to imbecility, is not sufficient to warrant a jury in setting aside a contract; there being no proof of fraud or undue influence. *Nance v. Stockburger*, 111 Ga. 821, 36 S. E. 100.

(a) The evidence in this case was not sufficient to show a lack of mental capacity on the part of the grantor to make the deed which it is sought to set aside, nor weakness of mind on the part of the grantor, coupled with fraud or undue influence practiced upon him by the grantee, so as to avoid the deed, and the court committed no error in granting a nonsuit.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 149-155, 648; Dec. Dig. §§ 68, 78.*]

Error from Superior Court, Campbell County; E. J. Reagan, Judge.

Action by M. L. Johnson and others against W. J. Coleman and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

J. F. Golightly, for plaintiffs in error. J. S. James, for defendants in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(134 Ga. 717)

CITY OF ROME v. CROZIER.

(Supreme Court of Georgia. June 30, 1910.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 979*)—TAXES—REMEDY FOR WRONGFUL ASSESSMENT—INTERLOCUTORY INJUNCTION — CONFLICTING EVIDENCE.

This case involving the question whether the complainant and his property were within the corporate limits of the city of Rome or outside of the same, and whether he was subject to municipal taxation, and the evidence being conflicting on this subject, and involving the identification of certain streets named in the act of 1908 (Acts 1908, p. 904) altering the municipal limits, there was no abuse of discretion in granting an injunction, to continue until the final trial of the case.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2120; Dec. Dig. § 979.*]

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by J. M. Crozier against the City of Rome. From an order granting an interlocutory injunction, defendant brings error. Affirmed.

W. J. Nunnally, for plaintiff in error. McHenry & Porter and W. M. Henry, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(134 Ga. 681)

SHELTON v. SHELTON.

(Supreme Court of Georgia. June 25, 1910.)

(Syllabus by the Court.)

EXECUTION (§ 143*)—LEVY—CLAIM OF THIRD PERSON—INSUFFICIENT DESCRIPTION.

Although an entry of a levy on a *fi. fa.* standing alone would be insufficient to withstand a motion to dismiss the levy because of the lack of definiteness and certainty in the description in the entry of levy of the property levied upon, the defects in the entry of levy will be aided by the description of the property set forth in a claim affidavit, and, where the defects in the description contained in the entry of levy are cured by the aid afforded in a claim affidavit, the levy will be saved from dismissal.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 364-367; Dec. Dig. § 143.*]

Error from Superior Court, Gilmer County; N. A. Morris, Judge.

Action by Mahala Shelton against Wesley Shelton. Judgment for plaintiff, and, on a levy of execution, John W. Shelton filed claim. Levy dismissed, and plaintiff brings error. Reversed.

An execution in favor of Mahala Shelton against Wesley Shelton was levied upon certain real estate to which John W. Shelton filed a claim. Upon the trial, on motion of counsel for the claimant, the levy was dismissed upon the ground that the officer's entry did not sufficiently describe the property levied on, and the plaintiff excepted. That entry was in the following language: "Georgia, Gilmer County. I have this day levied the within *fi. fa.* on parts of land lots #51 & 22 in 11th Dist. 2nd. Sect. of Gilmer Co. (80 a. of #51, more or less, 47 a. #22), as the property of Wesley Shelton, to satisfy a *fi. fa.* issued from the superior court in favor of Mahala Shelton and against Wesley Shelton." The claim affidavit was in the following language: "Georgia, Murray County. Personally appears before the undersigned officer John W. Shelton, who on oath says that 80 acres more or less of the west side or half of lot of land number 51 in the 11th district and 2nd section of Gilmer county, Georgia, and 47 acres more or less of the northeast side of the west half of lot of land number 22 in the 11th district and 2nd section of Gilmer county, Georgia, the same being all of said west half of said lot of land except 33 acres more or less sold to M. B. Smith and described in a deed to said Smith, levied on by R. A. Pinson, deputy sheriff of Gilmer county, Georgia, by virtue of an execution issued from the superior court of

Gilmer county, Georgia, in favor of Mahala Shelton against Wesley Shelton, as the property of said Wesley Shelton, is not the property of said Wesley Shelton, but is the property of affiant," etc.

J. Z. Foster and A. H. Burtz, for plaintiff in error. Wm. Butt, for defendant in error.

BECK, J. (after stating the facts as above). While the description of the property levied upon as set forth in the entry of levy made upon the execution was so wanting in definiteness and certainty that a dismissal of the levy would have been proper had that description remained unaided, we are of the opinion that the plaintiff in execution could invoke the description contained in the claim to complete and make certain the defective description. In the case of Walden v. Walden, 128 Ga. 129, 57 S. E. 324, it is said: "The entry of levy was also objected to when offered in evidence. It was in these words: 'Levied the within *fi. fa.* on a tract or parcel of land lying in Jefferson county, Georgia, 79th district, G. M., containing one hundred acres, more or less; levied on as the property of Thomas E. Walden, and legal notice given to tenant in possession. This December 7th, 1904.' This levy, standing alone, is plainly insufficient in description. It has two aids to help it: First. It is the levy of a mortgage *fi. fa.* which could only be lawfully levied on the mortgaged property, and it is possible that some presumption as to the officer doing his duty may arise; the description, as far as it went, corresponding with that in the mortgage. Connolly v. Atlantic Contracting Co., 120 Ga. 213 [47 S. E. 575]. Second. The real saving aid to this levy, as between the parties litigant, is that the present plaintiffs interposed to such levy claims, in which they stated that the land had been levied on, and described it as in the mortgage, which description we have held above to be sufficient. The principle that, as between the parties, a defective entry of levy will be aided by the allegations or description of a claim affidavit, and that the claimant will be estopped from denying such allegations, has generally been applied to levies on personality. Pearce v. Renfro, 68 Ga. 194; Drawdy v. Littlefield, 75 Ga. 215 (5); Cohen v. Broughton, 54 Ga. 296 (1); Smith v. Camp, 84 Ga. 117 (7) [10 S. E. 539]. But it has also been applied to levies on real estate. Scolly v. Butler, 59 Ga. 849; Hollis v. Lamb, 114 Ga. 740, 742 [40 S. E. 751, 752]." And in the case of Hollis v. Lamb, supra, it was said: "It is entirely immaterial, under the facts of the present case, whether the levy showed that the lands levied on were or were not in Taylor county. The entry of levy was made by 'M. L. Riley, sheriff,' and described the lands as being in the '12th district of said county.' The claim affidavit made by Lamb, and which was a part of the record

of the case, shows on its face that it was made in Taylor county, Ga. It recites that Riley, sheriff of said county, had levied on these lands, which were in the Twelfth district of said county. Therefore this defect in the levy was cured by the recital in the claim which was filed, and rendered certain the locus of the land, and the county of which Riley was sheriff, even if the levy was not properly amendable."

Giving to the defective entry of levy the aid of the description of the property in the claim affidavit, we think the levy was saved from dismissal and the court erred in sustaining the motion to dismiss.

Judgment reversed. All the Justices concur.

(134 Ga. 665)

AKEN v. BULLARD et al.

(Supreme Court of Georgia. June 25, 1910.)

(Syllabus by the Court.)

REFORMATION OF INSTRUMENTS (§ 32*)—LACHES.

A petition by a plaintiff who seeks to reform a deed executed 23 years prior to the institution of his suit, on the ground of mutual mistake of the parties as to the meaning and effect of the terms of the deed, wherein the plaintiff's knowledge of the terms of the deed at the time of its execution is not negatived, nor any reason given as an impediment to an earlier prosecution of his claim, or to excuse his laches, is properly dismissed on demurrer.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 119-121; Dec. Dig. § 32.*]

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Action by R. H. Aken against J. H. Bullard and others. Judgment for defendants, and plaintiff brings error. Affirmed.

In 1872 the will of James Aken was duly admitted to record. He devised a certain tract of land to his grandchildren, Ransom H. Aken and Ellen Geiger, to be equally divided between them. The devise to R. H. Aken was in fee simple, and that to Ellen Geiger was in fee, defeasible upon her death without issue, with limitations over in that event to the other devisees in the will. Prior to his death, James Aken had indicated how he wished the land divided between R. H. Aken and Ellen Geiger, and had put R. H. Aken in possession of that half which he desired him to have. In 1885 R. H. Aken and Ellen Geiger (who had intermarried with one Pendergrass) executed to each other their respective deeds intended to carry into effect an agreement of partition between them in ratification of the division as indicated by their grandfather. The deed from the plaintiff to Ellen Pendergrass recited for its consideration the partition of the land, and purported to convey the land therein described to Ellen Pendergrass in fee simple, with warranty of title. On February

23, 1885, Ellen Pendergrass, upon a consideration of \$275, conveyed to J. H. Bullard her life estate in the land described in the partition deed; and subsequently, on March 18, 1899, she conveyed by deed to J. H. Bullard a fee-simple title to the same land. Copies of both deeds were attached to the petition, and it appeared that both had been recorded, the former on February 2, 1886, and the latter on March 24, 1899. In 1908 R. H. Aken brought a petition against Ellen Pendergrass and J. H. Bullard, alleging the foregoing facts, and further alleging that the deed from plaintiff to Ellen Pendergrass failed to carry out the intention of the parties thereto; that, instead of the words "forever in fee simple," which were inserted therein, the words, "to be held under the limitation and conditions in the will of James Aken," should have been inserted, and the failure to insert these words was the result of an accident and a mutual mistake under which each party labored as to the meaning of the terms used in the deed; that at the time Bullard obtained the deed from Ellen Pendergrass, purporting to convey the fee-simple estate described in the deed from plaintiff to Ellen Pendergrass, he well knew that the deed under which Ellen Pendergrass held the land was merely a deed of partition, and that she did not claim any greater interest in the land than that which she acquired under the will of her grandfather, and he well knew the purpose for which the deed from plaintiff to Ellen Pendergrass was executed, and that it was not the intention of either of the parties to the deed that the paper should have the effect of a release by plaintiff to Ellen Pendergrass of any interest in the land contingent upon her dying childless; and that Ellen Pendergrass had no children, and is now 65 years of age, and, in the event of her death without children, the plaintiff is one of the devisees under the will of his grandfather, who was to share in the land devised to Ellen Pendergrass upon the contingency of her death without children. The prayer was for the reformation of the deeds and for general relief. The court dismissed the petition on general demurrer, and this judgment is now under review.

A. S. Thurman and Cobb & Erwin, for plaintiff in error. Greene F. Johnson, for defendants in error.

EVANS, P. J. (after stating the facts as above). The doctrine of laches is founded upon the maxim, "Vigilantibus non dormientibus subveniunt leges." It rests on reasons of public policy, and its aim is intended for the repose of society by discouraging the assertion of antiquated claims. "The principles upon which courts of equity proceed in such cases," says Judge Nisbet, "is that the

lateness of the demand, arising from lapse of time, is presumptive evidence against its justice." *Adkins v. Hill*, 7 Ga. 573. Equity will relieve against mutual mistake, but only at the instance of a complainant who moves with reasonable diligence. What is a reasonable time must necessarily depend upon the peculiar facts and environments of the particular case. The deed asked to be reformed was executed 23 years before the institution of the suit to reform it. The petition does not disclose the name of the scrivener, nor is it negatived therein that the plaintiff knew of the precise terms of the deed from the date of its execution. He alleges that Bullard knew of the mistake at the time he took his second conveyance from Mrs. Pendergrass in 1899. This deed was spread upon the public records a day or two after its execution, and yet the plaintiff waited more than nine years before he aroused himself from his lethargy. No excuse is given for the plaintiff's long delay. The witnesses to the partition agreement may be dead, the scrivener may have passed away, for aught that appears in the deed. The memory of the parties may be dimmed after the lapse of a quarter century. It is incumbent on the plaintiff, in order to repel the presumption of unreasonable delay, to allege in his petition the impediments to an earlier prosecution of his claim. 12 Enc. Pl. & Pr. 834. This was not done. The laches of the plaintiff is so palpable from the petition that its dismissal on demurrer was proper. *Gould v. Glass*, 120 Ga. 51, 47 S. E. 505; *McWhorter v. Cheney*, 121 Ga. 541, 49 S. E. 603; *Basch v. Frankenstein*, 68 S. E. 75.

Judgment affirmed. All the Justices concur.

(124 Ga. 712)

HENDRIX v. VALE ROYAL MFG. CO.
(Supreme Court of Georgia. June 30, 1910.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§§ 150, 155*)—INJURY TO SERVANT—KNOWLEDGE OF DANGER—WARNING—DUTY OF MASTER.

In an action by a servant against a master for alleged failure of duty on the part of the latter in not giving to the servant warning of a danger incident to his employment, it must appear that the master knew or ought to have known of the danger, and that the servant injured did not know and had not equal means with the master of knowing such fact, and by the exercise of ordinary care could not have known it. If the danger be obvious and as easily known to the servant as to the master, the latter will not be liable for failing to give warning of it. Civ. Code 1896, §§ 2611, 2612; *Commercial Guano Co. v. Neather*, 114 Ga. 416, 40 S. E. 299; *Crown Cotton Mills v. McNally*, 123 Ga. 35, 51 S. E. 13, and cases cited. As the purpose of instructions by the master to an inexperienced servant is to enable the servant to avoid dangers incident to his employment, if the servant knows of such dangers instructions are unnecessary. *Crown Cotton Mills v. McNally*,

127 Ga. 404, 56 S. E. 452. In the absence of anything to the contrary, every adult is presumed to possess such ordinary intelligence, judgment, and discretion as will enable him to appreciate obvious danger. Therefore an adult servant of ordinary intelligence will be held to be affected with knowledge of a manifest risk or danger incident to the doing of a particular thing in the operation of a machine, during his employment, although he may be inexperienced as to such operation and though the master may have failed to instruct him in respect thereto. 1 *Labatt, Master and Servant*, § 394, and cases cited.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 297, 299-302, 305-307, 310; Dec. Dig. §§ 150, 155.*]

2. DEMURRER TO PETITION.

Applying these principles to the allegations of the petition in the present case, no cause of action was set forth, and the court properly sustained a general demurrer to the petition.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by B. J. Hendrix against the Vale Royal Manufacturing Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The substance of the petition, now material, was as follows: The plaintiff, 27 years of age, without experience in the operation of saws, was employed by defendant to operate a "bolting" saw in a shingle mill, and was instructed by defendant in its use. He continually operated the "bolting" saw for two weeks, when he was directed by defendant to operate a "shingle" saw. Being unfamiliar with the operation of a "shingle" saw, he so informed the defendant and asked to be instructed as to its operation. Defendant replied that instructions were not necessary, and directed the plaintiff to proceed to use the saw. He therefore began the operation of the "shingle" saw, "and, while making the first attempt to remove waste product remaining from the making of shingles, had his left hand caught by the machinery of the shingle saw," and three of his fingers thereby cut off. It was alleged, that a "bolting" saw is operated by hand, its purpose being to cut blocks of timber into suitable widths for shingles, while the "shingle" saw "is run by machinery, works very rapidly, and is dangerous to one not accustomed to its operation, its purpose being to split into shingles the blocks as they are delivered from the bolting saw," and therefore that the plaintiff's experience in the operation of the "bolting" saw could not aid him in the operation of the "shingle" saw. "The saw of the shingle is stationary, working in a horizontal plane." It "is fed from a carriage or superstructure, upon which is placed the shingle block. The carriage, working in a plane parallel with the saw, brings the block to the edge of the saw and at the height necessary to insure the proper thickness of the shingle, dropping the shingle into a chute, returns, and again brings the remaining por-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion of the block to the edge of the saw, cutting off another shingle. The carriage works from left to right; operator, facing the saw, adjusts the block upon the carriage and removes the waste or portion of the block from which no shingle could be cut. The carriage moves rapidly; and it is impossible for one not accustomed to judging such matters to determine from inspection the speed at which the carriage is moving, the carriage moving more rapidly than it appears." "Said shingle saw was dangerous in its operation to one without experience, and the danger was not apparent, and the petitioner did not know of the danger, and could not have known in the exercise of ordinary care; it being necessary, to operate said saw safely, to understand and appreciate that the carriage moved more rapidly than was apparent, which knowledge could only have been obtained from experience or proper training; and, further, that the proper time for the operator to move the waste product was when the carriage was moving from right to left, and not, as did your petitioner attempt to move the same, while the carriage was moving from left to right. * * * This difference was not apparent to an inexperienced man, and could not have been known in the exercise of ordinary care. * * * These dangers were known to the company, as was * * * petitioner's inexperience and unfamiliarity with the use of the machine. * * * It was the duty of the company to have instructed * * * petitioner in the operation of the saw, and to have warned him of the dangers incident to such operation."

Cann, Barrow & McIntire, for plaintiff in error. Garrard & Meldrim, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(134 Ga. 710)

BARTON-PRICE CO. v. MURPHY & CO.
(Supreme Court of Georgia. June 30, 1910.)

(Syllabus by the Court.)

1. TRESPASS (§ 40*)—ATTACHMENT (§ 273*)—PLEADING—SUFFICIENCY OF PETITION.

The petition set forth a cause of action, and therefore it was error to dismiss it on general demurrer.

[Ed. Note.—For other cases, see TRESPASS, Cent. Dig. §§ 80-88; Dec. Dig. § 40; * Attachment, Dec. Dig. § 273.*]

(Additional Syllabus by Editorial Staff.)

2. ATTACHMENT (§ 294*)—CLAIMS BY THIRD PERSONS—NATURE OF RIGHT.

The right of a third person to claim the property in attachment is merely cumulative and his failure to make such claim does not affect his rights.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 294.*]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by the Barton-Price Company against Murphy & Co. A demurrer to the petition was sustained, and plaintiff brings error. Reversed.

The Barton-Price Company, a Kentucky corporation, brought an action for damages against Murphy & Co., of Richmond county, Ga. The substance of the allegations of the plaintiff's petition was as follows: Murphy & Co. brought an attachment proceeding in a justice's court against the Atlas Hay & Grain Company and the Barton-Price Company to recover the amount of an account alleged to be due to plaintiffs by defendants, the ground of the attachment being that defendants were nonresidents. A summons of garnishment was issued against the Irish-American National Bank, and one was also issued against C. A. Doolittle & Son. The bank answered that it had in its possession "bill of lading for car S. A. L. No. 19464, which said bill of lading was made out to the Atlas Hay & Grain Company, consignor and consignee," and that at the time of the service of the summons of garnishment an assignment, dated July 6, 1905, was in its hands, and it held the bill of lading subject to the order of the Barton-Price Company. Attached to the answer of the bank was the original assignment or transfer of the bill of lading by the Atlas Hay & Grain Company to the Barton-Price Company, from which it appeared that it was executed in Louisville, Ky., on July 6, 1905. C. A. Doolittle & Son answered, that, at the time of the service of the summons of garnishment upon them, they had in their possession "a car S. A. L. No. 19464, upon storage, said car having been stored with [them] by the Georgia Railroad." By consent of the parties, the hay with which the car was loaded was sold and the proceeds arising from the sale deposited with C. A. Doolittle & Son, to await the final determination of the case. Murphy & Co., plaintiffs in the attachment proceedings, filed their declaration, in which they claimed that defendants were indebted to them in the sum of \$58.07, as per itemized statement of account thereto attached; but the itemized account attached to the declaration was made out against the Atlas Hay & Grain Company only. The suit was defended only by the Barton-Price Company, the other defendant not entering an appearance in the justice's court. Upon the trial the magistrate awarded judgment in favor of the plaintiffs against both defendants for the principal amount sued for and interest, and then rendered judgment against C. A. Doolittle & Son, as garnishees, "for the contents of car S. A. L. No. 19464." The case was repealed to the superior court by the Barton-Price Company. In the superior court this company reduced its plea to writing and

filed the same, wherein it denied that it was indebted to the plaintiffs; that it had ever been jointly associated with the Atlas Hay & Grain Company; and that it had any property that was legally subject to attachment under any claim of the plaintiffs. Upon motion of the plaintiffs, in the superior court, "the attachment against the appellant, the Barton-Price Company," was dismissed. After the dismissal of the attachment as to the Barton-Price Company, Murphy & Co., "without warrant of law, but under an illegal and void execution, unlawfully and illegally seized and took possession of the proceeds of petitioner's said hay, and with full knowledge of the fact that said proceeds were the property of said Barton-Price Company, and converted the same to their own use." The execution issued by the justice of the peace against the defendants in the attachment proceeding in the justice's court "was a nullity and utterly void and invalid, said Atlas Hay & Grain Company being nonresidents of Georgia, and said attachment proceedings having been dismissed by Murphy & Co. as to Barton-Price Company," and no property of the Atlas Hay & Grain Company having been "brought into court so as to confer jurisdiction over it," and there being "none over the property of the Barton-Price Company." The title to the hay was in the Barton-Price Company at the time of the issuance and levy of the attachment, which ownership was well known to Murphy & Co. The attachment proceedings were not sued out in accordance with law, do not set forth any grounds upon which an attachment could be issued, and as to the Barton-Price Company had no basis in fact, and were a deliberate invasion of its rights. The unlawful action of Murphy & Co. was a trespass upon the property and property rights of petitioner; and the appropriation by them of petitioner's property, under and by virtue of said illegal and void execution, was an aggravation and an additional trespass. By reason of these acts of Murphy & Co. petitioner has been damaged in the sum of \$1,000 for which it prays judgment. Copies of the various papers or documents and the judgments referred to in the petition were attached thereto as exhibits.

The defendants filed a general demurrer to the petition, which was sustained by the court, and the petitioner excepted.

P. C. O'Gorman and Sidney Smith, for plaintiff in error. Julian J. Zachry, for defendant in error.

FISH, C. J. (after stating the facts as above). When Murphy & Co. dismissed the attachment as to the Barton-Price Company, a foreign corporation, the case stood just as if it had been originally brought against the Atlas Hay & Grain Company alone, and the

judgment rendered in the justice's court against the Atlas Hay & Grain Company, as defendant, C. A. Doolittle & Son, as garnishees, and the property in the hands of the latter, did not render such property subject to the judgment, if the property belonged to the Barton-Price Company. As the petition in the present case alleged that the Barton-Price Company, the plaintiff, owned the property which was in the possession of C. A. Doolittle & Son, and that Murphy & Co. appropriated it to their own use, under an execution issued upon the judgment above referred to, it is apparent that the petition, as against a general demurrer, set forth a cause of action for trespass. The failure of the Barton-Price Company to claim the property did not affect its right of action, since the remedy by claim is merely cumulative.

Judgment reversed. All the Justices concur.

(124 Ga. 696)

O'FARRELL v. VONDEREAU.

(Supreme Court of Georgia. June 29, 1910.)

(Syllabus by the Court.)

1. BOUNDARIES (§ 11*)—DESCRIPTION—ADJACENT LAND.

When the boundary given in a deed is the land of a named person, the description of this particular boundary will be sufficient, although the title of such third person may be defective, if it be made to appear that the maker of the deed recognized him as the owner and as claiming the land, and the boundary line of the adjacent tract is established by competent extraneous evidence.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 92; Dec. Dig. § 11.*]

2. EXCESSIVE TAX LEVY.

The evidence was sufficient to support the finding of the jury against the contention of the plaintiff that the levy of a tax *fi. fa.*, which was the foundation of a tax deed to claimant's predecessor in title, was void because excessive.

Error from Superior Court, Clarke County; C. H. Brand, Judge.

Action by K. C. O'Farrell against one Ficklin. Judgment for plaintiff, and on a levy of execution, E. H. Vondereau, administrator, filed a claim. Judgment for plaintiff, and defendant brings error. Affirmed.

W. M. Smith, Henry C. Tuck, and Cobb & Erwin, for plaintiff in error. T. S. Mell, for defendant in error.

BECK, J. Mrs. O'Farrell, who was transferee of a mortgage *fi. fa.* against one Ficklin, had the same levied upon a tract of land embracing 25 acres, to which Vondereau filed a claim. Upon the trial of the issue thus made the jury returned a verdict in favor of the claimant. Vondereau purchased the land in question from one Davis, who purchased it at a tax sale under and by virtue of a tax *fi. fa.* against Ficklin. The following is a description of the land in the

levy of the tax *fi. fa.* referred to, and substantially the same description of the land is contained in the deed from the sheriff to Davis, and in the deed from Davis to Vondereau: "The tract or lot of land lying in the 216 district, G. M., said county, containing twenty-five acres, it being a part of the W. H. Ficklin lands, bounded on the west by Sandy creek bridge road; on the north by part of the Ficklin lands; on east by unknown street; on south by lands owned by Loan Association of Henrico County, Va., Thomas Potts, Treasurer." For a more detailed statement of the facts, see *Moody v. Vondereau*, 131 Ga. 521, 62 S. E. 821. The verdict being in favor of the claimant, and the court having overruled a motion for a new trial, the plaintiff in the mortgage *fi. fa.* excepted. While the motion contains several grounds, in substance the attack upon the verdict is based upon two contentions only. The first is that the sheriff's deed to Davis is void because of insufficiency in the description of the land sold—that is, the tract of land in controversy—and the second ground of attack is that this deed was void because of the excessive levy by virtue of which the tax sale at which Davis was purchaser was made.

1. An examination of the levy under which the tax sale was made, and of the deed to Davis, the purchaser at the sale, discloses that the western and eastern boundaries of the tract of land in question are, respectively, a road and a street; and while the street is described as an unknown street, and the character of the road which constituted the western boundary of the land is somewhat in question, both road and street are sufficiently fixed and certain as boundaries of the tract of land on the western and eastern sides. Now, if the southern boundary can be determined and is susceptible of exact location, then, as the deed calls for a definite acreage, the determination of the northern boundary becomes merely a matter of mathematical calculation. The southern boundary calls for the land "owned by Loan Association of Henrico County, Va., Thomas Potts, Treasurer." A tax deed from Weir, sheriff, to Thomas Potts, was introduced in evidence. This deed conveyed "about 25 acres of land, more or less, in Clarke county, Georgia, in the corporate limits of the city of Athens, and bounded as follows: On the west by Sandy creek bridge road, on the north by other lands of W. H. Ficklin, on the south and east by streets, said land being in a triangular shape." In the case of *Moody v. Vondereau*, supra, it was said: "Any description will suffice which identifies the land with such certainty that the specific parcel intended to be granted can be ascertained, either by the calls of the instrument as applied to the land, or by aid of the descriptive portions of the grant." And in the same case it was said that even if it be conceded that the deed from Weir, sheriff, to

the Loan Association of Henrico County was invalid because of its indefinite description of the land, it would not follow from this circumstance that the call for the loan association tract as a southern boundary could not furnish a line of boundary between the parcel of land claimed to be owned by the loan association and that sold to Davis. "The call of the Davis deed for the southern boundary therein described is not for the deed to Potts, treasurer, or any lines fixed in that deed, but for the line of another tract of land, viz., that of the Loan Association of Henrico County, Va. Where the line of another tract is called for in the description of a deed as one of the boundaries of the land conveyed, the line must be run to such boundary line. If the boundary is given as the land of another, the description of this particular boundary will be sufficient, although the name of the person given as an adjoining owner may be incorrect, if it be made to appear that the maker of the deed recognized him as the owner, and as claiming the land at the time the deed was made. 2 Devlin on Deeds, § 1014. The designation of another tract as a boundary is part of the description of the land conveyed, and extrinsic evidence is admissible to show its location. When this is done, the line of such tract becomes the boundary line of the land called for by the deed." *Moody v. Vondereau*, 131 Ga. 525, 62 S. E. 821. And we are of the opinion that on the last trial of this case there was sufficient evidence from which the jury would be authorized to find that the northern boundary of the tract of land referred to as Potts land (that is, the land sold to the loan association) had been surveyed and located so as to be capable of ascertainment at the time of the levy of the tax *fi. fa.* under which the tax sale of the land in controversy to Davis was made. We do not think that the fact that the loan association of which Potts was treasurer may never have had any title to the land known as the Potts land, because of the defect in the sheriff's deed to the loan association, affects the question under consideration. It is not a question as to who was the actual owner of the land, the northern boundary of which is called for as the southern boundary of the tract of land conveyed by deed from Davis to Vondereau; but the question is whether that northern boundary of the first tract of land had been located and surveyed and so known at the time of the levy under which the tax sale was made to Davis; and, if the boundary of the Potts land had been surveyed and located, then the oral testimony of those who knew of the location and survey, together with the description in the deed from the sheriff to Davis, could render the identification of the lands conveyed at the tax sale to Davis complete, and the deed from the sheriff to Davis was not void for want of sufficiency in description, and the deed from Davis to the

claimant likewise was not so wanting in sufficiency of description as to be invalid.

2. The question as to whether or not the levy of the tax *fi. fa.* by virtue of which at a tax sale the property in controversy was sold and conveyed to Davis was excessive and the sheriff's deed to Davis void was submitted under the court's instructions (to which the plaintiff in error takes no exception) to the jury, and there was sufficient evidence to uphold their finding.

Judgment affirmed. All the Justices concur.

(3 Ga. App. 51)

E. E. FORBES PIANO CO. v. HIXON.

(No. 2,664.)

(Court of Appeals of Georgia. July 5, 1910.)

(Syllabus by the Court.)

1. DISMISSAL AND NONSUIT (§§ 19, 65*)—
"SET-OFF" — DISMISSAL AFTER SET-OFF
FILED.

After a plea of set-off is filed, the plaintiff cannot dismiss his action so as to interfere with the plea, unless by leave of the court, on sufficient cause shown, and on terms prescribed by the court. Civ. Code 1895, § 3754. A plea of set-off is a cross-action, and, after it is filed, the defendant is entitled to prove his case, and, if the evidence authorizes it, he is entitled to a judgment. A plaintiff cannot defeat this right by dismissing the original action in vacation, nor can the court on its own motion dismiss or nonsuit the case, and thus deprive the defendant of the benefit of his cross-action. *Lewis v. Wall*, 70 Ga. 649.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 33-36, 160; Dec. Dig. §§ 19, 65.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6439-6444; vol. 8, pp. 7798, 7799.]

2. DISMISSAL AND NONSUIT (§ 19*)—GROUNDS.

The defendant having been served in the county in which the suit was filed, and having filed an answer pleading a set-off, without protest as to the jurisdiction of the court, and there being no evidence to the effect that the defendant was not a resident of that county, the plaintiff had no ground for dismissing its suit or for complaining of the judgment rendered.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 33-36; Dec. Dig. § 19.*]

3. CONTINUANCE (§ 20*)—GROUNDS—ABSENCE OF COUNSEL.

It appearing that the plaintiff was notified that its case, in which the plea of set-off had been filed, had been set for trial upon the calendar for a certain day, and was, by the notice, informed that the defendant was insisting upon this plea of set-off, and it further appearing that neither the plaintiff nor its counsel (though the plaintiff had more than one attorney) was present to prosecute the action, and the only reason assigned by the plaintiff for failure to be present being the absence of one of its attorneys, and the showing for his absence being insufficient; *held*, that the trial judge did not err in proceeding with the trial, nor in refusing to grant a motion for a new trial, based upon the ground that a continuance should have been granted.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 51, 53-57; Dec. Dig. § 20.*]

Error from City Court of Polk County;
F. A. Irwin, Judge.

Action by E. E. Forbes Piano Company against Will Hixon. Judgment for defendant, and plaintiff brings error. Affirmed.

F. W. Copeland and Geo. A. H. Harris & Sons, for plaintiff in error. J. L. Tison, W. H. Trawick, and E. S. Ault, for defendant in error.

RUSSELL, J. The E. E. Forbes Piano Company brought a suit against Hixon in the city court of Polk county for \$528.46. To this petition the defendant filed a plea of set-off, admitting the plaintiff's claim, but exhibiting a larger counterclaim in his own favor, and asking a judgment against the plaintiff for the excess, amounting to \$118.61. Attached to the plea was a statement in which there purported to be very minutely detailed every transaction between the plaintiff and the defendant during the period in which the defendant was employed by the plaintiff. The defendant's answer was filed June 19, 1909, and on December 11, 1909, the general manager of the plaintiff company undertook to have the suit dismissed, without the consent of the company's attorneys, and, so far as appears from the record, without the knowledge of the court. The case coming on regularly for trial at the January term, 1910, the defendant testified to the correctness of the various items of the statement attached to his plea of set-off, and that the amount in excess of the plaintiff's demand, for which he asked judgment, was correct and due; and a verdict and judgment were rendered in his favor. Before the adjournment of the court the plaintiff filed a motion for a new trial, which was refused; and exception is taken to the judgment overruling the motion for a new trial.

It appears that the plaintiff not only did not have the consent of the defendant, which was essential, in order to enable it to dismiss the suit, but that it paid the costs, and attempted to withdraw the action without regard to the plea of set-off, without leave of the court, and over the protest of the attorneys who had filed the suit. Under the provisions of the Civil Code of 1895, § 3754, after a plea of set-off is filed, a plaintiff cannot dismiss his action so as to affect the plea of set-off, unless by leave of the court on sufficient cause shown, and on the terms prescribed by the court. While, therefore, the plaintiff had the right to dismiss the suit, or at least to abandon the hope of a recovery against the defendant, it could not prevent the defendant's recovering against it, unless the defendant failed to prove his claim or the plaintiff disproved it to the satisfaction of the jury. The court therefore did not err in proceeding with the trial, even after the attempt of the plaintiff to dismiss the action.

The court went to the trouble of having the plaintiff notified that the case had been set down for trial upon the calendar fixed for the January term. It was not required that this should be done. The counsel who filed the plaintiff's petition also notified its general manager that the case had been set for trial. And yet there was no appearance on the part of the plaintiff company, either by its general manager or any other representative of the company, or by either of its counsel. The contention is made that the court erred in refusing a new trial, because the case should have been continued on account of the absence of one of the attorneys. We do not think the court erred in not continuing the case. The court was not required to continue it on his own motion without any showing whatever. We do not say that there are not instances in which it may sometimes be proper to give a case this direction, but certainly, under the facts appearing in this record, the trial judge did not abuse his discretion in not granting a continuance. The only reason given by the general manager for his absence is that one of his attorneys was unable to attend at that term of the court. The absence of the attorney did not afford any legal reason for the absence of the plaintiff's agent. He should have been present to supply the necessary proof as to the absence of his counsel, the fact that such counsel was employed, and to show the court why he could not safely go to trial in the absence of such counsel. The plaintiff had more than one attorney. Only the absence of the leading counsel would, in any view of the case, have required a continuance; and it was for the plaintiff in the first instance to let the court know upon which attorney he most relied. Certainly the absence of the attorney under the circumstances we have mentioned afforded no excuse for the absence of the client, and, if it did, the court had no information upon the subject. Taking the affidavit of the plaintiff's attorney to be true, no reason is shown why the court was not informed of the facts to which the absence of counsel was due; and, furthermore, the facts stated did not present a sufficient reason for a continuance of the case, because it does not appear that Mr. Copeland (the absent attorney referred to) was the sole attorney, or that there was any reason why his presence was more necessary in Chattooga county court than in the city court of Polk county. We are clear that the judge did not err in overruling the motion for a new trial. The showing made authorized the inference that the plaintiff was so extremely negligent of its interests that it cannot ask relief. The fullness with which the facts are stated, in connection with the rulings in the second and third headnotes, render any further elaboration unnecessary. Judgment affirmed.

(8 Ga. App. 37)
DOLVIN, DAVIDSON & CO. v. W. W. STOVALL CO. (No. 2,529.)
 (Court of Appeals of Georgia. July 5, 1910.)
(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 117*)—APPEAL TO JURY—WHEN LIES.

From a judgment of a justice's court, dismissing a case for want of prosecution, an appeal to a jury does not lie. If there is error in the judgment, certiorari is the remedy to have the case reinstated. *Humphries v. Blalock*, 100 Ga. 404, 28 S. E. 165; *Toole v. Edmondson*, 104 Ga. 776, 31 S. E. 25.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 372; Dec. Dig. § 117.*]

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Action between Dolvin, Davidson & Co. and the W. W. Stovall Company. From the judgment, Dolvin, Davidson & Co. bring error. Affirmed.

Geo. A. Merritt, for plaintiffs in error.
 Saml. H. Sibley, for defendant in error.

HILL, C. J. Judgment affirmed.

(8 Ga. App. 20)
TYGART v. SUTTON et al. (No. 2,392.)
 (Court of Appeals of Georgia. July 5, 1910.)
(Syllabus by the Court.)

APPEAL AND ERROR (§ 1002*)—CONTRACTS (§ 252*)—SALES (§§ 428, 442*)—EVIDENCE (§ 402*)—CONCLUSIVENESS OF VERDICT—RESCISSION OF CONTRACT—NOTES FOR PRICE OF GOODS SOLD.

No error of law appears, and the verdict is supported by the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3935; Dec. Dig. § 1002.* *Contracts*, Cent. Dig. § 1145; Dec. Dig. § 252.* *Sales*, Cent. Dig. §§ 1214-1223; Dec. Dig. §§ 428, 442.* *Evidence*, Cent. Dig. § 1799; Dec. Dig. § 402.*]

Error from City Court of Nashville; R. Eve, Judge.

Action by J. W. Sutton and others against S. T. Tygart. Judgment for plaintiffs, and defendant brings error. Affirmed.

Hendricks & Christian, for plaintiff in error. J. P. Knight and W. G. Harrison, for defendants in error.

HILL, C. J. The plaintiffs sued for damages resulting from an alleged breach of contract. The jury found a verdict in their favor for the full amount of the suit, and the defendant's motion for a new trial was overruled. The case made by the plaintiffs may be stated in substance as follows: They bought from the defendant a gasoline engine with express warranties. After a trial of the engine, it failed to fulfill these warran-

ties, and they so informed the defendant, who then agreed with them that if they would give him two promissory notes, aggregating the sum of \$625, he would furnish them, in lieu of the gasoline engine, a steam engine and boiler, and that the two notes would be a payment by them on the steam engine and boiler, to be furnished in the early autumn; that relying upon these representations, and with the understanding that he was to furnish to them a steam engine and boiler and that the notes were to be accepted as a payment thereon, they executed and delivered to him two promissory notes; that, after getting possession of these two notes, he transferred them for value, before due, to an innocent purchaser, and, as they had no defense to the notes, they being negotiable notes in the hands of an innocent purchaser, they were compelled to pay them to the holder. They charge that the defendant acted in bad faith in his representations made to them when they executed the notes; that he did not intend to furnish the steam engine and boiler in pursuance of his agreement and promise; and that although they frequently demanded that he comply with his contract and furnish the steam engine and boiler, tendering to him the gasoline engine, he refused to do so; and the suit is to recover as damages the amount of the two notes. Their petition contained also a count for other damages resulting to them from the failure of the defendant to comply with his contract, but that count was stricken on demurrer, and the suit was tried alone on the count to recover the amount of the two notes as damages. The defendant denied the allegations of the plaintiffs, and contended that they bought from him the gasoline engine under an express warranty, that the engine fulfilled the warranty, and that the notes were given by the plaintiffs in payment of the gasoline engine. He denied specifically that any rescission was made of the first contract, or that he agreed to take back the gasoline engine and to furnish a steam engine and boiler. On the issues thus made in the pleadings and the proof, the jury settled the conflict in favor of the plaintiffs, and, as the evidence of the plaintiffs fully supports the verdict, this court is not authorized to interfere, unless the trial court committed some material legal error prejudicial to the defendant.

The principal ground of defense relied upon, presented both by the general demurrer and by exceptions to the evidence, was that the notes sued on were unconditional contracts in writing, and that the plaintiffs were attempting to set up an additional or verbal contract at variance therewith. We do not think that this well-settled principle of law is applicable to the facts of this case as shown by the evidence of the plaintiffs and as found true by the jury. According to this evidence, there was a mutual rescission of

the first contract, and another contract was made, which was breached by the defendant. Of course, the parties had the right to mutually rescind the first contract. Civ. Code 1895, § 3710.

The defendant insists that the purchasers could not have defended against the notes for the purchase money of the gasoline engine, and, inasmuch as they had paid the notes, they could not recover for the breach of the contract. Even under this test, we think the purchasers of the engine could have defended against the notes if they had been sued by the payee, for in such a suit they could have inquired into the consideration of the notes, and, under a plea of a breach of express warranty, which is substantially equivalent to a plea of failure of consideration, could have shown that the consideration had failed because the warranties made at the time of the purchase had not been satisfied. Therefore, if the notes were given for the purchase of the gasoline engine as claimed by the defendant, this did not preclude an inquiry into the consideration, and proof of the failure of consideration, because the express warranties had not been fulfilled. See the recent case of Pryor v. Ludden & Bates Southern Music House, 134 Ga. —, 67 S. E. 654, where the court fully discusses what is known as the "parol evidence rule," and cases in which it is applicable, and also cases in which it is not applicable. But, as before stated, the jury found that the contentions of the plaintiffs were true, that the sale of the gasoline engine had been rescinded by mutual consent, and that the notes were not given in payment of the gasoline engine, but were to be credited by the defendant on the new steam engine and boiler which he agreed to furnish them in lieu of the gasoline engine, which had not come up to the express warranties and which had proven unsatisfactory. Under these facts, it is clear that the particular phase of the parol evidence rule is not applicable. The ruling on this point disposes of the main defense set up, and of the different views of the defense presented to this court by demurrer, and the majority of the grounds contained in the motion for a new trial as amended, and really leaves in the case only one material question for the decision of this court, to wit, whether the amount of the notes was, under the evidence, the correct measure of damages.

It is insisted by plaintiff in error that the only measure of damages was the difference between the purchase price of the gasoline engine and its value on the day of the breach of the contract, if any breach was shown, and that, as the plaintiffs did not attempt to show the value of the gasoline engine, the verdict was without any evidence to support it. We do not concur in this opinion. The verdict of the jury, finding the contentions of the plaintiffs to be the truth of the case,

eliminated the gasoline engine entirely. The notes which the plaintiffs had to pay in the hands of an innocent holder were given in pursuance of the new agreement entered into, and were to be credited on the steam engine and boiler. This steam engine and boiler were never furnished to the plaintiffs by the defendant. They were therefore entitled to recover from him the amount of the notes which they had been compelled to pay, and the consideration of which, so far as the defendant was concerned, had completely failed. They got nothing for these notes, and, as the defendant had breached his contract, according to the verdict of the jury, they were entitled to be paid the amount of the notes. From the amount of the notes, if the defense had been made and the evidence had supported it, the rental value of the gasoline engine during the time it had been used by the plaintiffs should have been deducted, and the difference would have constituted the true measure of damages under the facts of this case. But, as no such defense was made, the jury did not err in finding as the true measure of damages the amount of the notes with interest thereon.

In our opinion no error of law was committed by the trial court, and there is sufficient evidence in the record to support the verdict.

Judgment affirmed.

(7 Ga. App. 755)

BURGIN & SONS GLASS CO. et al. v. McINTIRE et al. (No. 2,286.)

(Court of Appeals of Georgia. June 14, 1910.)

(Syllabus by the Court.)

1. ATTORNEY AND CLIENT (§§ 179, 192*)—LIEN FOR SERVICES—NATURE.

The statutory lien given to an attorney at law arises upon his employment, and is perfected by the ultimate recovery of the judgment for his client. As between the attorney and the client, or as between the attorney and other creditors of the client, it is not essential to the validity of the lien that it should be filed or recorded, or enforced by foreclosure.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. §§ 179, 192.*]

2. JUDGMENT (§ 538*)—PETITION—TIME FOR FILING—WAIVER BY DEFENDANT—EFFECT.

The defendant can waive the time of the filing of the petition, so as to authorize the rendition of a judgment binding upon him at a term earlier than that at which the case would be in order for trial according to statute, but the judgment so rendered would not affect the interests of third persons. Except as to the defendant himself, his waiver neither enlarges nor diminishes the jurisdiction of the court. If such consent is entered, but the case is not tried until the court has acquired jurisdiction regularly, the judgment then rendered is within the usual statutory jurisdiction of the court and is as binding as ordinary judgments. The delay in trying the case and entering judgment until the court has acquired jurisdiction

according to law makes the waiver as to the time of filing the petition wholly immaterial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 983; Dec. Dig. § 538.*]

3. EXECUTION (§ 324*)—PREFERRED CLAIMS.

Where property is sold under execution and the fund realized is applied by the court on a rule against the sheriff to prior judgments or liens, the attorney for the plaintiff in execution is not entitled to be paid a fee out of the fund for bringing it into court.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 324.*]

(Additional Syllabus by Editorial Staff.)

4. EXECUTION (§ 324*)—PREFERRED CLAIMS.

Under Civ. Code 1895, § 2814, par. 3, giving an attorney a lien upon property recovered in suits for recovery of personalty for his fees, superior to all liens except those for taxes, which may be enforced by the attorney or his representative as liens upon personalty and realty, by mortgage and foreclosure, attorneys are entitled to have their liens for services paid out of the fund arising from execution sale of defendant's property which they have recovered as attorneys.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 324.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Proceedings for distribution of a fund in a sheriff's hands realized from an execution sale. From the order of distribution, Burgin & Sons Glass Company and others bring error. Affirmed.

Wm. W. Gordon, Jr., for plaintiffs in error.
Cann, Barrow & McIntire, A. L. Alexander, and Edmund H. Abrahams, for defendants in error.

HILL, O. J. The questions in this case arise on a rule against the sheriff to distribute a fund in his hands realized from the sale of personal property under execution. By consent the questions were submitted to the judge, without the intervention of a jury. The claimants of the fund and the claims thereon were: (1) Burgin & Sons Glass Company, under a judgment dated February 7, 1908. On this judgment an execution had been issued, and the property of the defendant sold by the sheriff, and the fund then in court for distribution realized. (2) Burgin & Sons Glass Company claimed an attorney's fee and costs for bringing this fund into court. (3) A justice's court execution in favor of Bishop & Babcock Company dated November 9, 1907. (4) An execution in favor of Witteman Bros., from the city court of Savannah, dated September 9, 1907. (5) A claim of lien by Cann, Barrow & McIntire for attorney's fees, for recovery of the property of the defendant in execution which had been sold by the sheriff, and from which the fund for distribution had been realized. (6) Costs of court. The fund was not sufficient to pay all the claims, and the court, after hearing the evidence, directed the sheriff to pay it out in the fol-

lowing order of distribution: (1) Cann, Barrow & McIntire, \$50; (2) costs of court; (3) execution in favor of Witteman Bros.; (4) execution in favor of Bishop & Babcock Company; (5) the balance of the fund, if any, to Burgin & Sons Glass Company's execution. The court disallowed the fee claimed by Burgin & Sons Glass Company for bringing the fund into court. Burgin & Sons Glass Company and Bishop & Babcock Company except to this judgment of distribution, in so far as it holds that Cann, Barrow & McIntire were entitled to a lien as attorneys, and to the preference of payment awarded to the execution in favor of Witteman Bros., and to the disallowance of an attorney's fee for bringing the fund into court. The specific grounds of objection will sufficiently appear in the course of this opinion.

The evidence pertinent to these grounds of objection, briefly stated, is as follows: Cann, Barrow & McIntire, as attorneys, had recovered from the trustee in bankruptcy the property which had been levied upon by the sheriff and sold under an execution in favor of Burgin & Sons Glass Company against the Kalola Company, and out of which the funds in the hands of the court for distribution had been realized. The contention was that these attorneys had not filed for record in the clerk's office their claim of lien on the property alleged to have been recovered by them, and had taken no steps otherwise to enforce it, but had appeared at the sheriff's sale of the property, and had then given notice that they did claim a lien on the property sold; that they did not in any manner take any steps to assert their lien against the property, and should not now be allowed to come into court, without having complied with any of the statutory requirements for the enforcement of their lien as attorneys, and claim the fund realized from the sale of the property on the mere proof of their services in recovering it; that to have entitled them to a lien on the fund in question they should not only have filed and recorded their lien, but should have perfected it by foreclosure. As to the execution in favor of Witteman Bros., the evidence shows that Witteman Bros. brought suit against the Kalola Company in the city court of Savannah, at the November term, 1906; that the petition was not filed, as required by the statute, 14 days before the return day of the court, but was filed on the first day of the term, and there was no process annexed to the petition. There was a written waiver of the time of filing and of process and service, and an acknowledgment of service by counsel for the defendant. The judgment was rendered on this suit on September 9, 1907, and an execution issued thereon on September 11, 1907.

1. The court did not err in holding that Cann, Barrow & McIntire were entitled to an attorney's lien, and that this lien should be

first paid out of the fund arising from the sale of the property of the defendant which they had recovered as attorneys. Civ. Code 1895, § 2814, par. 8. The statutory lien given to an attorney at law arises upon his employment, and is perfected by the ultimate recovery of the judgment for his client. *Lovett v. Moore*, 98 Ga. 158, 26 S. E. 498. "As between the attorney and his client, or as between him and other creditors of the latter, the filing or recording of his assertion claiming a lien on the property recovered by him is not essential to its validity." To make it good against innocent purchasers of the property it must be filed and recorded, but as against the client and other creditors such filing and recording are not necessary in order to make it a valid lien on the property. Civ. Code 1895, § 2814, par. 4; *Coleman v. Austin*, 99 Ga. 629, 27 S. E. 763.

2. The court did not err under the facts of the case in holding that the execution in favor of Witteman Bros., which was based on a judgment prior in date to the judgments in favor of the other claims, was entitled to precedence. The validity of the judgment in favor of Witteman Bros. is assailed on the ground that suit was not filed within 14 days of the first day of the term as required by the statute, but was filed on the first day of the term, and because there was no valid process, and it is insisted that these two defects rendered this judgment void as to third parties, whatever might be its validity as to the defendant. In so far as the lack of process is concerned, the defendant would have the right to waive process (Civ. Code 1895, § 4983), and, even without an express waiver, appearance and pleading to the merits as in this case would in law amount to a waiver (Civ. Code, § 4981), and a judgment thereafter rendered would be binding, not only upon the defendant, but upon all persons. We do not think, however, that the statutory period within which the law requires a petition to be filed, can be waived by the defendant, so as to prejudice the rights of third persons. The waiver would be good as to him, but would not confer such jurisdiction upon the court as would authorize it to render a judgment that would be valid against the rights of third persons. The Civil Code, in section 5079, expressly declares that while "parties by consent, express or implied, cannot give jurisdiction to the court as to the person or subject-matter of the suit, it may, however, be waived, so far as the rights of the parties are concerned, but not so as to prejudice third persons." If, therefore, the facts in this case show that the rights of third persons were prejudiced by the waiver of the defendant as to the time of filing the petition of Witteman Bros., the judgment rendered in the case would be invalid as to them. The suit was marked filed as on the first day of the November term, 1906. The statute requires suits to be filed 14 days before the term, and therefore the suit was returnable to the next

term of the court, which would have been in January, 1907. The plaintiff did not take a judgment on the suit until September 9, 1907, which was in the third term of the court after the term to which the suit was brought, and the trial judge put his ruling on the ground that the delay in taking the judgment until the third term of the court to which the suit was filed rendered the waiver of filing immaterial and harmless, in so far as the rights of these judgment creditors were concerned. The judgment was not rendered any earlier because of the consent, but was rendered at a term when, without the waiver, judgment was in order.

The case of *American Grocery Co. v. Kennedy*, 100 Ga. 462, 28 S. E. 241, which is relied upon by plaintiff in error, is distinguished from this case by the fact that the judgment in that case was rendered on the first day of the term, which was the day of the filing of the suit, and because of this fact the judgment was prejudicial to the rights of the other creditors, and therefore was not binding upon them. The determining factor in the case is whether the judgment in any way prejudiced the rights of other creditors of the defendant because of the waiver. The defendant could not waive the time of filing so as to affect prejudicially the rights of third persons; and if this waiver did not and could not have affected prejudicially the rights of third persons, the judgment would be valid as against them. In other words, it is against the policy of the law that a defendant, by waiving the statutory requirement as to the time of filing suits against him, should be permitted to give an advantage to one creditor over others who have obtained their judgments at the time and in the manner prescribed by law. *Beach v. Atkinson*, 87 Ga. 292, 13 S. E. 591; *Georgia R. Co. v. Harris*, 5 Ga. 527.

3. Where property is sold under execution, and the fund is before the court for distribution, and the court awards it to a claim other than that of the selling execution, there is no law under which the attorney for the plaintiff whose execution had sold the property would be entitled to a fee out of the fund for bringing it into court.

Judgment affirmed.

(8 Ga. App. 17)

CENTRAL OF GEORGIA RY. CO. v. MERCANTILE CLAIM CO. (No. 2,386.)

(Court of Appeals of Georgia. July 5, 1910.)

(Syllabus by the Court.)

CARRIERS (§ 134*)—LOSS OF FREIGHT—EVIDENCE.

No error of law appears, and the verdict is supported by the evidence.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 134.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by the Mercantile Claim Company against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Payne, Little & Jones and M. F. Goldstein, for plaintiff in error. Thos. L. Bishop, for defendant in error.

HILL, C. J. The Mercantile Claim Company, as transferee, sued the Central of Georgia Railway Company for the value of 18 boxes of cigars lost in transit. The justice's court rendered a judgment for the plaintiff, and an appeal was taken to a jury in the superior court. On the trial a verdict was found for the plaintiff, and the defendant's motion for a new trial was overruled. The evidence, briefly stated, is as follows: A shipment of seven cases of cigars was made from Ybor City, Fla., on June 12, 1906, consigned to R. F. Wynne, Atlanta, Ga. The cigars were received by the consignee in Atlanta on June 20, 1906. The shipment was checked over by the clerk of the defendant company in connection with the receiving clerk of the consignee. It was found that one case was in a damaged condition. One case had been apparently broken open and was apparently short 18 boxes of cigars, and one of the other boxes had also been broken open and all the cigars taken out of that box except two. The case in which the shortage appeared had been recoopered. The testimony showed that each case when full should contain 100 boxes of cigars, and the recoopered box, when received in Atlanta, contained only 82 boxes. The physical condition of the shipment and the shortage were noted by the agent of the railroad company in Atlanta in the freight bill which was presented to the consignee, and this condition of the shipment was also shown by the testimony of the consignee and his clerk. The clerk of the consignee testified that he did not know how many boxes of cigars had been shipped in the cases, although when full they should contain 100 boxes; that he used the invoice which had been sent to the consignee by the shipper for the purpose of checking the number of cigars or boxes received, and from this invoice there appeared to be a shortage of 18 boxes. The bill of lading, which was not introduced, but the contents of which were proved without objection, called for seven cases of cigars. The defendant objected to the testimony of the receiving clerk as to his having the invoice, when he checked the shipment; the objection being that the invoice was secondary and hearsay evidence, and was not competent for the purpose of showing the number of cigars which had been received by the railroad company. The court admitted the testimony of the receiving clerk

that he had the invoice before him when he checked the cases and that from the invoice he discovered that they checked short; but instructed the jury on this point that the testimony relating to the invoice was admitted not for the purpose of showing that what the invoice claimed was actually shipped, but as showing the circumstances surrounding the checking. There are several exceptions made in the amended motion for a new trial, but all of them are really embraced in the general exception that the verdict was without any evidence to support it; it being insisted by the special exceptions that the only evidence of the amount of the shipment and the alleged shortage was shown by the contents of the invoice, which was incompetent evidence for that purpose.

We do not think the court erred in allowing the testimony of the receiving clerk of the consignee that he had used the invoice for the purpose of checking the cigars, and that there appeared to be a shortage. The invoice was not used to show the shipment, nor to show how many boxes each case of cigars contained when received by the defendant company, but the circumstance that the cigars did check short by the invoice was admissible to repel any inference that the consignee got all the cigars that he expected to get. The bill of lading showed that the company had received seven cases of cigars from the shipper. The presumption of law was that these cases were all received in good order. The undisputed testimony was that each case, when full, would contain 100 boxes of cigars. When the seven cases received in good order by the railroad company at the point of shipment were received at the point of destination in Atlanta, it was found that the lid of a case had been broken open, and that this case contained only 82 boxes of cigars, and the case had also been recoopered. It was a reasonable deduction from these facts that this one case had been damaged and the contents thereof lost while it was in the possession of the defendant company. It had been received in good order, and it is fair to presume that it contained the same number of boxes as were contained in the other cases of equal size, ordered at the same time. Seven cases of cigars, containing 100 boxes to the case, were ordered by the consignee. Seven cases apparently in good order were received by the railroad company; and, when the shipment reached its destination in Atlanta, one of the cases had been broken open and there was an apparent shortage of 18 boxes of cigars, and the case had been recoopered. It seems to us that this evidence was sufficient to support the verdict for the value of the shortage, in the absence of any testimony by the defendant company.

Judgment affirmed.

(7 Ga. App. 852)

SIMS v. STATE (No. 2,880.)

(Court of Appeals of Georgia. July 5, 1910.)

(Syllabus by the Court.)

1. STATUTES (§ 161*)—REPEAL BY IMPLICATION.

Repeals by implication are not favored, and a later statute will not be construed as repealing a prior act on the same subject, in the absence of express words to that effect, except where the later act is clearly and indubitably contradictory of and repugnant to the former, so that the two acts cannot be reconciled.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230-234; Dec. Dig. § 161.*]

2. INTOXICATING LIQUORS (§ 45*)—REGULATION OF SALE—REPEAL OF STATUTE.

The act of the Legislature of 1908 (Acts 1908, p. 1112) making it a misdemeanor to sell what is known as "near beer," without first obtaining a license from the ordinary of the county and the payment of \$200 a year for the license, was not repealed by the act of 1909 (Acts 1909, p. 63), increasing the license to \$300 a year and restricting the sale of such beverages to cities containing 2,500 inhabitants or more by the last census. The two acts are not repugnant.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 45.*]

Error from City Court of La Grange; Frank Harwell, Judge.

W. F. Sims was convicted of illegally selling near beer, and he brings error. Affirmed.

E. T. Moon, for plaintiff in error. Henry Reeves, Sol., for the State.

HILL, C. J. Sims was convicted in the city court of La Grange on an accusation charging him with a misdemeanor, "for that * * * on the 1st day of January, 1910, in the city of West Point, Georgia, a city of less than twenty-five hundred inhabitants according to the last census report of the United States, [he] did then and there unlawfully sell and offer for sale in quantities of less than five gallons one bottle of Cook's malt ale, a 'near beer,' a beverage made in imitation of and intended as a substitute for beer, ale, and malt liquors, without first having obtained and paying for a license so to do for the year 1910, from the ordinary of Troup county, Ga." A demurrer was filed to this accusation on the ground that there was no offense charged under the law of this state.

If the allegations of the accusation are sufficient to constitute a misdemeanor under the statutes of this state, the verdict was demanded, as the defendant admitted the act charged against him in the accusation. So the question for decision is the one raised by the demurrer. In support of this demurrer it is said that the act approved September 5, 1908 (Acts 1908, p. 1112), was repealed by necessary implication by the act approved August 16, 1909 (Acts 1909, p. 63). Both acts relate to the manufacture and sale of

what is commonly known as "near beer." The act of 1908 (which was passed by the Legislature at an extraordinary session) in section 3 makes it a misdemeanor for any firm, person, or corporation to "sell or offer for sale in quantities of less than five gallons any such beverages, drinks, or liquors as are referred to in the first section of this act" ("in imitation of or intended as a substitute for beer, ale, wine, whisky, or other alcoholic, spirituous, or malt liquors") without obtaining a license so to do from the ordinary of the county wherein such business is carried on, and paying, therefor the sum of \$200 for each calendar year or part thereof. The act of 1909 in reference to this subject as contained in the general tax act for the support of the government passed by the Legislature that year provides, in section 7, subsec. 3, that "every person, firm, or corporation who shall sell or offer for sale in quantities of less than five gallons any such beverages, drinks, or liquors referred to in the first paragraph of this section," which describes them in the same language as the act of 1908, shall first obtain a license so to do from the ordinary of the county wherein such business is carried on, and shall pay a license tax of \$300 for each calendar year or part thereof for each place where the business is carried on, and provides that "no ordinary shall issue any license to any person, firm, or corporation to do or carry on such business outside of * * * the corporate limits of any incorporated city, town, or village of this state, provided further that no such license shall be issued to any one to do or to carry on such business in any town or city of less than 2,500 inhabitants, same to be determined by the last census report of the United States."

There are three modes in which a law or statute can be repealed, viz., expressly, by necessary implication, or where the last of two acts covers the subject-matter of the earlier one, not purporting to amend it, and plainly shows that it was intended to be a substitute for the earlier act, such latter act will operate as a repeal of the earlier act, though the two are not necessarily repugnant. 28 Am. & Eng. Enc. of Law (2d Ed.) 781; *Western & Atlantic R. Co. v. Atlanta*, 113 Ga. 554, 38 S. E. 993, 54 L. R. A. 294; *Thornton v. State*, 5 Ga. App. 397, 63 S. E. 301. The first and second modes of repeal is not applicable to this case. But it is insisted that the third mode is applicable, and that the act of 1909 repeals by necessary implication the act of 1908, in so far as it refers to the manufacture and sale of what is commonly known as "near beer." We do not concur in this view of the law. We think the act of 1908 which makes it a misdemeanor to manufacture or sell "near beer" in this state without first obtaining a license to do so from the ordinary of the county is still of force, and is simply re-

stricted by the act of 1909. The latter act limits the right to manufacture or sell "near beer" only to those cities in the state which contain a population of more than 2,500 estimated by the last census. It certainly was not intended by the Legislature that the act of 1909 should authorize the manufacture and sale of "near beer" in the state of Georgia in every place except cities of more than 2,500 inhabitants. The purpose of the law was manifestly to prohibit, even under license, the sale of "near beer" in towns of less than 2,500 inhabitants, or in the county; and, if the act of 1909 should be held to repeal the act of 1908 and permit the sale of "near beer" everywhere except in cities of more than 2,500 inhabitants, it would be clearly in the teeth of the manifest purpose of the Legislature in restricting the right to sell or manufacture as it did under the act of 1909; and at last the supreme test is: What was the intention of the Legislature in passing the subsequent act? If that intention was to restrict, and not to repeal, and the two acts are not in irreconcilable conflict, but can stand together, the court will adopt that construction which is in harmony with the manifest intention of the Legislature.

It is well settled, not only by the Supreme Court of this state, but by all the authorities on the subject, both courts and text-writers, that repeals by implication are not favored, and will never be declared by the courts to exist, except where the latter act is clearly and indubitably contradictory of and repugnant to the former act, and this contradiction and repugnancy are such that the two acts cannot be reconciled. As well expressed by Mr. Black in his work on Interpretation of Laws: "A statute will not be construed as repealing prior acts on the same subject (in the absence of express words to that effect) unless there is an irreconcilable repugnancy between them." See Black on Interpretation of Laws, 56, 112. See, also, *Montgomery v. Board of Education*, 74 Ga. 41, where a similar ruling is made and supported by many citations of authorities. Indeed, in the *Montgomery Case*, supra, in the body of the opinion, Mr. Justice Hall declares that the doubt expressed by the Supreme Court in *Central Railroad v. Hamilton*, 71 Ga. 461, that such a thing as a repeal of a statute by implication did not exist under the Constitution of 1877, was not merely a suggestion of the court in that case, but was an opinion expressed upon mature deliberation, after an able argument by learned and able counsel. Perhaps this question of repeal by implication has never been better expressed than in the quotation from Potter's *Dwarfs on Statutes*, used by the Supreme Court in the *Montgomery Case*, supra: "Nor hath a later act of Parliament ever been construed to repeal a prior act, unless there be a repugnancy or contrariety in them, or at least some notice taken of the former act."

so as to indicate an intention in the lawgiver to repeal it. The law does not favor a repeal by implication, unless the repugnance be quite plain. * * * Although, then, two acts of Parliament are seemingly repugnant, yet, if there be no clause of non obstante in the latter, they shall, if possible, have such construction that the latter may not be a repeal of the former by implication."

Applying these general principles, which are well established, to the two acts in question, we think the conclusion is irresistible that the Legislature did not intend that the act of 1909, relating to the manufacture and sale of "near beer," should repeal the act of 1908 on the same subject, but only intended by the act of 1909 to restrict the right of sale under license, given by the act of 1908; that the two acts in this respect are not repugnant or irreconcilable, and both can stand together, harmoniously accomplishing the purpose of the Legislature in both acts, and especially the purpose of the Legislature in the latter act. And we conclude that under these two statutes it is now a misdemeanor in this state to sell what is known as "near beer" or a beverage described in these two acts, with or without license, except in cities of 2,500 inhabitants or more, to be determined by the last census of the United States. We do not think that the decisions of the Supreme Court of this state and of this court holding in effect that indictments or accusations for selling without license, where a license could not be obtained because the county or state prohibited such sale, are analogous or strictly applicable to the situation presented by these two statutes; for in those decisions the underlying principle was that the right to sell or manufacture was absolutely taken away, and under these two statutes the right to sell or manufacture is not taken away, but is simply restricted to certain cities.

The plaintiff in error attacks the constitutionality of both the act of 1908 and the act of 1909, relating to the sale of "near beer," but as these exceptions are not made definitely or specifically, or in proper form for certification to the Supreme Court, this court declines to certify them.

Judgment affirmed.

(3 Ga. App. 34)

DAVISON v. BUSH et al. (No. 2,524.)

(Court of Appeals of Georgia. July 5, 1910.)

(Syllabus by the Court.)

1. COURTS (§ 185*)—COUNTY COURTS—APPEAL.

An appeal does not lie from the verdict of a jury in the county court to a jury in the superior court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 185.*]

Error from Superior Court, Greene County. Action by W. T. Bush and others against C. J. Davison. Judgment for plaintiffs, and defendant brings error. Affirmed.

Jas. Davison, for plaintiff in error. Cobb & Erwin and Miles W. Lewis, for defendants in error.

HILL, C. J. Bush and others sued Davison in the county court of Greene county. Before the trial the plaintiffs demanded a trial by jury, under the act of 1908 (Acts 1908, p. 41), amending section 4200 of the Civil Code of 1895. The jury rendered a verdict for the plaintiffs for \$156, and the defendant entered an appeal to a jury in the superior court of Greene county. When the case was reached for trial in the superior court, the plaintiffs moved to dismiss the appeal, upon the following grounds: (1) The law does not authorize an appeal to be entered to the superior court from a verdict rendered by a jury in a county court. (2) Where a trial by jury has been had in a county court, the remedy of the party who is not satisfied with the verdict is certiorari, and not appeal. (3) The defendant, having had a trial by jury in the county court, was not entitled to another trial by jury in the superior court. The judge of the superior court sustained the motion to dismiss the appeal, and this judgment constitutes the sole assignment of error.

Section 4200 of the Civil Code of 1895 provides that all trials in a county court "shall be by the court without a jury in all civil cases." The act of 1908, supra, amended this section as follows: "The trial and judgment in said court (referring to county courts) shall be by the court with a jury of six to be selected from a panel of twelve, each side being entitled to three strikes when demanded by either party ten days before the trial term." Section 4214, providing for appeals from county courts, was left unchanged, and that section provides: "If either party is dissatisfied with the judgment of the county judge, and the principal sum claimed, or damages claimed, exceeds fifty dollars, said party may enter an appeal from such judgment within four days, under the same rules and regulations as are provided for appeals in this Code." It is contended by counsel for the plaintiff in error that the amendatory act of 1908, supra, was intended to meet the decision of the Supreme Court in *De Lamar v. Dollar*, 128 Ga. 57, 57 S. E. 85, that as to cases in the county court, where the amount involved was less than \$50 there could be no jury trial, and, therefore, the constitutional right of trial by jury was violated by section 4200, and that the Legislature did not have under consideration in the amendatory act the subject of appeals from county courts, and there was no legislative intent to disturb the law of appeals from that

court, and if the amendatory act should be construed to take away the right of appeals where the trial was by jury in a county court, that result was inadvertent and unintended. But it is also insisted that the amendatory act of 1908 did not in fact forbid appeal in a county court from the verdict of the jury; that the right to appeal from the judgment of the court means a judgment not only of the court itself without the intervention of a jury, but the judgment of the court rendered on the verdict of a jury; in other words, that although there may have been a verdict of the jury in the county court, the judgment thereon was none the less a judgment of the county court from which an appeal was authorized, although there may have been a verdict upon which the judgment was founded; and it is also insisted by learned counsel that to construe the act of 1908, *supra*, as taking away the right of appeal in a county court, where there had been a verdict of the jury, would be to repeal section 4214 of the Civil Code of 1895, and that repeals by implication are not favored by the courts, and will not be declared, unless the alleged repealing act is irreconcilably repugnant to the existing statute. We do not think that the act of 1908 was intended by the Legislature to repeal any part of section 4214 of the Code, *supra*; nor do we think that that act is in any sense repugnant to that section. The act of 1908 was the legislative expression of the policy of our law, which is to give to every litigant at least one trial by jury, if he desires it. Before the act of 1908, in a county court, a trial by jury in a civil case could not be had, and, therefore, where the amount involved exceeded \$50, a dissatisfied litigant in the county court was given the right to appeal his case to a jury in the superior court from the judgment of the county judge. By the act of 1908 either party is given the right to a jury trial in the county court, upon timely demand. But if no demand is made in the county for a jury trial, then section 4200 still applies, and the judge would try the case without the intervention of a jury with the right to appeal from his judgment to a jury in the superior court under section 4214. So we think that the purpose of the Legislature in the act of 1908 was simply to give to a litigant his constitutional right of one jury trial. In other words, that under the law as it is now written a litigant in a county court can either demand a jury in that court, or he can appeal from the judgment of that court to a jury in the superior court. Article 6, § 4, par. 6, of the Constitution of this state, provides that

"the General Assembly may provide for an appeal from one jury in the superior and city courts to another." But there is no provision made by the Legislature to authorize an appeal from a jury in the county court to a jury in the superior court, and the Legislature has never attempted to grant this right, and the failure of the Legislature to provide a mode of appeal from a verdict of a jury in one court to a jury in another court is an equivalent to a declaration that none exists. It must be borne in mind that the technical right of appeal was unknown to the common law, and exists only by statute or constitutional provision. 2 Amer. & Eng. Enc. of Law (2d Ed.) 425; 2 Enc. Pl. & Pr. 15, 16, 17; 2 Cyc. 515, 519. Where no appeal is provided for by statute, it would seem that certiorari would be the proper remedy, for this right is always available, unless taken away by statute, to correct the errors of inferior tribunals, and is a common-law remedy. 6 Cyc. p. 745. In *Roser v. Marlowe*, R. M. Charlton, 543, it is said, referring to the remedies of certiorari and appeal, that "the nature of the two remedies is well understood, and one of the distinctions which has been drawn between them is that an appeal can only be had when it is expressly given, and a certiorari always lies, unless it has been expressly taken away." See, also, *Fontano v. Mosely*, 121 Ga. 46, 48 S. E. 707; *Riggell v. Sirmans*, 123 Ga. 455, 51 S. E. 381. Section 4141 of the Civil Code of 1895 contemplates that an appeal will lie in a justice court to a jury in that court or in the superior court, but denies the right of appeal from a jury in the justice's court to a jury in the superior court, and this seems to be in harmony with the policy of our law, which, as before stated, is to insure to each litigant one trial by jury. Of course, we do not refer to new trials which may be granted on motions filed for that purpose. Section 4215 of the Civil Code of 1895 does not expressly take away the right to certiorari in county courts where the amount involved is more than \$50, and section 4634 is probably broad enough to give this right; but even if the right of certiorari was not given by this statute, it would exist under the common law. But it is not necessary to the decision of this case for this court to decide what was the remedy for the plaintiff in error. We are clear that under the law an appeal from a verdict of the jury in the county court to a jury in the superior court was not his remedy, and for this reason that the judgment of the superior court in dismissing the appeal was proper.

Judgment affirmed.

(134 Ga. 782)

WILSON v. BROCK.

(Supreme Court of Georgia. July 13, 1910.)

*(Syllabus by the Court.)***1. HUSBAND AND WIFE (§ 347*)—CRIMINAL CONVERSATION—PLEADING—AMENDMENT.**

In an action by a husband for criminal conversation with his wife, an amendment alleging that the defendant administered drugs to the plaintiff's wife as a means of accomplishing her debauchery, and that as soon as he discovered the illicit relations between his wife and the defendant the plaintiff took his children and separated from his wife, is germane to the original action.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 347.*]

2. TRIAL (§ 252*)—CRIMINAL CONVERSATION—ACTIONS—INSTRUCTIONS.

There was no evidence to show connivance and collusion of the husband with the wife's adulterous intercourse, and a request for an instruction relating to the effect of such connivance and collusion was properly refused.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 252.*]

3. REQUESTS COVERED BY GENERAL CHARGE.

In so far as the requests to charge relating to acts occurring without the statute of limitation were pertinent and legal, they were covered by the general charge.

4. INSTRUCTIONS PROPER.

Certain instructions are criticised as being without evidence to support them. Upon an examination of the record, we do not think this criticism is meritorious.

5. NEW TRIAL PROPERLY REFUSED.

It was not erroneous to refuse a new trial on the ground of newly discovered evidence, as the showing on this ground did not measure up to the rule as expressed in *Berry v. State*, 10 Ga. 511.

6. REVIEW ON APPEAL.

The evidence authorized the verdict, which has the approval of the trial judge, and his discretion in refusing a new trial will not be interfered with.

Error from Superior Court, Banks County; C. H. Brand, Judge.

Action by O. N. Wilson against W. L. Brock. From a judgment, Wilson brings error. Affirmed.

H. H. Perry, Johnson & Johnson, A. J. Griffin, C. R. Faulkner, and R. R. Arnold, for plaintiff in error. H. H. Dean, R. L. J. Smith, and W. W. Stork, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(134 Ga. 785)

GADSDEN v. STATE.

(Supreme Court of Georgia. July 13, 1910.)

*(Syllabus by the Court.)***1. HOMICIDE (§ 300*)—INVOLUNTARY MANSLAUGHTER—INSTRUCTIONS.**

Where the evidence as a whole presented not only the theories of murder and accidental killing with no evil design or intention or culpable neglect, but also of involuntary manslaughter in the commission of a lawful act with-

out due caution and circumspection, it was error to charge the jury that involuntary manslaughter had nothing to do with the case, and to confine their consideration to the first two theories.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 300.*]

2. HOMICIDE (§ 18*)—"MURDER"—INVOLUNTARY KILLING.

If an involuntary killing happens in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, the offense is "murder." Pen. Code 1895, § 67.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 24-31; Dec. Dig. § 18.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4632-4637; vol. 8, pp. 7726, 7727.]

Error from superior Court, Chatham County; W. G. Charlton, Judge.

John Gadsden was convicted of murder, and brings error. Reversed.

Shelby Myrick, for plaintiff in error. W. C. Hartridge, Sol. Gen., and John C. Hart, Atty. Gen., for the State.

LUMPKIN, J. Judgment reversed. All the Justices concur.

(134 Ga. 737)

MAYO et al. v. HARRISON et al.

(Supreme Court of Georgia. July 13, 1910.)

*(Syllabus by the Court.)***1. WILLS (§ 600*)—CONSTRUCTION—ESTATES CREATED.**

A testator died in 1865, leaving a will which contained the following item: "I give and bequeath to my beloved wife Sarah all the remainder of my estate, both real and personal, 405 acres of land whereon she now lives, three head of horses, my stock cattle and one yoke of work steers and cart, and all my hogs, household and kitchen furniture, and all of my farming implements, and any other thing or things that are mine, to be hers and at her own disposal during her natural life or so long as she remains my widow, at the expiration of which term all of my estate then remaining to be equally divided among my remaining children, only the part that may be coming from their grandfather's estate which I desire to be equally divided among my six youngest children." Held, that the will conferred upon the widow of the testator, during her life or widowhood, power to convey in fee any part of his estate, and that a purchaser from her, who took a conveyance of land in fee simple under such power, was not subject to be evicted, after her death, by the children of the testator. The language, "I give and bequeath unto my beloved wife * * * all the remainder of my estate, * * * to be hers and at her own disposal during her natural life or so long as she remains my widow, at the expiration of which term all of my estate then remaining to be equally divided among my remaining children," indicates the intent of the testator to confer an absolute power of sale on the wife so long as she lived and remained a widow, and to exclude the children from any claim on the property so sold, leaving that part of the testator's estate which might remain at the termination of the life estate to be divided among the children. The decision in *Broach v. Kitchens*, 23 Ga. 515, was based on the fact that the item of the will giving the widow a life estate, and the power to dispose of and enjoy the property so given as she might think fit, was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

followed by an item inconsistent with power in her to convey the fee in such property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1335-1339; Dec. Dig. § 600.*]

2. WILLS. (§ 600*)—CONSTRUCTION—ESTATES CREATED.

Where the widow of the testator sold the land mentioned in the will and made a conveyance thereof in fee simple, with warranty of title, and evidence was introduced tending to show that the price paid was the value, not merely of the life estate, but of the fee-simple estate, there was no error, as against those claiming as remaindermen under the will, in charging, in effect, that if the jury found from the facts and circumstances shown by the evidence, taking into consideration the deed in its entirety and all the other facts and attendant circumstances, that the grantor executed the deed in pursuance of and by virtue of the power and authority conferred upon her in the will to sell and dispose of the land, and so intended, the title thus conveyed would be good as against the claim of title by the remaindermen under the will. *Terry v. Rodahan*, 79 Ga. 278 (1), 5 S. E. 38, 11 Am. St. Rep. 420; *Mahoney v. Manning*, 133 Ga. 784, 66 S. E. 1082; *Roberts v. Lewis*, 153 U. S. 367, 14 Sup. Ct. 945, 38 L. Ed. 747; *South v. South*, 91 Ind. 221, 46 Am. Rep. 591; *Mathews v. Capshaw*, 109 Tenn. 480, 72 S. W. 961, 97 Am. St. Rep. 854; 22 Am. & Eng. Enc. L. 1112 (4); 31 Cyc. 1122 et seq. The dictum in *Wetter v. Walker*, 62 Ga. 145, to the effect that a conveyance by a life tenant with power to sell would be limited to the conveyance of the life estate, was expressly disapproved in *Weed v. Knorr*, 77 Ga. 647, 1 S. E. 167.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1335-1339; Dec. Dig. § 600.*]

3. REVIEW ON APPEAL.

The verdict was supported by the evidence, the preceding rulings are controlling as to the substantial questions of law involved, and none of the other grounds of the motion for a new trial requires a reversal.

Error from Superior Court, Johnson County; J. H. Martin, Judge.

Action between J. W. Mayo and others and J. L. Harrison and others. From the judgment, Mayo and others bring error. Affirmed.

Daley & Daley and Hines & Jordan, for plaintiffs in error. Wm. Faircloth, R. L. Gamble, J. R. Lamar, T. E. Ryals, and J. L. Kent, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(134 Ga. 684)

CRENSHAW v. WILKES.

(Supreme Court of Georgia. June 25, 1910.)

(Syllabus by the Court.)

SALES (§ 472*)—PASSING OF TITLE—CONDITIONAL SALES.

Where A., the secretary of a mining corporation, who is largely indebted to it upon a stock subscription, agrees with B., its president, that he will buy certain machinery needed by the company and sell it to the company for the price he pays for it as a credit on his indebtedness, and A. negotiates with a manufacturer for the purchase of the machinery, informing the manufacturer of his arrangement and agreement to sell it to the mining corporation,

and the machinery is selected by A., and inspected and approved by B., and the terms of the sale are that A. is to pay one-third cash and give his notes for the balance, and the manufacturer, at the instance and request of A., ships the machinery to the mining company, which pays the freight and installs the machinery at considerable cost, and which immediately cancels so much of A.'s indebtedness as is represented by the price of the machinery, the title of the mining corporation is superior to a conditional bill of sale signed by A., in which the manufacturer reserves the title to the property until the deferred payments are met, and of which neither the mining company nor its president has notice prior to the time of consummation of the sale. The subsequent record of the bill of sale within the statutory time would not change the rights of the parties.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 472.*]

Error from Superior Court, Cherokee County; N. A. Morris, Judge.

Action by J. E. Wilkes against Thomas C. Crenshaw. There was a directed verdict for plaintiff, and defendant brings error. Reversed.

Jane E. Wilkes, doing business as the Mecklenburg Iron Works, at Charlotte, N. C., brought suit to recover of Thomas C. Crenshaw certain machinery in his possession. The case was submitted to the court on agreed statement of facts, so much of which as is material being as follows:

Fred Keener bought from the plaintiff certain machinery. Keener was secretary and treasurer of the Mary Lee Gold Mining Company, a corporation doing business in Georgia. Keener owed the mining company a large amount on stock subscription, and, in settlement of a portion of it agreed with the mining company to purchase certain machinery needed in the operation of its mine and resell same to the mining company. Keener informed the plaintiff of his and the mining company's agreement, pursuant to which Crenshaw, as president of the mining company and representing it, went to the place of business of the plaintiff at Charlotte, N. C., in February, 1905, to inspect the machinery proposed to be purchased by Keener, to ascertain if it was such machinery as the mining company would accept. Keener had arranged with the plaintiff that, if Crenshaw agreed that the company would buy the machinery from him (Keener), the plaintiff would ship the machinery directly from plaintiff's factory to the mining company in Georgia. Crenshaw informed the plaintiff that the company would accept the property from Keener, and so notified Keener by letter and telegram from Charlotte; and of this latter fact plaintiff had knowledge. Keener was to pay one-third cash for the machinery and to give his obligation for the balance; and Crenshaw knew of this. After Crenshaw's departure from Charlotte the deal was closed between Keener and the plaintiff, and in accordance with the agree-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ment the plaintiff shipped the machinery to the mining company; the latter paying the freight. All the parties had knowledge that Keener was to purchase from the plaintiff the machinery on his own responsibility, resell it to the mining company, and be paid therefor by credit on the books of the mining company on stock subscription which he had taken in the mining company. The sale was consummated between Keener and the plaintiff on February 24, 1905, at which time one-third of the purchase price was paid in cash, and Keener executed to the plaintiff a conditional bill of sale to the machinery, wherein title was reserved in the plaintiff until the deferred payments were made. Crenshaw had no knowledge that the plaintiff was to retain title to the machinery, nor did the plaintiff give him any notice that she intended to require a bill of sale from Keener, reserving title to the property. The machinery was received by the mining company the latter part of March, 1905, and installed at considerable cost; and credit was immediately given to Keener on the books of the company for \$2,052, the purchase price of the machinery. The conditional bill of sale, dated February 24, 1905, was attested by two witnesses, one of whom was a notary public. Within 30 days it was recorded in the state of New Jersey, in the county of Keener's residence; and on August 4, 1905, it was recorded in Cherokee county, Ga., the county of the place of business of the Mary Lee Gold Mining Company. Crenshaw was notified by the plaintiff, some time in June, 1906, of her claim of title to the property. In March, 1907, a receiver was appointed for the mining company. The property was advertised for sale, and at the sale Crenshaw became the purchaser of the entire property of the mining company, including the property in this suit. Public notice was given, just before the sale, by plaintiff's attorney, of its claim of title. The property is in the possession of defendant, who refuses to deliver it on demand. The court directed a verdict for the plaintiff, and the defendant excepted.

Anderson, Felder, Rountree & Wilson, for plaintiff in error. Colquitt & Conyers, for defendant in error.

EVANS, P. J. (after stating the facts as above). The Mecklenburg Iron Works sold the machinery to Keener with knowledge that Keener was purchasing it for resale to the mining company. The vendor knew that Keener was to accept, in payment for the machinery, a pro tanto discharge of his indebtedness to the mining company, and shipped the machinery at the request of Keener to the mining company. The vendor, Keener, and the mining company, were aware of the various inducements of the parties influencing each one's participation in

the transaction. The entire transaction, while not constituting a tripartite agreement, did involve two sales—that is, a sale and a resale—so intimately connected and interwoven in negotiation, consideration, and execution that it would be a fraud to inject an element unknown to one of the participants in the transaction, and which would have the effect to impose upon that participant a liability not contemplated nor disclosed in the original transaction, and antagonistic to its general tenor and effect. If the vendor intended to reserve title to the machinery sold to Keener, she should have informed the mining company of such intention. Her consent to sell to Keener, with a knowledge that Keener intended an immediate resale to the mining company, and the shipping of the machinery to the mining company on Keener's request, was an assurance to the mining company of Keener's right to convey an unincumbered title. Otherwise it would be allowing the vendor to induce and accomplish the trade upon her apparent assent that Keener had full title to convey, and then allow her and Keener to secretly contract to the contrary. The circumstance that the consideration of the sale from Keener to the mining company was an existing debt does not change the complexion of the transaction. The mining company may have preferred to buy elsewhere, or machinery of a different type or of less value. It did cancel its debt against Keener, paid the freight, and installed the machinery at considerable cost. The case is not that of a creditor who simply takes additional security to an antecedent debt. Relatively to the vendor the mining company was a bona fide purchaser.

A vendor may make either an absolute or conditional sale of his goods. He cannot reserve the title, and at the same time empower his vendee to sell. His authorization of a sale by his vendee is inconsistent with the reservation of title in himself, which forbids a sale. If A. buys personalty of B., and gives to B. a note for its purchase price, with the stipulation that the title to the personalty shall remain in B. until the note is paid, and B. authorizes A. to sell the personalty and bring him the proceeds, a sale by A. to an innocent purchaser conveys a good title, although A. may not account to B. for the proceeds, and the reservation of title note may have been duly recorded. *Tucker v. Mann*, 124 Ga. 1003, 53 S. E. 504, *Clarke v. McNatt*, 132 Ga. 610, 64 S. E. 795. The principle decided in these cases is applicable to the case at bar; and we think the court erred in directing a verdict for the plaintiff upon the agreed statement of facts. We will not discuss the question of registration and constructive notice, so ably and elaborately argued in the briefs, because we are of the opinion that, even though the conditional bill of sale was properly execut-

ed and recorded in time, under the facts the plaintiff could not legally prevail.

Judgment reversed. All the Justices concur.

(134 Ga. 544)

COWART v. W. E. CALDWELL CO.

(Supreme Court of Georgia. June 14, 1910.)

(Syllabus by the Court.)

1. GARNISHMENT (§ 58*)—PROPERTY SUBJECT.

A fund in the hands of a trustee in bankruptcy, which the referee has ordered him to pay to a named person, cannot be reached by a creditor of such person by a summons of garnishment directed to and served upon the trustee.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 113; Dec. Dig. § 58.*]

2. GARNISHMENT (§ 58*)—DISMISSAL OF ATTACHMENT—LEVY BY IMPROPER SUMMONS OF GARNISHMENT.

It is not erroneous to dismiss an attachment when the only levy of the same is by the service of such a summons of garnishment.

[Ed. Note.—For other cases, see Garnishment, Dec. Dig. § 58.*]

3. JUDGMENT (§ 17*)—GENERAL DEMURRER TO PETITION—DISMISSAL—EFFECT.

Although an attachment may be dismissed because of its invalidity, the plaintiff is entitled to proceed for a verdict and general judgment on his declaration, if the defendant has appeared and made defense.

(a) The filing of a general demurrer to the declaration is equivalent to pleading to the merits of the case.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 17.*]

Error from Superior Court, Early County; W. C. Worrill, Judge.

Action by J. S. Cowart against the W. E. Caldwell Company. Judgment of dismissal, and plaintiff brings error. Reversed.

On October 18, 1907, J. S. Cowart sued out an attachment against W. E. Caldwell & Co., to recover the amount of a debt alleged to be due the plaintiff, the ground of the attachment being that "the said W. E. Caldwell & Co. resides out of this state." The proceeding was returnable to the April term, 1908, of the superior court of Early county, and upon it summons of garnishment was issued against D. W. James, individually and as trustee in bankruptcy of the estate of T. A. Bailey. On October 25, 1907, James, in response to the summons of garnishment, filed an answer in which he stated that he had been served with summons of garnishment in the case of J. S. Cowart v. W. E. Caldwell Co., that he "owed the defendant nothing, and had no property, money, or effects of it at the time of the service of said summons, and that between that time and the date of this answer had neither owed the defendant anything, nor received nor gotten possession of any property, money, or effects belonging to it, except that at the time of such service he, as trustee in bankruptcy of T. A. Bai-

ley, had in his hands five thousand dollars," the same being the net proceeds of the sale of certain lumber, which sale was made by him under an order of the referee before whom the bankruptcy proceeding was pending, in which order he was directed to pay the net proceeds of the sale to the Caldwell Company or its attorneys. On the same date the W. E. Caldwell Company gave a bond to dissolve the garnishment. On April 6, 1908, Cowart filed in the superior court his declaration in attachment against "W. E. Caldwell Co." On August 8, 1908, the W. E. Caldwell Company entered what it termed "its first and special appearance" before the court. In this pleading it was stated that the "special appearance" was made for the purpose of bringing to the attention of the court the following facts, which the pleader stood ready to prove: (1) "There is no such concern as the 'W. E. Caldwell & Co.' named as defendants to the above-stated action and alleged to be a resident of Louisville, Ky., but that is the place whereat the 'W. E. Caldwell Co.' resides and conducts business." (2) From the allegations in the declarations in attachment "the movant herein has gathered the impression that the plaintiff's intention was to sue out attachment proceedings against movant, but, not knowing the correct name by which movant should be styled, used the misnomer, 'W. E. Caldwell & Co.,' in naming the defendant to the * * * suit, and in referring to the defendant in the attachment proceedings." (3) "Movant is interested in bringing about a conclusion and determination of this attachment suit, inasmuch as the property and funds now in the hands of" the garnishee belong to it, and it is unjustly deprived of the use and benefit thereof, as the garnishee declines to turn over the same to movant pending the attachment proceedings. (4) Movant "is unwilling to voluntarily submit itself to the jurisdiction of this court and voluntarily appear and defend said attachment suit, which is a nullity, because: (1) Said proceeding is not brought against any legal entity, the said named defendant being neither a natural nor an artificial person; (2) the attachment bond is void, and the writ of attachment issued on said bond and accompanying affidavit made by the plaintiff is a mere nullity, because there is no such person as the 'W. E. Caldwell & Co.'; and (3) this court has not, by virtue of said attachment proceeding, acquired jurisdiction over either the person or property of movant herein." There was a prayer to be allowed to enter a special appearance for the purpose of proving the facts above alleged, that "upon due proof made thereof * * * said attachment proceeding be dismissed at the cost of the plaintiff, and that the gar-

nishee be authorized and required to surrender possession of the property levied upon to movant." On the same day, the W. E. Caldwell Company "before pleading to the merits," but without referring to its "special appearance," filed a general demurrer, and also several special demurrers to the declaration in attachment. On the same date, subject to the motion to dismiss the plaintiff's proceedings and to the demurrers, it filed an answer to the declaration in attachment. The plaintiff, by leave of the court, amended his pleadings by striking the words "W. E. Caldwell & Co." wherever they occurred, and inserting in lieu thereof the words "W. E. Caldwell Co., a corporation," alleging that the words stricken were inserted in lieu of the correct name of the corporation by mistake and were a mere accidental misnomer. This amendment was allowed over the objection of the W. E. Caldwell Company; and the court thereupon overruled the motion to dismiss the plaintiff's proceedings, based upon the grounds above indicated. The defendant then made an oral motion to dismiss the proceedings, upon the ground that the "court had not acquired jurisdiction in rem over any property belonging to the defendant, and that the defendant had not, by its filing of a bond to dissolve the garnishment, or by pleading without reservation to the merits, or otherwise, voluntarily submitted itself to the jurisdiction of the court, and personal service had not been perfected on said defendant." This motion the court sustained by dismissing the entire attachment proceeding, including the declaration in attachment. The plaintiff thereupon excepted and sued out a writ of error. No cross-bill of exceptions was filed by the defendant.

L. M. Rambo and Pope & Bennet, for plaintiff in error. Pottle & Glessner, for defendant in error.

FISH, C. J. (after stating the facts as above). The question whether the court erred in allowing the amendment to the plaintiff's proceedings, by which the words "W. E. Caldwell Co., a corporation," were inserted in lieu of the words "W. E. Caldwell & Co." wherever the latter occurred, is not before this court, as no exception to this ruling was taken. For a like reason the overruling of the "special appearance" motion to dismiss is not before us. This last-mentioned ruling, of course, naturally followed the other, as after the amendment was allowed the proceedings were clearly against the W. E. Caldwell Company as a corporation. We must treat the case, therefore, as if the proceedings were originally against the W. E. Caldwell Company, a foreign corporation. So treating it, did the court err in sustaining the defendant's oral motion to dismiss the entire proceedings, upon the grounds that the court had acquir-

ed no jurisdiction in rem over any property belonging to the defendant, and nothing had occurred by which the court had acquired jurisdiction to render a personal or general judgment against the defendant? The judgment of the court was partly right and partly wrong. As to the attachment and garnishment proceeding, it was right; as to the declaration in attachment it was wrong. The untraversed answer of the garnishee showed that at the time of the service of the summons of garnishment he, as an individual, owed nothing to the defendant in attachment, the W. E. Caldwell Company, a nonresident corporation, and had nothing in his hands belonging to that corporation, and had not since such service become indebted to that company or received any of its property or effects; but that as trustee in bankruptcy of the estate of T. A. Bailey he had in his hands \$5,000, the net proceeds of certain lumber, which had come into his possession as such trustee, and which he had sold under an order of the referee in bankruptcy, which directed him to make such sale and to pay over the net proceeds thereof to the W. E. Caldwell Company. The general rule is that while property or money is in custodia legis, the officer holding it is the mere hand of the court; his possession is the possession of the court; to interfere with his possession is to invade the jurisdiction of the court itself; and an officer so situated is bound by the orders and judgments of the court whose mere agent he is, and he can make no disposition of such money or property without the consent of his own court, express or implied. Among the legal custodians to whom these principles have been applied are trustees or assignees in bankruptcy. Rood on Garnishment, § 27, and citations. It has been so held in Georgia in regard to receivers. Zorn v. Wheatley, 61 Ga. 437 (2), 441; Lowe v. Stephens, 66 Ga. 607; Fountain v. Mills, 111 Ga. 122, 36 S. E. 428; Fulghum v. Williams Co., 114 Ga. 643, 647, 40 S. E. 695, 1 L. R. A. (N. S.) 1055, 88 Am. St. Rep. 48. It has been held that even after the bill has been dismissed the receiver is still the officer of the court and not subject to garnishment. Field v. Jones, 11 Ga. 413.

It is contended, however, in the present case that, inasmuch as the order of the referee directed the trustee to pay over the net proceeds of the sale to the W. E. Caldwell Company, it was thereby segregated and became a direct indebtedness or amount due to that company, and hence was subject to garnishment by its creditor. If a garnishment is served, a judgment rendered upon it against the garnishee must be upon it either against him in his individual capacity or in his official capacity, either against his personal funds or against the funds in his hands as trustee. This was not a transaction between James individually and the

Caldwell Company, nor an individual indebtedness by him to that company, even though the company might have a right to proceed against him if he failed to pay it in accordance with the order of the court; for such right would arise out of the fact that he had not carried out such order. The garnishment recognizes the action of the court ordering the sale and the payment of the net proceeds as a valid order and is founded upon it. Without that order there would have been no sale and consequently no proceeds to pay. The garnishment proceeding, therefore, is necessarily against the trustee in his representative capacity, and is an effort to subject funds which he holds in that capacity under an order of the referee or bankrupt court. That court has exclusive jurisdiction in matters of bankruptcy; the state court has none. In the regular order of proceedings, after distribution has been made, the bankrupt will seek a discharge, and the trustee, upon filing his report and account and vouchers, will also apply for a discharge. The court of bankruptcy will hardly grant him a discharge from his trust so long as he had money in his hands arising under an order of the court, not finally paid out or disposed of as the court had directed. If a state court could garnishee a trustee in bankruptcy, to catch funds in his hands which had been ordered paid by the court to which he was directly amenable, but which he had not actually paid out, and could compel him to withhold the payment, regardless of the order of the court of bankruptcy, it will be readily perceived that confusion and conflicts of jurisdiction would at once arise, and that a state court, by means of a garnishment, could indefinitely delay the final winding up of the matter in bankruptcy and the final discharge of the trustee. It has accordingly been held that a garnishment will not lie from a state court to a trustee or assignee in bankruptcy, to catch dividends which have been declared in favor of certain creditors or the amount which will be going to them under a composition. In *re Cunningham* (Dist. Court of Iowa) 9 Cent. Law J. 208; *Loveland on Bankruptcy* (3d Ed.) § 268, p. 782; 2 *Remington on Bankruptcy*, §§ 224, 225, p. 1363. As the garnishment, in so far as it was directed to and served upon James as trustee in bankruptcy of the estate of Bailey, was without authority of law and void, and in so far as it was directed to and served upon him in his individual capacity it failed to reach and fasten upon any property or asset belonging to the defendant, no lawful levy of the attachment was made; and consequently the court was without jurisdiction of the attachment proceeding, and therefore properly dismissed it.

The error which the court committed was in also dismissing the declaration in at-

tachment. The Civil Code of 1895, § 4575, declares: "When the defendant has given bond and security, as provided by this Code, or when he has appeared and made defense by himself or attorney at law, or when he has been cited to appear, as provided by this Code, the judgment rendered against him in such case shall bind all his property, and shall have the same force and effect as when there has been personal service." Section 4557 provides that where notice in writing has been given, as therein provided, to the defendant of the pendency of the attachment and the proceedings thereon, "the judgment rendered upon such attachment shall have the same force and effect as judgments rendered at common law; and no declaration shall be dismissed because the attachment may have been dismissed or discontinued, but the plaintiff shall be entitled to judgment on the declaration filed, as in other cases at common law, upon the merits of the case." These two sections of the Code have been construed together; and it has been accordingly held that under their provisions, although the attachment may be dismissed because of its invalidity, still the plaintiff is entitled to proceed for a verdict and a general judgment on his declaration, if the defendant has appeared and made defense (*Joseph v. Stein*, 52 Ga. 332 [2]), or if he has replevied the property levied upon under the attachment (*Camp v. Cahn*, 53 Ga. 558 [2]), or if he has been duly cited to appear (*McAndrew v. Irish American National Bank*, 117 Ga. 610, [2], 43 S. E. 858.)

In the present case the defendant filed a general demurrer to the declaration in attachment. It is well settled that the filing of a general demurrer is equivalent to pleading to the merits of the case. *Lyons v. Planters' Bank*, 86 Ga. 485 (1), 12 S. E. 892, 12 L. R. A. 155; *Savannah Ry. Co. v. Atkinson*, 94 Ga. 780, 21 S. E. 1010; *Southern Ry. Co. v. Cook*, 106 Ga. 451 (3), 32 S. E. 585; *Paulk v. Tanner*, 106 Ga. 219 (1), 32 S. E. 122; *Dykes v. Jones*, 129 Ga. 99, 103, 58 S. E. 645.

Counsel for defendant in error, however, contend that the demurrer was filed subject to the motion for which the defendant made its "special appearance." There was no express reservation to this effect in the demurrer; but admitting that the demurrer was so filed, and that, being so filed, it did not, when it was filed, amount to pleading to the merits or to appearing and making defense in the case made by the declaration in attachment; still when this written motion to dismiss was overruled by the court, and no exception was taken by the defendant to this ruling, the general demurrer stood permanently uncovered; it was stripped of the protection afforded by the motion under cover of which it was made and thenceforth stood as the equivalent of a plea to the merits without reservation.

Being made subject to the final determination of the motion to dismiss which preceded it, and this motion having been finally decided against the defendant, the demurrer was, of course, no longer subject to this motion. In other words, the demurrer was made for the purpose of being considered in the event that the precedent motion to dismiss should be overruled, and, when this motion was overruled, the demurrer stood as unconditional pleading in the case.

Judgment reversed. All the Justices concur.

(134 Ga. 676)

ALEXANDER v. BARRETT et al.

(Supreme Court of Georgia. June 24, 1910.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 138*)—DISMISSAL OF MOTION—GROUNDS.

The fact that service of the motion for a new trial and the rule nisi upon the opposite party was made, not by an officer, but by the movant, is not a valid ground for a dismissal of the motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 278, 280; Dec. Dig. § 138.*]

2. NEW TRIAL (§ 155*)—DISMISSAL OF MOTION—GROUNDS.

Retention by the trial judge of a motion for a new trial for more than 90 days after the hearing before passing upon the same will not work a dismissal of the motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 315; Dec. Dig. § 155.*]

3. NEW TRIAL (§ 132*)—PROCEEDINGS TO OBTAIN—APPROVAL OF BRIEF OF EVIDENCE.

Where an application for a new trial was made, and an order was duly passed, in which it was provided that "movant is allowed until the hearing of the motion, whenever that shall be, to amend and perfect the motion and to prepare for approval and file a brief of the evidence in said case," and where at the time of the hearing the movant submitted a brief of the evidence, it was within the power of the judge to approve the brief; and, he having done so, it was not error to refuse to dismiss the motion for a new trial on the ground that no approved brief of evidence had been filed. *Malsby v. Young*, 104 Ga. 206, 30 S. E. 854.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 275; Dec. Dig. § 132.*]

4. MOTIONS (§ 56*)—ENTRY OF ORDER NUNC PRO TUNC—APPROVAL OF BRIEF OF EVIDENCE.

Where the judge, having before him the brief of evidence as submitted on the hearing of the motion for a new trial, approved the same as correct and granted the new trial, but failed to enter the order approving the brief of evidence, it was competent for him subsequently, and before the bill of exceptions was sued out, to pass an order reciting that the brief of evidence "was approved January 4, 1909," that being the date upon which the motion for new trial was passed upon, and that "this order is made now for then." Such nunc pro tunc order had the effect of an approval duly entered before passing upon the motion for a new trial.

[Ed. Note.—For other cases, see Motions, Cent. Dig. § 67; Dec. Dig. § 56.*]

5. REVIEW ON APPEAL.

The evidence not requiring the verdict as rendered, the first grant of a new trial will not be disturbed.

Error from Superior Court, Fulton County; J. S. Pendleton, Judge.

Action between Mary Alexander and V. M. Barrett and others. From the judgment, Alexander brings error. Affirmed.

Robert L. Rodgers, for plaintiff in error. Virgil Jones, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

(124 Ga. 778)

FIDELITY PRODUCE CO. v. PERDUE.

(Supreme Court of Georgia. July 13, 1910.)

(Syllabus by the Court.)

1. BANKRUPTCY (§ 398*)—RECEIVERS—APPOINTMENT—RIGHT TO REMEDY.

Where, in equitable proceedings to obtain injunctive relief and the appointment of a receiver to take charge of funds which had been set apart to the bankrupt under his claim of homestead, and for a judgment in rem against the same, the petitioner asserted the right to subject the funds to his demand on the ground that the notes which were the basis of the same contained a waiver of homestead, and the debtor, against whom the proceedings were instituted, in his answer set up that another creditor held a mortgage which constituted a lien upon the funds in question, the mortgage being for a greater amount than the funds involved in the controversy, and where the lienholder filed an intervention setting up the fact of the existence of the lien by mortgage in his favor, and the priority of the lien thus set up was not disputed, as appears from the pleadings and evidence in the case, a denial of a judgment in rem (that is, to subject the funds to the demand of the petitioner), and of the injunctive relief and the receivership, necessarily resulted, although in his intervention the lienholder did not pray for a decree subjecting the funds to his lien, or for other affirmative equitable relief. *Collins v. Myers & Marcus*, 68 Ga. 530; *Barnwell v. Wofford*, 87 Ga. 50; *Atlanta Brewing & Ice Co. v. Bluthenthal & Bickart*, 101 Ga. 541, 28 S. E. 1003.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 398.*]

2. RECEIVERS (§ 39*)—APPOINTMENT—SCOPE OF INQUIRY.

The intervention, having been filed before the hearing and allowed by the court, was properly before the court for consideration, although not formally served upon the petitioner; the latter having notice thereof upon the hearing and making no motion for a continuance or a postponement in order to procure evidence with which to contest the allegations of the intervention.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 39.*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by the Fidelity Produce Company against A. L. Perdue. Judgment for defendant, and plaintiff brings error. Affirmed.

while crossing the car track, in her effort to reach the usual place for boarding the car, she was struck and killed by the car. At the trial two witnesses testified that they witnessed the fatal injury—the son of the deceased and a passenger upon the car. According to the son's version of the occurrence, he and his mother left their home and were proceeding up Pine street, when he observed the car just beyond Willow street. At that time he and his mother were about 20 yards from the car tracks. The South Decatur line is double-tracked. He observed the car, and estimated (on the trial) that it was running at about the same speed at which it was running at the time it struck his mother, 25 miles per hour. He ran across the track in advance of the rapidly approaching car, passing over the track as the car was about 60 yards away, and as he crossed the track he waved his hand in signal just as the car passed. His mother was following him, and he saw her just as he waved at the car. She was then north of the south track—in between the tracks—and was struck just as she stepped over the first rail of the north track. The passenger testified that he was on the front seat of the car, and he noticed that the motorman, in approaching Pine street, "had what we call the power on full," and did not check the speed of his car. He saw the deceased and her son when the car was between 200 and 300 feet from the crossing, and they were about 50 feet from the track. They were running, and when the car was from 100 to 200 feet from the crossing, and the deceased was in about fifteen feet of the tracks, he thrice exclaimed in a loud tone, "Stop this car!" The son had crossed the track when he called to the motorman to stop the car. He did not know that the motorman heard him. The deceased was wearing an old-fashioned sunbonnet, and the witness did not see her look towards the car as it approached the crossing. The evidence was sufficient to authorize an inference of negligence on the part of the defendant's agent.

The next question is whether the deceased was so clearly guilty of a want of ordinary care, by the exercise of which she could have avoided the injury, as to authorize a nonsuit. The injury was done by an electric car running through the streets and suburbs of Atlanta. Such a car stops at numerous points, at short intervals apart, to take on passengers. It is not altogether like a train propelled by steam, which only stops at certain stations. From the nature of the business and the frequency of the stops, and from the fact that its purpose is to transport passengers in densely populated communities, electric street cars are equipped so as to stop readily, to meet the requirements of the character of the business in which they

are engaged. The place of the injury was a crossing of a street or a public road. It was a custom to stop when signaled. The son of the deceased ran toward the place where it was usual to board the car, closely followed by his mother. He ran across the track to the side where it was customary to give the signal to stop the car for the purpose of boarding it. The mother was following the son, and was wearing a sunbonnet. It does not appear that she actually saw the rapidly approaching car. At one point in the son's testimony he said he saw the car when he crossed the track, and it was about 60 yards distant. Other evidence indicated that it might have been even further. After crossing the track, he at once signaled for the car to stop; but it did not do so. It passed directly after he gave the signal, and just as the deceased stepped on the track it struck her. Considering the character of the car, the fact that the son and his mother could have been seen approaching the track, that he got across and gave a signal for the car to stop, and that she was wearing a sunbonnet, which might have to some extent interfered with her seeing the near approach or speed of the car, we think it should have been left for the jury to say whether she was so wanting in the use of ordinary care in stepping on the track, or in not stopping, rather than to have determined it as a matter of law. Whether she thought the car could and would be stopped in obedience to her son's signal before reaching the place where she attempted to cross, and, if so, whether she was wanting in ordinary care, or whether she merely attempted to outrun the street car and knowingly sought to cross directly in front of it, whether she was guilty of a want of ordinary care, would better be left to the determination of the jury under the evidence.

Judgment reversed. All the Justices concur.

(124 Ga. 779)

HULL v. WATKINS et al.

(Supreme Court of Georgia. July 12, 1910.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS (§ 344*)—APPLICATION TO SELL LAND—CLAIM AFFIDAVIT—JURISDICTION OF SUPERIOR COURT.

Where an administrator advertises that it is his intention to apply for leave to sell any real estate as the property of his intestate, and an affidavit is filed under the provisions of section 4630 of the Civil Code of 1895, before the order is passed granting leave to sell, and the claim affidavit so filed is duly transmitted to the superior court of the county where the property is situated, that court has jurisdiction, under the issue made up as prescribed in the Code section last referred to, to try the "right of property," and the issue submitted on the trial should not be so restricted as to determine the single question as to whether the property is held adversely to the administrator, but, un-

der the issue made up under the circumstances stated above, the right of the administrator to have an order granting leave to sell and the necessity for such an order should be determined, as well as whether the property is held adversely to the administrator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1442, 1443; Dec. Dig. § 344.*]

Error from Superior Court, Clarke County; C. H. Brand, Judge.

J. L. Hull, administrator of M. G. Watkins, advertised his intent to apply for leave to sell realty alleged to belong to the estate, and Lizzie Watkins and others filed a claim asserting title to the property. There was a directed verdict for claimants, and the administrator brings error. Reversed.

Hull, as administrator of M. G. Watkins, deceased, having advertised in the official gazette of Clarke county that it was his intention, as administrator as aforesaid, to apply to the court of ordinary at the January term, 1908, for leave to sell certain real estate, which, as he claimed, belonged to the estate of the said Watkins, Lizzie Watkins, in her own behalf and as agent of her sisters, Charity Watkins, Sarah Watkins, and Margaret Watkins, filed a claim, asserting title to the property. On the trial T. W. Mabry testified: "I know the land in question in this case. M. G. Watkins was in possession of said land at the time of his death, which I think occurred in 1891. Since that time his children, the claimants, or some of them, have been in possession, and are still in possession. T. G. Watkins was a son of M. G. Watkins, and married my daughter. T. G. Watkins died in October, 1906, leaving no children, but leaving a wife, and she died a few days afterwards during the same month." J. L. Hull testified: "As the administrator of M. G. Watkins, there are debts existing against M. G. Watkins, of which I have been given notice. Dr. I. H. Goss holds a note for \$51, less a credit of \$19. This credit was paid by T. G. Watkins, and his estate holds that claim against the estate of M. G. Watkins. There is no other property out of which to pay these debts belonging to the estate of M. G. Watkins, except the land, for which an order has been applied to sell, and which is involved in this claim case. I have never been in actual possession of the land in question, nor have I ever taken possession, or demanded it. I was appointed administrator some time in 1907, and made application for order to sell land now in question." The foregoing is all of the evidence appearing in the record. The judge directed a verdict in favor of the claimants. Judgment was entered that the property in dispute was not subject to sale by the administrator. He excepted to the refusal of a new trial.

John J. Strickland and J. L. Hull, for plaintiff in error. Geo. C. Thomas and Cobb & Erwin, for defendants in error.

BECK, J. (after stating the facts as above). Civ. Code 1895, § 4630, provides that, "when an executor, administrator, guardian, or other trustee shall advertise that it is his intention to apply for leave to sell any real estate as the property of his testator, intestate, ward, or cestui que trust, or having obtained such order, it may be lawful for any person claiming such real estate, either by himself, his agent, or attorney, to file in the court of ordinary an affidavit claiming said property, a copy whereof shall be served on such executor, administrator, guardian or trustee, as the case may be, previous to the day of sale." Under the provisions of this section the children of the administrator's intestate, before the order was obtained for leave to sell the land in controversy which the administrator was seeking to obtain, filed in the court of ordinary an affidavit claiming the property, and, as required by law, the ordinary transmitted the claim affidavit to the next term of the superior court of the county where the land is situated, and the issue was there made up in the same manner as in the trial of claims to property levied on by execution, following the directions relative to the making of such issue laid down in Civ. Code, § 4631. The section last referred to provides that, when the issue has been made up as prescribed, "the right of property shall there be tried." If the claim had been filed after the granting of an order conferring upon the administrator the right to sell, the only question to be tried under the issue, according to the decision in the case of *Hall v. Armour*, 68 Ga. 449, would have been whether or not the property was subject to sale; and in case it should appear that some one held adversely to the administrator a verdict for the claimant would necessarily result. But we are of the opinion that where parties shown to be in possession of the property decide to contest the right of the administrator to an order granting leave to sell in limine, and before the passing of such order in the court of ordinary, the right to have an order granting leave to sell, and the necessity for such an order, as well as whether the property is held adversely to the administrator, can be contested and settled. When evidence was introduced showing that M. G. Watkins died in possession of the land sought to be sold, that the persons in possession were heirs of the deceased, that there were debts of the estate still unpaid, and that there was no other property than that involved in this controversy with which to pay the same, a prima facie case was made entitling

the administrator to the order which he was seeking to obtain.

We think the "rights of property" between the persons engaged in this controversy can all be settled in the superior court, which has ample jurisdiction to determine the questions that may arise in this case. Those questions relate to the right of the administrator to an order for the sale of the land which he was seeking to obtain, to the title to the property in controversy, and the right of the claimants to hold it as against the representative of the estate of their deceased father. And inasmuch as the statute provides that the issue between the administrator and the claimants in this case is to be tried as other claim cases, we see no reason why, by an equitable amendment to the joinder of issue, in aid of the proceedings upon the part of the administrator as they stood at the time of the trial, the administrator might not set up his right to recover the property for the purpose of bringing the same to sale, where the prima facie right to an order for the sale of the property in this cause is not overcome by evidence in favor of the claimants' right to retain possession. And should such an amendment be filed, all questions springing out of proceedings to bring the property to sale, and the claim filed in resistance thereto, could be adjudicated in one proceeding, thereby saving the heavy expense incident to an independent action to oust the persons in possession of the property after the right to an order granting leave to sell had been established.

Judgment reversed. All the Justices concur.

LUMPKIN, J. I concur in the judgment of reversal. But I think that attention should be called to the two cases of *Hall v. Armour*, 68 Ga. 449, and *Head v. Driver*, 79 Ga. 179, 3 S. E. 621. The decision in the former case has never been reviewed. Whether it is in accord with section 4831 of the Civil Code or not, that case arose under a claim interposed after an order of sale had been granted, and it appeared that the persons in possession held, not as heirs of the intestate, but as purchasers claiming under a conveyance. In the second case above cited, it was held that, "prior to the Code, it was not absolutely settled whether an administrator could recover in ejectment against an heir at law without first obtaining an order for sale from the ordinary. Under the Code, it is the better practice, if it is not indispensable, to obtain such order." See, also, *Luttrell v. Whitehead*, 121 Ga. 703, 49 S. E. 691, where it was said that the order was necessary. The difference between the cases first cited is apparent. In the case at bar the administrator is applying for an order to sell. If he should, either

as better practice or as matter of necessity, obtain an order for sale before recovering possession from the heirs, and if he cannot obtain an order for sale if the heirs are in possession, he is between the horns of a legal dilemma. The law does not place him in such a position. He is entitled to the order of sale, under the evidence in the record.

(124 Ga. 783)

GUINN et al. v. TAYLOR.

(Supreme Court of Georgia. July 13, 1910.)

(Syllabus by the Court.)

WILLS (§ 637*)—CONSTRUCTION—INTERESTS CREATED.

A will devising certain property contained the following provisions: "Item Third. I will and bequeath to my beloved daughter, Martha Scott Guinn and her children born and to be born, all of my property, real and personal, that may belong to me at the time of my death. The income of all such property to be for the use and benefit of my said daughter, Martha Scott Guinn, formerly Martha Scott Abrahams. Said income to be used by her without liability to account to her said children for her benefit and that of her said children and to be free from all debts of Robert J. Guinn, her husband; neither is said income to be sold for any debts of the said Martha Scott Guinn except any surplus which may remain after a support has first been allowed for her and her said children. Neither shall any part of the property outside of the income be sold for the debts of the said Martha Scott Guinn. In case of death of any of the children of the said Martha Scott Guinn, without issue living at that time, then the part going to such child shall immediately vest in the survivor or survivors in equal shares." Item 4 provided for the appointment of a trustee for Martha Scott Guinn and her children, to preserve the corpus and to pay over to Martha Scott Guinn the income from the property, and provided that, with the consent in writing of the trustee and the ordinary, the property might be sold publicly or privately, the proceeds thereof to be reinvested "upon like uses and purposes." "Item Fifth. Upon the death of my daughter, Martha Scott Guinn, it is my will that all the property with its income if any be equally divided, share and share alike, between the children of the said Martha Scott Guinn, then living. If any of the children of Martha Scott Guinn should die before her death, without children, then the part of such deceased child or children shall go to the survivors, but should any of the children of Martha Scott Guinn be dead at the time of the death of Martha Scott Guinn and leave a child or children, they to stand in the place of deceased parent." Item 6 provided that the trustee "shall appropriate each year from the proceeds of my estate a sum sufficiently to keep the graves of my husband and myself in good condition." The wife of the plaintiff was one of four children of Martha Scott Guinn, all of whom survived her. The plaintiff claims an interest in the property as heir of his wife. *Held:*

Construing in connection with each other the items of the will above named, it was the intention of the testator to hold the property together until the death of Martha Scott Guinn, with a proviso that, in the event of the death of any of her children in her lifetime, the interest devised to such child was to go to the "survivors," but at the death of Martha Scott

Guinn the property was to be divided and vest absolutely in the persons then entitled, namely, one share to each of her children then living, and one share per stirpes to the surviving children of any child of Martha Scott Guinn who died during her lifetime. The wife of the plaintiff, having survived her mother, Martha Scott Guinn, took a vested interest in the property, which would descend by inheritance to her heirs.

(a) The plaintiff, as sole heir of his wife, having petitioned the court for a partition of property conveyed by the will, it was proper to overrule a demurrer to the petition setting up the contention that the plaintiff under the will referred to was not entitled to any interest in such property as heir of his wife.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1519; Dec. Dig. § 637.*]

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Action by C. I. Taylor against J. W. Guinn and others. A demurrer to the petition was overruled, and defendants bring error. Affirmed.

H. A. Hall, for plaintiffs in error. E. R. Bradfield, Jr., for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(134 Ga. 699)

SHIPPEN BROS. LUMBER CO. v.

ELLIOTT, Mayor, et al.

(Supreme Court of Georgia. June 29, 1910.)

(*Syllabus by the Court.*)

1. STATUTES (§ 188*)—AMENDMENT—TITLES.

The act approved October 21, 1891 (2 Acts 1890-91, p. 898), entitled "An act to amend the charter of the town of Ellijay, in the county of Gilmer, and to confer certain powers therein named," is not violative of the provisions of article 3, § 7, par. 17, of the Constitution (Civ. Code 1895, § 5779), on the ground that the act failed to sufficiently designate the previous acts of the General Assembly which constituted the charter of the town of Ellijay. *Puckett v. Young*, 112 Ga. 578, 37 S. E. 880; *Town of Poulan v. Atlantic Coast Line R. Co.*, 123 Ga. 605, 51 S. E. 657; *Burge v. Mangum*, 134 Ga. —, 67 S. E. 857.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 205, 206; Dec. Dig. § 138.*]

2. TAXATION (§ 314*)—ASSESSMENT—POWER OF MUNICIPALITY—STATUTORY PROVISIONS.

The provisions of the act of the General Assembly, approved October 16, 1891 (1 Acts 1890-91, p. 231; Pol. Code 1895, § 717), "that the mayor and council of each town or city are authorized, at their option, to elect three freeholders residing in the town or city, as assessors, who shall value and assess all the property within the said town or city liable for taxation," it is to be construed as cumulative, conferring upon the municipalities the option of assessing property for taxation through the agency of appointed freeholders, but does not preclude an assessment through other agencies provided by law.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 314.*]

B. CONSTITUTIONAL LAW (§ 284*)—DUE PROCESS OF LAW.

In so far as the charter of the town of Ellijay (2 Acts 1890-91, p. 900, § 10), purports

to authorize the mayor and council to assess or raise the valuation of any unreturned property to its true market value, it is violative of the due process clause of the Constitution of the United States, and of the similar clause of the Constitution of the state of Georgia, because no provision is made which affords the owner of any unreturned property a hearing on the question of its value.

(a) It is unnecessary to deal with other questions which relate exclusively to the exercise of discretion by the judge.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 893-896; Dec. Dig. § 284.*]

Dvane, P. J., dissenting in part.

Error from Superior Court, Gilmer County; N. A. Morris, Judge.

Action by the Shippen Bros. Lumber Company against J. H. Elliott, Mayor, and others. Judgment for defendants, and plaintiff brings error. Reversed.

Thos. A. Brown, for plaintiff in error. A. H. Burtz and D. W. Blair, for defendants in error.

ATKINSON, J. 1-2. The rulings announced in the first and second headnotes do not require elaboration.

3. The plaintiff was a taxpayer in the town of Ellijay. It omitted to return its property for taxes for the year 1909. The mayor and council, after giving notice and a hearing, assessed the property at a stated value for the purpose of taxation. Execution issued for the amount of the taxes based on the assessed value, and suit was brought to enjoin the enforcement of the execution. It was contended that the mayor and council were without authority to assess the value of the property. The charter of the town of Ellijay contained the following: "Sec. X. Be it further enacted, that the marshal of said town shall receive the return of property, both real and personal, and shall lay the same before the mayor and council before an assessment has been made; that when any person or corporation fails or refuses to return its property for taxation, or when property is returned below its true market value, the mayor and council may assess or raise the valuation of any property to its true market value." Acts 1890-91, vol. 2, p. 900. It was alleged that section 10 was unconstitutional, because it violated the due process clause as embodied in the Constitution of the United States (Civ. Code 1895, § 6030), and of the Constitution of the state of Georgia (Civ. Code 1895, § 5700), it being substantially the same in each of the Constitutions. The attack upon the constitutionality of this provision of the charter was based upon the ground that there was no provision made which afforded a hearing to a taxpayer in the matter of fixing the value at which his unreturned property should be taxed. The town of Ellijay was incorporated by the act

approved August 16, 1883 (Acts 1882-83, p. 297), and its charter was subsequently amended at several different times. Acts 1887, p. 584; Acts 1889, p. 1078; Acts 1890-91, p. 598. Section 10 of the act of 1891, which is attacked as being unconstitutional, when considered in connection with all of the provisions of the charter as contained in the act incorporating the town of Ellijay and the several amending acts above mentioned, in so far as it relates to the ascertainment of values of unreturned property for taxation, does not contemplate the conferring of power upon the mayor and council to provide by ordinance for the ascertainment of the value of unreturned property, but professes to be a complete act within itself and to make final disposition of the matter by conferring upon the mayor and council directly the power to assess the value, and makes no provision which affords the taxpayer a hearing as to the value of property to be assessed, but the assessment by the mayor and council is contemplated to be final and binding. It thus appears that the question before us is different from what it might be if the charter provided authority to assess the value of property, and expressly conferred power upon the municipality to adopt ordinances providing for the ascertainment of values, and ordinances were in fact adopted which provided for notice and a hearing to the taxpayer. In the case of *City Council of Augusta v. King*, 115 Ga. 454, 41 S. E. 661, it was said: "A legislative act which undertakes to empower a city council to collect 'all sums that may be assessed by said city council, or its authority, against each and every improved lot lying on any street in [the city], through which the pipes of the [city] waterworks may pass,' is unconstitutional when it makes no provision for fixing the amount of the assessment for which it provides, with relation either to the cost thereof or the benefits to the property owners interested, nor for notice to them, nor for giving them any hearing with respect to the reasonableness or justness of such assessments. See Acts 1887, p. 568. An act of this nature, with such omissions, is violative of article 1, § 1, par. 3, of the Constitution, which provides that 'No person shall be deprived of * * * property except by due process of law.'" In the case of *Savannah, Florida & Western R. Co. v. Mayor and Aldermen of the City of Savannah*, 96 Ga. 680, 23 S. E. 847, it was said: "That the charter of a city provides for the appointment by the mayor and aldermen of freeholders to assess the damages sustained by lotowners in consequence of the opening or extension of any street, with power to the mayor and aldermen to enforce the award or decision of these assessors, without providing for notice of any kind to such lotowners as to these matters, would not render the charter violative of the constitutional prohibition against depriving persons of their

property without due process of law, if the charter made any provision for such notice to lotowners as would allow them an opportunity to be heard with reference to the amount of the compensation to be paid them before such assessments should become finally binding and conclusive upon them. * * * In the absence of any provision whatever for such notice in a city charter, it is unconstitutional in the respect above indicated." In each of the foregoing cases there was statutory power conferred upon the municipality to do the thing attempted; but in each instance, as is true with the statute creating the charter of the town of Ellijay, there was an omission to provide for a hearing to the property owner, and the law was held to be unconstitutional. The property owner is entitled to a hearing at some time before the assessment of the value of his property becomes finally binding, and a statute which attempts to authorize an assessment when the law does not afford him such a hearing, will be declared unconstitutional. *Central of Georgia R. Co. v. Wright*, 207 U. S. 127, 28 Sup. Ct. 47, 52 L. Ed. 134. See, also, cases cited in 8 Cyc. 1108. It will not suffice that he may have been afforded a hearing as a matter of grace; where he is entitled to a hearing, it is essential that the law should afford it to him as a matter of right. *Security Trust Co. v. City of Lexington*, 203 U. S. 323, 27 Sup. Ct. 87, 51 L. Ed. 204. See, also, *Process of Law*, by McGehee, c. 2, p. 82; *Gray on Limitation of Taxing Power and Public Indebtedness*, § 1165, p. 579. Under a proper construction of the charter of the town of Ellijay, the mayor and council would have complied with its terms with reference to the assessment of unreturned property for taxation without giving any hearing whatever, or passing any ordinance on the subject; and the hearing which they gave the plaintiff in error was given purely as a matter of grace. After construing the charter of the town of Ellijay as an effort to confer power upon the mayor and council to assess the value without also making provision which afforded the property owner a hearing, we have considered whether the plaintiff in error might not have been entitled to a hearing in a court of equity, and thus to have upheld the constitutionality of section 10 of the charter; but under the reasoning in the case of the *City of Augusta v. Pearce*, 79 Ga. 98, 4 S. E. 104, we have concluded that as to the question of the ascertainment of mere value equity will not afford a hearing, and we can discover no ground upon which to defend the constitutionality of section 10 of the charter as against the attack made upon it. As it was unconstitutional, all the proceedings under it were necessarily void, and the court ought to have granted the injunction. Having reached this conclusion, it is unnecessary to deal with other questions in the case which

depended entirely upon the discretion of the judge.

Judgment reversed. All the Justices concur.

EVANS, P. J. I concur in the judgment, but dissent from the conclusion of the majority that section 10 of the amended charter of the town of Ellijay was intended to be an exhaustive scheme for the assessment of property for taxation in that municipality. It is not usual, and indeed not desirable, that a municipal charter should be burdened with all the details for exercising the various powers conferred upon the municipality or any of its officers by the Legislature. When the power to do certain acts is conferred upon the mayor and council by the municipal charter, but the particular mode of exercising the power is not prescribed, this may be done by ordinance. Section 10 bears internal evidence that the Legislature did not contemplate that they were inhibiting the municipality from providing the mode of exercising the power given to the municipality relative to the assessment of taxes. It is not provided when the tax returns shall be made to the marshal, nor the form or manner in which they shall be made, nor is the machinery provided for the assessment of property of delinquent taxpayers. I do not think that the provision in the charter should be held to be self-executing, and a denial of the right of the municipality to provide by ordinance a constitutional mode of assessment, so as to render the charter provision unconstitutional; but rather should it be construed as authorizing the municipality to carry into effect the power conferred by the charter by adopting proper and legal by-laws or ordinances providing for the assessment of property. It does not appear in the record, however, that the municipality has adopted any by-law to carry into effect the charter provision; and for this reason I concur in the judgment, but dissent from so much of the opinion as holds section 10 to be unconstitutional.

(124 Ga. 704)

PAVLOSKI v. KLASSING et al.

(Supreme Court of Georgia. June 29, 1910.)

(Syllabus by the Court.)

1. PLEADING (§ 248*)—AMENDMENT—NEW CAUSE OF ACTION.

The former husband of one of the defendants brought suit against her and her present husband, alleging in the original petition, filed December 24, 1907, that in 1889 and 1890 described lots of land were conveyed to the plaintiff, of which he was in possession up to December 25, 1901, when defendants took possession of the lands "under some pretended but fraudulent and unlawful claim, * * * and have since over the protest" of the plaintiff held such possession, and that, after plaintiff obtained title to the lands, he conveyed the same to his brothers, who on December 3, 1907, con-

veyed the lands to plaintiff. Plaintiff prayed for a recovery of the lands, and "especially for any and all such orders, judgments, and decrees as may be consistent with law and equity in such cases made and provided." The plaintiff offered an amendment to the petition, alleging that upon the false and fraudulent representations of his former wife that, if he would have his brothers to make her a deed to the lands, she (who was then living separate from him) would immediately return to him and live with him as his wife "so long as they both might live," plaintiff had his brothers (who held from him a deed to the land to secure a debt which had been paid) to make her a deed on July 13, 1895, under which she claimed title to the land. She returned to the plaintiff's home July 24, 1895, but slept in a separate room, and refused to cohabit with the plaintiff, and left him on August 20, 1895, and thereafter married her present husband. Her promise to live with the plaintiff as his wife was falsely and fraudulently made for the purpose of procuring the deed made to her. In the amendment the plaintiff prayed for a cancellation of such deed. Held: (1) Such amendment was allowable, and was not subject to the objection that it added a new and distinct cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-706; Dec. Dig. § 248.*]

2. EVIDENCE (§§ 413, 419*)—PAROL EVIDENCE—VARYING WRITTEN CONTRACT—EXPLAINING CONSIDERATION FOR DEED.

The petition as amended sought to set aside the deed to the wife because of its having been procured by her fraud, and was not subject to demurrer on the ground "that said petition as amended is an attempt to add by parol to the terms of a written instrument, to wit, an attempt to add to the terms of an unconditional deed, by parol, a condition that it was to be effective only in the event that the defendant lived with the plaintiff as his wife."

(a) Though the deed recited a consideration of \$1,500, it could be shown by parol that the real consideration was as alleged in the amendment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. §§ 413, 419.*]

3. CANCELLATION OF INSTRUMENTS (§ 34*)—RIGHT TO RELIEF—SUFFICIENCY OF PETITION—LACHES.

The time during which the plaintiff was in peaceable possession of the lands should not be counted against him in determining whether or not he was barred by lapse of time from invoking the aid of a court of equity in having the deed to his wife canceled.

(a) The plaintiff having sought by equitable proceedings to have the deed set aside within seven years from the time he lost possession of the property and she took possession, his right to ask a court of equity to set aside the deed is not barred by his own laches.

(b) Upon proof of the allegations of the petition as amended that the former wife of the plaintiff procured the deed by fraud as alleged, the plaintiff is entitled to have the deed canceled. The petition as amended set forth a good cause of action, and was not subject to general demurrer.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 49-54; Dec. Dig. § 34.*]

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by Frank Pavloski against Julius Klassing and others. Judgment of dismissal, and plaintiff brings error. Reversed.

Frank Copeland and Hal Wright, for plaintiff in error. Nat Harris and Dean & Dean, for defendants in error.

HOLDEN, J. On December 24, 1907, the plaintiff brought suit against his former wife and her present husband to recover described tracts of land, making in his original petition substantially the following allegations: The plaintiff acquired title to part of the land in 1889 and to the rest in 1890. He subsequently conveyed it to his brothers, who on December 3, 1907, conveyed it back to the plaintiff, who is now the owner in fee, and entitled to its possession, control, and use. On and prior to December 25, 1901, he was in possession of the land. On or about that date the defendants "took possession of said lands * * * under some pretended, but fraudulent and unlawful, claim, and without any legal right or legal authority whatever, and have since over the protest of this petitioner held the possession of said land against petitioner's right, claim, and title, and are now in possession of the same under some pretended but unlawful and fraudulent claim, and refuse to deliver to petitioner the possession thereof." The plaintiff prayed for a recovery of the property and mesne profits, and "especially for any and all such orders, judgments, and decrees as may be consistent with law and equity in such cases made and provided." Amendments were offered, making substantially the following allegations: On July 13, 1895, the plaintiff had his brothers to make to the defendant, who was formerly the wife of the plaintiff, a deed to the lands, under which she claims title thereto. This deed recites a consideration of \$1,500, but the only consideration thereof was the promise of the defendant, who was at that time his wife and living apart from him, that she would "immediately return to live with petitioner as his wife so long as they might live." This deed was secured by her falsely and fraudulently representing to the plaintiff that, if he would have the same made, she would "again and immediately resume her place in plaintiff's family as his wife, and would continue so to live with him so long as they both might live; that plaintiff believed and acted on said statement, promises, and contract, and, acting on the same in good faith for said consideration, was misled, defrauded, and deceived by the said Henrietta, in this: that instead of resuming her place as plaintiff's wife, except for a short while as a pretense in order to obtain said land agreement, she declined and refused to do so, although plaintiff offered and was anxious to accept her back as his wife, and she refused to return, and soon after married to her present husband." She came back to live with the plaintiff on July 24, 1895, and lived with him until August 20, 1895, "and during said time refused to cohabit with plaintiff as his wife, but slept in a separate room from plaintiff, and refused to treat him as her hus-

band, and plaintiff charges that said Henrietta's only purpose was to secure his property, * * *" and "to fraudulently secure said deed," and plaintiff was thereby "injured, wronged, cheated, and deceived and defrauded." Plaintiff prayed for a cancellation of the deed, and that the title to the land be declared to be in him as against the defendants in the original petition and his brothers, whom he prayed to be made parties defendant, and who, by an order of the court, were made parties defendant. At the time the brothers of the plaintiff made the deed to his former wife, they held title to the land to secure a debt, which had then been paid. The two brothers who were made parties defendant acknowledged service, but filed no defense. The defendant Julius Klassing offered a disclaimer, and the other defendant, who was formerly the wife of the plaintiff, filed a demurrer. To the order of the court sustaining this demurrer the plaintiff excepted.

1. One of the grounds of the demurrer, which was filed during the term of the court at which the amendments were offered, was as follows: "That said petition as amended is a separate and distinct cause of action from that originally filed by plaintiff; the petition as originally filed having been a common-law action for the recovery of possession of land, together with mesne profits, and the petition as amended being an equitable proceeding to set aside and cancel a deed for fraud." Under the record in this case, we think it proper to treat both of the amendments as having been allowed by the court without objection. Whether or not the question as to whether the amendments added a new cause of action was properly raised by the demurrer need not be considered, as the amendments offered no new cause of action and were allowable. The plaintiff in his original petition stated that the defendants held the lands "under some pretended but fraudulent and unlawful claim" of title, and prayed for a recovery of the lands, "and especially for any and all such orders, judgments, and decrees as may be consistent with law and equity in such cases made and provided." The allegations in the amendment set forth the deed under which the defendants claimed title to the land, and alleged that it was procured by fraud, and asked a cancellation of the same. This did not add any new cause of action to that originally brought. The object of the original petition was to maintain title to and obtain possession of the lands sued for. By the amendments the same result was sought, the plaintiff seeking, in furtherance of that purpose, to set aside, as having been procured by fraud, this deed which he caused his brothers to make to the main defendant. The gist of the original petition was that the plaintiff was the rightful owner of the lands sued for, and that the defendants were holding them under a pretended but fraudulent and unlawful claim. The amendments specified that the alleged fraud-

ulent claim was based on a deed which the defendant, who was formerly the wife of the plaintiff, had obtained by fraud, and sought a cancellation of this deed in the suit for a recovery of the possession of the land sued for in the original petition. Amendments of this nature did not add a new cause of action, and were permissible. *Jordan v. Downs*, 118 Ga. 544, 45 S. E. 439; *Bridger v. Exchange Bank*, 126 Ga. 821, 56 S. E. 97, 8 L. R. A. (N. S.) 463; *Brice v. Sheffield*, 121 Ga. 216, 48 S. E. 925.

2. Two of the grounds of demurrer were as follows: "(7) That said petition, as amended, is an attempt to add, by parol, to the terms of a written instrument, to wit, an attempt to add to the terms of an unconditional deed, by parol, a condition that it was to be effective only in the event that defendant lived with plaintiff as his wife. (8) That said petition as amended should be dismissed upon the ground that such condition cannot be ingrafted on said deed, it appearing that there was no intention to incorporate such condition in the deed." There is no merit in either of these grounds of the demurrer. The consideration of the deed could be inquired into, and, although it recited a consideration of \$1,500, the plaintiff had a right to show that he had his brothers to make the deed to his wife in consideration of her living with him, and could show that it was procured by fraud on the part of the wife. There was no effort to add any condition to the deed or to change the terms thereof.

3. One of the grounds of the demurrer was that plaintiff's right to recover the land and cancel the deed was barred because of his own laches. We think that the petition, properly construed, means that from the time the brothers of the plaintiff made his wife a deed on July 13, 1895, up to December 25, 1901, the plaintiff was in possession of the land, and that the possession of the land by his wife and her second husband never began until December 25, 1901. The brothers of the plaintiff made him a deed to the property on December 3, 1907, and this suit was filed on December 24, 1907. We do not think the equitable right of the plaintiff to have the deed canceled was barred by laches on his part. Twelve years had elapsed between the date of the execution of the deed to the wife of the plaintiff which it was sought to cancel and the time the suit was filed, but only about six years intervened between the time the possession of the land by the plaintiff ceased and the time of the filing of the suit. Ought the time during which the plaintiff was in possession of the property to be counted against him, in determining whether or not his right to have the deed cancelled is barred by his delay in undertaking to assert such right? We think not. In 18 Am. & Eng. Enc. Law, 124, it is said: "The owner of the legal title in possession may lie by until his possession is invaded or his title attacked,

before taking steps to vindicate his right." On page 125 of this work the following language is used: "But, when the plaintiff is out of possession, it would appear that the defense of laches is available. * * * Laches will not be imputed to one in peaceable possession of property for delay in resorting to a court of equity to establish his right to the legal title." In this connection, see *Pierce v. Middle Georgia Land Co.*, 181 Ga. 99, 102, 103, 61 S. E. 1114; 5 Pomeroy's Eq. Jur. § 33, p. 58. Conceding that the plaintiff, while in possession of the property from the time the deed to his wife was made, or from the time his wife left his home soon thereafter, which possession continued to December 25, 1901, had the right to apply to a court of equity to have the deed canceled, we do not think his failure to do so can be considered against him, under the facts of this case, in determining whether or not he was barred by lapse of time from asserting his right to have the deed canceled. He was in possession of the property and enjoying the benefits of it, and his failure to assert such rights before his possession and enjoyment of the benefits of the property were disturbed should not be considered against him in determining whether or not by lapse of time he had lost the right to have the deed from his brothers to his wife canceled in a suit for that purpose filed after he lost possession. The only time that should be counted against the plaintiff is that intervening between the date when his wife and her husband took possession of the property on December 25, 1901, and the date when this suit was filed on December 24, 1907, which was six years. There is in this state no statute of limitations barring the right of the owner of land to sue for a recovery of it, though another in adverse possession for seven years or more under color of title may acquire a prescriptive title which would be the superior title. The analogy of the law is followed in courts of equity; and, as the plaintiff sought to have the deed made to his wife canceled within a less time than seven years after he lost possession of the property, we do not think he was barred by the lapse of time from asserting such rights, there being no special circumstances sufficient to authorize a departure from the general rule above announced. At the time the plaintiff brought this suit, he had obtained from his brothers a deed to the land. The allegations of the petition were sufficient to show that the wife of the plaintiff by fraud on her part induced the plaintiff to have his brothers execute a deed to her, and the petition was sufficient to withstand a general demurrer. *Brown v. Doane*, 86 Ga. 32, 12 S. E. 179, 11 L. R. A. 381. The court committed error in sustaining the demurrer and dismissing the petition.

Judgment reversed. All the Justices concur.

(134 Ga. 690)

WILSON v. GRANGER & LEWIS.

(Supreme Court of Georgia. June 25, 1910.)

*(Syllabus by the Court.)***1. JURY (§ 13*)—RIGHT TO JURY TRIAL—LEGAL OR EQUITABLE PROCEEDING—ACCOUNTING—EXCEPTIONS TO AUDITOR'S REPORT.**

The plaintiff filed a petition in the superior court, alleging a complicated state of facts, including the taking up by the defendants, for her benefit, of several claims, one being transferred at less than the full amount due on it, the shipment of lumber by the plaintiff from a sawmill for the purpose of discharging the indebtedness, the taking possession of the sawmill and operating it by the defendants, the sale of the property by them, and the buying of a tract of timbered land by them, taking title in their names, but allowing the timber to be cut and used at the plaintiff's mill. It was alleged that "said matters of account, being of an intricate and complicated nature, cannot be adequately and properly considered in a court of law; and it is necessary, in order that your petitioner may have adequate and complete relief, that an accounting be had under the equitable powers of the court." Discovery was waived. The prayers were for judgment for an amount which was alleged to be due from the defendants to the plaintiff, that an auditor be appointed "to prepare an accounting" between the parties, and for process. Two amendments were filed to the petition, which referred to it as "in equity." The answer of the defendants likewise so characterized the case, as did also the process and the various entries on the papers. An auditor was appointed, who filed a report adverse to the contentions of the plaintiff. She filed exceptions. At the hearing, counsel for plaintiff contended that the cause was one at law, and that the plaintiff was entitled to a jury trial on the exceptions of fact to the auditor's report as matter of right, instead of treating them as subject to be approved or disapproved by the presiding judge, as in cases of an equitable character. *Held*, that such contention was properly overruled.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 35, 62; Dec. Dig. § 13.*]

2. REVIEW ON APPEAL.

Upon a careful consideration of the auditor's report, the various exceptions filed by the plaintiff thereto, and the evidence, it is *held* that there was no error in overruling such exceptions and sustaining the findings of the auditor.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by Mrs. L. E. Wilson against Granger & Lewis. Judgment for defendants, and plaintiff brings error. Affirmed.

Twiggs & Gazan, for plaintiff in error. Osborne & Lawrence, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(134 Ga. 674)

GEORGIA & FLORIDA DEVELOPMENT CO. v. BUCK.

(Supreme Court of Georgia. June 24, 1910.)

*(Syllabus by the Court.)***1. NO MISJOINDER OF ACTIONS.**

The petition was not demurrable on the ground that there was a misjoinder of causes of

action, in uniting an action *ex delicto* with an action *ex contractu*.

2. VENDOR AND PURCHASER (§ 65*)—SALE OF LAND BY TRACT.

A deed contained the following description: "Seven thousand five hundred and seventy-eight acres, more or less, lying and being in the 32d Dist. G. M., Charlton County, Georgia, bounded on the north by Folkston lands, Edward lands, Cooner lands, and lands of John Vickery, east by Molette lands and St. Mary's river, south by St. Mary's river, and west by Spanish creek and lands of John Wilson, except so much of the above-described land as has been previously sold, which has been deducted from the total number of acres included in said boundary." A petition was filed, seeking a reformation of such deed, alleging a deficiency in the number of acres, and seeking to recover on the warranty contained in the deed for such deficiency. The plaintiff alleged "that during the negotiations preceding the actual sale, and at the time of making the sale, and at the time of executing and delivering the deed, it was the understanding of both parties thereto that the boundaries in the deed described a tract or body of land containing about 10,000 acres, and it was mutually intended to convey all of said land within said boundaries in said deed, except the amount previously sold off and that decreed to belong to J. E. Bryant et al., and it was mutually understood that the amount of land in the tract previously sold and deducted under the Bryant et al. decree aggregated 1,800 acres, more or less, and that there was left 7,578 acres then belonging to the defendant. * * * which said 7,578 acres he agreed to sell and convey to petitioner at \$1 per acre, amounting to \$7,578; said agreement to sell and convey being by the acre, and not by the tract." *Held* that, under the allegations of the petition and the description contained in the deed, it is apparent that the sale was by the tract, and not by the acre, although in one part of the petition the plaintiff alleges that the contrary was true.

(a) Where the plaintiff alleged that it was the understanding of both parties that the boundaries in the deed described a tract or body of land containing about 10,000 acres, and it was mutually intended to convey all of said land within said boundaries in said deed, except the amount previously sold off and that decreed to belong to named persons, and "that the amount in the tract previously sold and deducted under the * * * decree aggregated 1,800 acres, more or less," such allegations are inconsistent with a sale by the acre and a covenant that the tract of land contained an exact number of acres. "Eighteen hundred acres, more or less," cannot be subtracted from a tract of land included within certain boundaries and "containing about 10,000 acres," so as to leave an exact number of acres as a result. Such allegations as to the contract must be taken most strongly against the pleader, and are not cured by mere general statements that the sale was understood to be, and was in fact, by the acre.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 95; Dec. Dig. § 65.*]

3. REFORMATION OF INSTRUMENTS (§ 36*)—SUFFICIENCY OF PETITION.

Under the allegations of the petition, the plaintiff did not make out a case authorizing a reformation of the deed in regard to the quantity of land conveyed, or the manner of its conveyance by the tract, instead of by the acre; nor did it show that the plaintiff was authorized to recover for a deficiency in the quantity of land.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 141, 144; Dec. Dig. § 36.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. APPEAL AND ERROR (§ 1078*)—FAILURE TO ARGUE POINT IN BRIEFS.

The petition contains some allegations to the effect that by an oversight the deed was headed, "State of Georgia, Clinch County," but was actually executed in the state of Florida, and that the plaintiff cannot offer the deed in evidence as a registered deed without having it corrected in this particular. In the briefs of counsel for plaintiff in error no reference is made to this allegation, but the case was argued alone on the points decided in the preceding headnotes. This court, therefore, will not determine this question, but will affirm the judgment without prejudice to the right of the plaintiff to institute another proceeding, with proper allegations, to seek to obtain a reformation of the deed in this particular, should it be so advised.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256; Dec. Dig. § 1078.*]

Error from Superior Court, Tift County; R. G. Mitchell, Judge.

Action by the Georgia & Florida Development Company against E. A. Buck. Judgment for defendant, and plaintiff brings error. Affirmed.

Isaac S. Peebles, Jr., and Smith & Foy, for plaintiff in error. O. W. Fulwood, J. B. Murrow, and J. J. Murray, for defendant in error.

FISH, O. J. Judgment affirmed. All the Justices concur.

(124 Ga. 682)

PEDRICK v. PEDRICK.

(Supreme Court of Georgia. June 23, 1910.)

(Syllabus by the Court.)

1. DIVORCE (§ 184*)—REVIEW—DISCRETION OF LOWER COURT.

In cases of cruel treatment or habitual intoxication by either husband or wife, the jury, in their discretion, may grant either a total or partial divorce. Civ. Code 1895, § 2427.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 571, 572; Dec. Dig. § 184.*]

2. DIVORCE (§ 184*)—REVIEW—DISCRETION OF LOWER COURT.

In the present case there was evidence tending to show cruel treatment on the part of the defendant toward the plaintiff; but the jury found a partial divorce, instead of a total divorce, as desired by the plaintiff. No reason appears why this was an abuse of the discretionary power vested in the jury; and the presiding judge having approved the verdict, and refused to grant a new trial on motion of the plaintiff, this court will not reverse the judgment.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 184.*]

3. DIVORCE (§ 186*)—REVIEW.

In such a case, it not appearing that there was any abuse of discretion either on the part of the jury or of the judge, this court will not reverse the judgment and grant a new trial merely because it appears from the briefs of counsel that both parties desired it to be done, and because the jury at the first hearing found in favor of a total divorce, and at the second hearing found only a partial divorce.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 186.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action between A. E. Pedrick and P. S. Pedrick. From the judgment, A. E. Pedrick brings error. Affirmed.

Oliver & Oliver, for plaintiff in error. Robt. L. Colding, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(8 Ga. App. 53)

HOBBS v. STATE. (No. 2,695.)

(Court of Appeals of Georgia. July 5, 1910.)

(Syllabus by the Court.)

1. RAILROADS (§ 255*)—WRECKING TRAINS—QUESTION FOR JURY.

Where one is charged with the offense of attempting to wreck a railroad train, the question whether it was his intention to actually wreck the train or merely to obstruct the tracks, and, therefore whether he should have been indicted under section 520 of the Penal Code of 1895, rather than under section 512, is a question of fact for the jury, and may be determined in every case by those circumstances which indicate the probable result of the defendant's act.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 780; Dec. Dig. § 255.*]

2. CRIMINAL LAW (§§ 596, 598*)—CONTINUANCE—ABSENCE OF WITNESS.

Continuances in criminal cases are not governed by the same rule as those in civil cases. In a criminal case, a motion for continuance should be granted whenever the principles of justice appear to demand a postponement, whether the witness on account of whose absence the postponement is asked has been subpoenaed or not, if his testimony is material, and it appears that the defendant has used all the diligence within his power, and all the means at his command to procure the attendance of the absent witness. A motion for a continuance put upon the ground of absence of a witness, while to some extent addressed to the discretion of the judge, ought generally to be granted if his testimony is material, even though other witnesses present may testify to the same facts as the absent witness would state. The absent witness might be believed, while the witnesses present might be discredited by the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1323, 1338; Dec. Dig. §§ 596, 598.*]

3. CRIMINAL LAW (§ 824*)—INSTRUCTIONS—ALIBI.

When alibi is the only defense set up by a defendant in a criminal case, and this defense is sustained by testimony, the jury should be properly instructed in the rules governing the consideration of the subject of alibi, even in the absence of a request, and although the defense of alibi is included in the general plea of, "Not guilty." It is the duty of the court to instruct the jury, without request, in the law applicable to the substantial issues presented by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1833, 1908; Dec. Dig. § 824.*]

4. CRIMINAL LAW (§ 331*)—INSANITY—BUDEN OF PROOF.

There is no merit in the exception to the instructions of the trial judge upon the subject

of insanity. As every person is presumed to be sane, the burden of proving insanity or idiosyncrasy rests upon the defendant, and the insanity or idiosyncrasy need not be established beyond a reasonable doubt, but only to the reasonable satisfaction of the jury, as the jury were correctly informed by the judge. When, in a given case, it appears that the defendant is insane or a lunatic or an idiot, and the burden has been shifted, it devolves upon the state to prove the sanity of the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 742, 744; Dec. Dig. § 331.*]

Error from Superior Court, Montgomery County; J. H. Martin, Judge.

Emmett Hobbs was convicted of attempting to wreck a railroad train, and he brings error. Reversed.

Wm. B. Kent, for plaintiff in error. E. D. Graham, Sol. Gen., for the State.

RUSSELL, J. The defendant was convicted of the offense of attempting to wreck a railroad train. The indictment was based upon the provisions of section 512 of the Penal Code of 1895, which prescribes that any one who shall wreck or attempt to wreck a railroad train, or a locomotive, or any car of the same, shall be punished by confinement in the penitentiary for life, unless the jury trying the case shall recommend the person to mercy. It is urged by counsel for plaintiff in error that the defendant, if guilty at all, violated section 520 of the Penal Code of 1895, and that under the evidence he could not properly be convicted upon the present indictment. The reason given is that the evidence fails to show any intent to wreck the train, and that the most that appears from the evidence, construing it favorably to the prosecution, is that the defendant obstructed the railroad or the train. The question as to whether this contention is sustained was one for the jury.

Conceding that the defendant placed a scantling or old cross-tie across the track, it is for the jury to say whether it was his intention to wreck the train or merely to derail or obstruct it. In *Sanders v. State*, 118 Ga. 329, 45 S. E. 365; it was held that "to place on the rails of a railroad track a piece of iron of sufficient size and weight to derail a passenger car is to obstruct the track of a railroad company, within the meaning of Penal Code 1895, § 520." *Sanders*, however, was indicted under section 520, and in the language of the ruling of the Supreme Court quoted there is nothing to indicate that if he had been indicted under section 512 of the Pen. Code 1895, for attempting to wreck the same train, it would have been held that there was a variance between the proof and the allegations. In other words, it could not have been held that if the surrounding circumstances were such as to satisfy the jury that the intention in placing the bar of iron across the

railroad track was to wreck the train, the jury would not have been authorized to find the defendant guilty. From the testimony of the engineer in the present case, we ourselves would be very doubtful whether the intent of this boy was to wreck the train, or whether he merely wanted to see the wood placed there by him splintered. The engineer testifies that the engine readily cut the obstruction out of its way into splinters, and that, though he endeavored to stop the train, he did not do so, and, after the train had passed through and over the obstruction, the engine proceeded on its way uninjured. However, the jury was authorized to find that the intent of the defendant (assuming that he placed the timber across the track) was to wreck the train; because there was testimony to the effect that such a piece of timber as he placed across the track would generally derail the train. Whether the derailment would result in a wreck is of course to be determined by such circumstances as the speed at which the engine might be running, the weight of the train, and the contour of the surroundings. For instance, if a train were derailed by running slowly and on level ground, with no objects upon the sides of the track with which it was likely to come in contact, these would be circumstances from which the jury might infer that there was no intent to wreck the train, though there might be a purpose to obstruct or derail it. On the other hand, a jury could well infer that an attempt to derail a train upon a high trestle, where an inch out of balance might precipitate the engine or coaches, or both, to certain ruin upon the rocks below, was a conclusive circumstance indicating an intention to wreck the train, and not merely to obstruct it.

2. We think the judge erred in overruling the defendant's motion for a continuance. The defendant asked a continuance because of the absence of two witnesses—J. H. Mosely, by whom he expected to show that he was an idiot, and Jake Phillips, by whom the defendant's father stated that he expected to prove not only that the defendant was an idiot, but also expected to prove an alibi. It appeared that the defendant had other witnesses present by whom he could show that he had always been considered an idiot, and it was, no doubt, for this reason that the court disregarded the showing so far as Mr. Mosely's absence was concerned; because it was proved that Mr. Mosely had been subpoenaed and was too sick to come to court. There is no doubt as to the reason which influenced the trial judge in disregarding the absence of Jake Phillips; for it appears that the court suggested to the Solicitor General that there was no necessity for further inquiry as to his absence, because it had not been made to appear that Phillips had been subpoenaed. As we pointed out in the case

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of *Paulk v. State*, 5 Ga. App. 567, 63 S. E. 659, the long-established rule that motions for continuances in criminal cases are addressed to the sound discretion of the trial judges is stated in section 961 of the Penal Code of 1895, and is especially pertinent to cases called for trial at the same term as that at which the defendant is indicted. In this section there is no requirement that it shall be made to appear that the witness has been subpoenaed. Of course if he has not been subpoenaed, or no effort has been made to subpoena him, and there has been ample opportunity to do so, a court would be justified in disregarding the absence of a material witness. But, as we said in the *Paulk Case*, if it appears that the defendant has done all that was within his power to procure the attendance of a witness, whose attendance could probably be later secured, even though he might not have subpoenaed him, this, of course, would afford no reason for overruling a motion for a continuance. We think, therefore, that the trial judge erred in assuming that the fact that Phillips had not been subpoenaed prevented the defendant from insisting that his absence was a legal ground of continuance. As to Mr. Mosely, it appears that he had been subpoenaed, and that he was too sick to attend the court on the day of the trial. The question which arises then, as to him, is, would his testimony have been material? It is not denied that he would have testified that the defendant was an idiot, and, if so, incapable of distinguishing right from wrong. This testimony would have been material. It is urged, however, that the defendant had other witnesses by whom he could establish the same fact, and who did testify upon the trial that the defendant was an idiot. If, according to uncontradicted evidence, the testimony of a witness who is unavoidably absent is material, it is not within the power of the court to say that the defendant has sufficient testimony upon that point because he has other witnesses present who will testify to the same fact as the absent witness. The credibility of a witness being for the jury, the court cannot select a party's witness for him. The jury might disregard as wholly unreliable the testimony of the witnesses who are present, and yet might pin their faith to every word uttered by the absent witness. Either his manner upon the stand, his opportunity for knowing the facts, the probability of his statement, or its very apparent sincerity, might carry conviction to the minds of the jury, while the interest or manner or bad character of other witnesses who testify to the same facts might cause the jury to eliminate their testimony from the case as wholly unworthy of credit. This principle was recognized so strongly by the Supreme Court that in *Reid v. State*, 23 Ga. 190, where the defendant moved for a continuance because of the absence of a witness by whom he expected to prove an alibi, and the

court overruled the motion because the defendant had at hand other testimony to the same effect, it was held that the court should either have granted the motion, or exacted a promise from the state not to introduce evidence to destroy the credit of the witness who was present.

3. We think, too, that the court erred in not instructing the jury as to the rules which should govern them in their consideration of the defense of alibi. It is true there was no request to that effect, and it has been held that, where the defense of alibi is presented solely by the defendant's statement, it is not error, in the absence of a request, not to refer specifically to the subject of alibi, because, as it is the duty of the state to prove the defendant's presence, proof of his absence is included under the general defense of "Not guilty." In the present case, however, it was sought to establish the alibi by the sworn testimony of the witnesses. It was the only defense in denial of the act itself presented by the defendant; because the plea of insanity is not a denial of the criminal act; it is not a denial that the defendant committed the act charged against him; it is rather an assertion that, even if he did commit the act, the law grants him immunity and overlooks the act, because he is mentally incapable of crime. The only issue, therefore, as affecting the guilt or innocence of the defendant in this case, if the jury thought him to be sane (as all men are presumed to be), was whether he did or did not do the act charged in the indictment. From one view a mere statement of this fact would seem to be sufficient instruction to the jury upon the subject of alibi, and, of course, in the absence of a request, the trial judge is not required to bring to the attention of the jury the various theories, arising from the evidence, which may tend to show his innocence, or at least the state's failure to prove his guilt. But it is to be borne in mind not only that there are cases in which the defendant might be guilty of a crime without being actually present, but also that where an alibi is insisted upon as a defense, this fact is to be measured by a rule different from that employed in determining the effect of testimony for the state. The state must satisfy the jury that the defendant committed the acts alleged against him, beyond a reasonable doubt. The defendant, to disprove the state's case has only to reasonably satisfy the jury that he was absent. As pointed out in *Smith v. State*, 3 Ga. App. 803, 61 S. E. 737, this rule is perhaps incongruous, and yet is well established by the decisions of the Supreme Court of this state. In *Fletcher v. State*, 85 Ga. 666, 11 S. E. 872, and in *Moody v. State*, 114 Ga. 449, 40 S. E. 242, it was held that when the defense of alibi was relied upon and sustained by testimony, a failure to charge upon the law of alibi would cause a new trial. While the Supreme Court has since held that failure to charge upon alibi, in the absence of a request,

where the defense was presented only in the statement of the defendant, was not erroneous, the rulings in the cases of Fletcher and Moody have not been overruled. The holding is merely in accord with the general rule that the court is not required to present any defense arising exclusively from the defendant's statement, without a written request. In every case it is the duty of the judge to present the controlling issues with sufficient definiteness to enable the jury to consider them legally, and as the only issue in this case really affecting the physical participation of the defendant in the alleged criminal act depended upon whether it was probable that he was at such another place at the time of the alleged offense as rendered his participation therein impossible, the jury should have been instructed in the rules controlling the consideration of the evidence by which the defendant sought to establish his alibi.

4. There was no error in the instructions of the trial judge on the subject of insanity as an excuse for crimes. In so far as the requests to charge upon that subject were legal and pertinent, the subject was fully covered in the general charge. The charge of the trial judge as a whole was a luminous exposition of the general principles of law governing the case, and some portions of it were more favorable to the defendant than he had a right to ask, but in our opinion the case should have been postponed, to enable the defendant to present the testimony of the absent witnesses, and the attention of the jury should have been specifically called to his defense of alibi, and the jury should have been told, not only that the defendant was only required to establish this defense to the reasonable satisfaction of the jury, and that if they had any doubts upon that subject the benefit of such doubts should be given the defendant, but also that the evidence tending to show an alibi was to be considered by them with a view of ascertaining whether it created a reasonable doubt of the defendant's guilt, either when considered alone or when taken in connection with all the facts in the case.

Judgment reversed.

(3 Ga. App. 26)

RICHARDSON v. STATE. (No. 2,450.)
(Court of Appeals of Georgia. July 5, 1910.)

(Syllabus by the Court.)

1. **CRIMINAL LAW (§ 778*)—INSTRUCTIONS—PRESUMPTION OF INNOCENCE.**

The defendant enters upon his trial with the presumption of innocence in his favor, which is equivalent to evidence authorizing his acquittal; but this presumption does not necessarily remain until the end of the investigation. It remains until it is rebutted by proof which is sufficient for that purpose. Consequently it was not error for the court to charge the jury that "the defendant enters upon his trial presumed by law to be innocent, which

presumption remains and continues with him throughout and until the end of the trial, unless at some time during the progress of the trial such presumption of innocence is overcome by proof."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846, 1847; Dec. Dig. § 778.*]

2. **REVIEW ON APPEAL.**

The evidence authorizes the instructions of the trial judge upon the subject of voluntary manslaughter. Construing the evidence as a whole, the evidence of mutual intent to fight was ample. The charge of the court was a full and fair exposition of the law applicable to each of the several grades of homicide involved, and a careful review of the evidence demonstrates that the special exceptions offered no sufficient reason for granting a new trial.

Error from Superior Court, Early County; W. C. Worrill, Judge.

Clarence Richardson was convicted of manslaughter, and brings error. Affirmed.

Glessner & Park, for plaintiff in error. J. A. Laing, Sol. Gen., and R. R. Arnold, for the State.

RUSSELL, J. Judgment affirmed.

(3 Ga. App. 23)

THOMPSON v. KELSEY. (No. 2,411.)
(Court of Appeals of Georgia. July 5, 1910.)

(Syllabus by the Court.)

1. **APPEAL AND ERROR (§ 957*)—JUDGMENT (§ 136*)—DEFAULTS—OPENING—DISCRETION OF COURT—CONSTRUCTION OF STATUTES.**

Section 5072 of the Civil Code of 1895, providing for the opening of defaults, should be given a liberal construction, in the promotion of justice and the establishment of the truth; and the discretion of the trial judge in opening a default and permitting the defendant to plead will not be interfered with by a reviewing court, unless manifestly abused, to the injury of the plaintiff. Under the facts of this case, the trial judge was fully authorized to open the default and permit the defense to be filed. *Basz v. Doughty*, 5 Ga. App. 460, 63 S. E. 516; *Brawner v. Maddox*, 1 Ga. App. 337, 58 S. E. 278; *Polarek v. Gordon*, 102 Ill. App. 356; *Hewlett v. Hewlett*, 4 Edw. Ch. (N. Y.) 7; *Tucker v. Harris*, 13 Ga. 2, 58 Am. Dec. 488; *Gray v. McNeal*, 12 Ga. 424; *Davis v. Bray*, 119 Ga. 224, 46 S. E. 90; Civ. Code 1895, §§ 3702, 5070; *Burch v. Pope*, 114 Ga. 334, 40 S. E. 227; *Halley v. Vandiver* (Ga. App., this day decided) 68 S. E. 651.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. § 957; Judgment, Cent. Dig. § 248; Dec. Dig. § 136.*]

2. **APPEAL AND ERROR (§ 1058*)—NEW TRIAL (§ 41*)—GROUNDS—EXCLUSION OF PROPER EVIDENCE—HARMLESS ERROR.**

The exclusion of competent and relevant testimony will not be ground for reversal, where the same witness subsequently gives testimony substantially the same as that previously rejected by the court; nor will the improper rejection by the trial court of testimony justify the grant of another trial, unless the testimony so excluded would probably have produced a different verdict. *Central of Ga. Ry. Co. v. Mote*, 131 Ga. 166, 62 S. E. 164, and cases cited; Pen. Code 1895, § 997.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4201; Dec. Dig. § 1058; New Trial, Cent. Dig. § 69; Dec. Dig. § 41.*]

8. EVIDENCE (§ 474½*)—OPINIONS—ALTERATION OF INSTRUMENT.

In a suit on a promissory note, the defense relied upon was that, subsequently to its execution, the payee or his agent made a material alteration in the note, without the knowledge of the maker, and with intent to defraud; the alteration alleged being the addition of the word "seal" to the signature of the maker, so that the instrument was changed from a simple contract in writing to a note under seal, the alteration being made for the purpose of saving the note from the bar of the statute of limitations. *Held*, testimony that the word "seal" was apparently written with an indelible pencil, in a different handwriting from the signature of the note, and appeared to have been freshly written, and that the impression made by an indelible pencil would rapidly fade, given by witnesses claiming to be experts, was properly admitted. 1 Wigmore on Evidence, § 561; Civ. Code 1895, § 5285; Crankshaw v. Schweizer, 1 Ga. App. 369, 58 S. E. 222; 2 Wigmore on Evidence, § 1242; Davitte v. Southern Ry. Co., 108 Ga. 670 (3), 34 S. E. 327.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 474½.*]

4. BILLS AND NOTES (§ 492*)—ACTIONS—BURDEN OF PROOF.

Where the defendant denied on oath that the note sued upon was at the time of its execution under seal, alleging that the word "seal" had been added to the signature, by the plaintiff or his agent, with the fraudulent purpose of preventing the application of the statute of limitations to the note, this amounted in substance to a plea of non est factum, and the burden of proof was upon the plaintiff to prove the execution of the note as sued upon, and the charge of the court to this effect was not erroneous. Stanton v. Burge, 34 Ga. 435; Winkles v. Guenther, 98 Ga. 472 (3), 25 S. E. 527; Planters' & Mechanics' Bank v. Erwin, 31 Ga. 371; Wheat v. Arnold, 36 Ga. 479; Thrasher v. Anderson, 45 Ga. 544.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1649-1651; Dec. Dig. § 492.*]

5. APPEAL AND ERROR (§ 273*)—RESERVATION OF GROUNDS OF REVIEW—SUFFICIENCY OF EXCEPTION.

A general exception to the charge of the court, without setting forth the excerpt objected to, will not be considered. Beaudrot v. State, 126 Ga. 579 (2), 55 S. E. 592.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 273; Trial, Cent. Dig. § 690.]

6. TRIAL (§ 232*)—INSTRUCTIONS.

Where the trial judge, in closing his charge to the jury, instructed them, in substance, that if they found that a preponderance of the evidence was in favor of the contentions of the plaintiff, it was their sworn duty to find a verdict for the plaintiff, but, on the other hand, if they found that the preponderance of the evidence was not for the plaintiff, but for the defendant, then it would be their sworn duty, as it should be their pleasure, to return a verdict for the defendant, the instruction was not rendered erroneous by the use of the word "pleasure," in referring to a verdict for the defendant, though the word was not used also in referring to a finding for the plaintiff. Although the plaintiff was a man and the defendant a woman, the use of the word "pleasure" in the connection above indicated did not tend to improperly influence the finding of the jury in behalf of the woman.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 232.*]

7. REVIEW ON APPEAL.

No error of law appears of sufficient gravity to warrant another trial, and there is evidence to support the verdict.

Error from City Court of Richmond County; W. F. Eve, Judge.

Action between A. J. Thompson and Alice Kelsey, administratrix. From the judgment, Thompson brings error. Affirmed.

W. L. & Warren Grice and James M. Hull, Jr., for plaintiff in error. Hamilton Phinley, for defendant in error.

HILL, C. J. Judgment affirmed.

(3 Ga. App. 38)

PELHAM MFG. CO. v. POWELL.

(Court of Appeals of Georgia. July 5, 1910.)

(Syllabus by the Court.)

1. COURTS (§ 189*)—TRIAL (§§ 10, 367*)—JURY (§ 25*)—RIGHT TO JURY TRIAL—CITY COURTS—JURISDICTION.

When a statute confers upon the judge of a court jurisdiction to try the facts, unless jury trial be demanded at the return term, no subsequent demand for a jury trial can thereafter divest the judge of this jurisdiction, though in the meantime the case has been tried once and a new trial granted. The statute relates to cases and not to trials.

(a) The jurisdiction to try the facts in such cases attaches to the judge officially, and may be exercised by any judge lawfully presiding in the court.

(b) The privilege of trial by jury may be made dependent upon a timely demand or other conditions, which, though onerous, do not "totally prostrate the right or render it wholly unavailable."

(c) Unless the statute makes it mandatory for the judge to try the case where a jury is not demanded, he has the discretion, nevertheless, of referring the facts to a jury. There was no timely demand for a jury trial in the present case, and the judge did not abuse his discretion in refusing it.

(d) The jurisdiction conferred by statute upon the judge of a city court, to try the facts unless jury trial be demanded in a designated time and way, is to be differentiated from the somewhat similar power sometimes conferred upon judges by stipulations of parties, as to particular trials in which, but for their consent, the judge would have no jurisdiction to pass upon the facts.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 189; Trial, Dec. Dig. §§ 10, 367; Jury, Cent. Dig. §§ 154-173; Dec. Dig. § 25.*]

2. SETTING ASIDE VERDICT ON APPEAL.

The verdict is not so wholly without evidence to support is as to justify this court in setting it aside.

Error from City Court of Camilla; A. S. Johnson, Judge.

Action by Z. L. Powell, by next friend, against the Pelham Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Payne, Little & Jones and Colquitt & Conyers, for plaintiff in error. Pope & Bennet, Spence & Bennet, and Cox & Peacock, for defendant in error.

POWELL, J. This is the second appearance of this case in this court. On the former hearing we reversed a judgment in the plaintiff's favor and sent it back for a rehearing. See *Pelham Mfg. Co. v. Powell*, 6 Ga. App. 308, 64 S. E. 1116. The general nature of the plaintiff's action is stated in the course of the former opinion, and need not be repeated here. When the case went back for a second trial, and while the officers were engaged in collecting up the jurors to fill the panel, evidently with the view of having the case tried by jury, counsel for the defendant entered an objection to the entire array, based on the ground that the jury boxes of the court had not been properly made up. The judge was about to sustain this objection, when counsel for the plaintiff made the point that no jury was necessary, as jury trial had not been demanded. The court, while holding that this point was well taken, nevertheless stated that he would allow a trial by jury if counsel for the defendant would make certain waivers as the summoning of a new jury, so as to prevent a continuance of the case for the term. Counsel for defendant declined to make the waivers, and tendered a demand for jury trial. The judge then announced that he would try the case without a jury, that the demand for jury trial came too late. The defendant therefore made the suggestion that the judge was disqualified to pass on the facts. The judge sustained this point, and the Honorable Albert Sidney Johnson, the judge of the city court of Newton was called on to preside, and he tried the case without a jury. He rendered judgment in favor of the plaintiff. No request for jury trial was presented to Judge Johnson, but, at the conclusion of the evidence, certain written objections to his presiding in the court were presented. These grounds of objection were similar to those raised in the case of *G. F. & A. Ry. Co. v. Sasser*, 4 Ga. App. 278, 61 S. E. 505, and ruled adversely to the defendant's contention in the decision of the Supreme Court in answer to the certified question propounded by this court in that case. See *G. F. & A. Ry. Co. v. Sasser*, 130 Ga. 394, 60 S. E. 997.

The portion of the act creating the city court of Camilla, relating to the judge's power to try the case without a jury, is in the following language: "The judge of the city court of Camilla shall have power and authority to hear and determine all civil cases of which said court has jurisdiction, and to give judgment thereon; provided, that any party in any case shall be entitled to a trial by jury upon entering a demand therefor in writing by himself or attorney on or before the call of the docket of the term of said court to which said case is made returnable in all cases where such party is entitled to a jury trial under the Constitution and laws of this state."

It was early held in this state that, as to

civil cases, "Modern law reform seeks, among other objects, to dispense as much as possible with juries;" that trial by jury is a privilege which may be waived; that when a party has had the opportunity to demand it, and has omitted to demand it, he cannot complain that it has been denied him; that by an act of the General Assembly the privilege may be "clogged with onerous conditions" without offending the fundamental law, unless, indeed, the statute be such as "totally prostrates the right or renders it wholly unavailing." *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 243. The requirement of a demand for jury trial as a condition precedent to the enjoyment of the privilege is no violation of the constitutional right of trial by jury. *Sutton v. Gunn*, 86 Ga. 652, 12 S. E. 979. If the statute fixes a reasonable time within which the demand must be made, the right is ordinarily lost unless the demand be made within the time prescribed. *Sutton v. Gunn*, supra; *Heard v. Kennedy*, 116 Ga. 36, 42 S. E. 509. See, also, *Waterman v. Gllsson*, 115 Ga. 773, 42 S. E. 95; *Miller v. G. R. Bank*, 120 Ga. 17, 47 S. E. 525. In the case of *Heard v. Kennedy*, just cited, where the language of the statute was almost literally that before us now, it was held that, if the jury trial was not demanded at the return term, it could not be demanded at a subsequent term.

In some of the city court acts of this state the language is mandatory that the judge shall try the case, if jury trial is not demanded, and in those courts the judge has not the discretion to order a jury trial over the protest of either party. *Green v. State*, 6 Ga. App. 324, 64 S. E. 1121, and cases therein cited. But unless the language is mandatory that the judge shall try the case in the absence of a demand for jury trial (and the language of the present act is not mandatory in that respect), the judge has the discretion of referring the facts to a jury. *Central R. Co. v. Gleason*, 69 Ga. 200; *Bibb Land Co. v. Lima Machine Works*, 104 Ga. 116, 30 S. E. 676, 31 S. E. 401; *Thorn-ton v. Travelers' Ins. Co.*, 116 Ga. 121, 42 S. E. 287, 94 Am. St. Rep. 99. If the statute sets no time limit within which the demand must be made, it may be made at any time before the case is called for trial, or upon the call for trial; and in such cases a waiver of jury trial may be withdrawn, where the case has been tried once and a new trial is to be had, if the notice of a desire for jury trial is timely given. *Brown v. State*, 89 Ga. 340, 15 S. E. 462. A party who without protest goes to trial before the judge when he should have been tried before the jury, and vice versa, will not be heard to complain or to demand a hearing before the other trier. *Logan v. State*, 86 Ga. 268, 12 S. E. 406; *Taffee v. State*, 90 Ga. 459, 16 S. E. 204; *Thomas v. State*, 7 Ga. App. 637, 67 S. E. 894. The only fair

deduction to be drawn from the principles stated and the cases cited above is that where the statute confers jurisdiction upon the judge to try the case without the intervention of a jury unless a demand for jury trial is made within a designated time, and the language does not make the duty of so trying it mandatory, the judge thereafter has the discretion of passing on the facts himself or of submitting them to a jury; and that neither party, after the time for making the demand has expired, can insist, as a matter of right, that the case be tried otherwise than in the manner allowed by the judge in his discretion. Generally a judge who has once passed upon the facts should exercise his discretion by refusing to try them again. But in the case at bar, where an unbiased judge who had never heard the facts was accessible, and a jury could not be obtained without considerable delay, there was no abuse of discretion in refusing a demand for jury trial, made after the term at which the statute prescribed it should be demanded. In fact, Judge Scaife, who first called the case, seems to have treated the defendant with all reasonable consideration in the matter; for he declined to exercise his discretion of ordering a trial without a jury, until it appeared that, on account of the objections the defendant was making, a jury could not be obtained without considerable trouble and delay.

The proposition here asserted deals with the extent of the judge's jurisdiction to try the facts, when a statute confers that jurisdiction, but makes it divestible by a demand for jury trial tendered within a designated time, and is not to be confused with the proposition, very widely recognized (see *Worthington v. Nashville, etc., Ry.*, 114 Tenn. 177, 86 S. W. 307, and the annotations thereto as published in 4 Am. & Eng. Ann. Cas. 1002), that where the parties by stipulation waive jury trial and consent for the case to be tried before a judge who otherwise would not have the jurisdiction thus to try it, the consent will not be extended to a retrial of the case, but will be presumed to have had reference only to the trial which, at the time the agreement was made, was about to occur before the particular judge to whom the stipulation referred. Almost the identical point involved in this case was before the Supreme Court of Alabama in the case of *Brock v. Louisville & Nashville R. Co.*, 122 Ala. 172, 26 South. 335. That court held that where the statute required the demand for a jury trial to be made at the first term, it could not be made thereafter, though in the meantime the case had been tried once and had been remanded by the Supreme Court for a new trial. As the court there said, "The statute deals with cases, not trials."

2. As to the other proposition so ably ar-

gued by counsel for the plaintiff in error—that the verdict is without evidence to support it—we will say that if we were, in the true sense of the words, a court of appeals, and not merely a court for the correction of errors of law, we could not give our approval to the verdict; the weight of the evidence seems to be against it.

But judgment affirmed.

(3 Ga. App. 88)

BUTLER v. LAZENBY. (No. 2,580.)

(Court of Appeals of Georgia. July 19, 1910.)

(Syllabus by the Court.)

1. POSSESSORY WARRANT (§ 1*)—WHEN LIES—POSSESSION OF DEFENDANT.

Possessory warrant will lie for the recovery of property wrongfully taken from the plaintiff's possession, though the defendant at the time of the issuance of the writ, has not personal physical possession of it, if it be in his power, custody, or control, or in the possession of some agent or custodian holding it for him or in collusion with him. When the property itself is before the court, the defendant, who denies that he is in possession of the property, is in no just position to complain if the court awards the possession to the plaintiff; the rights of no third person being involved.

[Ed. Note.—For other cases, see Possessory Warrant, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. POSSESSORY WARRANT (§ 7*)—CERTIORARI—POWERS OF SUPERIOR COURT—FINAL JUDGMENT.

Possessory warrant procedure is summary. The judge of the superior court has plenary jurisdiction, on certiorari in such cases, to settle all disputed issues of fact and to render final judgment.

[Ed. Note.—For other cases, see Possessory Warrant, Cent. Dig. § 6; Dec. Dig. § 7.*]

Error from Superior Court, McDuffie County; H. C. Hammond, Judge.

Action by D. T. Lazenby against Reuben Butler. Judgment for plaintiff, and defendant brings error. Affirmed.

P. B. Johnson, for plaintiff in error. Jno. T. West, for defendant in error.

POWELL, J. 1. Lazenby sued out a possessory warrant against Butler, his cropper, to recover possession of a bale of cotton. On the trial before the justice, the evidence in behalf of the plaintiff was that the defendant still owed him for advances and supplies, and that the bale of cotton in question was a part of the crop. The defendant did not deny that the bale of cotton was a part of the crop, but set up that there had been a division, and that he had paid all advances, and that with Lazenby's consent he had sold the cotton to Hunt Bros. Lazenby denied that he had given his consent for any sale of the property, and the evidence on the subject of a sale was in conflict. The constable had the cotton itself before the court, and Hunt, the alleged purchaser, was not a party to the case. The justice awarded the

possession of the property to Lazenby, the plaintiff in the possessory warrant. The case was carried by certiorari to the superior court, where the decision of the justice was sustained. This ruling of the superior court is now before us for review.

It is contended by the plaintiff in error that a possessory warrant will not lie against any one who is not in possession of the property at the time the warrant is sued out, and that in the present case, the possession of the cotton having been transferred to Hunt Bros., no legal judgment could be entered against Butler. Since in a possessory warrant case, possession is the only issue to be tried (Civ. Code 1895, § 4802), manifestly the action would fail of its purpose if the court could not lay hands on the property. In view of this fact, Civ. Code 1895, § 4805, authorizes most summary measures to compel the production of the property when it is in the possession of the defendant, or of any agent of his, or of any person intrusted by him with the property. In this case the court had the property physically before it. The only contestants as to the right of possession were Lazenby and Butler. If Butler did not have possession, actual or constructive, of the property, then what right has he to complain of the judgment? For the judgment merely settles the question of possession. If any third person has rights in the matter, these rights do not affect the defendant, and the judgment does not affect the third person. Besides, the court was authorized to find that the alleged purchaser was merely holding the cotton for the defendant.

2. It is also contended that Lazenby consented to the sale by Butler, and that under *Dennard v. Butler*, 2 Ga. App. 198, 58 S. E. 297, possessory warrant would not lie. Consent is a matter of fact (*Marchman v. Todd*, 15 Ga. 25), and on this point the evidence is conflicting. In possessory warrant cases, carried up on certiorari, the judge of the superior court may render a final judgment, notwithstanding conflicts in the evidence. *Susong v. McKenna*, 121 Ga. 97, 48 S. E. 695. If the judge sustains the judgment of the justice, on the conflicting facts, this court will not reverse his judgment; certainly not unless he has manifestly abused his discretion. *Hill v. Johnson*, 74 Ga. 362.

Judgment affirmed.

(8 Ga. App. 95)

THOMAS v. STATE. (No. 2,689.)

(Court of Appeals of Georgia. July 19, 1910.)

(Syllabus by the Court.)

BURGLARY (§ 41*)—EVIDENCE—SUFFICIENCY.

The proof of the corpus delicti being insufficient, and there being no evidence tending to show where the car alleged to have been broken was located at the time of the alleged breaking, the conviction of the defendant was

unauthorized, and a new trial should have been granted.

[Ed. Note.—For other cases, see *Burglary*, Dec. Dig. § 41.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

James Thomas was convicted of breaking into a railroad car, and brings error. Reversed.

Moore & Moore, for plaintiff in error. C. D. Hill, Sol. Gen., and D. K. Johnston, for the State.

RUSSELL, J. The defendant in the court below was indicted for breaking into and entering a railroad car in the custody of the Southern Railroad Company. He was arrested late one night on the streets of Atlanta by a policeman, who found him in possession of seven pairs of shoes, which were later identified as having come from a box of shoes which had been loaded into a car upon the tracks of the railroad company. The defendant, upon being arrested, stated that he was carrying the shoes, as directed by a hackman, to a house near by, but disclaimed any knowledge of where or how they were obtained. Both drivers of the hack in question were introduced by the state, and denied having given the shoes to the defendant. Testimony was introduced, showing that shoes similar to those found in the possession of the accused were loaded into the car, and another witness testified that he sealed the car in question. No testimony, however, was introduced tending to show where the car was at the time of the breaking—whether it was broken into on the track where it was loaded, which was shown to have been in Fulton county, or whether the breaking was done at some other place, perhaps not in Fulton county.

Inasmuch as the proof of the corpus delicti is not clear, and the venue not satisfactorily established, we deem it unnecessary to discuss the other assignments of error. The defendant may be guilty of larceny, because he had the shoes in Fulton county (see *Burley v. State*, 81 Ga. 741, 7 S. E. 693); but no one testified that the car was actually broken, and that it was in Fulton county at the time or after it had been broken and entered. As there must be another trial, however, we will say that under the evidence in the present record the judge should have instructed the jury that, where circumstantial evidence alone is relied upon to authorize a conviction, the circumstances must be sufficient to satisfy the jury of the defendant's guilt, to the exclusion of any other reasonable hypothesis than that he is guilty, and that if the circumstances relied upon are as consistent with the innocence of the accused as with the theory of his guilt he should be acquitted. *Riley v. State*,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

1 Ga. App. 651, 57 S. E. 1031. The law in its humanity requires that in every criminal case, in which the guilt of the defendant is dependent wholly on circumstantial evidence, the jury should be instructed that, if the proven facts are consistent with innocence, the defendant is entitled to an acquittal.

Judgment reversed.

(8 Ga. App. 90)

GEORGIA SOUTHERN & F. RY. CO. v. JONES. (No. 2,584.)

(Court of Appeals of Georgia. July 19, 1910.)

(Syllabus by the Court.)

RAILROADS (§ 447*)—KILLING OF STOCK—INSTRUCTIONS.

In a suit to recover damages from a railroad company for killing a cow, the court charged the jury, "If you believe the railroad company was not negligent—did all they could to prevent the killing—under the rules of law given to you, and are not liable therefor, the form of your verdict will be, 'We, the jury, find for the defendant.'" The foregoing excerpt was excepted to, because the use of the words "and are not liable therefor" allowed the jury to find against the defendant, although they found it was not negligent, and did all it could to prevent the killing of the cow. *Held*, that this criticism is wholly without merit, irrespective of other exceptions that might have been taken. No other error of law being complained of, and the verdict being supported by the evidence, the judgment refusing a new trial is affirmed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1642, 1649; Dec. Dig. § 447.*]

Error from Superior Court, Turner County; Frank Park, Judge.

Action by L. A. Jones against the Georgia Southern & Florida Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John B. Hutcheson, for plaintiff in error.
B. L. Tipton, for defendant in error.

HILL, C. J. Affirmed.

(88 S. C. 213)

STATE v. REVELS.

(Supreme Court of South Carolina. July 4, 1910.)

HOMICIDE (§ 255*)—INVOLUNTARY MANSLAUGHTER—EVIDENCE.

Evidence held to warrant a conviction of involuntary manslaughter caused by the negligent manner of handling a gun.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 255.*]

Appeal from General Sessions Circuit Court, Marlboro County.

French Revels was convicted of involuntary manslaughter, and he appeals. Affirmed.

Townsend & Rogers, for appellant. J. Monroe Spears, Sol., for the State.

JONES, C. J. The defendant was convicted of involuntary manslaughter and sentenced to two years on the public works of the county. The only question involved in the exceptions is whether there was any testimony tending to show involuntary manslaughter.

There was testimony that on the night of the homicide there was an ice cream supper given at the home of defendant, and that deceased, James Henry Jacobs, who was the brother-in-law of defendant, was present assisting the defendant, appearing to be partner. A crowd was present. In the yard a man and a boy were quarreling. Defendant told them he was not going to have any fuss there, and ordered the man Smith to shut up or get out, and Smith replied with an oath that he would hush or get out when he got ready. Defendant walked off saying that he would scatter the crowd, went into his house, and was returning along the passage in the direction of the front door with a cocked gun in his hand, when Allen Tolson caught hold of the gun, and requested defendant to put it up lest he cause trouble, and defendant said that he was not mad; that he would not hurt any one. The defendant told Tolson to turn the gun loose; it was cocked. About the time Tolson turned the gun loose the deceased, Jacobs, took hold of the barrel end, and they were pulling at the gun when it fired, the load striking deceased about the knee, from which wound he died. Immediately after the shooting, defendant said he would not have done it for anything in the world, and walked out of the house. Before he died, Jacobs said he was not mad with defendant, and would not hold it against him.

The testimony was sufficient to warrant an inference that the homicide was caused by the negligent handling of the loaded gun, within the definition of involuntary manslaughter as declared and enforced in *State v. Gilliam*, 68 S. C. 422, 45 S. E. 6.

The judgment of the circuit court is affirmed.

(88 S. C. 211)

STATE v. TUCKER.

(Supreme Court of South Carolina. July 5, 1910.)

HOMICIDE (§ 74*)—INVOLUNTARY MANSLAUGHTER—CRIMINAL CARELESSNESS—STANDARD FOR DETERMINATION.

Criminal carelessness on which to base a conviction of involuntary manslaughter is determinable by the standard of simple negligence or carelessness, or mere inadvertence, and it does not involve that degree of lack of care amounting to recklessness or gross carelessness.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 97-101; Dec. Dig. § 74.*]

Appeal from General Sessions Circuit Court of Union County; S. W. G. Shipp, Judge.

Russel Tucker was convicted of manslaughter, and he appeals. Affirmed.

Wallace & Barron, for appellant. J. C. Otta, Sol., for the State.

JONES, C. J. The defendant, under an indictment for murder, was convicted of manslaughter and sentenced to two years at hard labor on the public works of the county.

The testimony for the state tended to show that in Union county in December, 1909, at night, the defendant, who had never handled a pistol before, got his father's pistol out of the bureau and was "projecting" around with it in the room in presence of the deceased, a boy about 10 years old, his sister, and one or more other smaller children. Defendant, whose age is not stated, had playfully snatched a dime from the pocket of his sister, and the sister tried to recover it when defendant said to her: "If you don't sit down I am going to shoot you." The sister sat down and then the deceased tried to take the money from defendant, and defendant told him if he didn't sit down he was going to shoot him and deceased said: "No, you won't either." Then defendant said: "If you don't believe it, hold out your hand, I will show you." Then deceased held out his hand and snatched it back. Shortly afterwards the pistol fired, the ball striking deceased in the neck and killing him, whereupon the defendant said: "Lord have mercy! did I shoot him?" and, being frightened, ran off for a couple of hours, and returned. The deceased was a half-brother of the defendant. The defendant testified that he was sitting down rubbing the pistol and that deceased was sitting down by his side when he commenced, and that without knowing that it was loaded or that his brother was in front of him, pulled the trigger without meaning to do so. From the foregoing statement it is clear that there was some testimony of criminal carelessness in handling the pistol, which resulted in homicide.

Exception is taken to the following charge to the jury: "Where a person handles firearms in a criminally careless way and causes the death of some person, he would be guilty of manslaughter. Now, it is necessary for me to define to you what we mean by carelessness or negligence. Negligence is the want of due care; it is the failure to observe due care under the circumstances, or I might put it this way, it is the failure to do that which a person of ordinary firmness and reason would have done under the circumstances, or it is doing something that a person of ordinary care and prudence would not have done under the same circumstances. Now, that is a question of fact to you. The defendant comes into court charg-

ed with the taking of the life of Nick Tucker. He says that he did it; that it was an accident. Now, the question before you is whether or not, in taking the life of Nick Tucker, the defendant here was guilty of criminal carelessness in the sense that I have defined it to you. Inquire, would a person of ordinary prudence, surrounded by the same circumstances that surrounded him at the time, have acted in the same way that he did?"

The error assigned is that the court thereby charged that criminal carelessness upon which a verdict of guilty of involuntary manslaughter could be based was to be determined by the standard of simple negligence or carelessness or mere inadvertence, whereas it is submitted that criminal carelessness involves that degree of lack of care amounting to recklessness or gross carelessness. The point raised has been expressly ruled against appellant's contention in the case of *State v. Gilliam*, 66 S. C. 423, 45 S. E. 6, which sustained a charge like the one complained of, and held that a person who causes another's death by the negligent use of a pistol or gun is guilty of manslaughter, unless the negligence is so wanton as to make the killing murder.

The judgment of the circuit court is affirmed.

(36 S. C. 215)

STATE v. EDWARDS.

(Supreme Court of South Carolina. July 4, 1910.)

1. CRIMINAL LAW (§ 1151*)—CONTINUANCE—DISCRETION OF COURT.

Refusal of a continuance is in the discretion of the trial court and is not ground for reversal, except in a clear case of abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045-3049; Dec. Dig. § 1151.*]

2. CRIMINAL LAW (§ 593*)—CONTINUANCE—DISCRETION OF COURT.

Where accused was represented by two attorneys, the refusal to grant a continuance on the ground of the absence of one of them on the ground of illness was not an abuse of discretion; the attorney present being one of experience and capable of managing the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1320; Dec. Dig. § 593.*]

Appeal from General Sessions Circuit Court of Berkeley County; Ernest Gary, Judge.

James Edwards was convicted of murder, and he appeals. Affirmed.

John O. Edwards, for appellant. P. T. Hildebrand, Sol., for the State.

JONES, C. J. The defendant was arraigned at the July, 1909, term of the court of general sessions for Berkeley county, Judge Watts presiding, charged with the murder of his wife about eight years previous. The case was continued. At the November, 1909,

term, Judge Ernest Gary presiding, the case was tried and resulted in a conviction of murder without recommendation to mercy, and defendant was sentenced to be hanged on December 10, 1909.

The exceptions assign error in the refusal to continue the case at the November term and in proceeding with the trial. The court has often declared that the refusal of a motion for continuance is in the discretion of the trial court and will not be ground for reversal, except in a clear case of abuse of discretion. *State v. Kenny*, 77 S. C. 240, 57 S. E. 859.

In his order settling the case the presiding judge stated his reason for refusing the motion as follows: "The defendant was arraigned at the previous term of the court held by the Honorable R. C. Watts. For reasons satisfactory to him, a continuance at that term of court was granted. During the progress of the November term this case was called, after having been reached on the calendar, and the solicitor announced promptly that the state was ready and insisted upon a trial. The docket showed that Mr. Edwards and Mr. Davis were noted as counsel for the defendant, not only at the November term, but were so noted at the previous term. After the announcement made by the solicitor, Mr. Edwards appearing for the defendant, made a motion for the continuance, basing said motion, in part, upon the inclosed certificate and on the further grounds that Mr. Edwards did not feel fully warranted to proceed with the trial. It appeared to me that Mr. Edwards, being a lawyer of experience, was fully capable of managing the defendant's case, and I therefore held that the motion based on this certificate (the same being so very definite) was insufficient, and ordered the case to proceed to trial. The case was regularly tried, ably represented by Mr. Edwards, and the result is as appears in the case."

The physician's certificate, dated November 1, 1909, was in these words: "I hereby certify that Mr. G. B. Davis of the Berkeley bar is physically unable to attend court at this term or to attend to business, either legal or otherwise, at present. [Signed] H. S. Feagin, M. D." We see no abuse of discretion here.

The case is quite different from *Varn v. Green*, 50 S. C. 404, 27 S. E. 862, wherein all the counsel for the prisoner were sick and thereby unable to conduct his defense, and the trial judge committed error of law in permitting his ruling, refusing to continue, to be controlled by his custom in such cases to require the prisoner to employ other counsel.

The judgment of the circuit court is affirmed, and the case is remanded, so that a new day may be assigned for the execution of the sentence.

(36 S. C. 220)

DOVER v. LOCKHART MILLS.

(Supreme Court of South Carolina. July 4, 1910.)

1. TRIAL (§ 287*)—INSTRUCTIONS—INADVERTENT ERRORS—USE OF "AND" INSTEAD OF "OR."

In an action for injuries to a servant, where the complaint alleged negligence in not furnishing plaintiff with safe machinery and a safe place to work, in that a belt which broke and injured him was old, unsafe, defective and worn out, thereby causing it to break easily, an instruction that the burden was on plaintiff to prove that the place at which he was put to work was not safe and suitable, "and" that the belt was old, unsafe, and defective, was not objectionable for using the conjunctive instead of the disjunctive; there being in effect only one specification of negligence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 702; Dec. Dig. § 287.*]

2. APPEAL AND ERROR (§ 215*)—PRESENTATION OF OBJECTIONS—INSTRUCTIONS.

Any mere inadvertences in a charge, such as the use of a conjunctive instead of a disjunctive, must be brought to the attention of the trial judge or they will not avail as grounds of appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1309; Dec. Dig. § 215;* *Trial*, Cent. Dig. § 683.]

3. MASTER AND SERVANT (§ 264*)—INJURIES TO SERVANT—ACTION—PLEADINGS AND PROOF.

In an action for injuries to a servant by the breaking of a belt which plaintiff was attempting to place on moving machinery, where there was no allegation in the complaint that the belt was too tight, but it was alleged that it was unsafe and defective in that it was old and worn out, an instruction to disregard unsolicited testimony that the belt was too tight was not error.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 865; Dec. Dig. § 264.*]

4. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In an action for injuries to a servant by the breaking of a belt, instructions that if the belt was old and rotten and plaintiff threw it on a rapidly moving piece of machinery, when any one, by the exercise of ordinary care, would have known that it was dangerous, and the proximate cause of his injury was his own negligent act in so doing, instead of stopping the machinery before putting it on, it was for the jury to say whether he was guilty of negligence, and whether his negligence contributed to the injury, were not objectionable as charges on the facts.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 465, 466; Dec. Dig. § 194;* *Negligence*, Cent. Dig. §§ 358, 359.]

5. MASTER AND SERVANT (§ 296*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

In an action for injuries to a servant, an instruction that a servant has a right to assume that the machinery and appliances are reasonably safe, but that a man cannot walk into an apparent danger, and, without the slightest exercise of his faculties, take up a thing which the slightest degree of care would show him was unsafe, and recover because he thought it was all right, was not error.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1182, 1185; Dec. Dig. § 296.*]

6. MASTER AND SERVANT (§ 231*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—CARE REQUIRED OF SERVANT.

A servant may, without inspection, assume and rely upon the assumption that the machinery and appliances furnished him by the master are safe and suitable, and he is not bound to use ordinary care to ascertain if they are so.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 675; Dec. Dig. § 231.*]

7. MASTER AND SERVANT (§§ 217, 234*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF DANGER.

If a servant knows that appliances are not safe and suitable, or if it is obvious or apparent that they are not, and he uses them and is injured, he may be held to have assumed the risk or to have been guilty of contributory negligence, with certain exceptions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574, 706; Dec. Dig. §§ 217, 234.*]

8. TRIAL (§ 296*)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

In an action for injuries to a servant, error in charging that a servant must use ordinary care to ascertain if the machinery and appliances furnished him by his master are safe, is not prejudicial where the law was correctly stated several times, and just before the language complained of the judge had said that "a man cannot walk into an apparent danger, and, without the slightest exercise of his faculties, take up a thing which the slightest degree of care would show him was unsafe," and just after the language complained of he said, "if it is apparent that it is unsafe," etc.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705, 709; Dec. Dig. § 296.*]

9. MASTER AND SERVANT (§ 264*)—INJURIES TO SERVANT—ACTIONS—ISSUES AND PROOF.

The burden being upon plaintiff in an action for injuries to prove the allegation of his complaint that his injury was caused by the negligence of the defendant, his employer; the defendant, under the general denial, had the right to introduce any testimony tending to disprove that allegation, as, for instance, that the injury was caused by the negligence of a fellow servant or by the sole negligence of plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 864; Dec. Dig. § 264.*]

10. TRIAL (§ 314*)—CONDUCT AND DELIBERATIONS OF JURY—COERCING AGREEMENT.

The action of the court in recalling the jury and telling them that he regretted to keep them out longer in the case as it was clogging the work of the court, that it seemed absurd that a jury of 12 men could not agree on a case like that, that the case had had a fair and complete trial, and had been presented clearly, was not objectionable as coercing the verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 747; Dec. Dig. § 314.*]

11. APPEAL AND ERROR (§ 975*)—REVIEW—DISCRETION OF COURT—CONTROL OF DELIBERATIONS OF JURY.

The length of time which should be given to the consideration of a case by the jury being a matter for the sound discretion of the court, the exercise of such discretion will not be reviewed unless it has been abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3844; Dec. Dig. § 975.*]

Appeal from Common Pleas Circuit Court of Union County; R. W. Memminger, Judge. Action by Joseph B. Dover against the

Lockhart Mills. From a judgment for defendant, plaintiff appeals. Affirmed.

John K. Hamblin, for appellant. Townsend & Townsend and Sirrine & Charles, for respondent.

HYDRICK, J. Plaintiff sought to recover damages for injuries received while assisting a fellow servant in putting a belt on a pulley which was revolving very rapidly. The belt broke, and the end of it struck and hurt plaintiff's hand. Plaintiff was 47 years of age, and had been working in the mill about 30 days. By the use of a lever near at hand he could have stopped the machine and put the belt on with safety; and the person whom he was assisting testified that he told him several times to do so, but plaintiff refused, and insisted on putting the belt on while the pulley was in motion. The defenses were a general denial, and the pleas of contributory negligence and assumption of risk.

The first specification of negligence in the complaint was "in not furnishing plaintiff with safe machinery, and a safe place in which to work, in that the said belt was old, unsafe, defective, worn out, thereby causing the said belt to break easily." The court instructed the jury that the burden was on the plaintiff to prove that the place at which he was put to work was not safe and suitable, and that the belt was old, unsafe, and defective. The error assigned is in the use of the conjunctive "and" between the words "safe" and "suitable" and between the words "unsafe" and "defective," instead of the disjunctive "or"; the contention being that, where there are several specifications of negligence, it is not incumbent on the plaintiff to prove all of them, but if he proves only one, and that it was the proximate cause of his injury, he is entitled to recover, which, as a general proposition, is correct, but, properly construed, the complaint contained only one specification of negligence—that the belt had become defective from long use, in other words, that it was worn out. The other modifying adjectives used added nothing to this charge. The same may be said of the adjectives descriptive of the place—if it was "unsafe," it was "unsuitable." In this connection, these words are used interchangeably and synonymously. In responding to an exception which made the same point, the court said, in *Davis v. R. R.*, 75 S. C. 307, 55 S. E. 527: "It would greatly embarrass the practical administration of the law for the appellate court, in reviewing charges to the jury, to become hypercritical or a stickler for the technical rules of philology in every phrase and clause, and reverse verdicts for some loose expression or some slight misuse of a word, when the general import of

the charge stated the law. Any portion of a charge to which exception is taken should be fairly construed with reference to the clear tenor and import of the whole, and as an effort to explain the law of a case to men of ordinary or average education and intelligence. The average jurymen has little knowledge and less concern about fine distinctions, but generally has a desire and capacity for sufficient information to enable him to do substantial justice between the parties." Mere inadvertences of such a nature in charging the jury must be brought to the attention of the judge, or they will not avail as grounds of appeal; for if they are not of sufficient importance to attract the attention of counsel learned in the law, we may safely assume they do not mislead the jury or affect the result.

There was no error in instructing the jury to disregard the unsolicited testimony of one of the witnesses that the belt was too tight, because there was no such allegation in the complaint. It is contended that the allegation that it was unsafe and defective is broad enough to admit evidence that it was too tight. That might be so, if it had been alleged generally, and without more, that the belt was unsafe and defective. But, referring to the allegation of the complaint, it will be seen that, properly construed, it was intended to allege that the belt was unsafe and defective only in that it was old and worn out. There is not even an intimation to be gathered from the language used that it was too tight.

The fourth and ninth exceptions will be considered together. The fourth exception complains of the following instruction: "If you find that the belt was old and rotten, and that it was negligence on the part of the mill to furnish him with such a belt, if you so find, and that the man went and picked it up and threw it on a rapidly moving piece of machinery, which any one, by the exercise of ordinary care, would have known that it was dangerous, and the proximate cause of his injury was the negligent act of his own in putting the belt on a moving machine, instead of stopping the machine before putting it on, and the proximate cause was not the defect in the belt, but was the negligent act of the man himself in putting the belt on the moving piece of machinery, it would be for you to say whether, under that state of facts, he himself was guilty of negligence; if you find that he was, and that his own negligence contributed to the injury as a proximate cause, if the belt was old and rotten, but his own negligence would have brought about the same results had it been a new belt—then he is not entitled to recover; that is what is known as contributory negligence."

After the jury had been out some time, they were brought in, and the court gave them further instructions, of which the following portion is complained of in the ninth

exception: "Now, on the other hand, if the belt was so rotten and defective, so obviously dangerous as claimed on the part of the plaintiff, and he went and picked it up, and it was such a belt that any reasonable man could see was defective, and he deliberately put it on a moving piece of machinery, regardless of any rule, or any instructions, if any, you would have to say from the testimony whether or not he exercised, under the circumstances, the care a reasonable man would have done in putting a belt on a moving piece of machinery, and the question would be, then, could he recover if he had seen, or could have seen, that it was a defective belt, and that comes under the head of contributory negligence."

The errors assigned are that the judge charged on the facts (1) in stating what facts or series of facts would constitute contributory negligence, and (2) that it was inferable from the charge that, in his opinion, the plaintiff was guilty of contributory negligence. It will be seen from an analysis of the language above quoted that the facts are stated hypothetically, and that it was left to the jury to say whether, if they found the facts so stated to be true, the plaintiff was guilty of negligence; and, if so, whether his negligence contributed to his injury as a proximate cause thereof. The judge did not say what facts or series of facts would amount to negligence; nor can there be gathered from the language used any intimation of his opinion as to the facts.

The sixth and seventh exceptions impute error to a part of the charge which was in response to a verbal request made by plaintiff's attorney at the conclusion of the principal charge, as follows: "In connection with what your honor has said, I would like you to charge the jury that the plaintiff had a right to assume that the machinery was reasonably safe, and, in regard to the assumption of risk, he assumes the risk, unless it was known or apparent to him." The court: "I have already charged the jury fully on that point—that the party has a right to assume that the machinery and appliances are reasonably safe, and that the place to work is safe—and I charge you, also, that a man cannot walk into an apparent danger, and, without the slightest exercise of his faculties, take up a thing which the slightest degree of care would show him that it was unsafe, and then say he can recover, because he thought it was all right. The law does not set a premium on that sort of carelessness. A man has a right to rely upon the assumption that a thing is safe, but nevertheless says he must use ordinary care to ascertain if it is, and if it is apparent that it is unsafe, and he uses it and gets hurt, I don't think any fair-minded man would say that he would be entitled to recover, and the law says so; and while he has a right to rely upon that assumption the law requires that he use his

faculties to see what the risk is, and what the condition of the thing was."

The errors assigned are (1) that the judge charged on the facts, in stating what facts or series of facts would amount to carelessness, and (2) in charging that while a servant has the right to assume that the appliances furnished him by his master are safe and suitable, nevertheless he must exercise ordinary care to ascertain if they are, and if it is apparent that they are not, and he uses them and gets hurt, he cannot recover of the master.

The first assignment of error is untenable, for certainly, if a man walks into "apparent danger, and, without the slightest exercise of his faculties, takes up a thing which the slightest degree of care would show him was unsafe," he is guilty of negligence, which is the lack of only ordinary care. But there was error in charging that a servant must use ordinary care to ascertain if the machinery and appliances furnished him by his master are safe. A servant may, without inspection, assume and rely upon the assumption that the machinery and appliances furnished him by the master are safe and suitable, and he is not bound to use ordinary care to ascertain if they are so; but if he knows that they are not, or if it is obvious or apparent that they are not, and he uses them and is injured, he may be held to have assumed the risk, or to have been guilty of contributory negligence, except under circumstances of which there is no proof in this case.

By reference to the charge, it will be seen that the law upon this point had been correctly stated several times, and it was so stated immediately preceding the language complained of. Just before and in connection with the language complained of, the judge had said, "a man cannot walk into an apparent danger, and, without the slightest exercise of his faculties, take up a thing which the slightest degree of care would show him that it was unsafe," etc.; and just after the language complained of, he said, "If it is apparent that it is unsafe," etc., which, taken in connection with the context and with the whole charge, shows that the idea which the judge intended to convey and did convey was that while a servant has the right to assume and rely upon the assumption that the machinery and appliances furnished him are safe and suitable, still he cannot, under cover of that assumption, expose himself to obvious danger, and hold the master liable for the injurious consequences, except as above stated, under circumstances which appear not to have existed in this case. We are satisfied, therefore, that the error was not prejudicial.

The fifth exception complains of error in not charging that the burden was upon defendant to prove that the injury was caused by the negligence of a fellow servant. The burden was upon plaintiff to prove the allegation of his complaint that his injury was caused by the negligence of the defendant. Under the general denial, the defendant had the right to introduce any testimony tending to disprove that allegation, as, for instance, testimony tending to prove that it was caused by the negligence of a fellow servant, or by the sole negligence of the plaintiff. *Roberts v. Virginia-Carolina Chem. Co.*, 84 S. C. 283, 66 S. E. 298; *Wilson v. Ry.*, 51 S. C. 95, 28 S. E. 91; *Kennedy v. Ry.*, 59 S. O. 535, 38 S. E. 169.

The eighth exception charged that the judge coerced the verdict. After the jury had had the case under consideration for some time, they came into court, and the judge asked if there was any prospect of their reaching a verdict, and the foreman replied in the negative. After ascertaining that their differences were on the facts, the judge said, and this is the language complained of: "Now, gentlemen, I regret to keep you out longer on this case; it is clogging the work of the court. Another jury has gone out on another case; and, until you reach a verdict in this case, we will not have enough jurors to go on with the work. It seems absurd that a jury of 12 men cannot agree upon a case like that, and find a verdict one way or the other. The case was on the calendar. It has had a fair and complete trial, and has been presented to you gentlemen clearly. It has consumed the time of the court, and caused expense to your county." His honor then restated the salient principles of law applicable to the facts of the case, and sent the jury back for further deliberation. We see nothing in the language quoted from which it can be inferred that the verdict was coerced. It is the duty of the trial judge to admonish juries of the desirability and importance of trying to reconcile their differences and agree upon a verdict, and, in the exercise of the discretion vested in him, to keep them together for such reasonable time as may seem necessary and proper to that end. He is in the atmosphere of the trial, and is cognizant of all the facts and circumstances developed during the trial; and therefore the length of time which should be given to the consideration of the case by the jury must be left to his sound discretion. This court will not interfere with the exercise of that discretion, unless it is clearly made to appear that it has been abused. In this case, it appears to have been wisely exercised.

Judgment affirmed.

(86 S. C. 281)

DISEKER v. EAU CLAIRE LAND & IMPROVEMENT CO.

(Supreme Court of South Carolina. July 13, 1910.)

1. COVENANTS (§ 100*)—WARRANTY—BREACH—INCUMBRANCE.

A decision in a suit by a purchaser against the vendor which adjudges that a representation made to the purchaser by the vendor that certain land should be kept open is binding on the vendor, though the land has not been dedicated, is a decision that the land is incumbered within a covenant of warranty.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 139, 155; Dec. Dig. § 100.*]

2. COVENANTS (§ 104*)—WARRANTY—BREACH—REMEDIES.

Where an outstanding right to an easement on land conveyed by deed containing a covenant of warranty is enforced, and thus becomes a burden on the land, an action on the warranty is maintainable, but the mere right to an easement may not be set up by the grantee as a breach of warranty, when his use of the land has not been affected by the assertion of the right against him.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 139, 170; Dec. Dig. § 104.*]

Appeal from Common Pleas Circuit Court of Richland County; J. C. Klugh, Judge.

Action by James H. Diseker, Jr., against the Eau Claire Land & Improvement Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Frank G. Tompkins, for appellant. Lyles & Lyles, for respondent.

GARY, A. J. This is an action for breach of the covenants of warranty in two deeds, executed on the 5th of April, 1905, and the 9th of September, 1905, whereby the defendant conveyed to the plaintiff certain lots of land described in the complaint.

The plaintiff alleged that the defendant, committed a breach of the covenants of warranty by selling to him the said lands, after they had been dedicated by the former owners to the use of the citizens of the town of Eau Claire, for the purpose of establishing a park or public place, and that the lots, at the time of said sales, were burdened by this outstanding incumbrance in the nature of an easement, in favor of said town and the public in general.

At the close of the plaintiff's testimony, the defendant made a motion for a nonsuit on the following grounds: "1. That there has been no eviction or disturbance of the possession of the plaintiff, of the property in question—no actual eviction or disturbance of the property. 2. That by the decree of the circuit court, and the Supreme Court's decision of the case of *Marshall v. Eau Claire Electric Railway Company* it is not adjudged, so as to bind the defendant here, that the square in question had been dedicated to the town of Eau Claire, or to the

public of any community. 3. That there is no evidence in this case whatever of a dedication and acceptance by the public, which would show even any shadow of doubt of the title of the plaintiff to these lots in question. 4. It appears from the testimony that only a part of the lots of Diseker is affected by the doubt, even if any such exists." His honor, the presiding judge, overruled the first and fourth grounds, but sustained the second and third.

The first question that will be considered is whether there was error in sustaining the second and third grounds of the motion. It must be remembered that the rights of the plaintiff in the case of *Marshall v. St. Ry. Co.*, 73 S. C. 241, 53 S. E. 417, are not involved in this action. In that case it was decreed by his honor, the circuit judge, "that the defendant company be, and they are hereby, restrained from conveying any portion of said 'circle' to any person whomsoever." And in affirming said decree, the Supreme Court said: "Even if the map was not accepted or adopted by the defendant company, and even if the 'circle' was not dedicated, so as to confer rights that could be enforced by the public, nevertheless, if the company represented to the plaintiff that the 'circle' would be kept open, and thereby induced the plaintiff to purchase her lots, such representation would be binding upon the defendants," thus showing that the defendant had created an incumbrance on the property embraced within the "circle," against which it covenanted by the clauses of warranty contained in the said deeds. The exceptions raising this question are sustained.

The respondent's attorneys gave notice that they would ask for the order of nonsuit, upon the additional grounds that his honor, the presiding judge, erred in overruling the first and fourth grounds of said motion; and the next question that will be considered is whether there was error in this respect. As stated in *Nathans v. Steinmeyer*, 57 S. C. 386, 35 S. E. 733, we regard the law as settled in this state, that neither partial nor total failure of consideration can be set up as a defense, on account of a paramount outstanding title before eviction. It is also said in *Brown v. Thompson*, 81 S. C. 380, 62 S. E. 440, that a defendant cannot set up an incumbrance as a breach of the warranty, unless he has been evicted under it, or has actually extinguished it in whole or in part, to protect his title and possession. The reasons for the rule are stated in *Nathans v. Steinmeyer*, 57 S. C. 386, 35 S. E. 733, and are alike applicable to those cases in which the action is commenced by the grantee for a breach of the warranty, and those in which he, as defendant, attempts to set up the breach of warranty as a defense, when sued for the purchase money. The presiding judge

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

erred, therefore in not sustaining the nonsuit on this ground.

It is the judgment of this court that the judgment of the circuit court be affirmed.

WOODS, J. I concur. The incumbrance set up by the plaintiff, as a breach of the warranty contained in the conveyance to him, was the easement adjudged to be the right of Mrs. Marshall, in her suit against the Columbia & Eau Claire Electric Railway Company, to have the land, a part of which was conveyed to the plaintiff, kept open, as land dedicated to the public use. The position was taken by plaintiff's counsel that the rule which requires the grantee to show that he has extinguished the outstanding incumbrance, or has been evicted under it before he can maintain an action on a general warranty, does not apply when the incumbrance is an easement. It is true, as argued by counsel, that the grantee may not be able to extinguish the easement, but it is also true that the right to it may never be enforced. It cannot be doubted, under the principle on which the cases in this state were decided, that when an outstanding right to an easement exists and the right is actually enforced so as to become a burden on the land, an action on the warranty could be maintained. But the mere right to an easement in a third party cannot be set up by the grantee as a breach of warranty, when his use of the land has not been affected by the assertion of the right against him. Whatever may be the rights of Mrs. Marshall, there is no evidence that she has ever asserted them, so as to interfere with the plaintiff's enjoyment of the land conveyed to him.

(86 S. C. 242)

GENS v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. July 5, 1910.)

TELEGRAPHS AND TELEPHONES (§ 69*)—TELEGRAMS—FAILURE TO DELIVER—PUNITIVE DAMAGES.

A telegraph company's agent's refusal to attempt to deliver a telegram, on his attention being repeatedly called to the fact of nondelivery, shows willfulness sustaining an award of punitive damages.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 71; Dec. Dig. § 69.*]

Appeal from Common Pleas Circuit Court of Hampton County; Thos. S. Sease, Judge.

Action by William Gens against the Western Union Telegraph Company. From a judgment of nonsuit, plaintiff appeals. Reversed and remanded.

W. N. Heyward and W. B. De Loach, for appellant. E. F. Warren and G. Warren, for respondent.

GARY, A. J. This is an action for damages, alleged to have been sustained by the plaintiff, through the defendant's failure to deliver a telegram, and the appeal is from an order of nonsuit. On the 21st of April, 1908, the plaintiff sent to his attorney, Mr. W. B. De Loach, the following message: "Are you coming. Answer." At this time the plaintiff was under arrest for violation of an ordinance of the town of Ridgeland, S. C., and the telegram was sent in pursuance of an agreement with Mr. De Loach, that he would represent the plaintiff, whenever notified, in such cases. This message was delivered within a reasonable time. On the 21st of April, 1908, the following telegram in answer to the foregoing, was delivered to the defendant for transmission: "Camden, S. C. 4/21. Wm. Gens, Ridgeland, S. C.—Mr. De Loach not here, try Columbia, Supreme Court. Mrs. W. B. De Loach." But it was not delivered to the plaintiff until the lapse of more than 24 hours after it was received at Ridgeland.

At the close of the plaintiff's testimony, the defendant made a motion for a nonsuit on the ground that the complaint shows the action was not for mental anguish, and "that there is nothing upon the face of the first telegram or of the reply telegram, which would have notified the defendant company of any damage which would have been sustained, by reason of the nondelivery of these telegrams."

Even if it should be conceded that this is a proper construction as to what the complaint shows upon its face, nevertheless there was error in granting the nonsuit on this ground, for the reason that his honor the presiding judge had allowed the plaintiff to introduce testimony, tending to show that the plaintiff had sustained damages, other than those arising from mental anguish, as will be seen by reference to the following testimony, which appears in the record:

"Q. What did you do when you received that message, Capt. Bill? A. I got Mr. Colcock; I had to go and hunt Mr. Colcock, and at first I could not find him, and I went to Fayville—I got him there. Q. How far is that from where you live? A. Six miles. Q. How long does it take you to go there and get back? A. About an hour and a half—Mr. Warren: I object; there is no such allegation in the complaint. The Court: I think it is competent. Q. You procured the services of Mr. Colcock? A. Yes, sir. Q. How far did you go? A. Six miles. Q. How long did it take you to go there? A. A couple of hours. Good horse go there and come back in a couple of hours. Q. What was the services of that horse worth? A. My mare was worth \$225. Oh, a dollar or two. Mr. Warren: I object to that. The Court: Was that your own horse? Witness: Yes, sir. The Court: You did not have to hire one? Witness: No, sir. The Court:

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Strike it out. The Court: What was your horse doing—anything—at the time? Witness: Yes, sir; ploughing, and I was merchandising. The Court: You can prove that, I guess. Q. What was the services of your horse worth, to go that distance? A. I generally charge \$1.50 to go down there, and \$1.50 to come back. Q. That is what you generally hire them for? A. Yes, sir. Q. And you keep a horse for that? A. Yes, sir. Q. And the time you were away from your place? A. Yes, sir. Q. Did you pay for this message? A. Yes, sir; I paid for it. Mr. Berg paid for it, and I paid him. Q. Now Capt. Bill, I want to ask you—I believe you say your horse was worth \$1.50 going and \$1.50 coming? A. Yes, sir."

The second ground upon which the motion for nonsuit was made is that there was error in the admission of the foregoing testimony, and that if it was excluded there would be no testimony to sustain the allegations of the complaint. If testimony is incompetent and the presiding judge allows it to remain in the record, the right to a nonsuit must be determined, just as if it had been introduced without objection, and the rule is that "if testimony is received without objection, which would otherwise be incompetent, it becomes competent, and cannot be disregarded upon a motion for nonsuit; but its sufficiency must be left to the jury." *Ashe v. Ry.*, 65 S. C. 134, 43 S. E. 393. And the foregoing testimony tended to show that the plaintiff had sustained actual damages.

But even if the two propositions upon which the defendant relied for a nonsuit are sound, nevertheless the nonsuit should have been refused. In the first place, an unreasonable delay in the delivery of a telegram, raises a presumption of negligence on the part of the telegraph company. In this case, it should have been submitted to the jury to determine whether the delay was unreasonable.

In the second place, there was testimony tending to show that the plaintiff was entitled to punitive damages, in addition to the actual damages hereinbefore mentioned, as there was testimony tending to show that the attention of the agent was several times called to the fact that the telegram had not been delivered, and that he would take no notice of it.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial.

WOODS, J. (concurring in the result). I think the judgment of nonsuit should be set aside for reasons different from those stated in the opinion of Mr. Justice GARY. The main allegation of the complaint with respect to damage for delay in the delivery of the telegram is that the plaintiff was thereby "greatly distressed and worried." This al-

legation must be eliminated because the telegram related to the employment of an attorney, distinctly a business matter, and worry and disappointment in business affairs do not fall under the mental anguish statute. *Capers v. Telegraph Co.*, 71 S. O. 29, 50 S. E. 537. The evidence admitted over defendant's objection that the plaintiff, when he received no reply to his dispatch to Mr. De Loach, had taken his horse from his field and driven six miles to procure the services of another attorney cannot serve as an element of actual damages to warrant this court in reversing an order of nonsuit. No such damage was alleged in the complaint and the evidence with respect thereto was clearly incompetent. It seems to me illogical for this court to reverse a judgment of nonsuit on the ground that evidence, objected to and incompetent, tended to show that the plaintiff had some other cause of action than that which he undertook to state in his complaint.

There was nevertheless a good ground for sustaining the appeal from the order of nonsuit. By reason of the delay of the defendant's agent in delivering the telegram, the purpose of the plaintiff in using the defendant's wires as a means of communication was entirely defeated. Upon proof that the delay having this result was due to defendant's breach of its duty to use due diligence, the plaintiff was entitled to recover as actual damages the nominal amount paid the defendant for the service of prompt delivery, undertaken on plaintiff's behalf, and not performed. The payment for this service was alleged in the complaint and testified to by the plaintiff. This nominal damage was sufficient to support a finding of punitive damages on proof that the delay was due to willfulness or wantonness. *Arial v. Telegraph Co.*, 70 S. C. 418, 50 S. E. 6; *Doster v. Telegraph Co.*, 77 S. C. 53, 57 S. E. 671. There was evidence tending to show a willful disregard of duty on the part of the agent of the defendant at Ridgeland; that evidence being that the agent held the telegram addressed to the plaintiff for 24 hours without effort to deliver, though twice reminded by an assistant of his duty to deliver.

(56 S. C. 226)

PEAKE, Master for Union County, v. RENWICK et al.

(Supreme Court of South Carolina. July 4, 1910.)

1. PARTITION (§ 109*)—SALES—RIGHTS OF PURCHASER—CAVEAT EMPTOR.

The rule of caveat emptor does not apply to judicial sales for partition, and the officer making the sale is the agent of the parties to the action, and his representations are binding on them.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 350, 353; Dec. Dig. § 109.*]

2. PARTITION (§ 109*)—SALES—FRAUD—MISREPRESENTATIONS—REMEDY OF PURCHASER.

Where a purchaser at a partition sale was imposed on by fraud, or by misrepresentations innocently made, the court, in an action against him for the price, could give him, according to the circumstances, a pro tanto abatement of the price or rescind the contract of purchase.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 383, 385; Dec. Dig. § 109.*]

3. PARTITION (§ 109*)—SALES—MISREPRESENTATIONS—REMEDY OF PURCHASER.

Where at a partition sale of an unimproved lot of decedent, an improved lot, which decedent had conveyed, was by mistake included, the court, in an action against the purchaser for the price, would not direct a pro tanto reduction of the price, but would rescind the sale on it appearing that a pro tanto reduction would probably result inequitably to the heirs of decedent.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 381, 385, 386; Dec. Dig. § 109.*]

Appeal from Common Pleas Circuit Court of Union County; Ernest Gary, Judge.

Action by C. H. Peake, Master for Union County, against John Renwick and another. From a judgment of dismissal, plaintiff appeals. Reversed.

Wallace & Barron, for appellant. Townsend & Townsend, for respondents.

HYDRICK, J. This was an action to foreclose a mortgage given by defendants to plaintiff, as master, for the credit portion of the purchase price of a lot in the town of Union, sold under order of court for partition amongst the heirs of C. C. Culp. By mistake, the lot, as described in the complaint, in the advertisement for sale, and in the master's deed to defendants and their mortgage to him, included a lot which had been sold by Mr. Culp some years before his death to Dolly Ann Hawkins, upon which there were valuable improvements, including a dwelling house, well, orchard, and vineyard. The defendants knew that Dolly Ann Hawkins was, at the time of the sale, and for many years prior thereto had been, in possession of a part of the lot covered by the description, but allege that they believed, nevertheless, that they were buying all the land included within the boundaries given, and, before complying with their bid, they called the attention of the master to the fact that she was in possession of a part of the lot, and were assured by him that they would get all the land covered by the description, and that, relying upon his assurance, they completed the purchase by paying the cash portion of their bid and executing the bond and mortgage. Having failed to get possession of the Hawkins lot, they refused to pay the bond given for the balance of the purchase price, and to the complaint herein they pleaded failure of consideration. The circuit judge found that, on account of the mistake in the description, the master thought he was selling, and the defendants thought they

were buying, the Hawkins lot, together with the adjacent vacant lot, which alone was intended to be sold; that the minds of the parties did not meet, and therefore no contract was made, and he dismissed the complaint. It was error to dismiss the complaint. The decree should at least have restored the parties to their original condition.

The rule of caveat emptor does not apply to judicial sales of property for partition. The officer making such sales is the agent of the parties to the action, and his representations are binding upon them. *Tunno v. Fludd*, 1 McCord, 121; *Bank v. Bramlett*, 58 S. C. 477, 36 S. E. 912, 79 Am. St. Rep. 855.

While the court will not lend too ready ears to defenses by which parties seek to get rid of the obligation of contracts solemnly entered into, especially as in cases like this, the court will afford reasonable opportunity for investigation of the titles to property sold under its order, and will even order a reference to ascertain whether they be good; still, where it appears that a purchaser at such sale has been imposed upon by fraud or misrepresentation, even when the misrepresentation was innocently made, as it was in this case, and where it further appears that he relied not upon his own investigation and judgment, but upon such misrepresentation, and that it was a principal inducement to the purchase, he is entitled, in an action brought against him for the purchase money, to relief, which may, according to the circumstances, consist either in a pro tanto abatement of the purchase price, or in a total rescission of the contract. *Means v. Brickell*, 2 Hill, Law, 657, and *Latimer v. Wharton*, 41 S. C. 508, 19 S. E. 855, 44 Am. St. Rep. 739, and the cases cited therein.

In this case, as the Hawkins lot is improved, and the lot which was intended to be sold is not improved, a pro tanto reduction of the purchase price would probably result inequitably to the heirs of Mr. Culp, who, according to the testimony, thought that only the vacant lot was being sold, and made it bring a price with which they were satisfied. Therefore, the sale should be wholly rescinded, and the original status of the parties restored, unless the defendants are now willing to confirm the purchase and pay the bond and mortgage sued on, and take that portion of the lot covered by the description of their deed, exclusive of the Hawkins lot.

Judgment reversed.

(36 S. C. 203)

STATE v. DAVIS.

(Supreme Court of South Carolina. July 4, 1910.)

1. INDICTMENT AND INFORMATION (§§ 133, 159*)—FORMAL DEFECTS—WAIVER.

The defects in an indictment failing to state the time of the finding by the grand jury and the day of the designated month at which the

offense was committed relate merely to the form, and may be cured by amendment on timely objection, and an objection must, as required by Cr. Code 1902, § 57, be taken by demurrer or motion to quash before the jury is sworn.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 454, 468, 506-514; Dec. Dig. §§ 133, 159.*]

2. CRIMINAL LAW (§ 1208*) — PUNISHMENT — DISCRETION OF COURT—STATUTES.

Cr. Code 1902, § 160, providing that one convicted of a designated crime shall be "punished by imprisonment for not more than five years, or by a fine of not more than \$500," leaves it to the court to determine whether the sentence shall be by fine or imprisonment, and a sentence to imprisonment alone, without the alternative of a fine is valid.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3281-3287, 3289-3295; Dec. Dig. § 1208.*]

Appeal from General Sessions Circuit Court of Charleston County; Robt. Aldrich, Judge.

James Davis was convicted of larceny from the field, and he appeals. Affirmed.

Alonzo E. Twine, for appellant. John Peurifoy, Sol., for the State.

JONES, C. J. The defendant was convicted and sentenced under an indictment charging larceny from the field. After trial and verdict of guilty the defendant moved in arrest of judgment on the ground that the indictment was fatally defective in that it failed to state the time of finding by the grand jury, and the refusal of the motion is the basis of exception. The indictment was as follows: "State of South Carolina, County of Charleston. At a court of general sessions begun and holden in and for the county of Charleston in the state of South Carolina, at Charleston courthouse in the county and state aforesaid, on the second Monday of February in the year of our Lord one thousand nine hundred and ———, the jurors of and for the county of Charleston aforesaid, in the state of South Carolina aforesaid, upon their oath, present that James Davis on the ——— day of October in the year of our Lord one thousand nine hundred and nine, with force and arms at Charleston courthouse in the county of Charleston and state aforesaid, from the field of the said C. G. Dupont and S. W. Windham of the value of fifty (\$50.00) dollars of the proper goods and chattels of C. G. Dupont and S. P. Windham, then and there being found feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace and dignity of the state. John H. Peurifoy, Solicitor." The appellant also excepts on a ground not made in the circuit court, namely, that the time of the offense is not alleged. All such objections come too late after the jury is sworn. Section 57 of the Criminal Code of 1902 provides: "Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to

quash such indictment before the jury shall be sworn and not afterwards." The defects complained of related merely to the form of the indictment, and did not materially affect the nature of the offense charged, hence may have been easily cured by amendment upon timely objection. State v. May, 45 S. C. 509, 23 S. E. 513.

Appellant's remaining exception is that the sentence is void because it is not in the alternative. The sentence was imprisonment at hard labor on the public works of Charleston county for the term of two years, or at hard labor in the state penitentiary for a like period—two years. The statute (section 169 Cr. Code 1902) provides that "whosoever shall steal from the field any grain, cotton or vegetables, whether severed from the freehold or not, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by imprisonment for not more than five years or by a fine of not more than five hundred dollars."

The appellant contends that the judgment after providing for imprisonment should have further provided an alternative of fine. Such a construction of the statute would give the prisoner the right to determine whether he should suffer fine or imprisonment, whereas the statute leaves it to the court to determine what shall be the sentence, either by fine or by imprisonment. The sentence was in conformity to the statute.

The judgment of the circuit court is affirmed.

(86 S. C. 217)

STATE v. LANGFORD et al.

(Supreme Court of South Carolina. July 4, 1910.)

1. COUNTIES (§ 96*)—OFFICER—BONDS.

An agreement between the state and the sureties on the bond of a defaulting county treasurer, entered into pending an action by the state on the bond, which agreement provided that the sureties should pay \$20,000 in full; that the state should prosecute its claim against the treasurer; that on the recovery of judgment against him and assignment thereof to the surety, the latter would enforce it, and that the proceeds thereof should first pay the costs and then pay the state the excess over \$20,000 up to \$24,171, did not release the treasurer or surety from further liability and the state, though receiving the \$20,000 from the surety, could prosecute the action against the treasurer, since it had a beneficial interest in the proceeds, arising from the enforcement of a judgment against him, and since the surety became a trustee for the state to the extent of such interest.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 96.*]

2. COUNTIES (§ 96*)—OFFICERS—ACTIONS ON BONDS—STIPULATIONS—EFFECT.

The agreement did not operate as an assignment of the claim of the state, so as to bar the state from further prosecuting the action.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 96.*]

3. APPEAL AND ERROR (§ 242*)—QUESTIONS REVIEWABLE—QUESTIONS NOT PASSED ON IN THE TRIAL COURT.

A question not passed on in the trial court is not properly before the Supreme Court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1417-1425; Dec. Dig. § 242.*]

Appeal from General Sessions Circuit Court of Hampton County; Geo. W. Gage, Judge.

Action by the State against Jesse O. Langford and another. From a judgment for plaintiff, defendant named appeals. Affirmed.

The facts are fully set out, in the decree of his honor the circuit judge, which is as follows:

"The plaintiff sued the defendant Langford, former treasurer of Hampton county, on his official bond, and joined the defendant National Surety Company as one of the makers and surety on the bond. The complaint alleges a breach of the condition of the bond, in that Langford failed to turn over to his successor in office about \$25,000 of public moneys. The defendant Langford made a general denial. The other defendant pleaded defenses not now necessary to state. At the trial the defendant Langford was granted leave to make a supplemental answer, in which he pleaded: (1) That since this action was begun, the claim of the plaintiff had been discharged by payment. (2) That since this action was begun, the plaintiff had assigned its claim to the National Surety Company, thus defeating the plaintiff's further interest in the cause. After conference, counsel then agreed upon what had been done betwixt the state and the Surety Company, and counsel made and signed an agreed statement, upon which the case was to be tried. So the cause is now akin to a controversy without action. By the terms of the agreed statement, the original answers were withdrawn, and the only pleadings and proof now are the complaint, the supplemental answer of Langford, and the agreed statement.

"From the agreed statement it appears that on the 22d of October, 1909, the plaintiff and the Surety Company made an agreement, by which agreement: (1) The Surety Company was to pay \$20,000, in full settlement of all demands on it by reason of the bond. (2) The plaintiff was to press to judgment its claim against Langford and the Surety Company, the latter thenceforth a nominal party. (3) Any judgment recovered should be entered against Langford, or Langford and the Surety Company, at the Surety Company's request, and then satisfied or assigned to the Surety Company, for common interest as further herein provided. (4) The Surety Company should be subrogated to, and have assigned to it, all the rights of the

plaintiff in the judgment, subject to the next-stated provision. (5) Any judgment recovered against Langford should be collected by the Surety Company, with the state's assistance and co-operation, from Langford or any other parties liable therefor. (6) The money collected on the judgment should be applied (a) to costs, expenses, and fees; (b) to the payment of the plaintiff, all over \$20,000 and up to \$24,171.02; (c) to the Surety Company. Under this agreement the Surety Company paid the state \$20,000.

"The narrow issue is: Have the agreement and payment thereunder, one or both, operated to conclude this action? That is Langford's contention. He admits that the Surety Company, having made good the default, may now sue him, in an independent action, to recover back the money so paid, to the limit of \$20,000, but no more. If Langford's contention be true, then the intention which the state and the Surety Company had will be defeated; for they intended, and so expressly declared, that this action should proceed to judgment. That intention ought to be executed, unless it be in contravention of law, or hurtful to the rights of Langford. It can make no substantial difference to Langford, whether he answer this action, or whether he answer an action against him by the Surety Company; the issue in both is the same.

"The first contention of Langford in the supplemental answer is that the claim of the state has been paid. But that is not so; the state had two claims, one against Langford as principal, and one against the Surety Company as surety, and the claims rest on different liabilities. It is possible, and it sometimes happens, that the liability of the principal is intact, while the liability of the surety is discharged. The principal might be liable for the whole amount claimed, and the surety might be liable for only a part of it. The state claims \$24,171.02. If Langford is due to it that much, then the acceptance by the state of \$20,000 from the Surety Company does not operate to pay \$24,171.02. If Langford is due to the state the large sum, and that is susceptible of proof, then the state has something in issue besides the sum it got from the surety, and the cause ought to proceed to the end; that is, to judgment and execution. The \$20,000 paid by the Surety Company was not accepted as payment of the whole liability of Langford, and there is no reason why it should operate as such. It is not worth while to consider if the Surety Company may have from Langford, in the event of recovery, anything over what it has paid, as, under the sixth paragraph of the agreement, that is not in issue now. In my opinion the claim of the state against Langford has not been paid.

"The next contention is that the plaintiff

has assigned its claim, to wit, this cause of action, to the Surety Company, and that defeats this action. There is nothing within the agreement, about the assignment of the claim. There is in the minutes of the county commissioners a recital about the state and county transferring all rights of action which they may have against any other person or corporation that may have participated in the loss. But when the agreement was reduced to its finality, it provided (2) that the state should press to judgment its claim, and (3) that the judgment shall be assigned to the Surety Company, and (4) that the Surety Company should be subrogated to the rights of the state in the judgment. As matter of fact and of law, therefore, I conclude that the state's claim was not assigned to the Surety Company, but that the only thing assigned was the judgment, when it shall have been recovered.

"I have given careful consideration to the able argument of counsel for Langford. I have not been able to examine all the authorities they cite. I have rather considered the case, not so much on authority, but upon principles of reason, applied to its particular features.

"At the close of the agreed statement is this paragraph, to wit: 'The principal answers having been withdrawn, it is not necessary for plaintiff to offer proof in support of the allegations, as to the amount of the shortage. The court is requested to render judgment, in accordance with the admitted facts.' In conformity with this agreement, the plaintiff is entitled to judgment against the defendants for \$24,171.02. It is so ordered."

The receipt of the Attorney General for the \$20,000 is as follows: "Received from National Surety Company, exchange on New York for \$20,000 which, when paid, will be in full settlement of all claims of the state against the National Surety Company in the matters of Langford, in accordance with the agreement above set out, made by state in behalf of itself and the county of Hampton, under resolution of its county commissioners, October 22, 1909. J. Fraser Lyon, Attorney General, S. C."

The defendant Langford appealed from said decree.

W. B. De Loach, for appellant. J. Fraser Lyon, Atty. Gen., and W. H. Townsend, for the State.

GARY, A. J. (after stating the facts as above). The first question that will be considered is whether there was error, on the part of his honor the circuit judge, in ruling that the defense interposed by the defendant Langford, alleging that since this action was commenced the claim of the plaintiff had been discharged by payment, could not be sustained. The contention of

the appellant is predicated upon the theory that the agreement of the plaintiff to release the defendant National Surety Company was the sole consideration upon which the agreement was made. Not only did the Surety Company pay the \$20,000, but it also agreed "that on the recovery of judgment against J. C. Langford, and its assignment to the Surety Company, said Surety Company shall at its own expense, but with the assistance and full co-operation of the state and its associates, take such steps and file such proceedings as it may be advised might result in recovery of the whole or part of said judgment from the said Langford, or any other parties liable thereon, or by reason of any matters or transactions connected therewith."

It also agreed "that upon said recovery, if any, the moneys arising therefrom shall be disposed of as follows: (a) To the reasonable costs, expenses, and professional compensation therein; (b) next, to the payment to the state of the excess over \$20,000 of its recovery upon the judgment against J. C. Langford, and up to \$24,171.02, the amount demanded in the suit pending on the bonds; (c) the balance to the National Surety Company"—thus showing that the plaintiff had a beneficial interest in the proceeds, arising from the enforcement of the judgment, and that under the assignment thereof, the Surety Company would become a trustee for the plaintiff to the extent of its interest. The agreement entered into between the plaintiff and the Surety Company, was executory in its nature, and it clearly appears upon the face thereof that it was not intended that the payment of the \$20,000 should either discharge Langford or the Surety Company from further liability, unless it complied with the conditions of the contract, as to the enforcement of the judgment for the benefit of the plaintiff.

In the case of *Massey v. Brown*, 4 S. C. 85, the principle was announced that although the general rule is that a release of one of several joint obligors discharges the others, yet equity will restrain the general effect of the release, according to the intent of the parties, and that such intent may be shown, even by parol evidence. In that case the court uses the following language: "Equity construes a release according to the intention of the parties, and will give it no operation beyond the design or the purpose it was intended to accomplish. The principle is so fully enforced by Chancellor Kent, in *Kirby v. Taylor*, 6 John. Ch. (N. Y.) 242, that any further reference to authority in support of the rule is unnecessary. It is certainly in strict consistency with the doctrine of equity, which always seeks, if possible, to give effect to the intent which induced the act, if it can be ascertained, without a violation of the rules of law. We cannot, however, refrain, be-

cause they appear so pertinent to the case before us, from referring, in the language of the chancellor, to some of the authorities on which he rested his opinion. Lord Hardwicke said, in the case of *Cole v. Gibson*, 1 Ves. 503, 'that it was common in equity, to restrain a general release to what was under consideration, at the time of giving it.' And, again, in *Ramsden v. Hutton*, 2 Ves. 304, he observed 'that if a release be given with a particular consideration recited, notwithstanding that the release concludes with general words, yet the law, in order to prevent such surprise, will construe it to relate to the particular matter recited, which was under the contemplation of the parties, and intended to be released.'

The court thus states the rule in *Brown v. Whittington*, 39 Or. 300, 64 Pac. 649: "It is insisted at the outset that the plaintiffs cannot recover because the complaint admits that the note upon which judgment against Whittington and Shull was recovered by Brown was paid in full by Shull before the commencement of the action thereon. But the contention is not supported either by the allegations or the proof. The complaint alleges that prior to the commencement of the action, Shull gave Brown sufficient money to satisfy the note, with the understanding and agreement that it should not be considered as a payment, but that Brown should prosecute an action thereon in his own name, at the expense and for the use and benefit of Shull, and the testimony is to the same effect. This was no more than Shull could have compelled Brown to do. Mr. Brandt says: 'It is settled by a long-continued and unvarying current of authorities that the surety may, by a suit in chancery, after the debt becomes due, and before he pays it, compel the creditor to proceed to collect the debt from the principal, provided he indemnify the creditor against loss from a fruitless suit against the principal.' " 1 Brandt on Sur. (2d Ed.) 258. *Carson v. Richardson*, 3 McCord, 528; *Potts v. Richardson*, 2 Bailey, 15; *Thomson v. Palmer*, 3 Rich. Eq. 139; *Wilson v. Wright*, 7 Rich. Law, 399; *Kinard v. Baird*, 20 S. C. 377.

The second defense set up by Langford is as follows: "That the plaintiff since the commencement of this action, has assigned its claim, to wit, the cause of action herein sued on, to the defendant the National Surety Company; and hence the plaintiff has no further interest in the subject-matter herein." Error is assigned on the part of the circuit judge in not sustaining this defense. The exceptions raising this question are overruled for the reasons stated by the circuit judge.

His honor in his decree says: "It is not worth while to consider if the Surety Com-

pany may have from Langford, in the event of recovery, anything over what it has paid, as, under the sixth paragraph of the complaint, that is not in issue now." As the circuit judge has not passed upon this question, it is not properly before us for consideration.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(36 S. C. 170)

FIRST NAT. BANK OF RICHMOND, IND.,
v. BADHAM.

(Supreme Court of South Carolina. June 30, 1910.)

1. BILLS AND NOTES (§ 165*)—NEGOTIABILITY
— REFERENCE TO COLLATERAL CONTRACT —
STATEMENT OF CONSIDERATION.

A note is not rendered nonnegotiable by a promise to pay a certain amount "for value received in one machinery as per contract, November 23, 1899."

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 416; Dec. Dig. § 165.*]

2. BILLS AND NOTES (§ 160*)—NEGOTIABILITY
— CERTAINTY AS TO AMOUNT—ATTORNEY'S
FEES.

A note is not rendered nonnegotiable by a provision that, "in case it becomes necessary to employ an attorney to collect this note, a further sum not exceeding 10 per cent. for fees" will be paid.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 403; Dec. Dig. § 160.*]

Gary, A. J., and De Vore, A. A. J., dissenting in part.

Appeal from Common Pleas Circuit Court of Richland County; R. W. Memminger, Judge.

Action by the First National Bank of Richmond, Ind., against V. C. Badham. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The following are the exceptions taken:

"1. Because his honor erred in the admission of testimony in that on the issue of whether the erasure of the printed provision for attorney's fees in the two notes sued on herein had been made by the defendant or without his consent. His honor, over plaintiff's objection, permitted the witness Melghan (who, as bank collection clerk, had handled other notes executed to defendant, Badham, on printed forms like the two notes in question) to testify that the printed attorney's fee clause was not erased in the said other notes; plaintiff objecting that such testimony was irrelevant, and that the fact that the clause 'was not erased in other notes does not tend to prove that it was not erased on these notes,' and his honor holding and stating, 'does not prove that it was not erased on this note, but would be some evidence on that point,' and allowing defendant's attorney to ask the question, 'Do you recall ever having seen one of these notes of Mr. Badham with the clause to

which I called your attention erased? and allowing, over objection, the witness to answer, 'No, sir; I do not recall ever seeing one of the Badham notes with this erasure before.'

"It is submitted that the testimony was irrelevant and misleading in its effect upon the minds of the jurors, and that the effect was further prejudicial because his honor stated that the said testimony throws light on the question.

"2. Because his honor erred in allowing the defendant, Badham, over plaintiff's objection, to testify as to his relations with the machinery company to which he had indorsed the notes sued on herein, such testimony being conclusions from catalogues and correspondence which should have been produced as the best evidence, defendant endeavoring by such oral testimony—merely his personal construction in his own favor—to prove that he was agent for the sale of said machinery, rather than independent purchaser and dealer on his own account (as plaintiff contends the correspondence shows), and that his indorsement was not intended as an absolute guaranty, to wit: 'A. In consequence of my writing, complete estimates and prices for mills were furnished me, and I acted with the knowledge of the Richmond City Mill Works— Mr. Lyles: The matter of prices ought to have been in writing; let him produce the writing. (Defendant then testified they were lost.) Mr. Muller: That relieves the matter from my friend's objection. Mr. Lyles: I do not think so. It does not permit him to testify to any relations which were based upon the papers themselves. I do not think it is sufficient for one who has had a catalogue of machinery of a machinery institution to testify as to its loss and contents. He should have given notice to produce such a catalogue, because it is always presumed that a printed catalogue like that—that the party who had it printed can produce it. The Court: I do not see what the contents of a catalogue has to do with it. Do not see the necessity of going into the contents. Mr. Muller: He is stating the connection between himself and the Richmond City Mill Works. The Court: Leave out everything in reference to correspondence, and give a plain statement of your connection, and we will get along better. Mr. Lyles: Your honor understands us as objecting to his testimony. He is going to testify from conclusions of correspondence. There was no personal conference between them. Mr. Muller: My friend is in error about that. The Court: Go ahead. A. I began, with their consent and knowledge, to solicit business— Mr. Lyles: We object. If their knowledge and consent is in writing he must produce it. The Court: Go ahead. A. To solicit business in the city for the Richmond City Mill Works for their flour mill system. * * * I actively canvassed this state from one end

to the other for the Richmond City Mill Works, selling their machinery for them, soliciting trade for them, and I sold one or two of these large outfits for them— Mr. Lyles: Our objection goes to all of this.

* * * He is now testifying to the result of the correspondence; his idea of the result of the correspondence. * * *

The Court: This testimony ought to go in on the question of bona fide holder of the notes. Mr.

Lyles: We object on the ground that if he had written authority from them he must produce it; he has no right to testify what he had done by authority contained in a written instrument or correspondence. The

Court: I do not understand this witness to say that he had written correspondence on this. The Witness: Great many of them I did not. * * *

Richmond City Mill Works were in the habit of sending me inquiries in this state. It was understood between us that I should be their exclusive agent— Mr.

Lyles: We object to his understanding. The Court: Have you a written contract with them? A. No, sir. I am trying to explain

how the business grew up. Mr. Lyles: From the correspondence? * * *

The Court: Go ahead. The Witness: Under arrangements that had grown up between us and the understanding, I should have their exclusive agency of this state, they sent me inquiries

from all over the state which I went to see, soliciting this trade for them. During those

three or four years of soliciting I effected the sale of three mills * * * (Including this), and they recognized me as their agent

by sending me all these inquiries and directing me to go— Mr. Lyles: Does your honor rule he can testify to their sending

him these inquiries when all were accompanied by letters? If a matter is done in writing, no matter what it is, the writing is

the best evidence. (Objection overruled.) Witness: Well, as I said before, they sent

me inquiries all over this state. I sold this machinery for them, and would make settle-

ments with them; had correspondence with them concerning it. They would send me

directions, blue print for putting up this machinery, and directions of that kind.'

"It is submitted that there was error in thus allowing defendant to testify of the

effect and understanding of transactions by correspondence, the correspondence being the

best evidence, and plaintiff suffered thereby, in that defendant was permitted to present

to the jury, apart from the correspondence which was the best evidence, defendant's

own deductions and plausible argumentative testimony that he was, after all, merely an agent ('soliciting this trade for them'), and not debtor on the notes indorsed by him.

"3. Because his honor erred in allowing the defendant, Badham, over the objection of the plaintiff, to testify as to course of business by correspondence, and his conclusions therefrom of his agency in the sale of machinery for which the notes sued on were

given and indorsed by him, and his nonliability by said indorsement, instead of requiring an effort to produce the writing as the best evidence, and so allowed the defendant to testify that he was not the bona fide guarantor of the notes sued on, but acted as the representative of the machinery company through which the plaintiff claimed, to wit: 'Q. When you would sell one of these large plants, describe the method you would pursue. A. Well, I would send the order in to the Richmond City Mill Works for the machinery, describe what it was for, * * * and they would ship it to the customer—ship it to the original purchaser—and under my agreement I had to put that machinery up, that is, my mechanics had to put it up, according to the blue prints, the plans, that the Richmond City Mill Works furnished. Mr. Lyles: At the risk of seeming to be against the intimation of your honor's remarks a few minutes ago, we still submit that it is incompetent for this witness to go ahead and testify as to these orders, or anything else, having been in writing, until he has taken the proper steps showing that he has given notice to produce them, then he can offer secondary evidence of its contents. The Court: He is not testifying to the contents of the writing. Mr. Lyles: I think he is. He said he sent orders to these people for this machinery. He is showing that he sent in orders, and that shows a written instrument. The Court: I have not observed anything more than that this witness is giving a general statement of his connection with these people. * * * A. To make up a complete plant, I would sell the engine and boiler of the engine company I represented and the flour mill machinery from the City Mill Works, and the pulleys and shafting from the people I bought those things from, and the belting which I usually obtained in Columbia. Q. When you had settlements with the purchaser, how would you arrange them? A. That portion that belonged to the Richmond City Mill Works I would take good notes and turn them over to them, if notes, and with the other manufacturers the same way. I would divide up the whole order according to their interest in that order, and made settlement that way. Q. Was that done in the case of the Huffman machinery? A. Yes, sir. Mr. Lyles: All of it was in writing, and we object to his testifying. * * * The Court: Was that done in writing? A. I sent the notes to these people in a letter accompanying the notes when I sent them to them. The Court: Do you expect them to produce that letter; haven't you got it? Mr. Lyles: We have it. If he gives us notice to produce it, we will produce it right now. The Court: He has not got to the point of settlement yet. Go ahead. Q. (By Mr. Muller): That is the way you conducted the Huffman transaction? A. Yes, sir. * * * Q. * * * About what time did you first make that first trade with Huff-

man for the Richmond City Mill Works—Mr. Lyles: We object. The important point is whether he ever made the sale to S. J. Huffman for the Richmond City Mill Works. The Court: Did you make the sale for the Richmond City Mill Works? A. Yes, sir; in the manner I have just described.'

"It is submitted that his honor erred in allowing said oral testimony as to deductions of witness based upon correspondence, instead of requiring the correspondence as the best evidence, and that the error was harmful, in that the defendant was allowed to give as evidence his conclusions and opinions that he was acting 'for the Richmond City Mill Works,' and thus was the agent of said company, and not himself responsible for the purchase money of the goods, as contended for by plaintiff.

"4. Because his honor erred in allowing defendant, Badham, over plaintiff's objection, to testify to complaints and representations made to him by Mr. Huffman as to alleged defects in the machinery for which the notes sued on were given, to wit: 'The Witness: Huffman notified me that the machinery—Mr. Lyles: We object to anything that Mr. Huffman notified him of. The Court: Go on with it. The Witness: Huffman notified me that the mill was not doing anything like it was guaranteed to do; that he could not get over 25 bushels a day out of it, and that the yield of flour was so poor that it was worse than any of the old country mills, and that he could get no customers; that people were leaving him because he could not get enough flour per bushel of wheat, and he said if things did not get better he would throw it back on my hands, and he refused settlement for it until it was made good.'

"It is submitted that said testimony was hearsay.

"5. Because his honor erred in allowing defendant, over plaintiff's objection, to testify to statements made to him by Huffman, as follows, to wit: 'Huffman came to my office and said, instead of being all right, it was all wrong, and he not only refused settlement for the machinery, but wanted us to take it away from there, that it had damaged him; that he could not get the quality or the quantity of flour out of it, or, rather, the amount of flour per bushel that his customers demanded; that he could not get over 30 or 35 pounds, and that it had absolutely ruined him; that he could not do any grinding, people would not patronize him. I notified the Richmond City Mill Works of these facts, and explained to them why the settlement had not been forthcoming for this machinery. Mr. Lyles: Your honor understands us as objecting to all of that—Q. Did Mr. Huffman get any use of the mill? A. He said not.'

"It is submitted that said testimony was hearsay.

"6. Because his honor erred in allowing

the defendant, over plaintiff's objection, to testify to statements made to him by Mr. Haughton, an officer of the machinery company, to which defendant had indorsed the notes herein (and of which defendant claims to have been agent rather than purchaser), and which company had indorsed said notes to plaintiff, said statements being made after the notes had passed from his company into the hands of the plaintiff, and after this suit thereon had been instituted, to wit: 'Mr. Lyles: We object to any statement made by Mr. Haughton. The Court: That might go to show that the Richmond City Mill Works people were not the bona fide holders of the paper. Mr. Lyles: How could it tend to show it? It would be hearsay testimony. The Court: Suppose the agent of the mill works had admitted it. Mr. Lyles: Would it be binding upon the First National Bank, which then had these papers? The Court: If your theory be correct, what interest has the mill works people in these notes? If he can testify to any fact that these mill works people made an admission about the notes after the suit was brought, and after the note was assigned, it will tend to show whether they were bona fide holders without notice. Q. (By Mr. Muller): State what occurred? A. Mr. Haughton stated he had come down to see Mr. Lyles and Mr. McMahan about this matter, and he wanted to see me to see if we couldn't arrange some adjustment to the matter; Haughton was treasurer of the City Mill Works, and he wanted to know what proposition I had to make to the company. * * * I still urged him to back this machinery. * * * He told me no; that they had too much secondhand machinery. During that conversation one of the reasons he gave me why he did not wish to take back that machinery was the fact that they could not use that system of flour milling any more, that they were using another sifter—just the heart of the whole thing—that the rollers might be used, but the sifter they were not using any more in their system. It struck me as peculiar, but he would not give me any more information along that line, so the conversation drifted back to some settlement with the Richmond City Mill Works. The bank was never mentioned at all. He finally—I forget the amount—I told Mr. Haughton that I would ship this machinery back and would pay the freight * * * and pay him one or two hundred dollars in connection with it to get it off my hands, and we separated, he said he would not accept my proposition, but he would take it before the directors of his mill company. * * * Q. That was while that suit was pending in the name of the First National Bank? A. Yes, sir; but never said a word about the bank holding these notes, and he could not make any settlement, but, on the contrary, he said he was down here

to see what settlement he could effect with me.'

"It is submitted that said testimony is hearsay and also irrelevant, being the declarations after this action brought by plaintiff of a person not shown to bear any relations to the plaintiff, and his honor erred in admitting said testimony and in holding that it was relevant as tending to show whether the plaintiff was a bona fide holder without notice. It is submitted that said testimony was harmful error, in that it presented to the jury the alleged confession of the machinery company (strangers to this suit) that the machinery was not up to date, and that there was a failure of consideration in the notes.

"7. Because his honor erred in allowing the defendant, over plaintiff's objection, when defendant was a witness undergoing cross-examination by plaintiff, to testify in detail and give opinions and reasonings as explanations, over and above and in addition to the answers to the questions addressed to him by plaintiff's counsel, to wit: Witness identifying a letter received by him from the Richmond City Mill Works, dated November 24, 1899, and read in evidence, being in part as follows: 'We do not see how it would be possible for us to accept the order at the old prices. We have made very careful estimates, and we find that at the old basis of discounts we cannot cover the actual cost of manufacturing the machinery. The advance which we have made is moderate when the cost of production is taken into consideration. We hope that you can arrange the matter with your customer to get more money for this machinery. * * * It is our invariable custom to sell to our own customers on terms providing for a settlement within a reasonable time after shipment. * * * The account for the last order from you stood open on our books for six months before we received any cash payment, and there is still more than half the amount remaining on open account. * * * We presume that you protect yourself in making deals with your customers, and it is only reasonable that we should be protected and receive interest on deferred payments. The Witness: May I make any comment upon that answer? Mr. Lyles: No, sir. Mr. Muller: I think when counsel asks the witness if he wrote or received a certain letter that it will be reasonable if he has comment to make upon it to make it at the time— Mr. Lyles: The letters speak for themselves. Mr. Muller: The answer is not complete until the witness says what he deems necessary to answer. The Court: The object of examination is to give a man a chance to say what he has to say. If this witness wants to make a statement, I do not see how I can stop him from making it. The Witness: I would like to comment on the letter just read. I had notified these

people that I had actually sold this order, but I had done so on the basis of the old prices which they had furnished me. In the meantime, they notified me to advance the price, and I immediately wrote that letter telling them that I had already taken this order for the shipment at a subsequent date, and to know whether they would protect it or not. Then they wrote me that letter calling attention to the fact that there was a large amount open on that account. Charged against you? A. Certainly. That related to two mills we had sold— Mr. Lyles: We object to the witness explaining any further. The Court: I think he ought to have the right to explain it. The Witness: I had sold two mills, one to Cook, of Newberry, and the other to the Prosperity Mill Company. I could not effect the settlement with these people because the mills were not giving satisfaction. I remitted to the City Mill Works all cash that I obtained on them, and it left a balance due, which they called attention to in that letter. In the meantime I had sent Mr. Milne to put these mills in order, and just as soon as they were accepted by the customers, * * * as soon as paid for, I remitted to the City Mill Works. That was the balance they claim was open.'

"It is submitted that said details as to other transactions were irrelevant and tended to confuse the minds of the jurors and divert them from the significance of the letter read, which showed the defendant as a customer and debtor of the machinery company; and his honor erred in holding that the object of examination is to give a man a chance to say what he has to say, whereas the object of the cross-examination (to which his honor was referring) is not to give the witness opportunity to say what he wants to say, but to restrict him to the answering of such questions as his adversary wishes him to answer, the ruling in effect taking the witness from the control of the cross-examining counsel, and permitting said witness to violate the rule against parol testimony to supersede a written instrument. The error of the practice complained of appears in his honor's later ruling in reference to other like demands on the part of the witness to be given unlimited range in his replies, to wit: 'The Court: I have allowed the witness to comment on these letters, but they always turn out to be arguments, and I cannot allow it. You can examine him in reply to all these letters.'

"8. Because his honor erred in allowing defendant, a witness under cross-examination, to testify in detail and give opinions and reasons as explanations, over and above and in addition to the answers to the questions addressed to him by plaintiff's counsel, to wit: Witness, identifying a letter written by him to the machinery company, dated December 6, 1900, read in evidence, being in part as follows: 'The settlement that I shall try to effect with Mr. Huffman will

be for him to give me notes for the full amount of his indebtedness due next fall. These notes I will indorse and turn over to you. I already have a mortgage over all of his property, and Mr. Huffman is a man of first-class credit in our community, and the matter will be safe and secure, although we will be forced to give him this extension, for, as stated before, I have to handle him very diplomatically, for if he should be roused to the point of fighting us, he certainly would obtain damages. As the matter now stands, I have him in the most conciliatory humor, and think that I will have but little trouble in effecting a settlement. The Witness: I explained to these people why I had not been able to get a settlement with Huffman, and told them what I would try to do. As a matter of fact, Huffman would not do it. He would not sign anything. Huffman repudiated the whole thing, said the machinery had not come up to the guarantee, and I was trying to manage him diplomatically. Mr. Lyles: Your honor, do we understand that this witness is allowed to make a speech to the jury? The Court: I did not mean that the witness could make an argument on each letter; I only allow him to comment on it.'

"It is submitted that the foregoing statement of the witness, made pursuant to a previous ruling of his honor that the witness under cross-examination might elaborate his answers and explanations as he saw fit, designedly diverted attention from his admissions of liability which he had made in his letter, and injected into the evidence a third party's representations about the defects of the machinery, and thus it interfered with the plaintiff's orderly presentation of his case and control of the witness and was prejudicial, the practice of releasing the witness under cross-examination from the cross-examiner's guidance of him to a certain line of testimony transfers the control of the cross-examination from the examiner to the witness, and destroys one of the methods of searching a witness by cross-examination.

"9. Because his honor erred in holding and ruling that the notes sued on were non-negotiable, as follows, to wit: 'I guess the rest of the evidence is as to the sufficiency of this mill in coming up to the guarantee. We had better discuss and dispose of the question of the negotiability of the notes. * * * I have with great reluctance relinquished the idea of the negotiability of these notes. * * * I have before me a point blank decision of the Supreme Court (Green v. Spires [71 S. C. 107, 50 S. E. 534]) which decides that a note containing a special stipulation is a nonnegotiable note. I have compared these notes with the Green-Spires Case, and I cannot see any possible difference in favor of the negotiability of the notes; the difference, if any, is entirely in favor of the nonnegotiability of the notes in this complaint, because in the Green-Spires

Case the amount of attorney's fees is fixed, whereas in the case here the amount of the attorney's fee is not exceeding 10 per cent., making an uncertain element. I have followed the decision in the Spires Case, and hold that if that clause was in the note and was altered by some third person, not a party to this note or this proceeding, what is known in law as spoliation, that note would have been a nonnegotiable note, and this defense could obtain between the bank and defendant Badham.'

"It is submitted that this ruling was erroneous, since the attorney's fees were provided in the note to apply only after maturity, and hence the amount of the notes was fixed and certain during the currency of the notes, and they should be held negotiable.

"10. Because his honor erred in holding and ruling that the notes were nonnegotiable, as follows, to wit: 'There is another point in the case. * * * The note contains in the body of it this clause: "With all expenses if suit be instituted for the collection of this note." * * * The view that such stipulation does not render the note nonnegotiable * * * because that could not obtain till after the maturity of the note is obviated by the statute in this state, which authorizes the bringing of a suit or action before maturity of the note. Now, if true, and it is true under section 255b in the Code [of Civil Procedure] that suit may be brought upon a note before its maturity, and expenses incurred in that suit, as to an uncertain amount before the note is matured, that destroys the force of the reasoning which says the note shall be negotiable because an uncertain amount cannot enter into it as an element until the negotiability is destroyed' (by maturity).

"It is submitted that this is an erroneous conclusion from the special statute allowing suit and attachment before maturity in case of a debtor departing the state with intent to defraud: (1) this exceptional remedy is not to be taken as applicable to any note until proof of the fraudulent conduct, all presumptions being against the probability of fraud; (2) it is against public policy to construe a note so as to render it possible for the maker to defeat its negotiability, and lessen his obligation, by resorting to a fraud—thus profiting by his own wrong—the 'suit instituted for the collection of the note' contemplated and contracted for in the making of the note cannot have been a suit before maturity provided for by the statute in case of fraudulent absconding; (3) the statute provides that if the debtor pay the debt on or before its maturity, he shall not pay the costs of the suit instituted before maturity under this section, and this provision of the statute would control so that the clause in the notes herein could not have reference to costs in a suit instituted before maturity, and there is no contingency in which these

indeterminate costs could accrue till after maturity; (4) a note sued on under said section and attached, though not technically mature, would certainly be practically mature and no longer negotiable, and hence the expenses of the suit, if recoverable, must be regarded as not affecting the negotiability.

"11. Because his honor erred in allowing defendant's witness W. J. Elliott, over plaintiff's objection, to testify as to the rule or practice of retaining the attorney's fee provision in the Badham notes which came under witness' eye (not the notes sued on herein), to wit: 'Q. Now, please state what was the rule with regard to retaining or canceling that clause in the Badham notes in the transaction of his business? Mr. McMahan: We object to this testimony as to the rule; it is irrelevant, except as to what he did as to these particular notes. Your honor overruled our objection before. Q. (By Mr. Muller): Was that ever allowed to be stricken out? A. Never was. Q. If parties wanted it struck out, would Mr. Badham consent? A. No, sir; he never did consent. Q. You handled a good many of these notes? A. Yes, sir.'

"It is submitted that said evidence was irrelevant and calculated to make the jury believe that such practice would tend to prove that defendant had not himself made the erasure.

"12. Because his honor erred in allowing defendant's witness Milne, over plaintiff's objection, to testify as to defendant's practice not to allow the attorney's fee provision to be stricken out when parties were signing notes to him, to wit: 'Q. About these notes that you heard witnesses speak of, did you ever handle any of these notes for Mr. Badham? A. Yes, sir. Q. Do you remember that clause, "If it becomes necessary to employ an attorney to collect this note, a further sum of not exceeding ten per cent. for fees"? A. Yes, sir. Q. Did Mr. Badham ever allow that clause to be stricken out? (Objected to. Allowed.) A. Not to my knowledge. I had trouble once in Hampton county about that clause, and wrote to Mr. Badham for instruction, and his reply to me was that the notes must be signed just as they are made.'

"It is submitted that the said evidence was irrelevant, and his honor's allowing it tended to mislead the jury as to its value.

"13. Because his honor refused to allow the plaintiff in reply to interrogate the witness A. C. Moore as to the appearance under the microscope of the signature of S. J. Huffman to the notes in question to show that such signature was written after the alteration in the notes, his honor refusing the same upon the ground that such testimony was not in reply.

"14. Because his honor refused to allow the witness T. H. Gibbes to testify as an expert that the signature of the said S. J. Huffman had been put to said notes after the

alteration in question; his honor refusing to allow the same upon the ground that such testimony was not in reply.

"15. Because his honor erred in charging the jury that the notes sued on were 'not negotiable,' and the question was for the jury 'just as though the suit were between the Richmond City Mill Works and Badham.'

"It is submitted that his honor should have charged that the notes were negotiable (if the erasure was made by Badham or with his consent or before his indorsement of them), and that the defenses which might have existed against the original payee were precluded (subject to the condition stated as to the erasure).

"16. Because his honor erred in charging the jury that the notes were nonnegotiable on the ground of their containing the provision for expenses of suit if suit be instituted; whereas, his honor should have held that such expenses could not accrue until after the maturity of the notes, and hence said provision did not affect the negotiability.

"17. Because his honor erred in charging the jury that they must find for the defendant 'if the evidence does not satisfy you by the greater weight that the bank is the owner'; whereas, his honor should have charged that the notes were negotiable (subject to the condition as to erasure only), and the holder was presumed to be the owner.

"18. Because his honor charged the jury as follows, to wit: 'If the jury believe from the evidence that at the time of the commencement of this action these notes really belonged, and now belong, to the Richmond City Mill Works, and not to the First National Bank of Richmond, Indiana, and that this action is brought in the name of the bank for the benefit of the Richmond City Mill Works under some private agreement or understanding between the two corporations, then the jury must find for the defendant'—thereby erring in indicating to the jury that there was any evidence of such a fact upon which they might find the same.

"19. Because his honor charged the jury as follows, to wit: 'That if the jury believe from the evidence that the Richmond City Mill Works warranted or represented the flouring mill machinery for which the notes were given to have a certain capacity, and that it fell short of that capacity, then (1) such failure of the machinery to develop the capacity so warranted or represented would of itself amount to a good defense for the defendant, by way of discount, and would entitle him to a reduction of the price of the machinery represented by the notes by any amount that the jury may believe from the evidence would fairly represent the diminution in value of the machinery caused by such deficiency of capacity; (2) and if the jury also believe from the evidence that before the commencement of this action Sam J. Huffman, or the defendant, offered to return the machinery to the plaintiff, and the plaintiff

declined or failed to accept a return thereof, then the jury should find for the defendant on this ground'—which it is submitted was erroneous in the following particulars, to wit:

"(a) It instructed the jury that if there was a warranty by the Richmond City Mill Works of the machinery in question to have a certain capacity, and any failure of the machinery to develop that capacity, even to an immaterial extent, such failure would itself amount to a good defense.

"(b) It instructed the jury that a mere representation by said Richmond Mill Works that such machinery would develop a certain capacity, and a failure of said machinery to develop that capacity, such failure would amount to a good defense, even though such representation might not have been accompanied by any fraud or overreaching.

"(c) It instructed the jury that a failure of the machinery to develop the capacity warranted or represented would of itself amount to a good defense regardless of whether efficient means had been used by Mr. Huffman or Mr. Badham to properly develop the capacity, and regardless of whether the defect might not have been remedied.

"(d) It instructed the jury that if Sam J. Huffman offered to return the machinery to the plaintiff before the commencement of this action and the plaintiff refused to receive the same, the jury should find for the defendant on this ground regardless of the extent of the failure and regardless of the fact that the machinery had been sold to defendant, Badham; several years before this action was commenced and that settlements and adjustments had been had between said mill works and Badham, which were claimed to have covered all alleged failures of the machinery.

"20. Because his honor charged the jury as follows, to wit: 'That if the jury believe from the evidence that the defendant by his indorsement of these notes intended to guarantee their payment only in case the machinery came up to the representations or guaranty of the Richmond City Mill Works, if they believe from the evidence there were such representations or guaranty, then they must find for the defendant, unless they believe from the evidence that the machinery did come up to such representations or guaranty'—which it is submitted was erroneous in the following particulars, to wit:

"(a) It left it to the jury to find whether the defendant intended to limit his guaranty of the notes; when, the whole contract being in writing contained in the correspondence between the parties, he should have instructed the jury as to what guaranty was intended.

"(b) It put the burden upon the plaintiff of proving affirmatively that there had been no failure of the machinery to come up to the warranty or representations, and that they should have no regard to the degree of

such failure, or whether such failure, if any, had been adjusted between the parties or remedied by the Richmond City Mill Works.

"21. Because his honor charged the jury as follows, to wit: 'Now, upon this question, gentlemen of the jury, of the alleged failure of the machinery to come up to representation or guaranty, and the allegation of such failure, and that the machinery was returned, or offered to be returned to the parties, why that involves the question of the nature of the contract as you may see it from the testimony. I can give a case cited in argument which illustrates that point: That is, where a man in this state bought a certain lot of jewelry and fancy articles under the contract that he was to receive with that jewelry a showcase in which it was to be displayed, and that by displaying that jewelry and these articles in the showcase certain sales could be and would be guaranteed, and the company which sold the goods shipped him all the goods, but did not ship him the showcase in time for him to carry on his trade, and therefore he refused to accept any of the goods and offered to return them to the seller; the seller, however, refused to accept the return of the goods and brought suit against him for the value of the goods which were furnished, not including the showcase. The court held in that case that it appeared from the testimony that the showcase was an essential part of the contract; it was essential in making a proper display of the goods to carry out the guaranty of the sale of those goods, and as the failure to deliver the showcase was a failure in a material and important element of the contract, that this man had the right to reject all the goods, to refuse to accept them, to repudiate the contract entirely, and if he did so and made a bona fide offer to return the goods, which was refused, the company could not recover against him for such goods shipped; that the failure of an essential element, in delivering the showcase, and the offer to return such goods as had been shipped to him—why, the contract was at an end, and the party could not recover. You can take the contract and see if the principles involved in that case are applicable to this.'

"It is submitted that said charge was erroneous in the following particulars:

"(a) It instructed the jury that they must determine what was the contract between the parties, when the entire contract was in writing, embodied in the letters of the defendant, Badham, and those of the Richmond City Mill Works which had been offered in evidence.

"(b) It instructed the jury that a mere failure to come up to the representations of the Richmond City Mill Works would be sufficient to authorize the said Huffman or the defendant, Badham, to offer to return the machinery.

"(c) It instructed the jury that a failure

of the machinery to come up to the representations or guaranty of the Richmond City Mill Works, even in a slight particular, and an offer of the defendant Badham or Sam J. Huffman to return the machinery would be a sufficient defense to the action.

"(d) It misapplied the decision of this court in the case of Pratt & Co. v. Frasier & Co., in 72 S. C. 368, 51 S. E. 983, inasmuch as after testimony had been offered in this case of a settlement and adjustment of all disputes as to the alleged defects and the undisputed testimony had shown that the defendant had repeatedly promised to make settlement and several years of time had elapsed, it instructed the jury that the defendant, Badham, or Sam J. Huffman, might have offered to return the machinery, regardless of what had happened, and thus defeat the action.

"22. Because his honor left it to the jury to say what was the contract between the parties in question, although the same was embodied in the written correspondence between them.

"23. Because his honor erred in refusing plaintiff's request to charge, to wit: 'The law makes certain presumptions in favor of the holder of a negotiable promissory note:

"(1) The law presumes that the person in possession of the note is the owner, and that he acquired it for value and before maturity, in the usual course of business, in good faith, without notice of defenses to the payment of the note; in other words, this presumption, unless rebutted by proof, would cut off all defenses, because the notes are to pass current, like money, good in the hands of the holder without regard to private agreements or understandings that may have existed between previous parties.

"(2) In such a case, therefore, the consideration cannot be inquired into.

"(3) The indorsement and delivery of such a note transfers the title thereof to the indorsee, and includes and carries the promise of the indorser to pay the note if the maker does not pay it at maturity if the note is duly presented for payment at the place therein specified, and payment is demanded and refused and notice of presentment and demand and of protest for nonpayment is duly given to the indorser.

"(4) But there is a provision in the body of these notes, 'Presentment for payment and protest waived,' and, therefore, I charge you that it was not necessary for the owner and holder of these notes to present them for payment and protest them for nonpayment in order to fix liability on the indorser; he having by his indorsement of the notes with these words in them waived that condition to his liability.'

"24. Because his honor erred in refusing plaintiff's motion for a new trial made upon the following ground, to wit: 'Because his honor erred in charging without modification defendant's request numbered 6B(2),

to wit: "That if the jury believe from the evidence that the Richmond City Mill Works warranted or represented the flouring mill machinery for which the notes were given to have a certain capacity, and that it fell short of that capacity; (2) and if the jury also believe from the evidence that before the commencement of this action Sam J. Huffman, or the defendant, offered to return the machinery to the plaintiff and the plaintiff declined or failed to accept a return thereof, then the jury should find for the defendant on this ground"—whereas it is submitted that his honor should have modified said charge by adding words to the effect that such offer to return the machinery cannot relieve the defendant unless made before the acceptance of the machinery or within a reasonable time after the discovery of defects latent and not known and waived at the time of the acceptance of the machinery and settlement therefor, if there were such acceptance and settlement, and took from the consideration of the jury the evidence in the cause tending to show that even if the machinery had been defective, any defense based thereon had been adjusted and waived in the settlement which occurred subsequent to knowledge of the alleged defect.

"25. Because his honor erred in refusing plaintiff's motion for a new trial made upon the following ground, to wit: 'Because his honor erred in his illustration, or statement, from the case of Pratt & Co. v. Fraser & Co., in 72 S. C. 368 [51 S. E. 983], in further explanation of the above charge, in that in charging the jury that a party who had bought certain jewelry for sale, and therewith a showcase necessary for the display of the jewelry for sale, and to whom the seller shipped all the goods except the showcase, was justified in refusing to accept any of the goods, and in offering to return them to the seller and thereby rescinding the contract, he also charged without qualification that it was held in that case "that this man had the right to reject all the goods, to refuse to accept them, to repudiate the contract entirely, and if he did so, and made a bona fide offer to return the goods which was refused, the company could not recover against him for such goods shipped"; whereas his honor should have charged that the "right to reject all the goods, to refuse to accept them," is not of unlimited duration after receiving such part of the goods as arrived, and was exercised, in the case which he cited, promptly, with a notification to the plaintiff that the goods were in the depot subject to plaintiff's order, and that defendant declined to receive said goods, and his honor erred in charging in effect that, regardless of time or circumstances, the purchaser had the right "to repudiate the contract entirely," to make a "bona fide offer to return the goods," and thereby release himself from obligation,' even after there had been, as shown by the evidence in this

case, a settlement and adjustment of all disputes as to the alleged defects.

"26. Because, at the conclusion of his charge, against the suggestion and request of the counsel for plaintiff, his honor refused to instruct the jury that they could have or call for any letters or any of the documents offered in evidence, and ruled that, while they might come out and call for the reading, they did not have the right to have such papers with them without the consent of counsel."

Joe Berry Lyles, for appellant. D. W. Robinson, for respondent.

DE VORE, A. A. J. For the purpose of this opinion it will be necessary only to state that this was a suit commenced August 8, 1905, based upon two promissory notes, set out in the complaint; each being basis for a separate cause of action as will appear from the complaint herein.

The main question involved in the court below, as well as in this court, is whether or not said notes are negotiable. It will, therefore, be important to have copy inserted here:

"\$785.00. Columbia, S. O., July 12, 1902. On or before the first day of January, 1903, for value received in one machinery as per contract November 23, 1899, I, the undersigned of Richland county, state of South Carolina, promise to pay to the order of V. C. Badham, of Columbia, S. C., seven hundred and eighty-five dollars, negotiable and payable at the Carolina National Bank, Columbia. Without offset, with interest at the rate of 8 per cent. per annum after maturity until paid, waiving all relief whatever from valuation, appraisalment or exemption laws, with all expenses if suit be instituted for collection of this note. And it is expressly understood and agreed that the said V. C. Badham neither parts with the title, nor do the undersigned acquire any title in the property enumerated herein until this note and all other notes given in payment for same, and all extensions and renewals thereof are fully paid. And in case it becomes necessary to employ an attorney to collect this note, a further sum, not exceeding 10 per cent. for fees. Sam J. Huffman. P. O. Congaree, Richland Co., State of S. C."

The following indorsements are on the back of the said note: "Pay to the order of Richmond City Mill Works, V. C. Badham." "Richmond City Mill Works, by H. A. Moore, Treasurer." "Pay to the order of any Bank, Banker, or Trust Co. All previous endorsements guaranteed. First National Bank, Richmond, Indiana, O. R. Du Hadway, Cashier."

The other note is identical with the above, except the last indorsement, the amount and date of maturity; and these differences do not affect the question of negotiability; in other words, both notes must bear the same fate so far as that question is concerned.

According to the "case" previous to this one, another action was brought on the notes against the maker, Sam J. Huffman, and V. C. Badham, the defendant herein, jointly, but was discontinued, and this one commenced thereafter against V. C. Badham, because S. J. Huffman, in the former, answered and pleaded as a defense breach of warranty, alleging that the machinery was sold to him by Badham as agent for the Richmond City Mill Works, and that he and the Richmond City Mill Works, as an inducement to him, the said Huffman, to buy, had represented and warranted that said machinery would have a certain capacity of production per day, and said notes were given and accepted upon condition that he would not be liable unless the machinery upon trial proved to have such capacity, and same had failed to develop such capacity. The defendant, Badham, answered in that suit and virtually set up same defense. The plaintiff in order not to become involved in litigation with said Huffman upon that defense, as above stated, discontinued that suit and instituted this one against V. C. Badham alone.

Badham, in substance, sets up same defense here as in the other suit. In this suit he alleges that he, as agent of Richmond City Mill Works, had full power and authority to make, and as such did make, the representations, and that he accepted and took the notes subject thereto, and that his indorsement on said notes was conditional; that after a fair trial said machinery did not have the producing capacity of 50 barrels of flour per day, as represented by him to said Huffman.

On the trial in the court below his honor Judge R. W. Memminger presiding held the notes to be nonnegotiable. Said trial resulted in judgment for defendant. The case was heard in this court, at November term, 1909, involving 26 exceptions, almost all of which will depend upon negotiability or non-negotiability of the notes. Exceptions 9, 10, 15, and 16 in different forms raise the question of negotiability, and will be considered first and together.

In so far as our own decisions are concerned, beginning with *Bank v. Strother*, 28 S. C. 504, 6 S. E. 313, and coming on down to *Machine Co. v. Badham*, 81 S. C. 63, 61 S. E. 1031; the last utterance of this court upon the subject, for one reason or another, there is a difference of opinion among the Supreme Court Justices on the question under consideration. The court does not seem to have ever been a unit in any of the cases except the *Strother* Case. In that case the note contained three provisions: (1) "All counsel fees and expenses in collecting this note if it is sued or placed in hands of counsel for collection." (2) "Gives payee power to declare this note due at any time they may deem it insecure, even before maturity." (3) "With exchange on New York." Mr. Chief Justice McIver, in delivering the opinion of the court, held the note to be nonnegotiable

mainly on the ground that it contained the provision "with exchange on New York," for with reference to the other two provisions he uses this language: "If, however, there was any doubt as to the effect of either of these stipulations, there can be none as to the effect of the exchange provision as above." Thus clearly showing that he was not fully satisfied that the other two provisions affected negotiability.

The next case—*Sylvester Bleckley Co. v. Alewine*, 48 S. C. 308, 26 S. E. 609, 37 L. R. A. 86—the note provided for "10 per cent. attorney's fees for collection." Mr. Justice Gary, delivering the opinion of the court, said that *Bank v. Strother* held "that uncertainty in a note prior or subsequent to maturity destroyed its negotiability." Mr. Chief Justice McIver concurred in the result. Mr. Justice Pope concurred in the result on another ground. Mr. Justice Jones dissented as to question of negotiability.

The next case—*White v. Harris*, 69 S. C. 65, 48 S. E. 41, 104 Am. St. Rep. 791—the note contained the provision, "We agree in default of payment after maturity to pay 10 per cent. for attorney's fees for collection." Mr. Chief Justice Pope, delivering the opinion, held the note to be negotiable, for the reason that the attorney's fees were definite and certain. Mr. Justice Gary dissented for the reason stated in the *Sylvester* Case.

The next case—*Green v. Spires*, 71 S. C. 107, 50 S. E. 554—the note contained a provision to pay all costs and expenses, including 10 per cent. attorney's fees, if "collected through an attorney or by legal proceeding of any kind." Mr. Justice Gary, delivering the opinion, held the note to be nonnegotiable upon the authority of *Bank v. Strother*. Mr. Chief Justice Pope concurred. Mr. Justice Jones dissented as to question of negotiability. Mr. Justice Woods concurred in the opinion of Justice Jones, saying *Bank v. Strother* should be overruled in so far as it held nonnegotiable a note providing for payment of attorney's fees and costs of collection, which cannot accrue until after maturity.

The next case—*Machine Co. v. Badham*, 81 S. C. 63, 61 S. E. 1031—the note contained the provision "Negotiable and payable at the bank * * * with all expenses if suit be instituted for collection of this note." Mr. Justice Gary, delivering the opinion, held the note nonnegotiable. Mr. Chief Justice Pope concurred in the result. Mr. Justice Jones concurred in the result, but dissented on the question of negotiability. Mr. Justice Woods concurred in the dissenting opinion.

The citation of the foregoing cases will show the views of the Justices of this court, from which it will be seen this court has been divided on the question under consideration since the case of *Bank v. Strother* down to the present time.

It is very important that the law on the question involved should be settled by this

court, and rightly settled, not so much in accordance with the needs and purposes of the times with regard to commercial interest, but in accordance with sound reason as regards the question itself. Our court being divided in this regard, and no decision upon which we can rely for precedent, except the case of *Bank v. Strother*, supra, it will therefore be necessary to look elsewhere for authority.

Mr. Daniel on Negotiable Instruments (5th Ed.) § 62a, speaking of instruments like those involved here, says: "Such instruments should, we think, be upheld as negotiable;" and continues with his reasons therefor in the text, and, besides, cites numerous cases to support same, and also cites the cases contra.

I find the text-writers on the subject are about equally divided pro and con. The courts of the several states are about equally divided. I find those writers and jurisdictions opposed to holding paper like this under consideration negotiable, do so mainly on the ground of *uncertainty as to amount* that will be due under the terms of the instrument. In other words, the commercial world cannot estimate the value of paper if put on the market for sale, or negotiation, hence would not know what to pay for it.

Those writers and jurisdictions who favor the negotiability do so on the ground that no uncertainty as to amount due by terms of such instrument can arise until after maturity.

After a careful consideration of the authorities I am forced to the conclusion that the better reasoning leads to the following as a sound proposition of law: If a note or written instrument, otherwise negotiable, contain a provision or provisions which do not and cannot in any way have any effect on said note or written instrument until after it becomes nonnegotiable by operation of law, to wit, after maturity, such provision or provisions do not render the same nonnegotiable. The provisions in the notes involved here—that is, as to attorney's fees, and as to expense of collection—do not and cannot affect the negotiable character of the notes, because those provisions cannot have any active legal operation until after maturity, when the notes by operation of law become nonnegotiable. The notes involved here, are, however, nonnegotiable, on account of the following provision contained therein: "For value received in one machinery—as per contract November 23, 1899, I promise to pay," etc. This provision is notice to the commercial world of a contract made November 23, 1899, in connection with the purchase of the machinery for which these notes were given; the terms of the contract do not appear on the face of the notes, but it is sufficiently referred to and stated to inform those who deal with these notes they must take the contract into consideration in so doing.

The circuit judge in the court below held the notes to be nonnegotiable, which was cor-

rect, and this court will not reverse a correct ruling though the reason for it be erroneous or unsound. The notes being nonnegotiable, exceptions 1, 2, 3, 4, 5, 6, 7, 8, 11, 12, 13, and 14, which relate to the admissibility of evidence cannot be sustained, and are therefore overruled.

Exceptions 15, 16, 17, and 18 cannot be sustained, the notes being nonnegotiable.

Exception 19 imputes error to the circuit judge in charging the following: "And if the jury also believe from the evidence that, before the commencement of this action, Sam J. Huffman, or the defendant, offered to return the machinery to the plaintiff, and the plaintiff declined or failed to accept a return thereof, then the jury should find for the defendant on this ground." Under the law of this state there can be no rescission of an executed sale for breach of warranty, except (1) where this right is given in the contract of purchase; (2) where the seller is guilty of fraud; (3) where there has been an entire failure of consideration. The charge, therefore, should have limited the right of rescission to the instances above, and it should have been left to the jury to say whether or not, if the right ever existed to rescind, it had been waived by the defendant or by Huffman, in not undertaking to do so within a reasonable time.

Under the contention of the parties, and in view of the testimony submitted in the case, it was error to charge as above.

Exceptions 20, 21, 22, 24, and 25 are disposed of by what has been said as to 19.

Exception 23 is overruled as the request submitted by plaintiff is not applicable to nonnegotiable paper such as is involved here.

Exception 26 is overruled, the question raised there being matter in discretion of the trial judge.

Exception 10 is sustained in so far as the question raised therein concerns the charge in regard to section 255b of the Code of Civil Procedure of 1902. The same is not applicable here as construed and charged by the circuit judge, for the reason that it would have the effect of destroying altogether negotiable paper in so far as this state is concerned.

Let all the exceptions be reported with the case.

It is the judgment of this court that the judgment of the court below be, and the same is hereby, reversed, and the case remanded for a new trial.

GARY, A. J. I dissent from the conclusion announced herein that the notes were not rendered nonnegotiable by the provision as to attorney's fees, but concur in the separate opinion of Mr. Justice WOODS to the extent that the words expressing the consideration of the note "For value received in one machinery as per contract November 23, 1899," did not render the note nonnegotiable.

WOODS, J. I concur in the conclusion reached in the opinion of Judge DE VORE that the notes in suit were not rendered not negotiable by reason of the provision therein for attorney's fees. The learned judge has reached the conclusion, however, that the words in the notes expressing the consideration "For value received in one machinery as per contract November 23, 1899," prevented the notes from being negotiable instruments. I dissent from this conclusion because it seems to me not only an unsound and unfortunate limitation on the negotiability of promissory notes, but clearly opposed to authority. The notes are identical in form and need not be separately referred to. The first is in these words:

"\$785.00. Columbia, S. C., July 12, 1902. On or before the first day of January, 1903, for value received in one machinery as per contract November 23, 1899, I, the undersigned of Richland county, state of South Carolina, promise to pay to the order of V. C. Badham of Columbia, S. C., seven hundred and eighty-five dollars, negotiable and payable at the Carolina National Bank, Columbia. Without offset, with interest at the rate of eight per cent. per annum after maturity until paid, waiving all relief whatever from valuation, appraisal or exemption laws, with all expenses if suit be instituted for collection of this note. And it is expressly understood and agreed that the said V. C. Badham neither parts with the title, nor do the undersigned acquire any title in the property enumerated herein until this note and all other notes given in payment for same, and all extensions and renewals thereof are fully paid. And in case it becomes necessary to employ an attorney to collect this note, a further sum, not exceeding ten per cent. for fees. Presentment for payment and protest waived. Congaree, Richland Co., S. C. Sam J. Huffman."

The following indorsements were on the back: "Pay to order of Richmond City Mill Works, V. C. Badham." "Richmond City Mill Works, by H. A. Moore, Treasurer."

There is not a word importing that the payment of the amount promised was to be subject to or dependent on any contract of sale or any contingency whatever. Had there been such an expression, without doubt the instrument would not have been negotiable. These cases will serve to illustrate the principle. In *Dilley v. Van Wie*, 6 Wis. 209. the note was held not negotiable. There, however, the reference to a collateral contract was not, as in the note under discussion, explanatory of the consideration, but the words "subject to the provisions contained in an agreement this day made between said Carter and myself" were inserted in the body of the instrument, qualifying and rendering conditional the promise to pay. In *Cushing v. Field*, 70 Me. 50, 35 Am. Rep. 293, the note was held not negotiable because of the indorsement, "This note is subject of a con-

tract made November 13, 1874." This was manifestly a limitation upon the promise itself, and of course destroyed its certainty. In *Costello v. Crowell*, 127 Mass. 233, 34 Am. Rep. 367, the note was not an original promise in writing, but was itself collateral given to secure a contemporary agreement. The words "Given as collateral security with agreement" were written on the margin, and it is obvious, as stated by the court, that the note was conditioned "upon the performance of the undertaking to which this is collateral."

This case is entirely different. The promise to pay is not subject to a separate contract, nor according to a separate contract, nor subject to any contingency, but absolute and unconditional. The words relied on by the learned judge as making the note not negotiable merely express the consideration; the reference to the contract being manifestly for the purpose of indicating a sale by which the title to the machinery had to be reserved as a security for the debt. Such a reference to the consideration and the security does not take away from the paper a single element of a promissory note. It is none the less an unconditional written promise to pay a specified sum of money at a certain time to the order of the payee.

The generally recognized rule that the expression of the consideration does not affect the negotiability is thus stated in *Daniel on Negotiable Instruments*, vol. 1, § 51a: "The negotiability of the instrument is not impaired by recitals or statements upon its face, which merely state the consideration upon which it was made, and impose no other liability upon any parties thereto than that for the payment of the sum of money therein expressed. Where there is a memorandum upon the instrument that it is 'secured according to the condition of a certain mortgage'; or that it was 'given in consideration of a certain patent right'; or 'as part pay for a pianoforte,' or for any other consideration, or 'and the same will be credited in your joint note to me.' The statement that collateral security has been deposited for the performance of a promise contained in a bill or note is a recital only, which does not affect its negotiability; and though the recital contain the terms of a deposit, that does not alter the case, for it renders neither the amount, the time of payment, the payee, nor the engagement to pay uncertain."

Two cases in this state make it clear beyond all doubt that neither statement of the consideration nor provision for securing the promise affect the negotiability of the instrument. And these seem conclusive of the question here, for, as above indicated, reference to the contract of sale was made in the note merely to indicate that the note was given for the purchase money of machinery, and that by the contract of sale the title to the machinery was reserved as a security for payment of the note. In *National Bank v.*

Gary, 18 S. C. 282, a note held to be negotiable was in these words fully setting out the security:

"\$886.00. Charleston, S. C., July 31, 1877. On the first of November, 1877, I promise to pay to M. W. Gary or order, without offset, eight hundred and eighty-six dollars, for value received, with interest from date, interest after maturity at the rate of one per cent. per month, having deposited with M. W. Gary, as collateral security, seven hundred and thirty-five dollars Greenville and Columbia Railroad second mortgage coupons, past due. And in case this note shall not be paid when due, I hereby give the said M. W. Gary authority to sell the said security, or any part thereof, for my account, on the maturity of this note, or at any time thereafter, at public or private sale, at his discretion, without advertising the same, and to apply so much of the proceeds of said security to the payment of said note, as may be necessary to pay the same, with all interest due thereon, and also the payment of all expenses attending the sale of said security. If the net proceeds of such security shall not cover the amount due on this note, I hold myself bound to pay the balance forthwith, after such sale, with interest, at the rate of one per cent. per month."

In *Dowie & Molise v. Joyner*, 25 S. C. 123, the note was in these words, expressing the consideration, the security for the debt and a distinct undertaking on the part of the payee: "Collateral note for fertilizers. \$826.50. Eastover, S. C., April 23, 1884. On November 1 next, I promise to pay to the order of Dowie & Molise, eight hundred and twenty-six and $\frac{50}{100}$ dollars at First National Bank of Charleston, for value received in fertilizers. And to secure the payment of this note, I hereby agree on or before May 15 next, to pay to the said Dowie & Molise all moneys collected from the sale of said fertilizers, and to deliver to them all notes given for purchase of same, inclusive of freight on said fertilizers, as said collateral security for the payment of this note. That on or about September 15 next, Dowie & Molise agree to return said planter's notes for collection for their account, and that I agree in their behalf to collect the same, and remit to them the proceeds of such notes as may be collected, or transfer the original notes which, as trustees for them, we may be unable to collect in part or in full, and this agreement to remain in force until this obligation is satisfied." This was held to be a negotiable note, notwithstanding the agreement as to the collateral, and the agreement of the payees to return the collateral notes to the maker for collection.

It is a well-settled doctrine in other jurisdictions, also, that the reservation to the payee of title in the property for which the note is given or the statement of the consideration do not affect the negotiability. *Chicago Ry. v. Merchants' Bank*, 136 U. S. 268,

10 Sup. Ct. 999, 34 L. Ed. 349; *Choate v. Stevens*, 116 Mich. 28, 74 N. W. 289, 43 L. R. A. 277; *Siegel v. Chicago Trust & Savings Bank*, 131 Ill. 569, 23 N. E. 417, 7 L. R. A. 537, 19 Am. St. Rep. 51; *Windmill Co. v. Honeywell*, 7 Kan. App. 645, 53 Pac. 488; *Campbell v. Equitable Securities Co.*, 17 Colo. App. 417, 68 Pac. 788; *Collins v. Bradbury*, 64 Me. 37; *Gilpin v. People's Bank* (Ind. App.) 90 N. E. 91.

In *Markey v. Corey*, 108 Mich. 184, 66 N. W. 498, 36 L. R. A. 117, 62 Am. St. Rep. 698, suit was brought on a promissory note, on the face of which was written: "This note is given in accordance with the terms of a certain contract under the same date, between the same parties;" and the court held that the negotiability of the note was not affected by these words. In *Biegler v. Merchants' Loan & Trust Co.*, 164 Ill. 197, 45 N. E. 512, an indorsement on the note was as follows: "This note is secured by a lien upon my interest in certain horses named in the agreement this day made between S. W. Lelhy & Son and myself." It was held that the notes were negotiable, and were not affected by the recital of the security and agreement.

In *Bank of Sherman v. Apperson* (C. C.) 4 Fed. 25, the note recited that it was "for value received, being for a part of the payment on the Goree plantation purchased of said Gregg, as per agreement of the fourteenth of February, 1874." The court held that the note in question was negotiable, and "the recitals of the consideration in the face of the note did not at all affect its negotiable character."

In *Taylor v. Curry*, 109 Mass. 36, 12 Am. Rep. 661, a promissory note given to an insurance company and otherwise negotiable bore on its face the words "On policy No. 33,386." The policy referred to contained a provision for a set-off in case of loss. Yet the court held that this did not make the note contingent upon the happening of no loss, and added "a mere reference to the policy, without more, does not affect the negotiability of the note."

If a written contract had been introduced and had contained a limitation on the liability of the maker of the note, that fact would not affect the liability of the defendant as indorser, for, as we have shown, it would not affect the negotiability of the note. But it may seem important to observe that the record shows that defendant failed to offer in evidence any written contract limiting the liability of the maker, and himself testified that there was no written contract containing any limitation of the liability of the maker of the note.

On the trial counsel for defendant did not contend that the reference to the contract of sale in the note affected its negotiability, and the circuit judge did not so hold. It seems to me clear that the notes are negotiable, and that the judgment should be reversed, and a new trial ordered for error of the circuit

judge in holding otherwise. As this was the main issue in the cause, and the course of the trial, and the other rulings of the court depended very largely on the holding that the notes were not negotiable, the labor of considering the exceptions in detail would be fruitless.

JONES, C. J., concurs in the result, and in the separate opinion of WOODS, J.

(38 S. C. 237)

ARLEDGE et al. v. ARLEDGE et al.

(Supreme Court of South Carolina. July 5, 1910.)

DEEDS (§ 124*)—CONSTRUCTION—"ISSUE."

Where a deed in the granting clause conveys to A. "for her sole and separate use during her life and at her death to her issue," and the habendum clause reads "to A. and her issue," the word "issue" is one of limitation, and not of purchase, and hence does not convey a fee to A.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 344-355; Dec. Dig. § 124.*

For other definitions, see Words and Phrases, vol. 4, pp. 3782-3792; vol. 8, p. 7693.]

Appeal from Common Pleas Circuit Court of York County; Ernest Moore, Special Judge.

Action by Thomas D. Arledge and another against McD. Arledge and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

The decree of the circuit judge referred to in the opinion is as follows:

This is an action to compel the performance of a contract by the defendant McD. Arledge to purchase from the plaintiffs the lands described in the complaint and to enjoin the other defendants from clouding the title to the said lands. The plaintiffs aver a title in fee conditional in themselves to the said lands, a contract upon consideration by the defendant McD. Arledge to purchase and pay for the same upon receiving a good title in fee to the said lands, a tender by the said plaintiffs of their deed for the said lands accordingly to the said defendant McD. Arledge, and a refusal by the said defendant to accept the same and pay the purchase price. The plaintiffs further allege that the said defendants J. P. Palmer and G. W. S. Hart set up a claim of title to said premises, which claim is a cloud upon the title of the plaintiffs thereto. The defendant McD. Arledge admits the allegations of the complaint but the defendants J. P. Palmer and G. W. S. Hart aver title in themselves to the said premises and pray the judgment of the court that the title to the said lands is in them in fee simple. There is substantial agreement as to the facts between all the parties to the action, and all parties agreed in open court to submit their respective rights and titles to the determination of the court sitting in equity.

All of the parties claiming from a common source of title in J. P. Palmer, the question submitted for determination depends upon the construction of the deed by the defend-

ant J. P. Palmer to his father Thomas Palmer and sister J. A. Arledge, dated July 30, 1866, conveying the premises here in question. By this deed the premises are conveyed in the granting clause "unto the said Thomas Palmer for and during his natural life and from and after his decease to the said J. A. Arledge, wife of McD. Arledge, for her sole and separate use during her natural life and at her death to her issue"; in the habendum clause, "to the said Thomas Palmer for and during his natural life and unto the said J. A. Arledge and her issue after his decease"; and in the general warranty clause, "unto the said Thomas Palmer during his natural life and thereafter unto the said J. A. Arledge and her issue."

Both the said Thomas Palmer and the said J. A. Arledge being dead, and the plaintiffs being the "issue" of the last named, the said plaintiffs and the defendant McD. Arledge contend that, under the terms of this deed, the said J. A. Arledge took a fee conditional estate in this land, while the defendants J. P. Palmer and G. W. S. Hart claim that the said J. A. Arledge took only a life estate therein, and that, there being no issue of the said J. A. Arledge in esse at the time of the execution and delivery of the deed, no further estate passed thereunder, but that the fee simple in remainder was and is in the defendant J. P. Palmer, except in so far as he has since conveyed an interest therein to the defendant G. W. S. Hart.

As to the matter of the proper construction of the deed above mentioned, it appears that the very question here presented has been determined by the recent case of Williams v. Gause, 83 S. C. 265, 65 S. E. 241, where the Supreme Court of this state, in its latest deliverance upon the point, holds as the correct rule in the construction of a similar deed that the word "issue" in a deed is to be construed as a word of limitation, except when the language used in the deed shows that it was intended as a word of purchase. In that case the court held that, where there was a conveyance to one and "his lawful issue" "and their lawful issue forever," the grantee took a fee conditional, and that the use of the added words "and their lawful issue forever" did not indicate an intention to give the grantee merely a life estate, with remainder to his issue as purchasers. See, also, Holman v. Wesner, 67 S. O. 308, 45 S. E. 206.

It is urged, however, by the defendants J. P. Palmer and G. W. S. Hart that such was not the law of this state in 1866, but that the law then was, as laid down in Markley v. Singletary, 11 Rich. Eq. 397, that "the word 'issue' in a deed is always a word of purchase," and that "an estate in fee conditional could not be created by deed by the use of this word" (issue), "even when clearly designed as a word of limitation." They in-

sist that, especially as the deed here in question was drawn by a lawyer, it must be concluded that the word "issue" as used therein had the meaning then given to it by the decisions of this state.

But this contention cannot prevail, in the absence of any evidence of the use of the word in the deed here in question in the sense now claimed for it. Notwithstanding the fact that the deed was drawn by a lawyer, presumably familiar with the then existing law of the state, it is evident that it was not drawn with reference to any meaning so fixed for the word "issue" by the case of *Markley v. Singletary*, supra. For, under the decision in that case, the word "issue" as repeatedly used in this deed could be given no effect whatever, for the reason that, if it be construed as a word of purchase, there was no one then in esse to answer the description intended by the term. The oldest child of J. A. Arledge was not born until January 17, 1867, nearly six months after the date of the deed, and it cannot be supposed that either the draughtsman or the grantor contemplated this unknown and probably unsuspected fetus en ventre sa mère as being the "issue" who alone could take as purchaser under that designation in this deed.

Consequently, it cannot be determined that the deed here was drawn with reference to the effect of the use of the word "issue" as declared by the case of *Markley v. Singletary*. It must, on the contrary, be concluded that the word "issue" was used either in ignorance of its legal effect, or in the belief that it would be effective as a word of limitation. It is unquestionable that, even under the decisions as then existing in this state, it could have been so made effective by way of a declaration of trust in the deed, and it must be assumed that the attorney drawing the deed supposed it to be efficacious as a word of limitation, as it could not apparently have been otherwise intended. By the latest decision of the highest court of the state as above quoted, the word is now given the effect which it was probably intended to have both by the grantor and the draughtsman, and, however contrary this decision may be to the pre-existing rules of construction, it cannot be doubted but that it effectuates the probable purpose of the grantor in the deed at bar.

We are bound therefore by the decision in *Williams v. Gause*, already cited, to hold that the word "issue" as appearing in the deed here is to be taken as a word of limitation, and to construe this deed as limiting an estate in fee conditional to the said J. A. Arledge in the lands here in question, unless the "language of the deed" itself shows that it was intended as a word of purchase. So resorting to the language of the deed we find nothing to indicate such an intention, but, on the contrary, the intention evidently was to use the term as a word of limitation. It

must be concluded therefore that the title of the plaintiffs to the lot of land described in the complaint is a good and valid title in fee conditional and that the deed of the said plaintiffs will convey a good title in fee simple thereto.

It is, therefore, ordered and adjudged that the said plaintiffs do, within 30 days after written notice of the filing of this decree, deposit with the clerk of this court a deed duly executed by them, in the usual form and with the usual covenants, with proper renunciations of dower by the wives of any of the plaintiffs who may be married, conveying in fee simple to the defendant McD. Arledge the lot or parcel of land described in the complaint in this action, free from any claim or incumbrance, said deed to be delivered to the said defendant McD. Arledge upon the payment of the purchase money therefor as hereinafter directed.

It is further ordered and adjudged that the said defendant McD. Arledge, within 30 days after written notice of the filing of this decree, upon the execution and deposit by the said plaintiffs of the said deed as aforesaid, do pay over to the said plaintiffs or their attorneys the sum of two thousand (\$2,000) dollars in full of the purchase money of the said land; whereupon the said deed shall be delivered as aforesaid.

It is further ordered that the said defendants J. P. Palmer and G. W. S. Hart be and they are hereby forever enjoined and restrained from setting up any pretended title or claim to the said premises described in the complaint or any part thereof, or from otherwise seeking to cloud the title to the said land by any such title or claim thereto, alleged to be held by the said defendants or either of them at the time of the commencement of this action.

Hart & Hart, for appellants. Witherspoon & Spencers and W. F. Harding, for respondents.

GARY, A. J. This is an action for specific performance of a contract. The facts are fully stated in the decree of his honor the circuit judge.

The question presented by the exceptions is, whether there was error on the part of the circuit judge in ruling that in the deed under which all the parties claim "issue" is a word of limitation. As a similar question has undergone judicial investigation in the recent case of *Williams v. Gause*, 83 S. C. 265, 65 S. E. 241, we deem it only necessary to cite this case to show that "issue," mentioned in the deed, is a word of limitation, and not of purchase. The appellant's attorneys were permitted to review the case of *Williams v. Gause*, 83 S. C. 265, 65 S. E. 241, but the court adheres to the views therein expressed.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(86 S. C. 337)

BRIDGES v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. July 11, 1910.)

1. EMINENT DOMAIN (§ 152*)—RIGHT OF WAY—COMPENSATION OF REMAINDERMAN.

Where a railroad was built through land in possession of a life tenant, the remaindermen, on the death of the life tenant, could recover compensation for the right of way and the damages caused by the construction of the railroad.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 406; Dec. Dig. § 152.*]

2. EMINENT DOMAIN (§ 152*)—RIGHT OF WAY—RIGHT TO COMPENSATION.

The right of remaindermen to compensation for the construction of a railroad through the land during the lifetime of the life tenant is a personal right, and does not pass to a purchaser at a sale for partition among the remaindermen, after the life tenant's death.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 152.*]

Appeal from Common Pleas Circuit Court of Lancaster County; Ernest Moore, Special Judge.

Action by John A. Bridges against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

J. Harry Foster, for appellant. E. M. Thomson, for respondent.

HYDRICK, J. In 1868, the owner of a tract of land conveyed it to her son for life, with remainder to his children. About 1888, during the life of the son, a railroad, now operated by defendant, was built through the tract. The life tenant died in 1906. In 1907, the land was sold, by order of court, for partition amongst his children, and bought by plaintiff, who brought this action to recover compensation for the use by defendant of the right of way. The circuit judge directed a verdict for defendant.

On the death of the life tenant, his children had the right to compensation for the right of way, and the damages caused by the construction of the railroad through their land. *Cureton v. R. R. Co.*, 59 S. C. 371, 37 S. E. 914; *Trimmer v. Darden*, 61 S. C. 220, 39 S. E. 373; *Railway v. Reynolds*, 69 S. C. 481, 48 S. E. 476. But the plaintiff, to whom the fee was conveyed, burdened with the apparent easement, has not that right. He bought the land subject to the easement. The right to compensation for the easement was, at the time of the conveyance, in the owners of the land, and was not conveyed by the deed. It was a right personal to them—a mere chose in action—a right which they could and may have waived. The same question was decided adversely to appellant's contention in *Lewis v. Railroad Co.*, 11 Rich. Law, 91. The courts of other states are practically unanimous in their decisions to the same effect, as will be seen by reference

to the cases cited in the notes to 11 A. & E. Enc. L. (2d Ed.) 1189, and 15 Cyc. 796. Judgment affirmed.

(134 Ga. 818)

STEPHENS v. COLUMBUS R. CO.

(Supreme Court of Georgia. July 14, 1910.)

(Syllabus by the Court.)

DEATH (§ 10*)—ACTION BY MARRIED WOMAN—DEATH OF PLAINTIFF—SUBSTITUTION OF ADMINISTRATOR.

Where a married woman died after having instituted her suit to recover damages for pain and suffering resulting from personal injuries, and one duly appointed as administrator of her estate was made a party to the case, and the cause was ordered to proceed in his name as plaintiff, the case should not have been nonsuited on the trial, where the evidence made a prima facie case against the defendant, on the ground that the administrator was not a proper party to the case and that upon the death of the original plaintiff there was a "right of survivorship" in the husband.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 10.*]

Error from Superior Court, Muscogee County; S. P. Gilbert, Judge.

Action by Marietta Martin against the Columbus Railroad Company. On the death of plaintiff, L. L. Stephens was substituted. Judgment for defendant, and plaintiff brings error. Reversed.

Marietta Martin, on July 16, 1907, brought suit against the Columbus Railroad Company to recover damages for personal injuries alleged to be permanent and of a serious character, and to have been sustained by her while attempting to alight from the car of the defendant company, in consequence, it is alleged in the petition, of the negligence of the company's agents and employes in suddenly starting the car from which the plaintiff was attempting to alight. In due time the defendant filed its answer. Subsequently the petitioner died. Afterwards L. L. Stephens, as the duly appointed administrator of the estate of the deceased plaintiff, was made a party plaintiff, and the action proceeded thereafter in his name as administrator. At the February term, 1909, the case came on to be tried, and evidence was submitted in behalf of the plaintiff tending to sustain the material allegations in the petition. There was some evidence, elicited on cross-examination of the plaintiff's witnesses, tending to show that at the time of the death of Marietta Martin she had a living husband, who, however, had not been seen in two or three years, and who, at the time of the injuries complained of and at the time of her death, was living, if at all, in a state of separation from the plaintiff's intestate. At the conclusion of plaintiff's evidence, counsel for defendant made a motion for a nonsuit, upon the ground that it appeared from the evidence that Marietta Mar-

tin had a husband living, and that upon her death there was a right of survivorship in her husband, and that the administrator could not proceed with said suit. The court granted the nonsuit, and the plaintiff excepted.

T. T. Miller, for plaintiff in error. Frank U. Garrard, W. C. Neill, and A. W. Cozart, for defendant in error.

BECK, J. (after stating the facts as above). Conceding that the evidence in the case established beyond controversy the fact that the intestate of the plaintiff in error had a husband in life at the time she sustained the injuries complained of, and at the time of her death, we think that the court should have overruled the motion for a nonsuit. The court below evidently granted the nonsuit upon the idea that the right of action survived to the husband, and not to the administrator of the original plaintiff, who died after the institution of her action to recover for personal injuries to herself. That the action itself did not abate is perfectly clear from the reading of section 3825 of the Civil Code of 1895, which provides: "No action for a tort shall abate by the death of either party where the wrongdoer received any benefit from the tort complained of; nor shall any action for the recovery of damages for homicide, injury to person, or injury to property abate by the death of either party; but such cause of action, in case of the death of the plaintiff, shall, in the event there is no right of survivorship in any other person, survive to the personal representative of the deceased plaintiff, and in case of the death of the defendant shall survive against said defendant's personal representative." This action was brought to recover for pain and suffering, mental and physical, resulting from the injuries complained of, which were, it is alleged, of a serious and permanent character, impairing plaintiff's mind and her bodily vigor and strength and her capacity to labor.

Under the facts alleged in the petition, and which there was evidence before the court and jury to support, it appeared that the original plaintiff in the case had been injured by the negligent and tortious conduct of defendant's agents and employees. Under such a state of facts two different causes of action may arise—the one in favor of the woman for her own pain and suffering, and the other in favor of the husband for the loss of his wife's services and the expenses incurred, if any, as the consequence of the injuries to her. These causes of action are separate and distinct, and in favor of different parties, and could not properly be joined in one suit. *Georgia Railroad Co. v. Tice*, 124 Ga. 459, 52 S. E. 916. This suit was instituted by the woman to recover for pain and suffering. To that action she was a

necessary, and the only necessary, party, and at her death there was no other party in whom was vested the right of survivorship. If the husband had been originally joined with the wife in this suit, construing it as one to recover for pain and suffering only (for the allegations as to loss of earning capacity and as to the permanency of the injuries are incident to the allegations of pain and suffering), in case of the wife's death the right of action could not have survived to the husband, but the action could have proceeded only in the name of a duly appointed personal representative of the wife.

We do not think that any right of survivorship which would authorize the husband to proceed with this suit could be inferred from the provision, contained in section 3828 of the Civil Code, that "the husband may recover for the homicide of his wife, and if she leaves child or children surviving, said husband and children shall sue jointly, and not separately, with the right to recover the full value of the life of the deceased, as shown by the evidence, and with the right of survivorship as to said suit if either die pending the action." The right of survivorship here referred to arises in cases where, under the provisions of the statute just quoted, the husband and a child or children are properly joined as plaintiff in a suit brought to recover the "full value" of the life of the deceased, where the deceased is a married woman leaving husband and children at the time of her death tortiously caused. In such a suit as that last supposed, there could be no recovery for that which constitutes the sole ground of recovery in the case at bar, to wit, pain and suffering inflicted upon the deceased.

Judgment reversed. All the Justices concur.

(124 Ga. 339)

BOARD OF EDUCATION OF PAULDING COUNTY v. PAULDING COUNTY
GRAND JURY.

(Supreme Court of Georgia. July 15, 1910.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 48*)—
BOARD OF EDUCATION—NEGLECT OF DUTY—
DISCHARGE—REVIEW.

The act of August 22, 1907 (Acts 1907, p. 100), amending the act of August 21, 1906 (Acts 1906, p. 61), contains the following provision: "The failure on the part of any board of education to perform the duties required by this act shall be immediately inquired into by the first grand jury sitting after such neglect of duty; and if said grand jury should find that any member or members of said board have failed to perform their duty, it shall report the same to the judge of the superior court, who shall cause a rule nisi to issue against such member or members, and they shall be heard by the judge in their own behalf; if said member or members cannot give a good and sufficient reason why they have not performed their duties as required by this act, they shall be

discharged, and the said judge shall fill the vacancies until the next grand jury shall meet." *Held*, that the exercise of the power to hear the members of the board of education, and to discharge them, if they do not give a good and sufficient reason why they have not performed their duties as required by the act, and to fill the vacancies thus caused until the meeting of the next grand jury, is not a judgment of the superior court to which a bill of exceptions may be filed, bringing such action to this court for review. *Carter v. Janes*, 96 Ga. 280, 23 S. E. 201. See, also, *Harris v. Sheffield*, 129 Ga. 299, 57 S. E. 305.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 105; Dec. Dig. § 48.*]

2. DISMISSAL OF WRIT OF ERROR.

A bill of exceptions having been signed and filed, assigning error upon such action of the judge, the writ of error will be dismissed, on motion, for want of jurisdiction in this court to hear and determine the questions thus raised.

Error from Superior Court, Paulding County; Price Edwards, Judge.

Action by the Paulding County Grand Jury against the Board of Education of Paulding County. From the judgment, the Board of Education brings error. Dismissed.

R. E. L. Whitworth, for plaintiff in error.
W. K. Fielder, Sol. Gen., for defendant in error.

FISH, C. J. Writ of error dismissed. All the Justices concur.

(124 Ga. 777)

ROBINSON v. WOODWARD.

(Supreme Court of Georgia. July 13, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§§ 522, 713*)—EXCEPTIONS, BILL OF (§ 59*)—RECORD—SUFFICIENCY OF BILL OF EXCEPTIONS.

The bill of exceptions recites that, upon the trial of a statutory complaint for land brought by the plaintiff in error against the defendant in error, the trial judge, upon an agreed statement of facts in writing, signed by counsel for both parties, decided that the title to the lands sued for was in the defendant and that the plaintiff do not recover same, to which judgment exceptions were had. The bill of exceptions contained an agreed statement of facts, wherein it was stated "that defendant claims said lots of land solely as such heir at law, and from no other source whatsoever, and that plaintiff claims said lots of land solely by reason of the instrument hereto attached, and that unless said instrument divested said Ashley O. Best of title, the ownership and title of said lots is in defendant." The bill of exceptions specified as a part of the record material to a clear understanding of the errors complained of, among other things, the agreed statement of facts and the instrument therein referred to. Neither a copy, nor any of the contents of the instrument referred to, was embodied in the bill of exceptions, or attached as an exhibit thereto, or contained in a brief approved by the trial judge and made a part of the record. In the transcript sent up by the

clerk as the record, there appears what purports to be a copy of such instrument, and there appears what purports to be a copy of the agreed statement of facts signed by counsel for both parties and filed in the clerk's office, with what purports to be a copy of the instrument therein referred to as annexed thereto. *Held*:

(1) Where no motion for a new trial is made, the evidence should be embodied in the bill of exceptions, or attached as an exhibit thereto, and properly identified by the trial judge, or contained in a brief of the evidence approved by him and made a part of the record. *McClarty v. Penn Mutual Life Ins. Co.*, 131 Ga. 724, 63 S. E. 224; *Roberts v. Cairo*, 183 Ga. 642, 66 S. E. 938.

(2) In the transcript sent up by the clerk as being record, those papers which purport to be copies of the agreement of counsel and of the instrument annexed thereto cannot be considered as record, not being approved by the trial judge and made a part of the record, it only appearing that such agreed statement of facts was signed by counsel and filed in the office of the clerk; and only the agreement of counsel as appearing in the bill of exceptions, with a mere reference to such instrument, can be considered. Cases cited *supra*; *Dolvin v. American Harrow Co.*, 134 Ga. — (67 S. E. 541).

(a) A construction of the instrument above referred to being necessary for the determination of the only question involved in the case, this court is unable to review the correctness of the final judgment upon the merits, and an affirmance of the judgment of the court below must necessarily result. Cases cited *supra*.

(3) Several months after the bill of exceptions was certified and filed in this court, there was signed by the trial judge and sent to this court by the clerk of trial court, under his certificate and seal, a second certificate of the trial judge, in which the latter stated that the pages annexed thereto "comprise a complete, true, and correct copy of the agreed statement of facts, and of the original deed referred to therein, exhibited and used in this court on the trial of said case. And I further certify that the annexed copy of said agreed statement of facts, and of said deed, are a complete, true, and correct copy of the agreed statement of facts and of said deed filed in the office of the clerk of this court." *Held*, such certificate and copies annexed thereto cannot be considered by this court.

(a) As neither the copy nor any of the contents of the instrument can be considered as any part of the record, the bill of exceptions cannot, under the provisions of Civ. Code 1895, § 5570, be amended so as to include such copy, or any part of such contents.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. §§ 522, 713;* *Exceptions*, Bill of, Dec. Dig. § 59.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by M. E. Robinson, administrator, against G. B. Woodward. Judgment for defendant, and plaintiff brings error. Affirmed.

Garrard & Meldrim, Jacob Gazan, and Jos. M. Dreyer, for plaintiff in error. Boykin Wright and Hamilton Phinizy, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(134 Ga. 844)

CITY ELECTRIC RY. CO. v. TURNER.
(Supreme Court of Georgia. July 27, 1910.)

(Syllabus by the Court.)

1. SUFFICIENCY OF PETITION.

The petition set out a cause of action. The demurrer was without merit, and was properly overruled.

2. REVIEW ON APPEAL.

The evidence was sufficient to support the finding; and, no other ground of complaint being set up in the motion for a new trial, it was properly overruled.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by W. P. Turner against the City Electric Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Dean & Dean, for plaintiff in error. McHenry & Porter and W. M. Henry, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(124 Ga. 786)

CASON v. STATE.

(Supreme Court of Georgia. July 13, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1152*)—JURY (§ 72*)—IMPANELING—TALESMEN—DISCRETION OF COURT—REVIEW.

Under Pen. Code 1895, § 858, if on the trial of a person indicted for felony the jury cannot be made up from the regular panel of 48, the court shall continue to furnish panels, consisting of such numbers of jurors as the court, in its discretion, may think proper, until a jury is obtained. Unless the court abuses its discretion in regard to the number of jurors in such successive panels, it will furnish no ground for reversal.

(a) Where, after 10 jurors had been selected, the regular panels were exhausted, and the court drew 30 talesmen and directed the sheriff to summon them, and upon 4 of them coming into court they were put upon the defendant as a special panel, and subsequently as others came in they were put upon him one at a time, it does not appear that such a proceeding was an abuse of discretion on the part of the presiding judge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3056; Dec. Dig. § 1152; *Jury, Dec. Dig. § 72.*]

2. CRIMINAL LAW (§ 918*)—NEW TRIAL—GROUNDS—IRREGULARITIES—PRELIMINARY PROCEEDINGS.

Where a juror's name appeared on the book containing the jury list as "Sterling Whitfield," and the man summoned was named "Starling Whitfield," and the evidence introduced before the judge clearly showed that the two were identical, and that there was a mere error in spelling the juror's first name, it furnished no ground for a new trial that the court held the juror competent and directed the clerk to correct the spelling of the name on the list of jurors drawn.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 913.*]

3. CRIMINAL LAW (§ 918*)—NEW TRIAL—GROUNDS—IRREGULARITIES—IMPANELING JURORS.

Where, after the defendant had exhausted his strikes, a juror was put upon him, accepted, and told to take his seat in the jury box, but at once, and before the juror was sworn, the court stated that he had forgotten to ask if the juror had any excuse, and upon the statement of the latter that he had a pain in his breast, had been sick two or three days, and did not think he was able to serve, and upon observation of his physical condition and appearance as a sick man the court excused him from the jury, this furnished no ground for a new trial, although the defendant's counsel stated that they did not want to be understood as agreeing to excuse the juror. *Ozburn v. State*, 87 Ga. 173, 13 S. E. 247.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 918.*]

4. JURY (§ 75*)—IMPANELING—COMPETENCY OF JUROR.

After the juror had been excused, there was no error in overruling a motion to declare a mistrial on that ground, and proceeding regularly to have the panel completed.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 384-390; Dec. Dig. § 75.*]

5. CRIMINAL LAW (§§ 366, 419, 420*)—HOMICIDE (§ 204*)—EVIDENCE—HEARSAY—DYING DECLARATIONS—RES GESTÆ.

Where a person was walking along a street at night, and saw the flash of a pistol, and heard the report, and thereupon went immediately to the place, traversing a distance estimated at about 150 yards, and occupying in going about two minutes of time, and where, on approaching the spot, he saw a man run away in the dark, and, thinking that he recognized the man who had been shot, and who had fallen to the ground, he called the name of such person and asked if it were he, and, on receiving an affirmative answer, asked who had shot him, and the wounded man answered, giving the name of the accused, and died a few minutes later, on a trial of the accused for his murder, there was no error in admitting evidence of the above-stated facts over the objection that the conversation detailed was hearsay, and neither dying declarations nor part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 811, 816, 819, 820, 973; Dec. Dig. §§ 366, 419, 420; *Homicide, Cent. Dig. § 438; Dec. Dig. § 204.*]

6. CRIMINAL LAW (§ 404*)—EVIDENCE—ADMISSIBILITY.

The evidence sufficiently identified the pocketbook and warrant claimed to have been found in the pocket of the city marshal, who was killed, so as not to require a new trial on account of their admission in evidence as against an objection that they were not shown to have been in his pocket, or to be the same book and paper in it as those found, and to be unchanged, or that they were irrelevant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 891; Dec. Dig. § 404.*]

7. SUFFICIENCY OF EVIDENCE—ISSUANCE OF WARRANT.

The evidence for the state made a prima facie showing that the warrant was issued by the city clerk.

8. CRIMINAL LAW (§ 430*)—HOMICIDE (§ 338*)—EVIDENCE—DOCUMENTARY EVIDENCE—TRANSCRIPT OF ORDINANCE.

A copy of a section of a municipal ordinance, which on its face was complete in itself and declared that it should be unlawful for any

person to be in a state of intoxication or drunkenness in the city, or to conduct himself openly on the streets or public places like one intoxicated or drunk, and directed that a person should be taken in custody by the marshal at once, if found in such a condition, but should not be tried until sober. It was certified by the city clerk as a "true copy of section 9 of the Ordinance 253 as contained on page 293 of Book of Ordinances of the city of Tallapoosa." This was admitted in evidence, along with evidence tending to show that the accused was drunk, and acting in a drunken manner on the streets, and that the marshal was sent for, and took him into custody. *Held*, that the transcript was not objectionable, on the ground that the city clerk was not the proper person to certify to the ordinance, or that it was not relevant. Civ. Code 1895, § 5218.

(a) Where it is sought to have the clerk of a municipal corporation certify to a transcript of an ordinance, generally the entire ordinance on the subject in hand should be copied, so that it may be determined what is the effect of the ordinance as a whole. But, under the facts of this case, the admission of the certified transcript of the section authorizing an arrest of one drunk on the streets, along with evidence tending to show that the accused was thus drunk, and killed the marshal who arrested him, will not furnish ground for a reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1019; Dec. Dig. § 430; *Homicide, Cent. Dig. §§ 709-713; Dec. Dig. § 338.*]

9. CRIMINAL LAW (§ 218*)—"WARRANTS"—ISSUANCE.

By section 16 of the charter of the city of Tallapoosa (Acts 1888, p. 240) it is provided that "all processes, writs, warrants, subpoenas, or other papers shall be issued by the clerk of council in the name of the mayor of said city, and signed by such clerk; and it shall be the duty of the marshal of said city to serve all such processes," etc. The "warrants" referred to were warrants for the arrest of offenders against municipal ordinances.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 218.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7393-7395; vol. 8, pp. 7832, 7833.]

10. GROUNDS FOR NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

The newly discovered evidence did not require a new trial.

11. HOMICIDE (§§ 336, 340*)—NEW TRIAL—GROUNDS—VERDICT CONTRARY TO EVIDENCE.

If there were inaccuracies in any of the rulings or charges of the court of which complaint was made in the numerous grounds of the motion for a new trial, in view of the entire evidence and the charge of the court, they are not such as to require a reversal. The evidence introduced for the state made a plain case of murder. The accused introduced no witness, except the clerk of council, who testified that he did not issue the warrant on the day it bore date, though he identified the signature as his. The accused in his statement did not claim that he was resisting an illegal arrest, but stated that after his arrest, and as the marshal reached the city prison, he took a pistol from the pocket of the accused; that in the dark the latter stumbled and threw out his hand, causing an accidental discharge of the pistol. This was met by proof of previous threats, of flight from the scene of the homicide, and of the fact that the safety attachment of the pistol was such as to render it reasonably impossible for the firing to have occurred in

such a manner. The presiding judge did not err in overruling the motion for a new trial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 707, 715-720; Dec. Dig. §§ 336, 340.*]

Error from Superior Court, Haralson County; Price Edwards, Judge.

Bose Oason was convicted of homicide, and brings error. Affirmed.

Griffith & Mathews, for plaintiff in error. W. K. Fielder, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(134 Ga. 678)

HOLLAND v. McRAE OIL & FERTILIZER CO.

(Supreme Court of Georgia. June 25, 1910.)

(Syllabus by the Court.)

1. DAMAGES (§ 182*)—INJURIES TO SERVANT—ADMISSIBILITY OF EVIDENCE.

Where a plaintiff sought to recover damages on account of physical injury, alleging in his petition that the injury was permanent, and that his entire earning capacity was destroyed, and that he had not earned anything since receiving the injury, it was competent for the defendant, upon the trial of the case, to show that the plaintiff had had employment since the injury, had earned certain amounts of money therefrom, and had been offered a position at given wages.

(a) In such a case, in connection with testimony tending to show that the plaintiff was capable of doing work, it was competent for the defendant to show that since his recovery the defendant (his former employer) had offered him employment at certain wages. The weight to be given to such evidence, in considering what opportunity for obtaining employment and earning money he had, was for the jury, along with evidence as to his capacity to perform the duties of the offered position.

(b) The offer of employment in this case did not appear to have been made in connection with any effort to compromise.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 500; Dec. Dig. § 182.*]

2. DAMAGES (§ 157*)—INJURY TO SERVANT—ACTIONS—ADMISSIBILITY OF EVIDENCE.

Where, in such a suit, no claim was made for physician's bills, or for exemplary or punitive damages, and there was no claim that the injury was maliciously inflicted, it was not competent to show that the defendant had paid the physician's bill of the plaintiff, or had furnished groceries to him; there being no counterclaim or issue made by the pleadings in regard to such subjects.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 429-440, 447-453; Dec. Dig. § 157.*]

3. EVIDENCE (§ 471*)—CONCLUSIONS—AGENCY.

If the question as to who was the general manager of a manufacturing company, which operated a mill, was material, it was not competent to show, by the testimony of a witness who was the superintendent of such mill, that he supposed that a named person acted as the general manager.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

4. EVIDENCE (§ 472*)—OPINION EVIDENCE.

Where the plaintiff contended that a certain appliance of the defendant had been left in a dangerous condition by the superintendent of its mill, and this was denied by the defendant, it was not competent to have such superintendent, as a witness, give in general terms his opinion as to whether he had left such appliance in a dangerous condition or not. The facts should be proved for the consideration of the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.*]

5. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—ADMISSIBILITY OF EVIDENCE.

Where the plaintiff alleged that a certain hood, or cap, connected with a cup elevator in an oil mill, had originally been properly and securely constructed and fastened, so as to be safe, and that the superintendent and alter ego of the defendant had removed such hood or cap, and replaced it with insecure fastening, so as to leave it in a dangerous condition, and that by reason thereof it gave way, when plaintiff rightfully took hold of it, and precipitated him into a seed conveyor, thereby causing him injury, it was not error to allow a witness, who at the time of the occurrence in question, and for some time prior thereto, was an officer of the defendant corporation and connected with the management of its mill, to testify that when he returned to the mill, a few hours after the plaintiff was injured, the hood was there, like it had always been.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

6. CORPORATIONS (§ 428*)—NOTICE TO OFFICER—LIABILITY OF CORPORATION.

Notice to an officer of a corporation, acting for it in connection with its business, and within the scope of its agency, is notice to his principal.

(a) The charge of the court on this subject, as set out in the eighth and tenth grounds of the motion for a new trial, is not entirely clear, but on another trial any inaccuracies will doubtless be corrected.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1748-1761; Dec. Dig. § 428.*]

7. CORRECT INSTRUCTION.

Under the evidence, there was no error in charging as follows: "I charge you further that, * * * if you should find that both the injured party and the defendant were innocent and that the catastrophe was the result of accident, * * * there could be no recovery."

8. MASTER AND SERVANT (§§ 101, 102, 125, 150*)—CARE IN FURNISHING MACHINERY—SAFE PLACE TO WORK—DUTY TO WARN—INJURY ACTION BY SERVANT—INSTRUCTION.

A master is bound to exercise ordinary care in furnishing machinery equal in kind to that in general use, and reasonably safe for all persons who operate it with ordinary care and diligence. A like measure of diligence is imposed in reference to furnishing a reasonably safe place for his employes to work. If there are latent dangers in machinery, or dangers incident to an employment unknown to the servant, of which the master knows or ought to know, he must give the servant warning in respect thereto. But if there are latent defects in machinery or appliances, or incident to the employment, of which the master does not know, and could not know by the exercise of ordinary care, he will be excused for a failure to discover them.

(a) It was not an exact statement of the rule of law to make the question of excusing the master for not discovering latent defects turn on

whether they were "such as to deceive human judgment."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 172, 180-184, 192, 243-251, 291-307; Dec. Dig. §§ 101, 102, 125, 150.*]

9. MASTER AND SERVANT (§§ 139, 294*)—VICE PRINCIPAL—INJURY TO SERVANT—INSTRUCTION.

Where the plaintiff alleged that he was injured by reason of the negligence of a superintendent and alter ego of a corporation for which he was working, and this was denied by the defendant, although the circumstances showed that such person at times performed manual labor for the defendant company, yet where it showed, without conflict, that he was the superintendent in charge of the operation of the manufacturing plant of the defendant, with power to direct its operation, and to employ and discharge the laborers, and to determine the number of them required, to put them at whatever work he directed, and to charge them as he saw fit, he was, relatively to the duty of giving notice of a danger known to him to a laborer, to whom the same was unknown, the alter ego of the corporation, although there were two other officials of the company who were superior in command to him, and who also gave direction to him and others. *Moore v. Dublin Cotton Mills*, 127 Ga. 609, 56 S. E. 839, 10 L. R. A. (N. S.) 772.

(a) Under such facts, it was error to charge as follows: "If you should find that he [such superintendent] was not in charge, but find that he was a mere fellow servant, and not an alter ego or a vice principal, if you should find that to be the fact of the case, and find that he was merely a fellow servant with the plaintiff, then I charge you that the plaintiff could not recover."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 427, 435-448, 1162-1167; Dec. Dig. §§ 189, 294.*]

Error from Superior Court, Telfair County; J. H. Martin, Judge.

Action by Ned Holland against the McRae Oil & Fertilizer Company. Judgment for defendant, and plaintiff brings error. Reversed.

W. W. Bennett and Hardeman, Jones & Johnston, for plaintiff in error. Tom Eason and Graham & Graham, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(3 Ga. App. 69)

EAVES et al. v. J. E. FIELD & SON.

(No. 2,279.)

(Court of Appeals of Georgia. July 19, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 105*)—NECESSITY FOR OBJECTIONS.

A ruling upon the admissibility of testimony may, of course, be reviewed by a motion for a new trial; but the admissibility or incompetency of testimony, to which no objection was interposed at the time it was introduced, cannot be tested for the first time by an exception to a charge of the court which is abstractly correct, and would generally be unexceptionable, merely because some of the evidence in the case might have been subject to be excluded if proper timely objection had been urged there-

to. Exceptions to the charge of the court cannot be used as a substitute for timely objections to the introduction of testimony. Consequently, as no objection was made to any of the testimony in this case, so far as it appears from the record, nor any motion made to rule out any of the testimony introduced, it was not error to instruct the jury that "they should take into consideration all of the evidence which had been adduced before them in making up their verdict," even if some of the testimony was legally inadmissible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 260-266; Dec. Dig. § 106.*]

2. PARTNERSHIP (§ 213*)—PLEA DENYING PARTNERSHIP.

A plea denying partnership must be sworn to. There was no plea denying partnership in this case. The question of partnership not being involved, the petition must be construed as setting forth a cause of action against the named defendants, by which they became jointly and severally liable to the plaintiff for the value of goods furnished. The evidence authorized the finding against both defendants, and there was no error in refusing a new trial.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 409; Dec. Dig. § 213.*]

Error from City Court of Cartersville; A. M. Foute, Judge.

Action between W. A. Eaves and others and J. E. Field & Son. From the judgment, Eaves and others bring error. Affirmed.

T. J. Lyon and G. H. Aubrey, for plaintiffs in error. J. T. Norris, for defendants in error.

RUSSELL, J. Judgment affirmed.

(8 Ga. App. 100)

CORKER v. SPERLING. (No. 2,132.)

(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

1. LIBEL AND SLANDER (§ 112*)—EVIDENCE—SUFFICIENCY.

The testimony of the witness introduced by the plaintiff that certain words were used by the defendant in a meaning which substantially conformed to the allegation in the petition as to the language there charged to have been used by him, and the tacit admissions of the defendant that he had made statements to the same general effect as those charged in the declaration, were sufficient to authorize the verdict.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 325-341; Dec. Dig. § 112.*]

2. TRIAL (§§ 29, 302*)—RULING ON EVIDENCE—RIGHT OF JUDGE TO DISCUSS EVIDENCE—WITHDRAWAL OF JURY.

Where a ruling upon the sufficiency of testimony is invoked, the trial judge has the right to make his ruling intelligible by stating the impression that certain testimony has made upon his mind, and even to state definitely to what in his opinion a witness has testified, especially when he calls the attention of the jury specifically to the fact that the impression made upon his mind is to have no influence upon their determination as to what was really testified. Where it is either apparent or probable that a discussion of the testimony must ensue upon a motion or ruling invoked of the court, and the party deems it to his interest

that the jury should not hear it, a timely request that the jury be withdrawn should be preferred.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80-84, 723; Dec. Dig. §§ 29, 302.*]

3. APPEAL AND ERROR (§ 971*)—WITNESSES (§ 263*)—RECALL OF WITNESS—DISCRETION OF COURT.

A trial judge is not required to recall a witness to refresh his recollection of the testimony, nor to regard affidavits as to what a witness who has already been upon the stand would testify if reintroduced. It is discretionary with the court to permit a witness who has already given his testimony to be again placed upon the stand for the purpose of repeating or explaining statements previously made by him; but the practice is not to be favored where reasonable opportunity has been afforded for a full examination of the witness, and the discretion of the court in reference to this matter will in no case be controlled, unless it is perfectly clear that this discretion has been abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3852-3857; Dec. Dig. § 971.* Witnesses, Cent. Dig. §§ 900-908; Dec. Dig. § 263.*]

4. LIBEL AND SLANDER (§ 100*)—PROOF—VARIANCE.

Proof of language substantially similar, or a practical identity of meaning with the defamatory words alleged, in an action for slander, is all that is requisite or feasible. Substantial identity as to the charge and the proof is all that is usually attainable in actions based upon oral utterances. Where a defamation is reduced to writing, complete certainty is necessary; "but for oral utterances such verbal precision need not and cannot be required. It need not be, for the importance of single words in oral discourse is comparatively much less than in writings; and it cannot be, since memory does not retain precise words, except of simple utterances and for a short time. Hence verbal precision is in general not required in proving oral utterances. The substance or effect is sufficient." 3 Wigmore on Evidence, § 2097.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 262-271; Dec. Dig. § 100.*]

Error from City Court of Waynesboro; H. C. Hammond, Judge.

Action by Rosa Sperling against P. L. Corker. Judgment for plaintiff, and defendant brings error. Affirmed.

E. L. Brinson and Phil P. Johnston, for plaintiff in error. Wm. H. Fleming, for defendant in error.

RUSSELL, J. Judgment affirmed.

(8 Ga. App. 86)

DE JARNETTE v. HOLMES. (No. 2,511.)

(Court of Appeals of Georgia. July 19, 1910.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The controlling issues being questions of fact, and the verdict being fully supported by the evidence, and no prejudicial error of law appearing, the judgment denying another trial is affirmed.

Error from City Court of Sparta; R. W. Moore, Judge.

Action between H. R. De Jarnette and Robert Holmes. From the judgment, De Jarnette brings error. Affirmed.

M. F. Adams and R. L. Merritt, for plaintiff in error. W. H. Burwell, for defendant in error.

HILL, C. J. Affirmed.

(8 Ga. App. 90)

ALLEN v. STATE. (No. 2,592.)

(Court of Appeals of Georgia. July 19, 1910.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 535*)—EVIDENCE CORROBORATIVE OF CONFESSION—PROOF OF CORPUS DELICTI.

Though the evidence is weak and unsatisfactory, it was sufficient to authorize the conviction of the defendant, and the verdict was approved by the trial judge. Proof of the corpus delicti may be sufficient to corroborate a confession, if the jury is satisfied with this degree of corroboration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1225, 1226; Dec. Dig. § 535.*]

Error from City Court of Blakely; W. A. Jordan, Judge.

Hilliard Allen was convicted of crime, and he brings error. Affirmed.

C. D. Russell and G. D. Oliver, for plaintiff in error. Walter Park, Sol., for the State.

RUSSELL, J. Judgment affirmed.

(8 Ga. App. 97)

KEMP v. STATE. (No. 2,696.)

(Court of Appeals of Georgia. July 19, 1910.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 552*)—SUFFICIENCY OF EVIDENCE.

The incriminating circumstances raised a grave suspicion of the defendant's guilt, but are consistent with his innocence. For this reason, the conviction of the defendant was unauthorized, and a new trial should have been granted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1257, 1259-1262; Dec. Dig. § 552.*]

Powell, J., dissenting.

Error from City Court of Swainsboro; Frank Mitchell, Judge.

Cleveland Kemp was convicted of crime, and brings error. Reversed.

S. J. Tyson and W. W. Larsen, for plaintiff in error. A. S. Bradley, Sol. Gen., for the State.

RUSSELL, J. Judgment reversed.

POWELL, J., dissents.

(8 Ga. App. 89)

DAVIS v. WILLIAMS. (No. 2,541.)

(Court of Appeals of Georgia. July 19, 1910.)

(Syllabus by the Court.)

1. BAILMENT (§ 8*)—ESTOPPEL OF BAILEE TO DENY TITLE OF BAILOR.

The bailee, as a general rule, cannot deny the title of his bailor; and the facts of this case do not bring it within any exception to the rule. Patten v. Baggs, 43 Ga. 173.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. § 82; Dec. Dig. § 8.*]

2. REVIEW ON APPEAL.

The only issue in this case was whether there was a bailment or a sale; and the jury found the former. The verdict is supported, and no material error of law appears.

Error from City Court of Miller County; C. O. Bush, Judge.

Action between Ike Davis and Julia Williams. From the judgment, Davis brings error. Affirmed.

W. I. Geer, for plaintiff in error. Rich & Nelson, for defendant in error.

HILL, C. J. Judgment affirmed.

(8 Ga. App. 99)

GRAVES v. HUNNICUTT. (No. 2,096.)

(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

1. BROKERS (§ 88*)—ACTION FOR COMMISSIONS—SUFFICIENCY OF EVIDENCE.

It was error to award a nonsuit. There was some evidence from which a jury would have been authorized to infer that the plaintiff as a real estate broker was the procuring cause of the sale of the defendant's property, although the sale was actually effected for a lower price than the broker was authorized to offer, and the deal was finally closed by another real estate agent. Hill & Moultrie v. Wheeler, 2 Ga. App. 349, 58 S. E. 502.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 128, 129; Dec. Dig. § 88.*]

2. BROKERS (§ 88*)—ACTION FOR COMMISSIONS—QUESTION FOR JURY—PROCURING CAUSE.

The testimony of the plaintiff that negotiations between himself and the purchaser had not been terminated should have been submitted to the jury, and it also was for the jury to say whether the services rendered by the plaintiff as a broker were the prime cause of inducing the purchaser to buy.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 128, 129; Dec. Dig. § 88.*]

3. BROKERS (§ 57*)—RIGHT TO COMMISSIONS.

That a broker was not given the exclusive sale of the property, and that the owner, either by himself or through another agent, made the sale before the termination of the broker's authority to sell, will not defeat the broker's right to commissions, if he was the procuring cause of the sale, and if the only other cause which induced the purchase was a reduction of the price.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 66, 67, 72; Dec. Dig. § 57.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by A. Graves against C. W. Hunni-

cutt. Judgment of nonsuit, and plaintiff brings error. Reversed.

Burton Cloud and Geo. Gordon, for plaintiff in error. Chas. A. Read, for defendant in error.

RUSSELL, J. Judgment reversed.

(8 Ga. App. 118)

BURSE v. STATE. (No. 2,533.)

(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

1. QUESTION IMPROPERLY PRESENTED.

The objection to the disqualification of the presiding judge on account of relationship was not properly presented, or in writing, and no evidence was offered, either at the trial or upon the hearing of the motion for a new trial, to support the statement that the prosecutor was akin to the judge.

2. REVIEW ON APPEAL.

There is no merit in the other assignments of error. The evidence authorized the conviction of the defendant, and there was no error in refusing a new trial.

Error from Superior Court, Douglas County; Price Edwards, Judge.

Henry Burse was convicted of crime, and he brings error. Affirmed.

W. A. James, for plaintiff in error. W. K. Felder, Sol. Gen., for the State.

RUSSELL, J. Judgment affirmed.

(8 Ga. App. 125)

CUNNINGHAM v. STATE. (No. 2,771.)

(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The points presented in the certiorari are without merit.

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Charlie Cunningham was convicted of crime, and he brings error. Affirmed.

Brown & Shipp and Jos. P. Brown, for plaintiff in error. Jos. E. Pottle, Sol. Gen., and James Davison, for the State.

POWELL, J. Judgment affirmed.

(8 Ga. App. 67)

T. L. LANGSTON & CO. v. R. C. NEELY CO.
(No. 2,112.)

(Court of Appeals of Georgia. July 19, 1910.)

(Syllabus by the Court.)

SALES (§§ 187, 441*) — ACTION FOR PRICE — BREACH OF WARRANTY—INTEREST.

The trial was free from error, and the finding of the jury upon the facts at issue was authorized by the evidence. The defendants were entitled to set off the overpayment upon the 75 yards of bagging, as to which there had been a breach of express warranty, against the unpaid

portion of the plaintiffs' account (the contract was an entire contract); but the plaintiffs were entitled to interest upon that portion of the account as to which there was no dispute, from the time when payment was to have been made, under the contract, up to the time when the payment was actually made. Direction is therefore given that the judgment be amended in accordance with the special finding of the jury, so as to award to the plaintiffs the interest alleged to be due in their petition, and established without dispute in the testimony.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 499, 1279; Dec. Dig. §§ 187, 441.*]

Error from City Court of Waynesboro; H. C. Hammond, Judge.

Action by T. L. Langston & Co. against the R. C. Neely Company. Judgment for defendant, and plaintiffs bring error. Affirmed, with directions.

J. H. Porter and Phil P. Johnston, for plaintiffs in error. E. L. Brinson, for defendant in error.

RUSSELL, J. T. L. Langston & Co. brought suit against the R. C. Neely Company for \$750 principal, interest on \$2,500 from October 1, 1907, to July 2, 1908 (when a payment of \$750 was alleged to have been made), and interest on \$750 from July 2, 1908, forward. The plaintiffs attached to their petition a written contract embodying stipulations concerning the purchase of 2,000 50-yard rolls of new two-pound bagging, which was signed by both parties, and also a statement of account. The defendants in their answer admitted the receipt of the bagging in question, and, although they insisted that it was defective in several respects and did not conform to the express warranty of the contract, they nevertheless admitted that for reasons satisfactory to themselves they had waived the defects of this shipment, by the acceptance of the bagging specified in the statement, and were indebted to the plaintiffs upon that shipment \$750. They set up, however, that there were 75,000 yards of bagging which, under the provisions of the same contract, had previously been shipped to them, as to which they were not precluded from setting up the breach of the express warranty contained in the contract, and that this bagging was worth one cent per yard less than the bagging that they bought, and that should have been delivered to them. As to this lot of bagging the defendants claimed that they had overpaid the plaintiffs \$750, and they asked that this sum be set off, as money had and received against the plaintiffs' demand. The finding of the jury was in accordance with the defendants' contention, the verdict being: "We, the jury, find for the defendant, the R. C. Neely Company, the sum of \$750, to be set off against the balance of \$750 claimed in the plaintiffs' declaration."

The verdict was authorized by the evidence and is sustained by law. The rule in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

regard to the recovery of payments voluntarily made has no application to the case, because the contract was an entire contract. It is immaterial that the first shipments were closed by notes which were afterwards paid. Of course, as to that portion of the bagging which they accepted with full knowledge of its defects, the defendants, under the circumstances stated in the record, waived all right to rely upon the express warranty; but as to those shipments, or that portion of the bagging which they received and accepted before they knew there had been a breach of the express warranty, there can be no question upon this point. The defendants would have the right to recover whatever might be the difference between the market price of the bagging that they bought and the bagging that was shipped to them. The acceptance of the shipment would not imply a waiver of the express warranty. In fact, they would have the right to rely upon the express warranty, even if they accepted the shipment, unless it was clear that they intended to waive it. Any payments they may have made, even though it happened that the payments amounted exactly to the contract price of the first three shipments, if the contract is an entire contract, are to be treated as payments merely upon the gross amount of the contract; and if the payment was made under such circumstances as appear in this record (the defendants having given notes before the goods were delivered to them, which they were afterwards compelled to pay), any amount by which the payments exceeded the true value of the goods purchased, as determinable by the express warranty, would be money received by the plaintiffs which they would be required, *ex æquo et bono*, to return to the defendants.

The verdict was a special finding upon the facts. It was in accordance with the instructions of the judge as to the form of the verdict, and this finding as to the only disputed issue in the case is authorized by the evidence. There is, therefore, no need for the expense and delay of another trial; but it seems that the interest which the plaintiffs

claimed upon the amount for \$2,500 prior to the payment of the \$1,750 was lost sight of in framing the judgment. The plaintiffs' claim in this respect was supported by the evidence. It was undisputed either by the pleading or the proof of the defendants. The defendants received by the verdict all they claimed. The judgment should have been molded in accordance with the pleadings and the evidence, as well as the verdict, especially when the finding of the jury was a special finding upon the particular facts. We do not deem it necessary, however, to order a new trial to correct this error. There should be deducted from the \$750, found as a set-off in favor of the defendants, the sum of \$131.25, the interest to which the plaintiffs were entitled upon \$2,500 for the nine months from October 1, 1907, to July 2, 1908, when the \$1,750 was paid; and the judgment should be so molded as to be one in favor of the plaintiffs for \$131.25. It is directed that judgment be entered accordingly.

Judgment affirmed, with directions.

(8 Ga. App. 86)

SOUTHERN EXPRESS CO. v. BUEHL-MEADOR CO. (No. 2499.)

(Court of Appeals of Georgia. July 19, 1910.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

This case involves \$33.50. No material error of law was committed by the justice on the trial. The evidence supports the verdict, and the judgment of the superior court in overruling the certiorari is affirmed.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between the Southern Express Company and the Buehl-Meador Company. From the judgment, the Express Company brings error. Affirmed.

Phillip H. Alston, for plaintiff in error. Ogburn, Dorsey & Shelton, for defendant in error.

HILL, C. J. Judgment affirmed.

(86 S. C. 419)

STACKHOUSE et al. v. ROWLAND et al.

(Supreme Court of South Carolina. July 21, 1910.)

1. COUNTIES (§ 178*)—VALIDITY OF BONDS—RIGHT TO CALL ELECTION.

The county of Dillon was established by act approved February 5, 1910 (26 St. at Large, p. 863), and such act created a board of commissioners and directed that such board should hold an election for county officers on April 10, 1910, and provided for the erection of a courthouse and jail by a courthouse commission. An act, approved February 25, 1910 (26 St. at Large, p. 960), provided that to provide additional funds for erecting and equipping such courthouse the county board of commissioners of said county issue and deliver to the special courthouse commission bonds of said county, to be known as "courthouse bonds," in the aggregate sum of forty thousand (\$40,000) dollars, and the said commissioners shall order an election to be held at Dillon on the second Tuesday in April, 1910, on the question whether the said bonds shall be issued. *Held*, that the board required to order the election could not have been the board of county commissioners, as such board, under the statutes, would be elected on the day appointed for the bond election, and that construing both statutes together the proper board to order the election would be the board of election commissioners who were already authorized to call an election on that day, and that the election should be held in the county of Dillon, and that the qualified electors of that county should vote at their respective precincts, and the election should not be confined to the town of Dillon.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 269-273; Dec. Dig. § 178.*]

2. STATUTES (§ 181*)—CONSTRUCTION—REJECTING ORDINARY MEANING OF WORDS.

However plain the ordinary meaning of words used in a statute may be, the courts will reject that meaning, when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature, and if possible will construe the statute so as to carry out the intention of the Legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 263; Dec. Dig. § 181.*]

3. COUNTIES (§ 178*)—BONDS—LEGALITY OF ELECTION.

Where a statute, authorizing the issuance of county bonds for the building of a courthouse, directs that the election to determine their issuance be ordered and held by a certain board other than the board of election commissioners, and the latter board in good faith, supposing that they were authorized to hold the election, orders and holds such election, and the same is fairly conducted after due notice by the board of election commissioners, and there is no protest nor objection of any kind by the voters or taxpayers, either before or after the election, such election will be recognized as valid.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 269-273; Dec. Dig. § 178.*]

Mandamus proceedings by R. P. Stackhouse and others against J. W. Rowland and others. Writ issued.

Livingston & Gibson, for relators. W. B. Hargrove, for respondents.

WOODS, J. In this proceeding for mandamus the relators, constituting the courthouse commission of Dillon county, ask that the county board of commissioners of that

county be required to execute and deliver county bonds to the amount of \$40,000, to be sold by them and the proceeds expended in the construction of a courthouse and jail. The respondents allege that the statute law of the state authorizes the board of commissioners to issue bonds when such issue has been approved by a majority vote at an election held in pursuance of the statute. It is conceded that an election was held at all the election precincts in the county after due advertisement, under the order and control of the board of election commissioners of the county, and that at such election there was a majority vote in favor of the issue of the bonds; but it is contended that this election was illegal and could confer no authority to issue the bonds, in that the act required the election to be ordered and conducted by the county board of commissioners, not at all the voting precincts, but at the town of Dillon alone.

The county of Dillon was established by act of the Legislature, approved February 5, 1910 (26 St. at Large, p. 863). Among other things necessary to the organization of the new county the statute provided for the erection of a courthouse and jail by the commissioners who are the relators in these proceedings. This act authorized the commissioners to receive donations, but invested them with no power to obtain funds by pledge of the public credit or otherwise. The attempt was made to supply this deficiency, and to provide the commissioners with the funds requisite for the construction of the public buildings by an act approved on the 25th day of February, 1910 (26 St. at Large, p. 960). The first section of this statute provided: "That for the purpose of providing additional funds for erecting and furnishing or equipping a new courthouse building for the county of Dillon, at Dillon, S. C., the county board of commissioners of said county be, and they are hereby, authorized and empowered to issue and deliver to the special courthouse commission hereinafter named, interest-bearing coupon bonds of said county, to be known as 'courthouse bonds,' in the aggregate sum of forty thousand (\$40,000) dollars, * * *: Provided, That for the purpose of determining the issue of bonds authorized in section 1 of this act, *the said commissioners shall order an election to be held at Dillon, on the second Tuesday in April, 1910, on the question whether the said bonds shall be issued or not, in which election only the qualified voters residing in said district shall be allowed to vote, and said commissioners shall give notice of said election for three weeks in the Dillon Herald, a newspaper published in the town of Dillon, shall designate the time and place and appoint the managers of said election, and receive the returns of the managers and declare the result.*"

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The difficulty is indicated by the words of the statute we have italicized. Viewing the context alone no one would hesitate to say that "the said commissioners" who are required to order the election meant the county board of commissioners, for that board of commissioners had just been referred to in the act as the commissioners authorized to issue the bonds. But it was impossible for the county board of commissioners to order an election on the second Tuesday in April, 1910, because no such board was or could have been then in existence inasmuch as the act creating the county of Dillon provided that on that same day the first county board of commissioners should be elected. Hence, if the statute providing for the election on the bond issue be construed so as to give force to all the words just as they are used, the absurd result would be reached that an election was to be held by a board which could not be in existence at the date fixed for the election; and so there could be no election. Giving the ordinary meaning to the words used, the further absurdity would be inevitable that the question of issuing bonds for county purposes, binding on the entire county, should be decided by an election held at the town of Dillon, where only the electors registered at that precinct could vote.

However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning, when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature, or would defeat the plain legislative intention; and if possible will construe the statute so as to escape the absurdity and carry the intention into effect. The cardinal rule, that the courts should in all cases give effect to the obvious intent of the Legislature, and that every technical rule of construction should yield to the clear meaning of the statute, is stated in *Endlich on Stat. Inter.* § 295. Numerous cases in which clerical errors have been corrected by the courts pursuant to this principle are given in section 319 of the same work.

This rule has been followed in many cases in this and other jurisdictions. In *Waring v. Cheraw, etc., Ry. Co.*, 16 S. C. 416, the word "hereinafter" was read "hereinbefore," when the use of the former would have destroyed the manifest purpose of the statute. In *Kitchen v. Southern Ry. Co.*, 68 S. C. 554, 48 S. E. 4, the word "of" was construed to mean "or," in order to give full effect to the meaning of Lord Campbell's act. In *Baldwin v. Travis County*, 40 Tex. Civ. App. 149, 88 S. W. 480, the word "taxed" was substituted for "attached," the court holding that the use of the latter word "appears to be improper and inapt, in that it does not appear to definitely express or convey the meaning evidently intended by the Legislature." In *California Loan Co. v. Wells*, 118

Cal. 489, 50 Pac. 697, it was held that the word "July," which was evidently intended, should be read instead of "June," which had been used in the act under consideration. In *Re Frey*, 128 Pa. 593, 18 Atl. 479, the word "city" was inserted instead of "county," when the court was of opinion that "the section is senseless and absurd as it is written, while the purpose of the Legislature is perfectly obvious and certain."

While this rule is generally recognized, the courts in applying it should exercise circumspection to avoid any effort to amend statutes. The principle depends upon the absurdity being manifest and the legislative intent obvious. Here it is perfectly obvious that the purpose of the Legislature was to give the electors of Dillon county the opportunity to decide by an election whether funds should be provided by issue of county bonds for buildings absolutely indispensable. What public officials should conduct the election was an entirely subordinate matter.

A statute so plain and important in its purpose should not be declared impossible of execution merely because as to a subordinate matter—the method of holding an election—the Legislature has used words, which, given their literal meaning, would impose impossible or absurd conditions. In such a case the literal meaning of the words must be rejected, and a meaning assigned to them expressive of the legislative intent, if such intent be plainly indicated to the court by consideration of the entire statute, or other statutes on the same or similar subjects, and by taking into view all the related facts and conditions.

Looking at the matter in this way we find that the General Assembly could not have intended the county board of commissioners to order the election when there was no such board; and that therefore "the said commissioners" who were ordered to hold the election must have been some board of commissioners already in existence, whose general organization and duties made it appropriate that it should have charge of an election. Such a board was the board of election commissioners already created under the statute establishing Dillon county. That act and the act providing for the necessary public buildings of the county were passed at the same session of the General Assembly, they related to the same subject, and therefore should be read and construed as far as possible as one statute. The former act had already provided that the board of election commissioners should hold an election for county officers on April 10, 1910. When the second act provided for an election on the question of the bond issue, it was doubtless intended that this should be one of the questions voted on at the same election—not that there should be two elections. Certainly it is very improbable that the General Assembly meant that there should be two sets of commissioners ordering and conducting two elections on

the same day with different machinery. We think, when the whole subject is viewed in its entirety, it is not overstraining the meaning of words to hold that the General Assembly meant that the question of the bond issue should be submitted to the people on the same day and by the same commissioners, who were required to submit the question of the election of public officers. There can be no doubt that the General Assembly meant further that the election should be held in the county of Dillon, and that the qualified electors of the county should vote at their respective precincts; not that the election should be confined literally to the town of Dillon.

The election having been ordered and held by the board of election commissioners, in accordance with the statute as we interpret it, and having resulted in favor of the issue of bonds, there is no reason why the county board of commissioners should not turn over the bonds to the relators as the courthouse commission. But even if it be assumed that the statute directed the election to be ordered and held, not by the board of election commissioners, but by some other board, that would not make the election as held a nullity. It appears to have fairly conducted, after due notice, by officers who in good faith supposed that they were authorized to hold it; and there was no protest nor objection of any kind by the voters or taxpayers, either before or after the election. Under these circumstances an election held by de facto officers will be recognized as valid. The authorities so holding are cited in *Wilson v. Cox*, 73 S. C. 398, 53 S. E. 613.

It is therefore ordered and adjudged that a writ of mandamus issue, requiring the county board of commissioners of Dillon county to issue and deliver to the courthouse commission county bonds, in accordance with the provisions of the statute.

(86 S. C. 218)

STATE v. SPRINGFIELD.

(Supreme Court of South Carolina. July 14, 1910.)

1. CRIMINAL LAW (§ 1043*) — APPEAL — GROUND OF ERROR.

No other ground of error than that specified to the exclusion of evidence can be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. § 1043.*]

2. CRIMINAL LAW (§ 1170*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where, in a homicide case, a ground of error to the exclusion of evidence is that the evidence was relevant to show apprehension on the part of the defendant of violence from deceased, any error in excluding the evidence is harmless; other and stronger evidence showing that fact being admitted without objection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3146; Dec. Dig. § 1170.*]

Hydrick, J., dissenting in part.

Appeal from General Sessions Circuit Court of Greenville County; Chas. G. Dantzer, Judge.

Young Springfield was convicted of manslaughter, and he appeals. Appeal dismissed.

Cothran, Dean & Cothran, for appellant. P. A. Bonham, Sol., for the State.

GARY, A. J. The following statement appears in the record: "The defendant was indicted, in the court of general sessions for Greenville county, for the murder of his father, Thomas Springfield, at Greenville, S. C., on December 30, 1908, tried before Judge Robert Aldrich and a jury at Greenville at September term, 1909; verdict, guilty of manslaughter. Sentence, two years at hard labor in the state penitentiary.

Upon the trial of the case the defendant offered testimony to show that shortly before he shot and killed the deceased, the deceased was in a drunken, turbulent humor; that he abused and beat his wife, the mother of the defendant; that he pressed a hatchet against her forehead, and threatened to kill her if she spoke; that he drew a gun upon her, and threatened to take her life. This testimony was excluded by the presiding judge, upon the ground that it was irrelevant."

The ground of error is thus specified: "This testimony was competent and relevant, upon the ground that the defendant had interposed a plea of self-defense; that he was entitled to prove every fact and circumstance connected with the conduct of the deceased occurring shortly before the fatal encounter, which was fairly calculated to create an apprehension for his own safety; that particular acts of violence were relevant to show an apprehension on the part of the defendant of violence from the deceased." No other ground of error can be considered.

Sam Johnson, a witness for the state, testified on cross-examination, that he had seen the deceased draw his pistol, and heard him threaten to kill the defendant; that the deceased was drinking some about 10 o'clock on the morning of the difficulty; that he had heard him threaten Mrs. Springfield, his wife, and say to her, with an oath, "today is your last." Mrs. M. E. Springfield, wife of the deceased, was asked the question: "What was his (her husband's) condition that day, do you know?" Her answer was: "Drinking as usual."

Zed Hall, a witness for the defendant, testified as follows: "Do you know whether or not you saw Mr. Springfield take a drink before the shooting? Yes, sir. Who with? Myself. * * * Was he drinking that day? Yes, sir. How long had you been with him? Several years. I asked Mr. Stroud, who testified, if you advised him to go from the store up to the house, and he said you did. Had

you been to the house just before? Yes, sir. How long was that before the shooting? Was an hour and a half; something like that. I want to ask you, what was his condition, with reference to turbulence, and violence, the frame of mind which he was in, with reference to turbulence and violence at that time? Very rough. Was it in consequence of that you asked Stroud to go up there? Yes, sir. Was there anybody else at the store? Yes, sir. You had been called to the house? Yes, sir. That was the condition in which you found him when you went over there? Yes, sir. Did you ever hear Thomas Springfield threaten the life of Young? Yes, sir. Did you ever see him do bodily violence to him or bodily harm to him? I have seen him choke him. How much did he choke him? Choked him pretty bad." * * *

Elliot Batson, another witness for the defendant, thus testified: "I want you to state whether or not you ever heard Thomas Springfield admit that he had threatened the life of Young Springfield? Yes, sir; I heard him say that he threatened the life of Young Springfield, and said that he had reconsidered it, and that it would be too bad. That was during the time that he was gone, that he said 'I have reconsidered that.' I says: 'That would be too bad; never do anything like that.' I says: 'Young will come back after awhile,' and he says, 'I will whip him for it if it takes me 50 years.'"

Young Springfield, the defendant, testified as follows: "Did you know of the way your father had mistreated and beaten your mother? Yes, sir; been knowing it for years. You heard Mrs. Springfield, your Aunt Ella, talking about what he said. What did you say there? I didn't say what they said. I said that I was going for my gun, that I might need it; I didn't say anything about any killing. Did you say anything about your father had beaten your mother? Yes, sir. Where was your mother then; was she away from home then? Yes, sir. Did you go up there while she was there? Yes, sir. Did you advise her about conditions at home? Yes, sir. What was your father's condition when you went up there? Drunk and disorderly."

The foregoing not only shows that testimony similar to that which was excluded was introduced without objection, but that other and stronger testimony was admitted without objection, tending to show the hostile attitude of the deceased towards the prisoner, and rendering it necessary for the defendant to be on the alert against attack by the deceased.

Appeal dismissed

HYDRICK, J. (concurring). In view of the circumstances under which the testimony was excluded I think the first exception, which assigns error in excluding it, without speci-

fying the purpose for which it should have been admitted, as the other exceptions do, is sufficient to require the consideration by this court of the question of its relevancy for any purpose. The rule that an exception must specify the error complained of does not require the assignment in the exception of the reasons in detail why the matter complained of is erroneous; for that is argument, which, in my opinion, should not, but too often does, incumber the exceptions, as a result of a too rigid construction of the rule.

The record shows that the testimony was excluded on the objection of the solicitor, without stating the ground of his objection; and the court promptly ruled it out on the ground that it was irrelevant. Counsel for the defendant were not requested by the court to show its relevancy, and, under rule 11 of the circuit court (33 S. E. viii), it would have been improper for them to have attempted to do so, without a request from the court. Therefore, I think this court should, under the first exception, consider whether the testimony was relevant; and, if so, whether its exclusion was prejudicial.

Under the plea of self-defense, the defendant had the right to introduce any testimony which tended to show that immediately before the fatal encounter deceased was in a vicious humor not only towards the defendant himself, but also toward others, for that tended to throw light upon the question, who was at fault in bringing on the difficulty, which was of vital importance. That is one reason for the admission of evidence of uncommunicated threats against the defendant (*State v. Falle*, 43 S. C. 61, 20 S. E. 798) and of the general behavior of the accused, immediately before the difficulty, in such cases. *State v. Thrailkill*, 71 S. C. 140, 50 S. E. 551; *State v. Miller*, 73 S. C. 277, 53 S. E. 426, 114 Am. St. Rep. 82.

But, in this case, the verdict could not have been based on the finding that the defendant was at fault in bringing on the difficulty, for all the testimony, both on the part of the state and of the defense, pointed beyond all doubt to the fact that the attack upon the defendant was unprovoked by him. For that reason, I concur in affirming the judgment.

(36 S. C. 352)

HERBERT v. PARHAM.

(Supreme Court of South Carolina. July 18, 1910.)

MASTER AND SERVANT (§ 284*) — BOTTLING — DANGER NOT INHERENT.

Employment in labeling bottles of beverage charged with carbonic acid gas is not dangerous as a matter of law, through their likelihood to explode while being handled.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 284.*]

Appeal from Common Pleas Circuit Court of Charleston County; C. G. Dantzler, Judge.

Action by James M. S. Herbert against C. W. Parham. Judgment for plaintiff, and defendant appeals. Reversed.

Huger & Wilbur, for appellant. Nathans & Sinkler, for respondent.

GARY, A. J. This is an action for damages alleged to have been sustained by the plaintiff through the negligence of the defendant. The allegations of the complaint, material to the questions under consideration, are as follows: "That on or about the 10th day of August, 1908, the defendant, C. W. Parham, employed the plaintiff, James M. S. Herbert, a youth of tender years, to wit, 12 years of age, to label the bottles containing the beverage or drink called pepsi-cola and other beverages, which said employment was dangerous, in that, in the event the bottles were defective in construction, they were liable to explode after being charged with the said beverage, which danger was well known to the defendant, but unknown to the plaintiff. That on the 11th day of August, 1908, the first day after entering upon said employment, the defendant, knowing the dangerous character of said employment aforesaid, and knowing the youth and inexperience of said plaintiff, negligently, carelessly, and in disregard of the plaintiff's safety, furnished to the plaintiff to be labeled, in performance of his duties, a bottle defective in construction containing said beverage, which bottle, by reason of its defective construction, was unable to withstand the pressure of the gases with which it was charged, and, while being labeled by the plaintiff, exploded in his hands, and a piece of glass struck this plaintiff in his left eye, injuring the same severely and seriously impairing his vision."

The defendant denied the allegations of negligence, and set up the defense of contributory negligence, in which it was alleged that the plaintiff was injured "through his own misconduct, in willfully striking bottles together, after being warned and cautioned not to do so." At the close of the plaintiff's testimony the defendant made a motion for a nonsuit, on the following grounds: "It is not proved that the defendant was negligent. It is not proved that the bottle was defective in construction, nor that defendant failed to use reasonable care in selecting and furnishing said bottle to the plaintiff. It is not proved that the defendant knew of any defect in construction, or ought to have known of any such defect. It is not proved that defendant failed to give any adequate warning, under the circumstances of the case. But, even if defendant had failed to give a proper warning, it is not proved that that failure was the operating or proximate cause of the injury. It is not proved that the defendant failed in any duty or care. There is no evidence to support the allegations of the complaint." This motion, as also a motion to direct a verdict, and for a new trial, were refused. The jury rendered a verdict in favor

of the plaintiff for \$900, and the plaintiff appealed.

The analysis of the complaint shows that the plaintiff relies upon the following facts to establish negligence on the part of the defendant: (1) That the work of labeling the bottles was inherently dangerous; (2) that the danger, which was known to the defendant, but unknown to the plaintiff, arose from the fact that, if the bottles were defective, they were liable to explode after being charged; (3) that the defendant, with knowledge of the plaintiff's inexperience, negligently furnished a bottle to be labeled which was defective; but it is not alleged that the defendant had knowledge of the defect.

The first question that will be considered is whether the labeling of the bottles was inherently dangerous. The plaintiff did not introduce any testimony tending to prove that there was danger, other than that arising from the bursting of the bottle, and in his testimony he admitted (which fact we desire to emphasize) that the defendant had warned him against the danger of breaking the bottles by striking them together. He also testified that the defendant showed him how to label the bottles. There is no doubt that the work of labeling bottles charged with pepsi-cola is attended with some danger; but the further question arises whether the danger is such as the law recognizes when the action is based on negligence. In *Minnier v. Sedalia, W. & S. W. R. Co.*, 167 Mo. 112, 66 S. W. 1078, the rule is thus stated: "Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade; and the standard of due care is the conduct of the average prudent man."

It was held in *Brands v. St. Louis Car Co.*, 213 Mo. 698, 112 S. W. 511, 18 L. R. A. (N. S.) 701, that a master is not negligent in failing to warn an employé of the danger of an explosion of an emery wheel, at which he is set to work, where the danger of explosion is so slight as to relieve him of the charge of negligence in furnishing such wheel. The court therein uses this language: "The second proposition is that the defendant, with actual knowledge that emery wheels were liable to explode, was negligent in not warning plaintiff of the danger incident to the working with emery wheels. But, if we are right that there was no negligence on the part of the defendant in using the said straight emery wheel, then in general use, and no testimony that such wheels were so inherently liable to break up as to require defendant to take notice that they were dangerous, it cannot be said, we think, that the defendant had actual knowledge that such wheels were inherently dangerous. The plain-

tiff's own testimony demonstrates that he was directed how to work this machine, and it is not pretended that the wheel broke on account of any misuse of the same by plaintiff; and hence the fact that plaintiff was not told that emery wheels did not explode or break in some instances in no wise contributed to cause this particular one to break or explode. The mere failure to inform plaintiff that emery wheels will explode at times had nothing to do with causing this emery wheel to explode, and, had he been told that emery wheels at long intervals had been known to explode, it could not in any manner have lessened the likelihood of explosion, in this case."

In the case of *Melchert v. Smith Brewing Co.*, 140 Pa. 448, 21 Atl. 755, which was an action for personal injuries, it appeared that the plaintiff, while at work in the defendant's brewery, transferring bottled ale from shelves into boxes, was injured by the breaking of a bottle, and it was held that the court properly refused to submit the defendant's negligence to the jury. The court used this language in that case: "The plaintiff sought to establish negligence by the defendant upon the theory that the plaintiff was put to work involving latent dangers, and it was the defendant's duty to give the plaintiff warning of the danger. The difficulty with this part of the case is, if anything, more serious than the part we have been considering. It certainly cannot be said that a service of merely removing bottles containing ale from shelves to boxes is a dangerous service in itself. In the ordinary case in which this duty is held to arise, as *Rummel v. Dilworth*, etc., Co., 131 Pa. 509, 19 Atl. 345, 346, 17 Am. St. Rep. 827, the employment of young and inexperienced persons to work amidst dangerous machinery is the subject of consideration, and in rare instances, as that was, it is held that such a duty is imposed upon the employer. But that case is in no sense applicable to the facts of this case. Here the service was of the most simple and apparently harmless character, and the attempt to prove that there was in point of fact a latent danger was altogether unsuccessful. * * * This kind of liability is a very refined one, at best, and the essential fact of the existence of the alleged latent danger as the source of a consequent duty as to information must necessarily be clearly established, before any charge of negligence in that respect can be sustained."

These views are in accord with our own cases of *Hicks v. Sumter Mills*, 39 S. C. 39, 17 S. E. 509; *Gentry v. Railway*, 66 S. C. 256, 44 S. E. 728; *Edgens v. Manufacturing Co.*, 69 S. C. 529, 48 S. E. 538; *Green v. Railway*, 72 S. C. 398, 52 S. E. 45; *Green v. Power Co.*, 75 S. C. 102, 55 S. E. 125. Having reached the conclusion that the labeling of the bot-

tles was not dangerous in the eyes of the law, it was error to refuse the motion for nonsuit.

It is the judgment of this court that the judgment of the circuit court be reversed.

(86 S. C. 309)

WHISONANT v. ATLANTA & CHARLOTTE AIR LINE RY. CO.

(Supreme Court of South Carolina. July 13, 1910.)

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—QUESTIONS FOR JURY.

Where there was no direct and positive testimony tending to sustain the allegations of negligence of a master, but there were facts and circumstances from which the jury might properly draw inferences in favor of some of the acts of negligence specified, there was no error in refusing motion for nonsuit.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1001; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 182*)—INJURIES TO SERVANT—FELLOW SERVANTS.

Const. art. 9, § 15, providing that, every employé of any railroad corporation shall have the same rights and remedies for any injury suffered by him, from the acts or omissions of said corporations or its employes, allowed by law to persons not employes, when the injury results from the negligence of a superior agent or officer or of a person having a right to control or direct the services of the party injured, applies to a servant working as an assistant car repairer and workman about the yards and tracks of a railroad company, while working underneath a defective and overloaded car, under the directions of one in charge of the repairs.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 372; Dec. Dig. § 182.*]

3. MASTER AND SERVANT (§§ 288, 289*)—INJURIES TO SERVANT—QUESTIONS FOR JURY.

Where, in an action by a servant for personal injuries, the facts were susceptible of more than one inference as to contributory negligence and assumption of risk, the case presents questions for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1068, 1089; Dec. Dig. §§ 288, 289.*]

4. MASTER AND SERVANT (§ 217*)—ASSUMPTION OF RISK—KNOWLEDGE.

Const. art. 9, § 15, providing that knowledge by an employé injured by defective machinery, ways, or appliances, "shall be no defense" to an action for injury caused thereby, means that the action shall not be defeated by reason of the servant's knowledge, and it is not ground for nonsuit that the plaintiff operated voluntarily a defective appliance, after knowledge of its unsafe character.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 583; Dec. Dig. § 217.*]

Appeal from Common Pleas Circuit Court of Cherokee County; J. W. De Vose, Judge.

Action by Sallie L. Whisonant, as Administratrix, against the Atlanta & Charlotte Air Line Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Sanders & De Pass, for appellant. N. W. Hardin and G. W. Speer, for respondent.

GARY, A. J. This is an action for damages alleged to have been sustained on account of the wrongful acts of the defendant, in causing the death of plaintiff's intestate.

The allegations of the complaint, material to the questions involved are as follows: "That on said ——— day of January, 1907, and before, plaintiff's said intestate was employed by said lessee company in and about the yard and tracks of the defendant company at Blacksburg, S. C., as an assistant car repairer and workman, and was on said date by the wrongful acts, neglect, and default, by the negligent, careless, wanton, and willful conduct and acts of the servants and employees of the defendant and defendant's lessee, injured so that he died on the ——— day of January, 1907, the wrongful acts, neglect, and default, negligence, and willfulness being that on the said date a very heavy and large gondola car, which had been disabled and injured seriously in a wreck on said road, in a collision near Broad River bridge, which was left in its broken, defective, and overloaded condition on the side tracks at Blacksburg, so badly overloaded and out of repair that it was dangerous to repair the same with the tools and appliances in the hands of plaintiff's intestate, who was ordered to repair same, but declined to do so on account of its condition, and because he was not supplied with jacks and other tools large enough to do the repairs in safety and with due care, whereupon a foreman was sent from the shops of said lessee at Spencer, N. C., with jacks and tools that were represented to be sound and sufficient to do the work with safety; that said foreman and 'boss' proceeded to repair the said defective and overloaded car as foreman, by constructing a foundation on insecure grounds, defective material, and with incompetent cormen, and attempted to jack up said car, for the purpose of making said repairs with jacks that, under the circumstances, with the material used, were too light for the work to be done; that when said gondola car was jacked up for repairs, plaintiff's intestate was ordered under said car to make the repairs, and while he was under the car at work, on account of the defective and insecure foundation, defective and improper material used in jacking up said car, weak and defective jacks, and incompetent servants who were helping in the work, the said foundation, material, and jacks suddenly and unexpectedly gave way, the gondola car fell upon plaintiff's intestate, and his skull was crushed between parts of the car, and was otherwise injured, from which he died, all of which was due to the negligent and willful conduct of the servants in charge of said work.

The specific acts of negligence herein alleged are: (a) Insecure foundation; (b) defective material in foundation, and jacking up the injured car; (c) weak, defective, and inefficient jacks; (d) incompetent servants;

and (e) an unsafe place to work." The defendant denied all the allegations of the complaint, except the corporate existence of the defendant, and set up the defenses of assumption of risk, contributory negligence, and negligence of a fellow servant.

At the conclusion of plaintiff's testimony, the defendant moved for a nonsuit on the following grounds: "First, that there is a total failure under the evidence to show any negligence, as alleged in the complaint; second, that if there is any evidence of negligence the evidence is that Mr. Whisonant's negligence combined with it as a proximate cause, and that he was guilty of contributory negligence; third, that if there was any negligence it was the negligence of a fellow servant in the same department of labor, and that Whisonant assumed the risk of that; fourth, that his injuries were caused by one of the dangers incident to his employment which was assumed by the deceased."

This motion was refused, and at the conclusion of the entire testimony, the defendant made a motion to direct a verdict on the same grounds, on which it had made a motion for a nonsuit. This motion was refused. The jury rendered a verdict in favor of the plaintiff for \$2,500, and the defendant appealed.

The first question that will be considered is whether there was error on the part of his honor, the presiding judge, in refusing the motion for nonsuit. While it may be conceded there was no direct and positive testimony tending to sustain the allegations of negligence, still there were facts and circumstances from which the jury might properly have drawn the inference in favor of some of the acts of negligence specified in the complaint. The rule is thus stated in *Railroad v. Partlow*, 14 Rich. Law, 237 (affirmed in *Dantzler v. Cox*, 75 S. C. 334, 55 S. E. 774, *Wertz v. Ry.*, 76 S. C. 388, 57 S. E. 194, and *State v. Rodman*, 68 S. E. 343): "It may be that no one of the facts would, of itself, warrant the inference, and yet, when taken together, they may produce belief, which is the object of all evidence." In 1 Greenl. Ev. § 51a, it is said: "It is not necessary that the evidence should bear directly upon the issue. It is admissible if it tends to prove the issue, or constitutes a link in the chain of proof; although alone, it might not justify a verdict in accordance with it. All the circumstances mentioned in this ground may be regarded as links in the chain of proof, from which the jury might deduce the inference of defendants' privity and direction, in the acts of trespass. This is usually the case where an issue depends on circumstantial evidence.

* * *

Without undertaking to state the circumstances in detail, we have reached the conclusion that there was testimony tending to prove that plaintiff's intestate was killed while assisting Hedricks, the foreman or

"boss," to repair the car; that Hedricks was his superior officer at the time, and had the right to direct and control his services; that at the time of the injury, he was performing his duty under the directions and orders of Hedricks, and his death was the direct and proximate result of such orders; that the foundation for the jacks was insecure, and the defendant, through Hedricks, its agent, failed to provide a safe place for Whilsonant to work.

The next question for consideration is whether the nonsuit should have been granted, or the verdict directed for the defendant, on the ground that the injury was caused by the negligence of a fellow servant. In the case of *Hallums v. Ry.*, 82 S. C. 299, 64 S. E. 147, it was held that article 9, § 15, of the Constitution, providing that "every employé of any railroad corporation, shall have the same rights and remedies, for any injury suffered by him, from the acts or omissions of said corporations or its employés, allowed by law to persons not employés, when the injury results from the negligence of a superior agent or officer or of a person having a right to control or direct the services of the party injured," applies to a section hand in the employment of a railroad corporation. It is the duty of the section hands to keep the track in proper repair, and free from obstacles that might endanger the safety of the trains passing over it; such, for instance, as the wreckage arising from the giving way of a defective car. And, it was the duty of Hedricks, and those whose services he had the right to control and direct, to repair the car, in order that it might be operated safely over the track. One of the risks of operating a defective car is not only to endanger the lives of the employés and the traveling public, but to injure the track itself. We are therefore unable to discover any difference in principle between this case and that of *Hallums v. Ry.*, 82 S. C. 299, 64 S. E. 147, and the reasoning therein is, in all respects, applicable to the case under consideration. See, also, *Rippy v. Ry.*, 80 S. C. 539, 61 S. E. 976, 1010, 21 L. R. A. (N. S.) 601, and note to *Dunn v. Ry.*, 8 Am. & Eng. Ann. Cas. 232.

The last question to be considered is whether there was error in refusing to grant the nonsuits, or direct a verdict in favor of the defendant, on the grounds that the injury was caused by contributory negligence on the part of the plaintiff, or that the risk was one which he assumed. The facts were susceptible of more than one inference, and therefore presented a question for the jury. *Youngblood v. Ry.*, 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824. But in the last-mentioned case, another reason is assigned why the said defenses could not defeat the plaintiff's right of recovery.

"Section 15, art. 9, of the Constitution,

sets at rest any doubts that might be entertained on this question. It provides that 'knowledge by an employé injured of the defective or unsafe character or condition of any machinery, ways, or appliances, shall be no defense to an action for injury caused thereby, except as to the conductors or engineers, in charge of dangerous or unsafe cars or engines, voluntarily operated by them.' In other words, where an employé is injured while voluntarily operating machinery, after knowledge of its unsafe condition, his action for injury caused thereby shall not be defeated by reason of this fact. The word 'defense,' is not used in its technical sense. The words, 'shall be no defense to an action,' are to be understood as meaning, 'shall not defeat an action.' The Constitution did not intend to deal with pleadings, but with a principle of law. It did not intend that a defendant, on a motion for nonsuit, should get the benefit of a state of facts, which the Constitution declared should be no defense of the action. The object of this provision was to take from a defendant that failed to furnish suitable machinery the right to defeat an action by the employé, by showing that he did not act with due care in voluntarily operating the machinery, after knowledge of its defective condition. The only ground of the motion for nonsuit was the fact that the plaintiff operated voluntarily the defective appliances, after knowledge of their unsafe character, which we have shown could not defeat the plaintiff's action."

The foregoing disposes of all questions argued by the appellant's attorneys.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(36 S. C. 297)

STATE v. VAN BUREN.

(Supreme Court of South Carolina. July 13, 1910.)

1. CRIMINAL LAW (§§ 198, 369*) — FORMER JEOPARDY—ACQUITTAL—EVIDENCE.

Acquittal under an indictment for practicing medicine without a license on two specified dates by prescribing for unnamed persons does not bar a subsequent indictment for unlawful practice by prescribing for and treating a specified person on a specified day between such dates, since, because the first indictment failed to specify the places of the offenses and the names of the patients, it was necessary under it to prove the dates as alleged, but evidence of offenses on those dates is inadmissible under the second indictment.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 385; Dec. Dig. §§ 198, 369.*]

2. CRIMINAL LAW (§ 196*)—FORMER JEOPARDY.

A test whether two indictments charge the same offense, as affecting a plea of former jeopardy, is whether the evidence necessary to support the second indictment would have sustained a conviction under the first.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 384; Dec. Dig. § 196.*]

Appeal from General Sessions Circuit Court of Richland County; G. E. Prince, Judge.

H. Van Buren was indicted for practicing medicine without a license, and the State appeals from a judgment sustaining a plea of former acquittal. Reversed.

Wade Hampton Cobb, Sol., for the State.
James S. Verner, for the respondent.

WOODS, J. The defendant was indicted for practicing medicine without the license required by statute. The circuit court, without submitting the issue to the jury, sustained the plea of former jeopardy and acquittal, and the state appeals.

The portion of the first indictment material to the issue was: " * * * The jurors of and for the county aforesaid, in the state aforesaid, upon their oath present: That H. Van Buren, * * * on the fifth day of November, in the year of our Lord one thousand nine hundred and eight, * * * did practice medicine, in that he, the said Van Buren, did prescribe for the physical ailment of another. * * * And * * * that H. Van Buren, on the tenth day of October, in the year of our Lord one thousand nine hundred and eight, * * * did practice medicine, in that he, the said Van Buren, did prescribe for a physical ailment of another. * * * " On this indictment the defendant was tried and acquitted. The second indictment charged: " * * * The jurors of and for the county aforesaid, in the state aforesaid, upon their oath present that H. Van Buren, * * * on the 28th day of October, in the year of our Lord one thousand nine hundred and eight, * * * did unlawfully practice medicine by prescribing for the physical ailments of Mary Crim and by treating the physical ailments of the said Mary Crim. * * * " The statute contemplates that every violation of its provisions shall be a separate offense. The question is whether it appeared from the face of the indictment that the offenses charged were the same, so that an acquittal under the first indictment would be a bar to a trial under the second.

It will be observed that the charge in the first indictment is entirely indefinite, except as to the time. No person or place is mentioned, and no circumstances or particular description, except the dates of the alleged offenses. For this reason the time mentioned was a material part of the description of the offense, and it was necessary to prove the dates as alleged. The court says, in *State v. Reynolds*, 48 S. C. 384, 26 S. E. 679: "It is well settled that it is not necessary to prove the precise day, or even year, laid in the indictment, except where time enters into the nature of the offense, or is made part of the description of it. *State v. Anderson*, 3 Rich. Law, 176; *State v. Porter*, 10 Rich. Law,

148; *State v. Branham*, 13 S. C. 392." The state, therefore, on the trial under this indictment, was limited in its proof to showing that the defendant practiced medicine without a license on the 10th day of October, 1908, and the 5th of November, 1908. This being so, it seems perfectly clear that the defendant was never tried and was never acquitted of any charge except that of practicing medicine without a license on the days named. Whether he had practiced medicine on other days in violation of the statute, not being a question in issue, could not have been decided. The test laid down as useful and generally adequate, though not infallible, by which it may be decided whether two indictments charge the same offense, is: "Would the evidence necessary to support the second indictment have been sufficient to procure a legal conviction upon the first?" *State v. Glasgow*, Dud. 42; *State v. Thurston*, 2 McM. 395; *State v. Switzer*, 65 S. C. 187, 43 S. E. 513; *State v. Dewees*, 76 S. C. 72, 56 S. E. 674.

Apply this test. Obviously evidence necessary to support the second indictment, charging the practice of medicine without a license by prescribing for the physical ailments of Mary Crim on the 28th day of October, 1908, could have been introduced which would have been entirely insufficient to produce conviction upon the first indictment; for no evidence would have supported the first indictment except evidence of practicing medicine on the days therein named, while the evidence necessary to support the second indictment could well have been of practicing medicine by prescribing for Mary Crim on other days than those to which the first indictment was confined. The circuit court, therefore, erred in laying down as a legal inference that the second indictment necessarily charged the same offense as the first. On the trial upon the second indictment no evidence of practicing medicine without a license on the days named in the first indictment will be admissible, because the defendant has already been tried for those alleged offenses and acquitted; but he has not been tried for a like offense committed at any other time, and therefore the first trial and acquittal is ineffectual as a plea against the charge alleged in the second indictment to have been committed at a different time. This conclusion is in accord with the principle laid down in the cases in this state above cited, and the precise point has been so decided by other courts of high authority. *State v. Blanut*, 48 Ark. 34, 2 S. W. 190; *Commonwealth v. Hanley*, 140 Mass. 457, 5 N. E. 468; *People v. Gault*, 104 Mich. 575, 62 N. W. 724; 12 Cyc. 281.

The judgment of this court is that the judgment of the circuit court be reversed.

A. No; they have a block and they take them on that block, and ship them out; it is the standard thing. Q. But the only difference was the equipment of the lenses and shutters and the rheostat? A. Yes, sir."

The jury rendered a verdict in favor of the plaintiff for \$73, and the defendant appealed.

The first exception is as follows: "That his honor erred in allowing W. P. Dowling, the plaintiff, to testify over the objection of the defendant, as to the contents of an alleged lost letter, written subsequent to the alleged contract, to establish the existence of the contract sued upon. Whereas, it is respectfully submitted, that under the provisions of the statute of frauds, his honor should have held that the letter should have been produced, and that secondary evidence of its contents was not admissible to establish the existence and the production of a written memorandum of the sale, made at the time."

This exception cannot be sustained for the following reasons: (1) Oral evidence as to the contents of the letter was admitted without objection. (2) When plaintiff offered to introduce a copy of the letter in evidence, the defendant did not specify the grounds, but merely interposed a general objection. This was not sufficient. *Allen v. Cooley*, 53 S. C. 77, 30 S. E. 721. (3) There was other testimony introduced without objection, sustaining the allegations of the complaint. (4) The answer of the defendant not only failed to deny, but admitted, the contract. "Having acknowledged the agreement, the court considers it such an assent in writing, as overrules his plea of the statute of frauds." *Smith v. Brallsford*, 1 Desaus. 350.

The second exception was withdrawn. The remaining exceptions will be considered together and are as follows: Third. "That his honor erred in refusing to charge the jury the fourth request of the defendant, to wit: 'The jury is instructed that in order to recover any damages for an alleged breach of contract, the plaintiff must establish by the preponderance of the evidence, if the contract be for the sale and delivery of goods, wares, and merchandise for the price of \$50 and upwards, that the said contract was in writing, or that the buyer received part of the goods so sold, or paid something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain was made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.'" Fourth. "His honor erred in refusing to charge the seventh request of the defendant, to wit: 'The jury is instructed that the mere fact that goods are not, at the time of making the contract, in the condition in which they are to be delivered does not take the case out of the statute, and that if the bargain be to deliver certain goods of a certain description at a future time, and they are not existing at the time of the contract, but the seller does not stipulate to manufacture

them himself, or a particular person to do so, the contract is within the statute.'"

In regard to the request mentioned in the third of these exceptions, his honor, the presiding judge, said: "I refuse to charge you that, gentlemen, in this particular case, because I have virtually covered, in my own language, the law in regard to the statute of frauds here, which I conceive to be applicable to this case." He refused the other request without comment. In his general charge the presiding judge instructed the jury as follows:

"Now for the purposes of this case, I charge you, that in order to enter into a valid contract for the purchase of goods, over or above the value of fifty dollars (\$50), that the contract is required by law to be in writing. * * * Now I charge you further that where the goods to be delivered are to be manufactured, and that is a part of the contract, that the goods are to be manufactured and then delivered, that would take it out of the statute of frauds, and the party would be entitled to recover under a contract of that sort. * * * So I charge you that if the machine, described in this complaint here, was to be manufactured or any extensive part of it was to be manufactured, out of the ordinary run of machines of that class, if the amount of work to be done on it was an important item in the case, I charge you that such a contract as that would not have to be in writing; but if there was just a slight change to be made in it, it didn't have to be manufactured, such a slight change to be in the way of work and labor that it would not make an item in the cost of the machine, why, under those circumstances, a contract of that sort would have to be in writing. Now you understand, Mr. Foreman, that where the goods are to be manufactured, where there is to be work and labor performed on them, to such an extent as to cause that labor and work to enter considerably into the cost and price of the goods or the machine, if that was the contract, it would not have to be in writing, if the goods or the articles didn't have to be manufactured, and yet there might be still a little work or labor to be performed, or a little change to be made, which would not enter into the cost of the articles, then a contract of that sort, would have to be in writing."

The ruling of the circuit judge is sustained by the case of *Bird v. Muhlinbrink*, 1 Rich. Law, 199, 44 Am. Dec. 247, in which it was held that the fourteenth section of the statute of frauds extends to contracts executory, as well as to contracts executed, for the sale of goods above the value of \$50, which exist in solido at the time of the contract. But if the contract is for the sale of goods in futuro, which are not in existence at the time, and for work and labor to be bestowed upon them by the vendor, or procured at his expense, so as to make the work and labor the essential consideration of the contract, it is not

within the statute of frauds. Also, by the case of *Gadsden v. Lance*, McMul. Eq. 87, 37 Am. Dec. 548, in which it is said that "It is now the settled rule that when the goods contracted for exist in solido, and are capable of delivery at the time, it is within the statute; but where they are to be made, or something is to be done, to put them in a condition to be delivered, according to the terms of the contract, it is not within the statute."

It is the judgment of this court that the judgment of the circuit court be affirmed.

(86 S. C. 220)

STATE v. BOYER.

(Supreme Court of South Carolina. July 7, 1910.)

1. CHATTEL MORTGAGES (§ 232*)—UNLAWFUL DISPOSITION OF PROPERTY—EVIDENCE—CONFORMITY TO INDICTMENT.

Evidence of a chattel mortgage signed by defendant, and another individually by a company and by defendant as manager, and another mortgage signed by the company and by defendant individually and as treasurer, both mortgages being given to secure the company's notes, was proper under an indictment for disposing of property covered by chattel mortgages, executed by defendant.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 487; Dec. Dig. § 232.*]

2. CHATTEL MORTGAGES (§ 234*)—UNLAWFUL DISPOSITION OF PROPERTY—INSTRUCTIONS.

In a trial for disposing of mortgaged products an instruction that accused was guilty if he disposed of the products with intent to defeat the lien, without the mortgagee bank's consent, and failed to deposit the proceeds, was not improper as conflicting with provisions of the mortgages that on sales with drafts and bills of lading attached the drafts should be handled by the bank with permission to apply the proceeds to the debt, and that the mortgagor might remain in possession, until default or attempt to dispose of the property.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 495; Dec. Dig. § 234.*]

3. CHATTEL MORTGAGES (§ 232*)—UNLAWFUL DISPOSITION OF PROPERTY.

In a trial for disposing of products covered by two chattel mortgages, acquittal was not warranted by want of proof of unlawful disposition under one of the mortgages, where there was evidence tending to show unlawful disposition under the other.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 487; Dec. Dig. § 232.*]

4. CHATTEL MORTGAGES (§ 234*)—UNLAWFUL DISPOSITION OF PROPERTY—EVIDENCE.

Under the evidence in a trial for disposing of mortgaged products, held proper to refuse to direct an acquittal.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 495; Dec. Dig. § 234.*]

5. CHATTEL MORTGAGES (§ 230*)—"UNLAWFUL DISPOSITION OF MORTGAGED GOODS"—PROOF REQUIRED.

To constitute an unlawful disposition of mortgaged goods, they need not be taken beyond the state, nor with intent to defeat the lien, disposal with notice of the lien without the lienor's written consent and without payment or deposit as required by statute being sufficient.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 489; Dec. Dig. § 230.*]

6. CHATTEL MORTGAGES (§ 233*)—UNLAWFUL DISPOSITION OF PROPERTY—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction of unlawfully disposing of mortgaged cotton products.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 494; Dec. Dig. § 233.*]

Appeal from Common Pleas Circuit Court of Lee County; T. S. Sease, Judge.

J. R. C. Boyer was convicted of disposing of property under lien, and he appeals. Affirmed.

Frank G. Tompkins, for appellant. Solicitor P. H. Stoll and J. B. McLaughlin, for the State.

JONES, C. J. The defendant was convicted and sentenced under an indictment for disposing of property under lien in violation of section 337 of the Criminal Code. The indictment describes the lien covering the property as "certain chattel mortgages in favor of the Bank of Bishopville and the Farmer's Loan & Trust Company, corporations duly chartered by law, made and duly executed by J. R. C. Boyer to secure the payment of \$5,000."

In support of this allegation the court, over objection, permitted the state, after proof of execution, to offer in evidence a chattel mortgage dated October 21, 1908, executed by W. Newton Smith, individually, and Bishopville Oil Mill Company, J. R. C. Boyer, individually, J. R. C. Boyer, manager, to the Bank of Bishopville to secure the payment of a note of the Bishopville Oil Mill for \$4,000, payable January 1, 1909, on all the cotton seed now on hand and hereafter purchased, or otherwise acquired during the season of 1908-1909, and also all the products of every kind and description manufactured therefrom; also another chattel mortgage dated November 7, 1908, executed by Bishopville Oil Mill, J. R. C. Boyer, treasurer, and J. R. C. Boyer, individually, to the Farmers' Loan & Trust Company to secure a note of the Bishopville Oil Mill for \$1,000, payable January 1, 1909, on "60 tons of good merchantable cotton seed now stored in our seedhouse in Bishopville."

Exception is taken to the admission of these mortgages in evidence on the ground that they were not the same as charged in the indictment. This exception was not pressed in argument, and cannot be sustained, as the testimony was responsive to the indictment.

The second exception alleges error in the following portion of the charge: "Still, if the defendant, however, disposed of the products of that mill in such way and in such manner that the jury is convinced that he did it with the intention to defeat the proposed lien, then, if he failed to have the written consent of the bank, and failed to deposit the amount here within 10 days, then he would be guilty under the law." The er-

ror assigned is "that said charge is in conflict with the terms of the mortgage which gave the defendant the right to sell or dispose of the products of the mill, and his honor, the presiding judge, should have charged that the said mortgage, covering the products proved to have been shipped by the defendant, gave written consent for him to sell and dispose of the said products; the construction of said mortgage being a matter of law for the court, and not a matter of fact for the jury."

The mortgage, dated October 21, 1908, contains this stipulation: "It is agreed that whenever any of said manufactured products are sold or disposed of, subject to drafts with bills of lading attached, said drafts shall be deposited with and handled by the mortgagee, and so much of said proceeds as may be necessary to pay said note may be applied to the payment of the same, as may be determined by said bank, without any additional agreement or further consent on the part of mortgagors." No other stipulation appears which might be construed as a written consent to sell or dispose of the mortgaged property, but this applies only to sales with drafts and bills of lading attached, and it is not contended that in this case the sale or disposal was made in such manner.

The mortgage of November 7, 1908, does not contain the provision last above quoted. Both mortgages, however, contain a provision: "That said mortgagor may retain possession of said goods and chattels until default be made in the payment of the said note, but if the same is not paid when due, or if before the said note is due, the said mortgagor shall attempt to make way with or remove said goods and chattels, or any part thereof, from the place where they now are, or abuse or not properly care for said property, then, and in either event, the said mortgagee, or its agent, shall have the right, without suit or process, to take possession of the said goods and chattels, wherever they may be found, and may sell the same, etc." Hence it is manifest this exception cannot be sustained.

The third exception is as follows: 8. In that his honor, the presiding judge, refused to charge defendant's first request; the evidence of Mr. Scarborough and the defendant showing that they construed the mortgage to give the defendant the right to sell and dispose of the property so sold or disposed, and there being no other evidence showing the sale or the disposal of the cotton seed covered by the mortgage to the Farmers' Loan & Trust Company, the jury should have been instructed to bring in a verdict of "not guilty."

The first request was in these words: "1. The jury is instructed that under the testimony submitted by the plaintiff, consisting of the four thousand (\$4,000) dollar mortgage given by the Bishopville Oil Mill and J. R. C. Boyer to the Bank of Bishopville, and the evidence of Mr. Scarborough, cashier of said

bank, the contract embodied in the mortgage and explained by him shows that it was not the purpose of said mortgagor or said contract to prevent a sale or disposal of the products of the said mill in the regular course of business, and no testimony having been submitted showing a sale or disposal of the seed covered by the mortgage of the Loan & Trust Company, the jury is instructed to bring in a verdict of not guilty." For the purpose of this exception it may be conceded that there was no testimony that the cotton seed or products thereof, covered by the mortgage to the Farmers' Loan & Trust Company were sold or disposed of contrary to statute, but as there was some testimony of a disposal by defendant of the property covered by the mortgage of the Bank of Bishopville, contrary to the provisions of the statute, it was proper to refuse to direct a verdict of acquittal.

The testimony of Mr. Scarborough who was cashier of the Bank of Bishopville on this point was as follows: "Q. Now, Mr. Scarborough, at the time you took this mortgage, did you intend that the Bishopville Oil Mill should sell these products after they were manufactured? A. Yes, sir. Q. Or did you propose that they should keep them until you got ready to foreclose that mortgage? A. We had no objection to disposing of the property. Q. To sell these products, did you require a part of the money paid on those products, a proportionate amount as they got it in? A. Yes, sir. Q. And that was the understanding of the contract expressed in this mortgage that they drew on people for money; they must draw on them through your bank, and you reserved the right to keep as much as you thought fair and apply it to their debt? A. Yes, sir. Q. And you did not have any objection to their making a small sale or shipment when they did not draw with bill of lading attached? A. We had no objection, if it was not a very large amount. Q. You had no objection to selling a reasonable amount? A. Yes, sir."

The testimony of defendant Boyer on this point was as follows: "Q. What had been the custom between you and Mr. Scarborough as to your selling products of the mill other than oil? A. They had no objection to us selling anything at all. We sold meal and hulls, and oil stuff right along. Q. Did he require you to return the money to him for those sales? A. Yes, sir; we deposited the drafts; when we made drafts we deposited them in his bank. Q. And when the draft came back what was done with the money? A. He took out what money he thought was right in his judgment to take out and apply to the mortgage, and left us to take the balance and operate with. * * * Q. And you were selling right along the meal and hulls to the farmers here? A. Yes, sir. Q. And was expected to turn that over to the bank, and make your payments, was what they thought necessary? A. Yes, sir."

* * * Q. This contract between you and Mr. Scarborough, was that construed by you all or understanding to give you written permission to dispose of the products? A. Yes, sir; most certainly. We did not go to him every time we wanted to make a sale. Q. This mortgage gave you the right? A. Yes, sir; that was the understanding at the time, and I think he so understood it."

The foregoing testimony was not sufficient to authorize direction of verdict. The testimony upon which the state relied was to the effect that about the 1st of December, 1908, the defendant shipped from the Bishopville Oil Mill at Bishopville, Lee county, S. C., to Cross Hill Mill at Cross Hill, Laurens county, S. C., in two car load shipments, 600 sacks of cotton seed meal, worth \$1.25 per sack, and 20 tons of hulls, worth \$5 per ton, that said property was subject to the lien of the mortgage to the Bank of Bishopville, that the property was disposed of without the written consent of the mortgagee, and defendant failed to pay the debt secured by the mortgage within 10 days after said disposal, and failed to deposit the amount of the debt with the clerk of court of common pleas. There was testimony that practically the same persons were stockholders of both mills, although each was incorporated, and that defendant Boyer was treasurer of both mills and manager of the Bishopville mill. The defendant testified that the meal and hulls were consigned to the Cross Hill Mill to be used by that mill in its business, and the money to be paid to the Bishopville Mill, that no price was fixed and no time was fixed for payment, and that no charge was made therefor on the books of the Bishopville Mill, and no bill of lading with draft was issued, as it was shipped out on consignment.

It further appeared that the Baileys of Clinton, S. C., had a mortgage on similar property of the Cross Hill Mill, and when the meal and hulls from the Bishopville Mill entered the Cross Hill Mill the Baileys claimed that the property became subject to their mortgage, and declined to permit its reshipment to the Bishopville Mill. Notwithstanding instructions from the Bank of Bishopville to have the meal and hulls sent back to the Bishopville Mill, the defendant Boyer refused to carry out the instruction, giving as his reason for not doing so that he had got into trouble for shipping the property from the Bishopville Mill and did not care to get into further trouble. The result was that the property was never returned to the Bishopville Mill and was never paid for by the Cross Hill Mill, although disposed of by that mill, and the lien thereon defeated.

The fourth, sixth, and seventh exceptions allege error in refusing to charge that if the goods were not sold, the removal, in order to constitute a disposal, must be without

the state, with the purpose or necessary effect of defeating the lien. The court committed no error. As this case does not require a consideration of the effect of a removal of property under lien beyond the limits of the state, we need not refer to the cases of *State v. Rice*, 43 S. C. 200, 20 S. E. 986, and *State v. Haynes*, 74 S. C. 450, 55 S. E. 118. The case presented here is a disposition of property under a lien within the state. It was not essential for the state to show that the property was disposed of with intent to defeat the lien. *State v. Reeder*, 36 S. C. 497, 15 S. E. 544. It is sufficient to show that the property under lien was sold or disposed of by one with notice of the lien, without the written consent of the lienor, and without payment or deposit as required by the statute. Nor is the case as made by the state a mere removal of the property under lien from one county to another, which might be done under circumstances not affecting the lien and might not be in violation of the statute (*Whaley v. Lawton*, 57 S. C. 264, 35 S. E. 558), but testimony was offered from which a jury might infer a sale or disposition in violation of the statute.

Appellant declines to argue the fifth exception.

The judgment of the circuit court is affirmed.

(36 S. C. 280)

TOWN OF BRANCHVILLE v. FELDER.

(Supreme Court of South Carolina. July 18, 1910.)

1. CRIMINAL LAW (§ 216*)—PRELIMINARY WARRANT—NECESSITY.

Where there is nothing to indicate that the offense was committed in the presence of the officer who made the arrest, or that there were such circumstances of emergency as to justify an arrest without a warrant, defendant was entitled to demand that a warrant be issued before trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 435-438; Dec. Dig. § 216.*]

2. CRIMINAL LAW (§ 238*)—PRELIMINARY EXAMINATION—STATEMENTS OF WITNESS—SIGNATURE.

Defendant may waive the requirement of the statute that witnesses should sign their statements.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 489-491; Dec. Dig. § 238.*]

3. JURY (§ 25*)—DEMAND—TIME.

Demand for jury not made until the court has entered on the trial and taken part of the testimony is too late.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 156; Dec. Dig. § 25.*]

Appeal from Common Pleas Circuit Court of Orangeburg County; G. W. Gage, Judge.

Warren Felder was convicted of selling liquor in violation of ordinance and appeals. Reversed.

John J. Jones, for appellant. Solicitor Hildebrand, for respondent.

WOODS, J. The defendant was convicted before the mayor's court of the town of Branchville of the offense of selling liquor in violation of the town ordinance. The appeal is from an order of the circuit court affirming the judgment of the mayor's court.

At the call of the case in the mayor's court defendant's counsel demanded that a warrant be issued before trial. The demand was refused. There is nothing in the record to indicate that the offense was committed in the presence of the officer who made the arrest, or that there were such circumstances of emergency as to justify the officer in arresting without a warrant. This being so, the defendant was entitled to demand that a warrant be issued before his trial. *State v. Sims*, 16 S. C. 486; *Percival v. Bailey*, 70 S. C. 72, 49 S. E. 7; *State v. Byrd*, 72 S. C. 104, 51 S. E. 342. The exception on this point must be sustained.

It appears from the report of the mayor that the defendant expressly waived the requirement of the statute that the witnesses should sign their statements, and that the defendant's demand for a jury trial was not made until the court had entered on the trial and taken a part of the testimony. Hence the exceptions on these points must be overruled.

The judgment of this court is that the judgment of the circuit court be reversed.

(86 S. C. 341)

HOTTAL v. EKART et al.

(Supreme Court of South Carolina. July 18, 1910.)

CONVERSION (§ 7*)—PROCEEDS OF SALE—PERSONALTY.

The proceeds of lands sold for partition become personalty upon distribution under an order of the court, and in the absence of any statute directing otherwise, this rule is applicable when distribution is made to the guardian of an infant, though a different rule may prevail where the court retains control of the fund.

[Ed. Note.—For other cases, see *Conversion*, Cent. Dig. §§ 13-15; Dec. Dig. § 7.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; Walter H. Hunt, Judge.

Action by J. K. Hottal as administrator of the estate of Mossie M. Ekart, deceased, against Frank Ekart, Addie Pearl Gault, and her guardian, B. K. Wingo. From a judgment of the circuit court affirming a judgment of the probate court in favor of defendant Ekart, defendant Gault and her guardian appeal. Affirmed.

Simpson & Bomar, for appellants. Nicholls & Nicholls, for respondent.

JONES, C. J. This action was begun in the probate court of Spartanburg county for the settlement and distribution of the estate of Mossie M. Ekart, deceased. Defend-

ant Frank Ekart, as surviving husband of Mossie M. Ekart, claimed the entire estate under the laws of North Carolina. Defendant Addie Pearl Gault and her guardian, defendant B. K. Wingo, claimed that the estate was divisible under the laws of South Carolina, and that she, as heir at law of her sister, Mossie M. Ekart, was entitled to one-half of the estate.

This appeal is from the judgment of Hon. Walter H. Hunt, special judge, affirming the judgment of the probate court, holding that the estate was personal property and should be distributed according to the law of North Carolina, and that defendant Frank Ekart, the husband, was entitled to the whole estate, after paying costs of administration and certain debts.

The statute of North Carolina (Revisal 1908, § 4) introduced in evidence is as follows: "Husband, on wife's estate; his interest therein. If any married woman shall die wholly or partially intestate, the surviving husband shall be entitled to administer on her personal estate, and shall hold the same, subject to the claims of her creditors and others having rightful demands against her, to his own use, except as hereinafter provided. If the husband shall die after his wife, but before administering, his executor or administrator or assignee shall receive the personal property of the said wife, as a part of the estate of the husband, subject as aforesaid, and except as provided by law."

Mossie M. Ekart was a minor residing in North Carolina at the time of her death on September 6, 1907, or 1908, intestate, leaving no children, leaving surviving husband, Frank Ekart, and her sister, Addie Pearl Gault, a minor residing in Spartanburg county, S. C. Plaintiff became administrator de bonis non of estate of Mossie M. Ekart in April, 1909; B. K. Wingo became guardian of Mossie M. Ekart and Addie Pearl Gault, and on November 17, 1902, as such, received the proceeds of certain real estate belonging to the estate of their mother, Sarah Ann Gault, in Spartanburg county, which had been sold for partition and division, under an order of Judge Buchanan, dated September 22, 1902, requiring the master to pay the balance of the proceeds of the sale of the land, after charges, commissions, and costs, to the guardian of said Mossie and Addie or to the parties themselves, upon their reaching their majority.

The appeal depends upon the question whether the proceeds of real estate became personalty when paid over to the guardian Wingo under the order of the court. We think the proceeds of lands sold for partition became personalty upon distribution under the order of the court. The purpose of such a proceeding is to change land into money, and when distribution is made in money the distributees hold money, not land. This is undoubtedly true as to adults and, in the

absence of any statute directing otherwise, there is no good reason to have a different rule when distribution is made to the guardian of an infant.

This result was recognized in *Major v. Hunt*, 64 S. C. 102, 41 S. E. 818, where the court said: "If the order of sale had contained a provision that the proceeds of sale when paid into court should be delivered to the infant or her guardian, it might be contended with effect that this would manifest an intention to convert the realty in all events into personalty, and that equity which considers that as done which should have been done would stamp the proceeds with the impress of personalty." A different rule may prevail where the court retains control of the fund. *Ex parte John W. Mobley*, 2 Rich. Eq. 56; *Major v. Hunt*, 64 S. C. 97, 41 S. E. 816.

This fund in the hands of the guardian being personal estate of Mossie M. Ekart, domiciled in North Carolina, upon her death intestate, became the property of her surviving husband, subject to the conditions of the statute.

We do not construe the statute as making the right of the husband to succeed to the wife's personal estate depend upon the husband becoming administrator thereof. He is given the right to administer, but is not compelled to do so. It is sufficient if there be administration by another, as in this case. No decision of the Supreme Court of North Carolina giving a contrary construction was introduced in evidence, or even cited in argument.

The judgment of the circuit court is affirmed.

(36 S. C. 396)

HUTCHISON v. YORK COUNTY et al.

(Supreme Court of South Carolina. July 20, 1910.)

1. INJUNCTION (§ 144*)—TEMPORARY INJUNCTION.

While on the application for a temporary injunction, the case is not tried upon its merits, it is incumbent upon plaintiff to make out a prima facie showing that a temporary injunction is reasonably essential to protect his rights, and a temporary injunction does not follow automatically when a complaint states a cause of action.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 316; Dec. Dig. § 144.*]

2. APPEAL AND ERROR (§ 840*)—REVIEW OF CONSTITUTIONAL QUESTIONS—TEMPORARY INJUNCTION—HEARING.

In proceedings to obtain a temporary injunction where plaintiff's prima facie case depends upon allegations that a statute is unconstitutional, the judge hearing the application must consider that matter in determining the reasonable necessity for a temporary injunction, and the question is one of law with the presumption in favor of the validity of the statute, and in order to reverse the refusal of a temporary injunction in a case where the court has

held the law valid, the constitutional question must be reviewed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3305; Dec. Dig. § 840.*]

3. EMINENT DOMAIN (§ 274*)—RESTRAINING ACTION OF COUNTY AUTHORITIES—CONDEMNATION OF LAND FOR COUNTY ROAD.

Civ. Code 1902, § 1343, and Act Feb. 26, 1902 (23 St. at Large, p. 998), authorize the county board of commissioners to open new public roads or change the location of old ones, where such change would be for the material interests of the traveling public, and authorize them to condemn the land therefor. A complaint, in an action to restrain the county authorities from condemning land for a public highway through plaintiff's plantation, alleged that there already existed a public highway extending through plaintiff's plantation connecting the same communities that are proposed to be connected by the new highway, "which present highway according to the best knowledge, information, and belief of plaintiff, is as convenient and affords as short a route to the traveling public of the neighborhood as would this proposed new road," and plaintiff's amended complaint alleged that "according to her best knowledge and belief, it is entirely practicable to make the said established highway into a highly improved and wholly efficient highway, at very slightly, if any, greater expense to the county than will be required for the opening and establishing of said proposed new highway, and she charges that there is no necessity for such new highway." There was no allegation showing abuse of discretion, bad faith, or oppression, and there was nothing to show that the commissioners did not in good faith consider and determine the matter with a view to the material interests of the general traveling public, nor was there anything to show that the laying out and constructing of the new road would entail irreparable damage to plaintiff's land. *Held*, that the statute confides the matter of determining the necessity for the new road to the judgment and discretion of the commissioners, and an injunction was properly denied.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 753, 765-768; Dec. Dig. § 274.*]

Appeal from Common Pleas Circuit Court of York County; Ernest Moore, Special Judge.

Kate J. Hutchison brought action to restrain York County, Clem F. Gordon as Supervisor, and others, from vacating a public highway through her plantation and from taking land for the purpose of establishing a new and different highway. Injunction refused, and plaintiff appeals. Affirmed.

Wm. J. Cherry, for appellant. W. B. Wilson, Jr., for respondent.

JONES, C. J. The judgment of the circuit court herewith reported, together with the exceptions thereto, should be affirmed for the reasons therein stated.

While the judge hearing the application does not try the case upon its merits, it is incumbent upon plaintiff to make out a prima facie case that temporary injunction is reasonably essential to protect his rights. Temporary injunction does not follow automatically when the complaint states a cause of action. *Northrop v. Simpson*, 69 S. C. 554. 48 S. E. 613; *Marion Company v. Tilghman*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Co., 75 S. C. 221, 55 S. E. 337; Crawford v. Lumber Corporation, 77 S. C. 83, 57 S. E. 670. If plaintiff's prima facie case depends upon allegations that a statute is unconstitutional, the judge hearing the application must consider that matter in determining the reasonable necessity for temporary injunction, and if he holds the statute valid, the necessity is not made to appear. The question is one of law, in which the presumption is in favor of the validity of the statute. In order to reverse the refusal of temporary injunction in such a case, this court must review the constitutional question.

In *Riley v. Union Station Co.*, 67 S. C. 84, 45 S. E. 149, the judge hearing the application for injunction did not consider the constitutional question; hence there was no basis for a review of that matter by this court, but in that case the circuit judge held that there was no prima facie showing that the lands proposed to be condemned were not necessary for the construction of the proposed Union Station, and this court reversed the order of refusal upon the grounds: 1. Because the statute did not furnish an adequate remedy when the right to condemn was in issue. 2. Because the allegations of the fact made a prima facie case showing that injunction was necessary to preserve plaintiff's rights.

In that case there were allegations showing that the taking of the proposed land would prevent plaintiff from further use and occupation of her home, and would destroy an established industry and business thereon, to her irreparable injury, and that the taking of the property was not necessary, but oppressive. After trial upon the merits, *Riley v. Union Station* was again appealed to this court (71 S. C. 482, 51 S. E. 498, 110 Am. St. Rep. 579), and this court held "that the grantee of the power to condemn must not abuse the discretion confided by the Legislature and spoliolate private property by taking for pretended public use more than a reasonable necessity requires. We find no abuse of discretion or bad faith in defendant's proposal to condemn plaintiff's property, and the general rule is that if there be no bad faith or abuse of discretion on the part of the grantee in the matter of location, his discretion will not be interfered with."

From this it appears that in order to prevent a mere quasi public corporation, organized for private gain, authorized by law to condemn land, from proceeding to condemn what it decides to be necessary, it must be shown that there was abuse of discretion or bad faith in the location and selection of property to be condemned. But we are dealing now with a strictly public corporation which seeks merely an easement over plaintiff's land for strictly public use. The danger of oppression or spoliation of private property for gain is very slight, if

any. Hence there is greater reason in this case to require a showing that the public officers are about to abuse their discretion or act in bad faith, or oppressively, in changing the location of the old road.

The statute, section 1343, Civ. Code 1902, as well as Act Feb. 26, 1902 (23 St. at Large, p. 998), authorizes the county board of commissioners to "open new public roads and widen or change the location of old public roads where, in their judgment, such change would be for the material interests of the traveling public. They may obtain the right of way by gift or purchase, or they may condemn the land therefor and assess the compensation and damages therefor as hereinafter provided." The statute thus plainly confides the matter of determining the necessity for the new road or alteration of the old road to the judgment and discretion of the commissioners, and the complaint shows that the commissioners have determined that the proposed change in the old road will be material for the interests of the traveling public.

The original and amended complaint contained this allegation that might be regarded as having some bearing: "That there is at present, and has been for a number of years, a public highway extending through plaintiff's said plantation, connecting the same communities that are proposed to be connected by the said proposed highway, which present highway, according to the best knowledge, information, and belief of plaintiff, is as convenient and affords as short a route to the traveling public of the neighborhood as would this proposed new road." The amended complaint contains this additional allegation: "That, according to her best knowledge and belief, it is entirely practicable to make the said established highway into a highly improved and wholly efficient highway at very slightly, if any, greater expense to the county than will be required for the opening and establishing of said proposed new highway, and she charges that there is no necessity for such new highway."

There is no allegation showing abuse of discretion, bad faith, or oppression. It is greatly in favor of the new road that it may be opened and established at an expense not exceeding what would be necessary to repair and improve the old road, and it may well be inferred that the future cost of maintenance would be greatly in favor of the new road, and it may be that the new road would be safer than the old. Moreover, the commissioners are to consider what is the material interest of the "traveling public," a much broader scope than the "traveling public of the neighborhood," to which the allegation of the complaint is confined. There is nothing to show that the commissioners did not in good faith consider and determine the matter with a view to the material interests of the traveling public, as

required by the statute. Furthermore, there is nothing in the complaint to show that the mere work of laying out and constructing the new road would entail irreparable damage to plaintiff's land, and if, on the trial of the case on its merits, the court should enjoin the new and restore the old road, for all that appears plaintiff would be restored to her alleged rights; the loss of construction, etc., falling upon the county. *Northrop v. Simpson*, 69 S. C. 554, 48 S. E. 613.

The exceptions should be overruled, and the order of the circuit judge affirmed.

(134 Ga. 836)

RAGAN, MALONE & CO. v. TAFF.

(Supreme Court of Georgia. July 15, 1910.)

(*Syllabus by the Court.*)

HOMESTEAD (§§ 170, 175*)—WAIVER—GENERAL WAIVER—EFFECT.

A general waiver of homestead only operates in favor of the specific liability referred to in the waiver or obligation containing the waiver. Such waiver may be stated in the contract of indebtedness, or contemporaneously therewith or subsequently thereto in a separate paper. But a waiver of all homestead rights, in an application for a general line of credit, is not effectual to bar the debtor's right to homestead as against a debt thereafter contracted.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 336; Dec. Dig. §§ 170, 175.*]

Holden, J., dissenting

Error from Superior Court, Bartow County; A. M. Foute, Judge.

In an action against J. C. Taff, Ragan, Malone & Co. sought to intervene. From an order dismissing intervention, they bring error. Affirmed.

The firm of Taff & Conyers were adjudged involuntary bankrupts, and J. C. Taff, a member of the firm, applied in the United States court for the exemption of certain property as a homestead. Certain creditors filed their suit in the superior court of Bartow county, alleging that they were creditors of the bankrupt, that their indebtedness was evidenced by notes containing a waiver of homestead, and that they had not proved their claims in the bankrupt court; and they prayed the appointment of a receiver to take charge of the property of the bankrupt, which he was seeking to have set apart for a homestead, and that the same be sold and the proceeds distributed among the complaining creditors. To this petition Ragan, Malone & Co. filed an intervention, in which they alleged: On March 20, 1907, the firm of Taff & Conyers, of which J. C. Taff was a member, made a statement to them of their financial condition, for the purpose of obtaining credit, which contained the following provision: "In consideration of credit extended and to be extended on the faith of my (or our) solvency as shown by this statement, I (or we) hereby waive and re-

nounce for myself (or ourselves) and family any and all homestead exemption rights under the laws of the United States, or of any state, as against the payment of any indebtedness now owing or hereafter existing in favor of the said Ragan, Malone & Co.; and this waiver shall apply to all property now owned or hereafter acquired by the undersigned." Thereafter, on September 9th, they sold to Taff & Conyers a certain quantity of goods amounting to \$767.60, upon which account, after applying all credits, there was due \$632.12 principal. Prior to the giving of the statement by Taff & Conyers, in the years 1905 and 1906, J. C. Taff had executed to them similar statements upon which they extended him credit. They prayed that they be allowed to intervene and participate in the fund derived from the sale of the goods sought to be exempted by the bankrupt. A demurrer was interposed, on the ground that under the facts alleged J. C. Taff had not waived his right to a homestead in favor of interveners. The court dismissed the intervention, and the interveners excepted.

Paul F. Akin, for plaintiffs in error. J. M. Neel, O. T. Peebles, and Thos. W. & Watt H. Milner, for defendant in error.

EVANS, P. J. (after stating the facts as above). The constitutional and statutory rights of homestead and exemption are intended to reserve to a debtor, for a limited time, the use and enjoyment of a certain amount of his property from the processes of his creditors. It may not be necessary that an applicant for a homestead be a debtor; yet, as the homestead exemption only serves as a barrier against creditors, it is hardly supposable that one who does not owe any debt will ever apply for an exemption or homestead in his property. In making provision for notice to creditors, both the Constitution and statutes contemplate that the applicant is in debt and is seeking protection from his creditors. Under the Constitution of 1868 the debtor could make a special waiver, but was not allowed to defeat his right of homestead by a general waiver. A general waiver was pronounced void, as being opposed to public policy, in *Stafford v. Elliott*, 59 Ga. 837. The Constitution of 1877 (Civ. Code, § 5914) declares that "the debtor shall have power to waive or renounce in writing his right to the benefit of the exemption provided for," except \$300 of household and kitchen furniture and provisions. It is further provided in this Constitution (Civ. Code, § 5916) that the "debtor" shall have authority to waive the benefit of the exemption known as the short homestead. The General Assembly at its first session after the promulgation of the Constitution enacted that "any debtor may, except as to

wearing apparel and three hundred dollars worth of household and kitchen furniture, and provisions, waive or renounce his right to the benefit of the exemption provided for by the Constitution and laws of this state, by a waiver, either general or specific, in writing, simply stating that he does so waive or renounce such right, which waiver may be stated in the contract of indebtedness, or contemporaneously therewith or subsequently thereto in a separate paper." Civ. Code, § 2863. It will thus be seen, from the object and purpose of the homestead and exemption allowance, as well as from the phraseology of the organic and statute law, it is essential that the relation of creditor and debtor shall subsist before a valid waiver of homestead shall be effective. A mere written declaration to the public, or to one not a creditor, that the declarant waives all benefit to the homestead laws, would be no more effectual to deprive him of afterwards changing his mind than if the renunciation was of any other law designed for individual protection and benefit, such as the usury law, the statute of limitations, and the like.

Such a renunciation would be purely voluntary. In order to bind the debtor by the waiver, he must either have incurred the debt or contracted for it at the time of the waiver. Suppose a debtor gave his note to his creditor, and in the note he renounced his right of homestead generally, without reference to the particular debt evidenced by the note; can any one contend, should the maker subsequently become indebted to the payee upon a distinct matter, that the homestead waiver in the note would bar the debtor of his right to a homestead as against the subsequent debt? We think not. We do not mean to say that the debtor must have received the entire consideration of the debt before he can waive his right of homestead, but only that the relation of debtor and creditor with respect to a specific debt must exist between the parties before one can bind the other bound by his waiver. To illustrate: If a customer arrange with his merchant that the latter shall sell to him a certain amount of goods, and give his obligation therefor, containing a waiver of homestead, such waiver would prevent the customer from asserting against his contract with the merchant a homestead subsequently set aside, though the goods were furnished under such contract after the execution of the waiver. The case at bar is not like this illustration. Here a retail merchant gave to a wholesale merchant a statement of his financial condition which contained a general waiver and renunciation of his homestead rights. The retail merchant did not order the goods at the time he gave this statement, nor did the wholesale merchant contract at that time to sell him any goods. There was absolutely no privity of contract

between them. The goods were sold six months thereafter on open account, and we do not think the homestead waiver in the statement prepared for credit barred the retail merchant from applying for a homestead as against debts subsequently contracted.

Judgment affirmed. All the Justices concur except

HOLDEN, J. (dissenting). Taff & Conyers made to Ragan, Malone & Co. a statement of their financial condition, wherein it was stipulated, according to the proper construction of the statement, that they waived and renounced any and all homestead and exemption rights as to any debt they might create in favor of Ragan, Malone & Co., by reason of the latter extending credit to them on the faith of such statement. Ragan, Malone & Co. afterwards extended credit to Taff & Conyers on the faith of such statement, and the waiver in the statement was valid as against the debt thus created. It is true that the relation of debtor and creditor did not exist between the parties until Ragan, Malone & Co. sold the goods to Taff & Conyers. When the goods were sold on the faith of the statement, the stipulations therein became a part of the contract, and, as far as the agreement therein waiving all homestead and exemption rights was concerned, it had the same effect as if it was made at the time the goods were sold and the contract creating the indebtedness was made. Such agreement waiving homestead and exemption rights became a part of the contract whereby Taff & Conyers became a debtor of Ragan, Malone & Co. by reason of the latter selling the former goods on the faith of the statement, and the waiver was binding.

I cannot concur in the views of the majority of the court, and must dissent therefrom.

(134 Ga. 84.)

JEFFERSON v. GLAZE.

(Supreme Court of Georgia. July 15, 1910.)

(Syllabus by the Court.)

LANDLORD AND TENANT (§ 298*)—WARRANT TO DISPOSSESS—RECOUPMENT OF DAMAGES.

Where a landlord sues out a warrant to dispossess his tenant because of nonpayment of rent under a lease contract, and the tenant arrests such proceedings by filing a counter affidavit and giving the required bond, and where the allegations contained in the counter affidavit show that the landlord was indebted to the tenant at the time of suing out the warrant, by reason of damages resulting from the failure of the landlord to comply with certain obligations imposed upon him under the terms of the contract, and there is some evidence to support such allegations, it is error for the court to direct a verdict in favor of the landlord for double the amount of rent claimed to be due, as it is competent for the tenant, in proceedings of the nature indicated, under proper pleadings, to re-

coup the damages which he has sustained. *Weaver v. Roberson*, 134 Ga. —, 67 S. E. 662.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1276-1280; Dec. Dig. § 298.*]

Error from Superior Court, Muscogee County; S. P. Gilbert, Judge.

Action by H. D. Glaze against Rollin Jefferson. Judgment for plaintiff, and defendant brings error. Reversed.

Hatcher & Hatcher, for plaintiff in error. Bowden & Goldstein and Carson & McCutchen, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur.

EVANS, P. J. I concur in the judgment, but dissent from the intimation of the majority of the court that the tenant may recoup damages arising out of the landlord's violation of his contract. I think the tenant may defeat the action by showing that he has suffered damages to the amount of the rent or in excess thereof, but the tenant cannot recover any damages in excess of the rent by way of recoupment in a dispossessory proceeding.

(134 Ga. 652)

HATCHER et al. v. EQUITABLE LIFE ASSUR. SOCIETY.

(Supreme Court of Georgia. June 23, 1910.)

(Syllabus by the Court.)

1. INSURANCE (§ 368*)—FORFEITURE—NONPAYMENT OF PREMIUMS—PAID-UP POLICY.

Where a life insurance policy, issued in the year 1884, stipulated that the insurance should become forfeited upon failure to pay an annual premium when due, but also provided that after three payments had been made the insured might, within six months after default, surrender the policy and receive a paid-up policy for an amount to be fixed according to data provided for in the policy, and where the insured defaulted in the payment of the annual premium due in the year 1893, and did not surrender or offer to surrender the policy according to the terms of the provision referred to above, the beneficiaries would not be entitled to recover upon the policy after the death of the insured, which took place in 1907, although, as appears from the allegations in the petition, at the time of the lapse of the policy it had been lost or stolen, no effort having been made, in the long interval between the date of the lapse of the policy and the death of the insured, to have another policy issued to the insured, or a copy of the policy established which he might surrender up for cancellation in accordance with the provisions relative to surrender and cancellation.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 194, 936-939; Dec. Dig. § 368.*]

2. REVIEW ON APPEAL.

Under the ruling made in the foregoing headnote, the court did not err in sustaining a general demurrer to the plaintiffs' petition.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Mrs. Hammie F. Hatcher and others against the Equitable Life Assurance

Society. A demurrer to the petition was sustained, and plaintiffs bring error. Affirmed.

Mrs. Hammie F. Hatcher, the surviving wife of Marshall J. Hatcher, deceased, and M. Felton Hatcher and Mrs. M. F. H. Clarke, who are his only surviving children, brought suit as individuals and as the executors of his will against the Equitable Life Assurance Society to recover upon a policy of insurance issued by the defendant upon the life of the deceased, in which the plaintiffs were named as beneficiaries. They alleged that the insured had paid each annual premium due from the time the policy was issued up to November 15, 1893, but that he failed to pay the annual premium due on the last-named date. The policy, a copy of which was attached to the petition, contained, in addition to the forfeiture clause stated in the headnote, the following: "And, further, that if premiums upon this policy, for not less than three complete years of assurance, shall have been duly received by said society, and this policy should thereafter become void in consequence of default in payment of a subsequent premium, said society will issue, in lieu of such policy, a new paid-up policy, without participation in profits, in favor of said beneficiaries as aforesaid, his executors, administrators, or assigns, for the entire amount which the full reserve on this policy, according to the present legal standard of the state of New York, will then purchase as a single premium, calculated by the regular table for single-premium policies now published and in use by the society; provided, however, that this policy shall be surrendered duly receipted within six months of the date of default in payment of premium as mentioned above." The application for the insurance, which by the terms of the policy was made a part thereof, contained the following question and answer: "If a tontine savings fund policy be not selected, is it agreed, in consideration of the agreements contained in the policy hereby applied for, that any allowance for the reserve value which may be due or made in the case of the lapse of policy proposed shall be applied to the purchase of paid-up assurance, payable at the same time as the original policy, and not to the purchase of temporary assurance; and all right or claim to any other surrender value than that provided in the policy shall be specifically waived and relinquished, whether required by the statute of any state or not? Yes."

The assured died in April, 1907. The plaintiffs alleged that in December, 1907, the defendant company having denied liability under the policy on account of its having lapsed, they wrote the company, claiming that they were entitled to the paid-up policy called for by the contract above described, and demanding blanks for the proof of death; that the

original policy was lost or stolen at the time of the default in the payment of premium in 1893, without any fault of the decedent, who used due diligence to find it, but failed; and that the policy, or any interest therein, had never been assigned to any person. The plaintiffs sued to recover the amount of paid-up insurance which the full reserve on the policy at the time of its lapse would purchase as a single premium, calculated by the regular table for single-premium policies, which was alleged to be a stated sum, and prayed that the defendant be required to issue said paid-up policy for the amount named, and that plaintiffs have judgment thereon. The court sustained a general demurrer to the petition, and the plaintiffs excepted.

Reuben R. Arnold, for plaintiffs in error.
J. H. Gilbert and A. A. & E. L. Meyer, for defendant in error.

BECK, J. (after stating the facts as above). No elaboration of the doctrine announced in the headnotes is necessary. Questions identical with that decided, or very similar thereto, have been passed upon and elaborately discussed by the courts of last resort in many of the states, and the line of authority supporting the proposition announced is almost unbroken. See *Equitable Life Assurance Society v. Evans*, 25 Tex. Civ. App. 563, 64 S. W. 74; *Wells v. Vt. Life Ins. Co.*, 28 Ind. App. 620, 62 N. E. 501, 63 N. E. 578; *Grevenig v. Washington Life Ins. Co.*, 112 La. 879, 36 South. 790, 104 Am. St. Rep. 474; *Keyser v. Mutual Life Ins. Co.*, 104 Ill. App. 72; *Coffey v. Universal Life Ins. Co.* (C. C.) 7 Fed. 301; *Hudson v. Knickerbocker Life Ins. Co.*, 28 N. J. Eq. 167; *Universal Life Ins. Co. v. Whitehead*, 58 Miss. 226, 38 Am. Rep. 322.

Judgment affirmed. All the Justices concur.

(124 Ga. 654)

ROBINSON v. CARMICHAEL et al.
(Supreme Court of Georgia. June 23, 1910.)

(Syllabus by the Court.)

EXECUTION (§ 171*)—VACATING—INJUNCTION—ACCIDENT.

The injunction should have been granted. The case differs from that of *Ayer v. James*, 120 Ga. 578, 48 S. E. 154, and the cases therein cited; all being from courts where the dockets were not so crowded as were those of the city court of Atlanta, and where the practice of the assignment of cases was not the same. It was more like the case of *Howell v. Ware & Harper*, 133 Ga. 674, 66 S. E. 884, where a proceeding to set aside a judgment rendered by default in the city court of Atlanta, on the ground that the sudden illness of counsel had prevented him from filing a defense until the time for filing defenses had expired, was held not to be demurrable.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 497-518; Dec. Dig. § 171.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. M. Robinson against W. A. Carmichael and others. Judgment for defendants, and plaintiff brings error. Reversed.

The plaintiff instituted suit to set aside a judgment and enjoin the enforcement of an execution, upon the grounds that it was obtained by accident, as shown by the following facts: The suit in which judgment was obtained was filed on August 18, 1908, returnable to the September term of the city court of Atlanta. The defendant therein employed counsel who, at the first term, filed a meritorious defense. The defendant was unfamiliar with the method of procedure in the court, and did not know what to do, except to employ an attorney to look after the case. The attorney employed agreed to represent the defendant, and to notify him when there was anything for him to do with reference to the case. The defendant did not hear anything more with reference to the case until November 1, 1909, after the date of the judgment, when the sheriff called upon him to pay the amount recovered. The illness of his attorney, hereinafter mentioned, had been unknown to the defendant, and he did not know when the case was to be tried. Though residing in Fulton county, there was no evidence to show that, after employing an attorney and receiving the assurance that he would look after the case, the defendant ever made inquiry of his counsel or of the officers of the court in any manner concerning the case; but, for all that appears, he remained passive, trusting altogether to his attorney. There was a custom in the city court of Atlanta for the judge, on Friday of every week, to have "bar calls" of the docket for the assignment of cases on the "trial calendar" to be tried during the succeeding week. It was the custom for attorneys representing parties to cases likely to be called and assigned on the trial calendar to attend the bar calls, but it was not customary for parties to attend the bar calls. At the bar call on October 15, 1909, the case in question, being No. 19,822, was called for the first time from the general docket and placed on the trial calendar for October 18, 1909. On October 25th a judgment was rendered in the absence of the defendant and of his counsel. That was during the September term, 1909, of court, which adjourned October 30th. The attorney was not present at the trial, because on the 5th or 6th of October he was taken seriously ill with nervous prostration, and from that time until November 6th he was unable to attend to any business, or to see any one, or to discuss business, nor was he permitted to do so by his family or physician. It was not until November 5th, after the court had adjourned, that he knew that the case had been assigned to the trial calendar, or that a judgment had been rendered. The attorney did not have any partner

or associate. After the sheriff's demand, on November 1st, defendant learned of the illness of his attorney, and employed other counsel, who, on November 2d, filed the suit to set aside the judgment and enjoin the enforcement of the execution. Uncontradicted evidence, substantially as above set forth, was introduced at the hearing of the application for interlocutory injunction. The judge denied the application, and the plaintiff excepted.

Moore & Branch, for plaintiff in error.
Lowndes Calhoun, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(184 Ga. 662)

BOARD OF EDUCATION OF STEPHENS COUNTY v. PALMER.

(Supreme Court of Georgia. June 23, 1910.)

(Syllabus by the Court.)

SCHOOLS AND SCHOOL DISTRICTS (§ 144*)—TEACHERS—CONTRACTS OF EMPLOYMENT.

P. contracted with the board of education of the county of S. to teach a common school, located near the county line between the county of S. and the county of F., at a salary of \$40 per month. The board of education of S. county having refused to pay the teacher's demand for the full amount of his salary at the rate of \$40 per month, he brought suit against the board of education of that county. The defendant denied owing the amount claimed (\$120, the aggregate amount of salary for three months), but admitted that it was indebted to the plaintiff in the sum of \$19.79; this being the amount of the teacher's salary for three months, less \$100.21 which had been paid by the county school commissioner of the county of F. from the common school fund on account of children from that county who attended the school which the plaintiff had been employed to teach. Held that, the uncontroverted evidence showing that the plaintiff had received \$100.21 on account of the attendance of children from the county of F. at the school taught by him, the court erred in giving a charge which authorized the jury to return a verdict for the full amount of the salary claimed, with no deduction on account of the amount paid by the county school commissioner for the county of F.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 144.*]

Error from Superior Court, Stephens County; J. J. Kimsey, Judge.

Action by C. C. Palmer against the Board of Education of Stephens County. Judgment for plaintiff, and defendant brings error. Reversed.

The contract sued on was signed by Palmer and by the county school commissioner on behalf of the board of education. It contained (among others not here material) the following terms: "The board of education of Stephens county promises to pay of the common school fund to Prof. C. C. Palmer for teaching a school for white children in _____ subdistrict of said county, at Martin schoolhouse, for five months of the school

year ending December 31, 1906, a salary of (\$40.00) forty dollars per month. The board reserves the right to diminish equitably said salary, or to suspend said school, if the regular attendance falls below 12; and if the regular attendance exceeds 50 pupils then the board shall employ, or have employed, an assistant, and pay said assistant, upon separate written contract, such salary as may be deemed just and reasonable. The spring term to continue three months; the summer term to begin July 16, 1906." Palmer sued the board of education of Stephens county to recover \$120 and interest, for teaching three months, alleging that he had complied fully with the terms of the contract, and that the county refused to pay him the amount due and sued for. The defendant answered by setting up that Palmer had collected from Franklin county the sum of \$100.21 on account of pupils from that county who attended the school during the three months in question, and contended that his time belonged to Stephens county, and that it was entitled to have this amount deducted from the salary which defendant had contracted to pay plaintiff, and therefore that it owed plaintiff only \$19.79. Under instructions from the court the jury found for the plaintiff the full amount sued for, with interest. The case was brought to this court by direct bill of exceptions.

N. R. C. Ramey and J. B. Jones, for plaintiff in error. Robert McMillan, for defendant in error.

BECK, J. Under the terms of the contract set forth in the statement of facts, the teacher, the plaintiff in this case, was entitled to receive \$40 per month as his entire compensation, and he was not entitled to any additional pay from the county school fund of either the county of Franklin or the county of Stephens. The board of education of Stephens county had authority, under the provisions of section 1370 of the Political Code of 1895, to make employment of teachers at a salary; and when Palmer accepted this it was in lieu of the right to participate in the common school fund which, in proportion to the attendance of pupils upon the school, he could have claimed in the absence of a contract to teach at a salary. The school taught by the plaintiff was located near the county line of Stephens and Franklin counties; and section 1378 of the Political Code provides in such cases that, "when a common school is located near a county line, children from an adjoining county may, by consent of the county boards of the respective counties, be permitted to attend the school. In such cases the teacher shall make out two accounts, one against each county board, in amount proportioned to the number of children in the school from

the respective counties." Under the provisions of that part of the section just quoted, while it was the duty of the teacher to make out two accounts, one against the board of Franklin county, as well as one against the board of Stephens county, he was not entitled to receive any portion of the common school fund from either county in addition to the salary stipulated in the contract; and inasmuch as payments amounting in the aggregate to \$100.21 were actually made to him by the county school commissioner of Franklin county, upon the approval of the county school commissioner of Stephens county, the amount so paid should have been treated as a credit upon the amount of salary due for three months' teaching, and a verdict for the full amount of the salary stipulated in the contract, without allowance of such credit, was unauthorized by the evidence.

Under the ruling which we have made above, it is unnecessary to consider the question as to whether the contract which is under consideration was entire, and of such character that the plaintiff was not entitled to recover unless he had completed the term of five months during which he had agreed to teach, because in the answer of the defendant it is distinctly admitted that defendant was indebted to the plaintiff in the sum of \$19.79, which was the aggregate amount of the salary contracted to be paid for a period of three months, diminished by the amount which the teacher had received from the county school commissioner of Franklin county.

Judgment reversed. All the Justices concur.

(134 Ga. 656)

DARNALL v. GEORGIA RY. & ELECTRIC CO.

(Supreme Court of Georgia. June 23, 1910.)

(Syllabus by the Court.)

1. RAILROADS (§ 113*)—RIGHT OF WAY—RIGHT TO EXCAVATE.

Where a grantor in a deed conveys to the grantee a strip of land "for the purpose of a right of way for a street railroad," and subsequently the same grantor conveys a lot of land to another party by deed in which the right of way of the railway company is called for as the southern boundary of the lot conveyed to such other party, the latter is not entitled to maintain an action for damages against the railway company for excavations made upon its right of way in broadening and lowering its bed for a railway track, where there is no physical invasion of the property of such other party, and no negligence upon the part of the company in constructing its roadbed, affecting the property rights of the complainant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 230, 351-364; Dec. Dig. § 113.*]

2. DAMAGES (§ 188*)—EXCAVATIONS—ACTIONS.

The plaintiff having alleged that excavations made by the railway company on the

south side and east side of her lot of land had injured and damaged her property in a certain sum, and evidence having been introduced to show the aggregate amount of the damages to her premises resulting from the excavations both on the south and on the east, and it appearing that in no event was the defendant liable for the excavations made on the south, the court did not err in charging the jury that the plaintiff would not be entitled to damages for injury resulting from the excavations made on the east side unless there was evidence before them from which they could determine the proportionate amount of the damages resulting to her property in consequence of the excavations made on the east side.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 511; Dec. Dig. § 188.*]

3. EVIDENCE (§ 99*)—RELEVANCY.

The rulings of the court in excluding certain testimony offered in evidence were not erroneous; it appearing that the testimony thus repelled was irrelevant to the issues involved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 123, 137-143; Dec. Dig. § 99.*]

Error from Superior Court, Dekalb County; L. S. Roan, Judge.

Action by Miss Mattie H. Darnall against the Georgia Railway & Electric Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Miss Mattie H. Darnall brought suit against the Georgia Railway & Electric Company, alleging injury and damage to certain real estate owned by her. She alleged that the defendant company operated a street car line from the city of Atlanta to the town of Decatur, on the north side of the Georgia Railroad; that the defendant's line of railway crosses the wagon road from Decatur to Atlanta at a station on the street car line known as "Rose Hill"; that the lot of land alleged to have been damaged is bounded on the east by the said Decatur and Atlanta road, and on the south by the defendant company's right of way; that the company, which had been operating a single line of track during the year 1907, constructed an additional line of track, and in order to do this the company made an excavation of land, 10 to 15 feet wide, north of its original single track, and lowered the grade of both the old and the new tracks, so that the bed of the railway is about 10 feet below the surface of petitioner's lot; that the company also lowered the grade of the Decatur and Atlanta road on the east side of her lot, where the road crosses the car line, so as to adjust the grade of the wagon road to the grade of the railway tracks, and petitioner's house and the surface of her lot were thus left at an elevation of 10 feet; that these acts of the company were wrongful; that petitioner's property has been rendered more difficult of access, and its value has been decreased in a stated sum; and that in order to protect her land from washing away, she will have to construct retaining walls of brick or stone, and can approach the same only by

constructing steps leading from the road grade up to the surface of her lot, all of which will be expensive. On the trial the plaintiff introduced, as a muniment of title to the property alleged to have been damaged, a deed from the Germania Savings Bank, formerly the Germania Loan & Banking Company, dated August 15, 1904, conveying to the plaintiff a lot described as beginning at a point on the northeast corner of Atlanta road, and right of way of Georgia Railway & Electric Company at what is now Rose Hill station, thence extending north along Atlanta road 145 feet, thence west 128 feet, thence a little east of south 167 feet, thence east along right of way 97.9 feet to point of beginning. Also in evidence was a deed from the Germania Loan & Banking Company to the Atlanta Rapid Transit Company, the predecessor in title of the defendant railway company, dated August 16, 1900, and reciting, that "the said party of the second part is desirous of acquiring a right of way over certain portions of the land of said party of the first part, * * * for the purpose of building its line of road upon the same, which road is now about to be built from the city of Atlanta to Decatur, Ga.; and * * * the said party of the first part is also desirous of having a street extended through the southern portion of their said property;" and therefore, in consideration of \$1 in hand paid, the party of the first part sold and quitclaimed to the party of the second part, its successors and assigns, a strip of land 50 feet wide and 832 feet long, more or less, bounded on the south by the Georgia Railroad right of way 832 feet, on the east by Decatur wagon road 50 feet, and on the north by the lands of the vendee, "said lands being conveyed for the purpose of a right of way for a street railroad; and should the grantee, its successors or assigns, ever abandon the use of said lands as a street railroad right of way, then and in that event the same shall revert to and become the property of the vendor, its successors and assigns. The vendee, by acceptance of this deed, is bound and obligates itself to have at least one station on the right of way hereby conveyed, at which its cars shall stop to receive and discharge passengers. It is understood and agreed that if the party of the first part, or their successors, desires, they can, at any time they see fit, put in spur tracks to connect their land with the Georgia Railroad tracks, and shall not be hindered in any manner by said party from crossing their tracks. This deed not to become effective until said line is built through said property and in running order," etc. Upon the trial the jury rendered a verdict for the defendant. The plaintiff filed a motion for a new trial, and to the order of the court overruling the same she excepted.

Green, Tilson & McKinney, for plaintiff in error. Rosser & Brandon and Colquitt & Conyers, for defendant in error.

BECK, J. (after stating the facts as above). Under the conveyance from the Germania Loan & Banking Company to the Atlanta Rapid Transit Company, the predecessor in title of the defendant company, the latter acquired the right of way over the strip of land described in that deed, and had a right to construct and operate a line of railway with single or double tracks over the same; and, in order to do this, the railway company had the right to make such excavations opposite the southern boundary of the plaintiff's lot, for the adaptation of the grade of its line of railway at that place to the grade of other portions of its tracks, as might be dictated by reason of economy, convenience, and safety; and if in doing this they did not invade the property rights of the plaintiff, she would have no ground of complaint. Under the undisputed testimony, after the excavation had been made in the cut south of the premises of the plaintiff, there was an intervening space of five feet or more between the top of the cut and her land. There was no evidence whatever that the lateral support to her land had in any way been interfered with, or that a retaining wall was necessary to support her land after the cut made by the railway company had been completed. Her deed was executed subsequently to the deed conveying the strip of land to the predecessor in title of the defendant. There is no reference in her deed to a street as the southern boundary of the plaintiff's lot, but in the deed itself the call is for the right of way of the Georgia Railway & Electric Company as the southern boundary of said lot. What may have been the nature of the estate of the railway company in the strip of land it is unnecessary for us to discuss, further than to hold that the railway company had the right to construct a line of railway over this strip of land, and to make such excavations on that strip as were necessary in properly grading the same, and to use all or any part of the right of way as described in their deed for that purpose, so long as there was no physical invasion or injury to the plaintiff's property. And if by the proper construction of its tracks and roadbed there was a consequent damage to plaintiff's property, by causing a decrease in its market value, it was *damnum absque injuria*.

2. The plaintiff also contended that she was entitled to damages on account of lowering the grade of the road upon the east side of her premises, which was necessary in consequence of lowering of the roadbed of the railway company in order to adapt the grade of the dirt road to the railroad. The question of the amount of damages which the plaintiff had sustained in consequence of the lowering of the grade of the wagon road on the east side of her lot was submitted by the court to the jury under instructions as favorable to the plaintiff as she was entitled to. The jury found against her; and rightly

so, as appears from the evidence under proper instructions from the court, informing them that they could not find for the plaintiff on account of the injury to her premises in consequence of lowering the grade of the road on the east side of her lot of land, unless there was evidence from which they could determine the damages flowing from the alleged wrong in deepening the cut on the east side. And, inasmuch as there was no evidence as to the damages to plaintiff's property, save that which included the damages resulting from the excavation on the south as well as from the excavation on the east, and nothing to show or indicate the proportionate part of the damages flowing from the excavations on the south or on the east, the jury had before them no evidence from which they could determine the amount of the damages to the premises inflicted as a consequence of the excavations on the east side of plaintiff's lot. *Brooks v. Camak*, 130 Ga. 213, 60 S. E. 458.

3. The rulings of the court in excluding certain testimony offered in evidence were not erroneous, it appearing that the testimony thus repelled was irrelevant to the issues involved.

Judgment affirmed. All the Justices concur.

(134 Ga. 691)

HOWARD et al. v. RANDOLPH.
(Supreme Court of Georgia. June 28, 1910.)

(Syllabus by the Court.)

1. PARENT AND CHILD (§ 15*)—PERSON STANDING IN LOCO PARENTIS.

A person assuming the parental character and discharging parental duties to a minor child, received into his family as a child and not as a servant, stands in loco parentis to such child.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 160-164; Dec. Dig. § 15.*]

2. EXECUTORS AND ADMINISTRATORS (§ 206*)—SERVICES BETWEEN PERSONS IN FAMILY RELATION.

Where a person assumes the relation of a parent to a child not of kin, which he takes from an orphanage at the tender age of three years, and faithfully discharges the duties of that relation by receiving such child into his family and educating and supporting her as if she had been his own child, and where there is no express agreement to pay wages to the child, she cannot maintain an action against the executors of the person who stood in loco parentis for services rendered while a minor, although the value of the services may exceed the expenses of such education and support.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 733; Dec. Dig. § 206.*]

3. EXECUTORS AND ADMINISTRATORS (§ 221*)—SERVICES BETWEEN PERSONS IN FAMILY RELATION—ACTIONS—BURDEN OF PROOF.

One who has been received in infancy as a child into a family not of kin to her, and remains in the household after her majority, and then seeks to recover for services rendered to such family after majority, has the burden of

proof to show either an express contract or circumstances from which a contract to compensate for such services may be implied.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 901, 1862; Dec. Dig. § 221.*]

4. EXECUTORS AND ADMINISTRATORS (§ 221*)—SERVICES BETWEEN PERSONS IN FAMILY RELATION—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In elucidating the question whether such services were rendered gratuitously or under an implied promise of compensation, evidence relating to the character and extent of the services, the declarations and conduct of the recipient, the value of the services, and corresponding benefits to the recipient is admissible.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 902, 1865-1871; Dec. Dig. § 221.*]

Error from Superior Court, Jackson County; C. H. Brand, Judge.

Action by M. M. Randolph against W. C. Howard and others, executors of J. E. Randolph. Judgment for plaintiff, and defendants bring error. Reversed.

J. A. B. Mahaffey and Jno. J. Strickland, for plaintiffs in error. J. S. Ayers and H. H. Dean, for defendant in error.

EVANS, P. J. This is a suit to recover upon a quantum meruit \$3,949 principal, besides interest, for services alleged to have been rendered to J. E. Randolph, the defendants' testator. The greater part of the recovery sought is claimed for services alleged to have been rendered during the plaintiff's minority. The jury rendered a verdict in her favor for \$3,240.10 principal and \$929.50 interest. The plaintiff voluntarily wrote off from the amount of interest recovered \$343.60. The court refused the defendants a new trial.

We gather from the record that J. E. Randolph, who was without children, and whose household consisted of himself and wife, about the year 1885 took the plaintiff, then a child of about three years, from an orphanage, and received her into his household as a member of his family, where she remained until his death in 1905. Though of no kin to her, he gave to her his surname, maintained and educated her, and in all respects treated her as a daughter and a member of his household. He was a man in easy circumstances, always provided his household with two servants, and the plaintiff was not called upon to discharge any domestic services, except as are usually rendered by a daughter under like circumstances. Her education was not confined to the elementary branches of a common-school education, but she was taught music and art, and graduated from an institution of learning about the year 1899. After her graduation in 1899 she taught school five months, and again taught school in 1901 about five months. She was teaching school in 1905, when, about the 1st of February, she was summoned to the bedside of Mrs. Ran-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dolph, who died about a month later, and about a month thereafter Mr. Randolph died. Mr. Randolph owned several small tenant houses near a factory, some storehouses, and some land. He also conducted an undertaking business in Jefferson, a town of 1,500 or 1,800 population. When the plaintiff was about 12 or 14 years of age, she began to assist Mr. Randolph in dressing coffins as he would sell them, and she assisted in collecting the rents from the small houses, and in keeping his accounts with respect to these matters. To what extent she assisted in the collection of rents, and the character of the accounts which she and Mr. Randolph kept appertaining to the rent and undertaking business, does not appear with much precision in the record. Mr. Randolph was accustomed to use intoxicants, and sometimes got drunk, and the plaintiff always administered unto his wants on these occasions. Whenever Mrs. Randolph was sick, she would nurse her. Mr. Randolph left an estate of about \$60,000, and in his will bequeathed to the plaintiff \$1,000 in cash and a third interest in the undertaking business, from which she realized \$450. The whole evidence tended to show that the relations between the plaintiff and Mr. Randolph and his wife were cordial, and such as might be expected between parent and child. No hint of unkind, disrespectful, or inconsiderate treatment from one to the other is suggested.

1, 2. Until majority the child remains under the control of the father, who is entitled to its services and the proceeds of its labor. Civ. Code, § 2502. Likewise one who stands in loco parentis to such a child is entitled to the proceeds of its labor, and is bound for its care, maintenance, and support. *Eaves v. Fears*, 181 Ga. 820, 64 S. E. 269. A person who means to put himself in the situation of the lawful father of the child stands, with respect to the father's office and duty of making provision for the child, in loco parentis to the child. *Brinkeroff v. Merselis*, 24 N. J. Law, 683; *Powys v. Mansfield*, 19 Vesey, Jr., 154. Sir William Grant said that one sustained this relation "by assuming the parental character and discharging parental duties." *Weatherby v. Dixon*, 19 Vesey, Jr., 412. Where a person voluntarily assumes the relation of a parent to a child, whom he is under no obligation to support, and faithfully discharges the duties of that relation by receiving such child into his family and educating and supporting him on the same footing as if the child were his own, in the absence of an express agreement the child cannot maintain an action against such person for services rendered while a minor, although the value of such services may exceed the expenses of such education and support. Under such circumstances a promise to pay wages will not be implied. *Williams v. Hutchinson*, 3 N. Y. 812, 53 Am. Dec. 301; *Tyler v. Burrington*, 39 Wis. 376. As was said in *Schrimpf v. Settegast*, 36 Tex. 296:

"The weight of authority has established a doctrine that would hold a person who had, through motives of kindness or charity, received an orphan child into his family, whether it be a stepchild or an entire stranger, and treated it as a member of his family, as standing in loco parentis, so long as such child should see fit to remain in such family, or so long as it should be permitted thus to remain; and while that relation should exist, the party who stood in loco parentis would be bound for the maintenance, care, and education of such child, and would be entitled to his reasonable services, without being liable to pay for the same, only in the way of support, unless there had been an express promise to that effect."

The record is silent as to whether the plaintiff, at the time she was received into the family of the defendant's testator, had father or mother or any one else to whom she could look for support and maintenance. As she was taken from an orphanage at such a tender age, we may indulge the inference that she was an orphan. Her introduction into the family of Mr. Randolph was as a member of his household. Indeed, the plaintiff only begins to claim remuneration for services rendered after she had been in the household of her benefactor for some eight or nine years. At the time she was taken from the orphanage she was altogether too young to raise any inference that she was to be requited for services. There is no conflict in the testimony that Mr. Randolph faithfully discharged his assumed duty of a foster parent during the minority of the plaintiff; and consequently his estate is not liable for services rendered during her minority. There are several reported cases in this state (*Hudson v. Hudson*, 90 Ga. 581, 16 S. E. 349; *Phinazee v. Bunn*, 123 Ga. 230, 51 S. E. 300) where recoveries were sustained in suits by children against parents upon implied contract; but in these cases compensation was claimed for services rendered after the child's majority.

3. The plaintiff embraced in her suit items for services rendered subsequently to her majority. With respect to her right to compensation for services rendered since her majority, it may be stated as a general rule that, when services are rendered and voluntarily accepted, the law will imply a promise on the part of the recipient to pay for them. There are exceptions to, and limitations upon, this general rule, one of which is that, where services are rendered by members of a family living in one household, no such implication will arise from the mere rendition and acceptance of the service. This exception is not confined to cases where the parties sustain the relation of parent and child, but is extended also to strangers who have been received into the family as members of the household. *Williams v. Hutchinson*, *Tyler v. Burrington*, supra; *Hogg v. Laster*, 56 Ark. 382, 19 S. W. 975; *Scully v. Scully*, 28 Iowa,

548. The reason for the exception is thus stated by Chancellor McGill: "The household family relationship is presumed to abound in reciprocal acts of kindness and good will, which tend to the mutual comfort and convenience of the members of the family, and are gratuitously performed; and where that relation appears, the ordinary implication of a promise to pay for services does not arise, because the presumption which supports such implication is nullified by the presumption that between members of a household services are gratuitously rendered. The proof of the services and as well as the family relation leaves the case in equipoise, from which the plaintiff must remove it, or fail." *Disbrow v. Durand*, 54 N. J. Law, 343, 24 Atl. 545, 33 Am. St. Rep. 678. Therefore, where one who has been received in infancy into a family not of kin to her seeks to recover for services rendered to such family after her majority, the burden is upon her to show either an express contract, or circumstances from which a contract of remuneration for such services may be implied. What circumstances might be sufficient to imply a promise to pay for services rendered would depend upon the special facts of the case, taking into account the nature of the services, the relation of the parties, declarations made at the time, indicating an intent of the recipient to compensate for the services rendered, and the like. As the case is to be tried again, we will forbear a discussion of the evidence submitted as a basis for such inference, further than to say that there was sufficient evidence to submit to the jury the plaintiff's right to recover for services rendered after she attained her majority.

4. Error is assigned upon the action of the court allowing certain evidence. The character of the evidence was such as to bring it within the rule announced in the last headnote, and was admissible.

Judgment reversed. All the Justices concur.

(134 Ga. 687)

MOREL et al. v. SYLVANIA & G. R. CO.
et al.

(Supreme Court of Georgia. June 28, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1234*)—LIABILITY ON SUPERSEDEAS BOND—EXTENT.

The petition was not open to general demurrer, as it set forth a cause of action for the breach of a supersedeas bond.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1234.*]

Error from Superior Court, Screven County; B. L. Rawlings, Judge.

Action by the Sylvania & Girard Railroad Company and others against J. J. B. Morel and others. A demurrer to the petition was overruled, and defendants bring error. Affirmed.

The Sylvania & Girard Railroad Company and certain individuals, one of whom was alleged to be the president and the others directors of the corporation, applied for the writ of mandamus against Morel, Overstreet, and Mock, and certain agents of the corporation, to compel the defendants to deliver to them all the books, papers, money, and other property of the company in their possession or control; it being alleged that one of the defendants was the former president and the other two were directors of the corporation, but that they were no longer so. The defendants claimed to be still in the office and entitled to retain custody of the books, money, and other property of the company. The judge granted the writ of mandamus absolute. Defendants excepted, and brought the case to this court, where the judgment of the lower court was affirmed. *Morel v. Hoge*, 130 Ga. 625, 61 S. E. 487, 16 L. R. A. (N. S.) 1136. In order to obtain a supersedeas, the defendants gave a bond in the sum of \$5,000, payable to the plaintiffs, and containing the following condition: "Should the said principal obligors well and truly pay or cause to be paid to the said obligees all damages that may be sustained by said obligees by virtue of the issuing out of a bill of exceptions to the Supreme Court, and a granting of a supersedeas by the court, upon the giving of this bond as required by the court, in granting said supersedeas, in the mandamus case brought by the said obligees against the said obligors, in the superior court of said county of Screven, in which a mandamus absolute was granted by the judge of the superior court of said county on the 31st day of January, 1908, and the said principal obligors have filed their bill of exceptions to the Supreme Court of this state, then and in that event this bond to be void; otherwise, to be of force."

After the termination of the former case, suit was brought by the obligees in the bond against the obligors. It was alleged that, by reason of the exceptions to the Supreme Court and the granting of the supersedeas, Morel, acting as president, and two of the other defendants, "acting as superintendent," illegally and without authority, and contrary to the authority of the railroad company, remained in possession of the offices mentioned, to which others had been regularly and legally elected, and that they "were illegally and without the authority of said corporation paid out of the funds of said railroad corporation specified amounts," and "that by reason of said funds having been illegally paid to the said [named persons], they being in illegal possession of the offices aforesaid, the said railroad company has also been forced to pay to the officers, in whom legal possession of such offices was vested at the time aforesaid," an amount by

way of salaries in addition to the funds paid out as above stated, thereby being forced to pay salaries twice. The defendants filed a general demurrer, which was overruled by the court, and they excepted.

J. W. Overstreet, for plaintiffs in error.
White & Lovett, for defendants in error.

FISH, C. J. (after stating the facts as above). Fairly construed, we understand the petition to mean that the defendants, after a judgment had been rendered against them, declaring that they were illegally holding the books, money, and property of the railroad company and ought to deliver them to the plaintiffs in the former proceeding, brought the case to this court, retained possession of the money and property, gave the bond above indicated in order that they might do so pending the exception to this court, and by virtue of the possession thus retained salaries were paid to the acting president and acting superintendents, who were no longer acting officers of the corporation, and that this was done without the authority of the railroad company. There was no special demurrer, but the defendants relied solely upon a general demurrer. If an illegal appropriation of the funds of the corporation to pay the salaries of persons acting as officers of the corporation, who were no longer lawfully in office, as had been declared by the judgment of the court, pending an exception to this court, did not fall within the terms of the bond, it is not easy to see just what damages were intended by the presiding judge in requiring it, or by the parties in giving it. According to the allegations of the plaintiffs in the present case, a person claiming to be the president of the company, but who had ceased to be such, and other defendants, held the money of the company in their possession while the case was in this court by virtue of the supersedeas bond given, and while the matter was in that condition some of the funds of the company were appropriated, or caused to be appropriated, to the payment of salaries to some of the defendants, who were not entitled thereto. The judgment of the superior court was affirmed, by which it had been directed that the defendants deliver up the books, money, and property of the company; but, pending exception, some of it had been appropriated to salaries for some of the defendants who had been found to be out of office. The present petition alleges that this was without authority of the corporation and contrary to its authority. We think that this makes a case of damages falling within the purpose and intent of the supersedeas bond. *Waycross Air Line Ry. Co. v. Offerman & Western R. Co.*, 114 Ga. 727, 40 S. E. 738; *Id.*, 119 Ga. 983, 47 S. E. 582.

It has been held by a number of courts that a de jure officer cannot recover from

the government, or its subordinate corporations, the amount of salary paid to a de facto officer while the latter occupied the office and discharged its duties, although he was subsequently ousted at the instance of the de jure officer, but that the de jure officer, after judgment of ouster, might bring an action against the de facto officer for money had and received to his use. It has also been held that if the de facto officer, who is not de jure entitled to the office, brings suit against a municipality or county to recover his salary, the defendant may call in question his right to the office. It is unnecessary to discuss the question whether all the rulings made on this subject are theoretically logical, or the conflict which exists in the authorities in regard to some of these questions. For the present purpose it is enough to call attention to the fact that the basis on which many of the decisions in regard to public officers rest is the necessity for the government to proceed with the exercise of its functions and for the public to be able to deal with some person apparently rightfully discharging the duties of the office, and in order that this may be done, that the organized public in the form of the government itself may, if it sees fit, recognize the de facto officer and pay his salary while he discharges the duties of the office. See *Mayfield v. Moore*, 53 Ill. 423, 5 Am. Rep. 52; *McCue v. County of Wapello*, 56 Iowa, 698, 10 N. W. 248, 41 Am. Rep. 134; *Dolan v. Mayor, etc.*, 68 N. Y. 280, 23 Am. Rep. 168; *Commissioners of Saline County v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171. The present case does not involve a governmental corporation, but a case of an ex-president and ex-officials of a railroad corporation, remaining in possession and causing salaries to be paid to themselves, without authority of the company, pending an appeal from a judgment commanding them to deliver up the custody to their lawful successors. The rights of the public in dealing with de facto officers are not involved. According to the allegations, it is the persons claiming to be de facto officers of this railroad company, while seeking to reverse a judgment commanding them to deliver up its property, who are setting up their own de facto position as justifying payment to themselves of salaries from the funds of the company, without its authority. See *Waterman v. Chicago & Iowa R. Co.*, 139 Ill. 658, 29 N. E. 689, 15 L. R. A. 418, 32 Am. St. Rep. 228.

We deal with this case as we find it under the allegations of the plaintiffs, which are admitted by the general demurrer, and do not discuss other questions not raised by the demurrer.

Judgment affirmed. All the Justices concur.

(134 Ga. 828)

JOHNSON et al. v. BREWER et al.

(Supreme Court of Georgia. July 15, 1910.)

*(Syllabus by the Court.)***1. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 7*)—WHAT CONSTITUTES—CONSTRUCTION OF INSTRUMENT.**

Where a person borrowed money and gave a note therefor, with 16 accommodation indorsers and executed to 2 of them an absolute conveyance of real and personal property, in which they were "authorized to sell the same or any part thereof at private sale, or at public sale, for cash, paying the purchase price thereof on the promissory note," and to make such deeds, bills of sale, or other conveyances, in the name of the creditor, as might be necessary for carrying into effect the intention of the deed, and where it was provided that, if either of the grantees should fail or refuse to act in pursuance of the terms and conditions of the deed, the remaining grantee alone might do so, and that in the event of the death or resignation of both of them the indorsers should name a successor or successors, who should have all the powers of the original grantees, such a conveyance was a voluntary assignment for the benefit of creditors, and a compliance with the essential requirements of the statute was necessary to its validity.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 6; Dec. Dig. § 7.*]

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 7*)—CONSTRUCTION OF INSTRUMENT.

This is true although the deed declared that it was made in order to indemnify the indorsers against loss; "the intention of this deed being for the express purpose of vesting the title of the property herein conveyed in the said parties of the second part, for the use and benefit of them, the said indorsers." The instrument contained no clause of defeasance, and was not in the nature of a mortgage or mere security, but was an absolute conveyance to trustees to sell property and apply the proceeds to the payment of the note held by the creditor.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 6; Dec. Dig. § 7.*]

Holden, J., dissenting.

*(Additional Syllabus by Editorial Staff.)***3. ASSIGNMENTS (§ 31*)—DEFINITION.**

The word "assignment" has several meanings. In a broad sense it signifies the act by which one person transfers to another the entire right or property which he has in any realty or personalty in possession or in action or some share or interest therein, and is more particularly applied to a written transfer as distinguished by a transfer by mere delivery.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 61; Dec. Dig. § 31.*]

For other definitions, see Words and Phrases, vol. 1, pp. 566-571; vol. 8, p. 7584.]

4. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 1*)—DEFINITION.

An "assignment for the benefit of creditors" is an assignment whereby a debtor, generally insolvent, transfers his property to another in trust to pay his debts or apply the property on their payment.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 1, pp. 571-576.]

Error from Superior Court, Liberty County; P. E. Seabrook, Judge.

Action by C. G. Johnson and others against W. P. Brewer and others. Judgment for defendants, and plaintiffs bring error. Reversed.

W. T. Brewer, as tax collector of Liberty county, became indebted to it on account of taxes. In order to raise money to pay the amount thus due, he made a note to N. McQueen. On the same day, August 27, 1903, he executed a conveyance of certain real and personal property, including a mortgage held by him, to J. R. Ryon and C. W. Hendry; the instrument being executed like a deed, and duly attested and recorded. After the description of the property, it proceeded as follows: "To have and to hold the above-described realty and personalty unto them, the said parties of the second part, with all and singular the rights, members, and appurtenances thereto appertaining, to the only proper use, benefit, and behoof of them, the said parties of the second part, and their heirs and assigns, in fee simple. The condition of the above conveyance is such, that, whereas the said party of the first part has this day made his promissory note for the sum of \$2,645 payable to N. McQueen, in which he has become indebted to said McQueen in the sum above named, which said promissory note has, by [sixteen named persons, two of whom were the grantees, been] indorsed, whereby the said indorsers have become liable for the payment of the amount of the said promissory note; now in order to indemnify them, the said indorsers against loss by reason of said indorsement, the said party of the first part has this day sold and conveyed to the said parties of the second part all of the above-described property, who are authorized to sell the same or any part thereof at private sale, or at public sale for cash, paying the purchase price thereof on the promissory note above described, and in my name to make or cause to be made all deeds, bills of sale, or such other conveyances as may be necessary for the carrying into effect the intention of this deed, in as full and complete a manner as the said party of the first part could have done. And should either of the parties herein named as parties of the second part for any reason fail and refuse to act in pursuance of the terms and conditions of this deed, then the remaining party therein named as party of the second part may act as if no other party had been named; and in the event of death or resignation of both of the parties of the second part, then the indorsers of the said promissory note above referred to, or a majority of the same, shall name a successor or successors who shall have all the powers herein granted to the said parties of the second part; the intention of this deed being for the express pur

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pose of vesting the title of the property hereinafter conveyed in the said parties of the second part, for the use and benefit of them, the said indorsers." At the time of the execution of this conveyance, Brewer was insolvent, and was not indebted to McQueen, Ryon, or Hendry in any other manner than as above stated. On June 18, 1904, Ryon and Hendry, by virtue of the power contained in the deed to them from Brewer, conveyed the property to McQueen for the recited consideration of "\$1,800 cash in hand paid." Several creditors of Brewer filed an equitable petition attacking these conveyances. The facts were not in controversy, and it was agreed that the case would be controlled by a determination of the question whether the transaction constituted an assignment or only a deed to indemnify certain indorsers. The presiding judge held that the deed did not constitute an assignment, and rendered judgment in favor of the defendants. The plaintiffs excepted.

Donald Fraser, for plaintiffs in error.
Garrard & Meldrim and S. B. Brewton, for defendants in error.

LUMPKIN, J. (after stating the facts as above). The word "assignment" has several meanings. In a broad sense it is used to signify the act by which one person transfers to another, or causes to vest in such other, the entire right, interest, or property which he has in any realty or personalty, in possession or in action, or some share, interest, or subsidiary estate therein. It is more particularly applied to a written transfer, as distinguished from a transfer by mere delivery. An assignment for the benefit of creditors has been defined to be "an assignment whereby a debtor, generally an insolvent, transfers to another his property, in trust to pay his debts or apply the property upon their payment." Black's L. Dic. The distinction between an assignment for the benefit of creditors and a conveyance to secure an indebtedness or to secure an indorser or security against loss is illustrated by two cases decided by this court in February, 1892. *Kiser & Co. v. Dannenberg Co.*, 88 Ga. 541, 15 S. E. 17, and *Importers' and Traders' Bank v. McGhees & Co.*, 88 Ga. 702, 16 S. E. 27. In the former case an insolvent debtor assigned to one of his creditors notes and accounts to the amount of about \$3,000 as collateral security, and made to him a mortgage upon a stock of goods and other personal property to secure an indebtedness of \$3,400, the mortgage containing a power to sell the goods at wholesale or retail; and the creditor, by contemporaneous writings, stipulated to pay off the debt of another creditor out of the proceeds of the notes, accounts, and mortgaged property, and also to pay over to such other creditor all the money realized over and above \$2,000, and further that the stock when sold should bring 80 per cent. of invoice

cost. It was held that the mortgage, together with the contemporaneous writings, constituted an assignment, and that it was void for failure to comply with the requirements of the statute on the subject of assignments for the benefit of creditors. In the opinion Mr. Justice Simmons said: "Whether the trust was merely for one of the defendants, or, as was contended, for the entire body of creditors, we need not consider. It is the element of trust which brings it within the statute. Nor does it matter that the conveyance was in form a mortgage. It is sufficient that the security inures not merely for the benefit of the mortgagee, but also to that of another creditor for whom he holds in trust." In the second of the two cases cited a mortgage was given by the principal debtor to his indorser, not as a security for the debt, but solely for the indemnity of the indorser, to secure him against any loss that he might sustain by reason of such indorsement. It was held that, under section 2164 of the Code of 1882 (section 2983 of the Civil Code of 1895), the indorser could not proceed against the mortgaged property until judgment had been rendered against him in favor of the creditor; and that prior to that time the creditor could not claim any right of subrogation to enforce the mortgage. In the opinion Chief Justice Bleckley said: "Notwithstanding decisions of some other courts to the contrary, there is manifestly no element of trust in a mortgage of this character. It does not by its own vigor devote or appropriate the property embraced in it to the payment of the debt, but only to the indemnity of the indorser in the event he should sustain loss by reason of his indorsement, and it is recited that he indorsed the notes for accommodation. The mortgage created a mere lien, and therefore could not raise any trust by reason of passing title into the mortgagee. It passed no title," under the law of this state.

In *Hoffman v. Mackall*, 5 Ohio St. 124, 64 Am. Dec. 637, an assignment or unconditional deed of trust was distinguished from a mortgage, or deed of trust in the nature of a mortgage, thus: "There is a manifest and well-settled distinction between an unconditional deed of trust and a mortgage, or deed of trust in the nature of a mortgage. The former is an absolute and indefeasible conveyance of the subject-matter thereof for the purposes expressed; whereas, the latter is conditional and defeasible. A mortgage is the conveyance of an estate, or pledge of property, as security for the payment of money or the performance of some other act, and conditioned to become void upon such payment or performance. A deed of trust in the nature of a mortgage is a conveyance in trust by way of security, subject to a condition of defeasance, or redeemable at any time before the sale of the property. A deed conveying land to a trustee as a mere collateral security for the payment of a debt,

with the condition that it shall become void on the payment of the debt when due, and with power to the trustee to sell the land and pay the debt in case of default on the part of the debtor, is a deed of trust in the nature of a mortgage. By an absolute deed of trust the grantor parts absolutely with the title, which rests in the grantee unconditionally for the purpose of the trust. The latter is a conveyance to a trustee for the purpose of raising a fund to pay debts, while the former is a conveyance in trust for the purpose of securing a debt, subject to a condition of defeasance." See, also, *Crow v. Beardsley*, 68 Mo. 435, 438; *De Wolf v. Sprague Mfg. Co.*, 49 Conn. 282; *Burrell on Assignments* (6th Ed.) § 8.

Tested by the principles above announced, the deed from Brewer to Ryon and Hendry was a voluntary assignment. Brewer made a promissory note to McQueen, with 16 indorsers. Being insolvent at the time, he conveyed realty and personalty to 2 of these indorsers. It was stated in the deed that it was made in order to indemnify the indorsers against loss, and that it was for the express purpose "of vesting the title of the property herein conveyed in the said parties of the second part, for the use and benefit of them the said indorsers." But it was not conditioned upon the indorsers being held liable, or suffering loss. There was no clause of defeasance in case they did not have to pay the indebtedness or did not incur any loss. The conveyance was absolute. It was not a deed of trust in the nature of a mortgage. The two grantees named were trustees to do certain acts. It was expressly declared that, if either of them failed or refused "to act in pursuance of the terms and conditions of this deed," the other should have power to do so; and that, in the event of the death or resignation of both of them, the indorsers should name a successor or successors, who should have all the powers of the original grantees. Clearly this created a trust with certain powers to be executed. What they were to do is thus stated in the deed: They "are authorized to sell the same or any part thereof at private sale, or at public sale for cash, paying the purchase price therefor on the promissory note above described, and in my name to make or cause to be made all deeds, bills of sale, or such other conveyances as may be necessary for the carrying into effect the intention of this deed." There was no conveyance by the debtor to the principal creditor, either in payment of the debt or to secure it. There was not a mere security given to the indorsers to indemnify them against loss. There was an absolute trust deed to two of the indorsers, with power in the trustees to sell and convey the property, and appropriate the proceeds to the payment of the note. Under such a deed, they could not exercise the power for any other purpose. Even precatory or recommendatory words will suf-

fice to create a trust if they are sufficiently imperative to show that it is not left discretionary with the party to act or not, and if the subject-matter of the trust is defined with sufficient certainty, and if the object is also clearly defined, and the mode in which the trust is to be executed. Civ. Code, § 3162. While the primary purpose alleged for the making of the deed was the benefit of the indorsers, yet that benefit was to be worked out, without regard to any loss or payment by the indorsers or judgment against them, by means of a payment to the creditor, to be made by the trustees. This constituted an assignment.

Judgment reversed. All the Justices concur, except HOLDEN, J., who dissents.

HOLDEN, J. I cannot concur in the judgment of the other members of the court, but must dissent therefrom. The deed in question expressly stated that it was made "in order to indemnify them, the said indorsers, against loss by reason of said indorsement," and further declares: "The intention of this deed being for the express purpose of vesting the title of the property herein conveyed in the said parties of the second part, for the use and benefit of them the said indorsers." The indorsers were not creditors of the grantor. The fact that authority was given for a sale of the property and the payment of the proceeds thereof to the payee of the note did not make the deed one of assignment. The cardinal rule of construction of instruments in writing is to arrive at the intention of the parties. The intention of the parties to this instrument was that the deed should operate merely as a security to the indorsers. As before stated, the deed expressly declares that it is made "in order to indemnify them, the said indorsers, against loss by reason of said indorsement," and Civ. Code, § 2983, provides: "If the principal executes any mortgage or gives other security to the surety or indorser to indemnify him against loss by reason of his suretyship, the surety or indorser may proceed to foreclose such mortgage, or enforce such other lien or security, as soon as judgment shall be rendered against him on his contract." In *Importers' Bank v. McGhees*, 88 Ga. 702, 708, 16 S. E. 27, 28, in discussing the section just quoted, the court says: "We think this prescribes a rule which was intended to be general, and that it comprehends all cases of the class mentioned. By clear implication it negatives any right of foreclosure until the surety or indorser has paid something on the debt, or judgment has been rendered against him on his contract. In the present case neither of these events has occurred. The indorser is consequently without any right to inaugurate any proceeding to foreclose the mortgage. As to him the mortgage is immature, there has been no breach of its condition, it is not yet due and payable, and may never become so. It logically follows that the creditor cannot pro-

ceed on his own behalf to enforce the mortgage, although the petition alleges that the indorser, as well as the principal debtors, is insolvent. Notwithstanding decisions of some other courts to the contrary, there is manifestly no element of trust in a mortgage of this character. It does not by its own vigor devote or appropriate the property embraced in it to the payment of the debt, but only to the indemnity of the indorser in the event he should sustain loss by reason of his indorsement, and it is recited that he indorsed the notes for accommodation." Under the Code section above quoted, the indorsers would have no right to exercise the power of sale contained in the deed to them until judgment had been rendered against them, or until they had paid the debt, or some part thereof. The deed recites that it was made "in order to indemnify them, the said indorsers, against loss by reason of said indorsement," and further recited: "The intention of this deed being for the express purpose of vesting the title of the property herein conveyed in the said parties of the second part, for the use and benefit of them, the indorsers." In view of these statements in the deed, and the provision of the Code section above quoted (the meaning of which is that the power of sale could not be exercised until judgment had been rendered against the indorsers or until they have paid the debt, or some part thereof), the deed, properly construed, conveyed the title to the property simply for the purpose of indemnifying the indorsers, and cannot properly be held to be an assignment for the benefit of any creditor or creditors of the maker of the deed.

(134 Ga. 573)

ATLANTIC & B. R. CO. v. SUMNER.

(Supreme Court of Georgia. June 24, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1061*)—HARMLESS ERROR—REFUSAL OF NONSUIT.

Whether a nonsuit could or could not have been properly awarded when the plaintiff closed his case, there being sufficient evidence, when the evidence was all in, to support the verdict in favor of the plaintiff, the refusal to grant a nonsuit affords no cause for a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4210; Dec. Dig. § 1061.*]

2. EVIDENCE (§ 368*)—DOCUMENTARY EVIDENCE—PRIVATE MEMORANDA—COMPELLING PRODUCTION BY ADVERSE PARTY.

Where, on the trial of a civil case, the evidence was stenographically reported, but a mistrial was had, and in preparing for a second trial one side procured the stenographer to write out notes of the evidence, if this was done at the expense of such party and was its private memorandum, the presiding judge should not have required such party to deliver to the adversary party or his counsel such memorandum, unless it was either used in evidence by the party holding it, or witnesses were examined in relation thereto, or in some manner it became a document present in the courtroom which it was proper for the adverse party to have in

order to introduce in evidence. One party or counsel should not ordinarily be required to deliver such private memoranda used in preparation for a trial to his adversary merely for the convenience of the latter, though in response to a notice to produce. But, under the facts as they appear in the motion for a new trial, it is not apparent that the ruling made was of such a character as to require a reversal.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1540, 1541; Dec. Dig. § 368.*]

3. RAILROADS (§ 481*)—FIRES—ACTIONS—ADMISSIBILITY OF EVIDENCE.

Upon the trial of an action against a railroad company for the recovery of damages alleged to have been caused by the destruction of the plaintiff's property by fire started by sparks emitted from the smokestack of a particular locomotive operated by the defendant, it was competent for the plaintiff to show that all locomotives with straight smokestacks of the same construction as that on the engine alleged to have caused the fire threw out sparks.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1721, 1722; Dec. Dig. § 481.*]

4. APPEAL AND ERROR (§ 1067*)—HARMLESS ERROR—REFUSAL OF REQUEST.

The refusal of the court, upon written request, to charge that the jury were not bound by the valuation of the property as testified to by witnesses, was not hurtful to the defendant, when the jury found for the plaintiff much less than the estimated value of the property according to the testimony of any witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.*]

5. APPEAL AND ERROR (§ 302*)—MOTION FOR NEW TRIAL—SUFFICIENCY OF GROUND.

A ground of a motion for a new trial which is equivalent to an assignment of error upon the whole charge is too general to present any question for determination, unless the whole charge appears to be erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1748; Dec. Dig. § 302.*]

6. TRIAL (§ 255*)—FIRES—ACTIONS—INSTRUCTIONS.

Where, upon the trial of a case of the character indicated in the third headnote, the charge to the jury covered the issues made by the pleadings, the court was not bound, in the absence of a timely written request, to instruct the jury that "defendant had a right to operate its trains by the use of steam produced by fire, and that persons placing combustible property close alongside the track . . . took chances of fire from locomotives equipped and operated with due caution on the part of the defendant."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 255.*]

7. TRIAL (§ 260*)—FIRES—ACTIONS—INSTRUCTIONS.

Failure to charge that the presumption against a railroad company, arising from proof of injury caused by the running of its locomotives, machinery, etc., is a rebuttable presumption, is not cause for a new trial, when it appears that the judge charged section 2321 of the Civil Code of 1895 in its entirety, the language of which shows that the presumption therein referred to is rebuttable.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

8. FAILURE TO CHARGE NOT ERROR.

Under the pleadings and evidence in this case, the failure of the court to charge upon the subject of contributory negligence, or as to the duty of one injured by the negligence of another to use ordinary care to diminish the extent of the injury, furnishes no ground for a new trial.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

9. APPEAL AND ERROR (§ 216*)—HARMLESS ERROR—FAILURE TO CHARGE.

In an action brought against a railroad company for damages alleged to have been caused by fire arising from sparks emitted from one of its locomotives, where the charge of the court showed that the grounds of negligence on which the action was based were the improper construction of the locomotive and its improper handling at the time the injury occurred, and the judge gave in charge section 2321 of the Civil Code of 1895, in the absence of any request for a more specific instruction to the effect that the presumption arising against the company, upon proof that the damage was caused by the running of its locomotive, was only in respect to the acts of negligence charged in the petition, the failure to give such specific instruction furnishes no cause for a new trial. *Georgia, Fla. & A. Ry. Co. v. Sumner*, 133 Ga. 134 (1b), 65 S. E. 381, and cases cited.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216;* Trial, Cent. Dig. § 628.]

10. APPEAL AND ERROR (§ 1170*)—REVIEW—INSTRUCTIONS.

Mere failure to charge the rule as to the preponderance of evidence affords no cause for a new trial. *Georgia, Fla. & A. Ry. Co. v. Sumner*, supra (1a).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4540; Dec. Dig. § 1170.*]

Error from Superior Court, Tift County; *R. G. Mitchell*, Judge.

Action by J. S. Sumner against the Atlantic & Birmingham Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Rosser & Brandon, W. T. Colquitt, and J. H. Merrill, for plaintiff in error. C. O. Hall, F. G. Boatright, and Claude Payton, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(134 Ga. 804)

DAVIS v. DAVIS.

(Supreme Court of Georgia. July 14, 1910.)

(Syllabus by the Court.)

1. DIVORCE (§§ 50, 51*)—CONDONATION—EFFECT.

If a husband is guilty of cruel treatment toward his wife, or of adultery, and with full knowledge thereof she condones the offense and cohabits with him, and he is not guilty of any further misconduct, she cannot thereafter, at her mere will, desert him, and, if suit is brought against her for a divorce on the ground of willful and continued desertion for three years before the filing of the suit, set up the condoned acts, and thereby prevent the granting of a divorce.

(a) If after the condonation the conduct of the husband is such as to revive the condoned acts and give her a right to assert them, she is not debarred from so doing; nor is she prevented from setting up misconduct on his part after the condonation, for the consideration of the jury in determining whether a divorce should be granted.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 180-187; Dec. Dig. §§ 50, 51.*]

2. DIVORCE (§§ 238, 239*)—ALIMONY TO WIFE—ALLOWANCE—QUESTION FOR JURY.

Under the statutes of this state (Civ. Code 1895, § 2435), although a husband may obtain a divorce from his wife on the ground of willful and continued desertion for more than three years before the filing of the suit, it is not an inflexible rule of law that the wife shall not be allowed alimony. On the other hand, it does not follow that the divorced wife would be entitled to alimony as of course, when her conduct has been grossly improper and caused her husband to obtain a total divorce from her.

(a) Under the facts of the present case, the judge should have submitted to the jury the question of whether alimony should be allowed to the wife, if a divorce should be granted to the husband.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 670-683; Dec. Dig. §§ 238, 239.*]

Fish, C. J., and Atkinson, J., dissenting.

(Additional Syllabus by Editorial Staff.)

3. DIVORCE (§ 48*)—"CONDONATION."

"Condonation" has been defined to be the forgiveness, either expressed or implied, by a husband of his wife, or by a wife of her husband, for a breach of marital duty, with an implied condition that the offense shall not be repeated.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 169, 170, 184; Dec. Dig. § 48.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1411-1415; vol. 8, p. 7610.]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by Hugh F. Davis against Marie A. Davis. Judgment for plaintiff, and defendant brings error. Reversed.

Oliver & Oliver, for plaintiff in error. Robt. L. Colding, for defendant in error.

LUMPKIN, J. Hugh F. Davis brought suit against his wife, Marie A. Davis, for divorce on the ground of willful and continued desertion for more than three years. She denied the allegation of the plaintiff, and, by way of cross-libel, alleged that the plaintiff had deserted her, had cruelly treated her, and had been guilty of adultery. She prayed that a divorce be granted to her, and that she have a judgment for alimony. The jury found for the plaintiff a total divorce. In the second verdict they declared: "We fix the rights and disabilities of the parties as follows: That neither of the parties be at liberty to marry again." The defendant moved for a new trial, which was denied, and she excepted.

1. "Condonation" has been defined to be the forgiveness, either express or implied, by a husband of his wife, or by a wife of her husband, for a breach of marital duty, with an implied condition that the offense shall not be repeated. Webster's Dictionary; *Odom v. Odom*, 36 Ga. 286. Voluntary condonation and cohabitation subsequently to the acts complained of, and with notice thereof, prevents the grant of a divorce on account of them. Civ. Code 1895, § 2429. But if the implied condition be broken, the right

to set up such wrongful acts is revived, and the innocent party is not prevented from obtaining a divorce. What character of misconduct will serve to revive the right to rely upon acts previously condoned, and whether 't is necessary that such reviving acts shall be sufficient to furnish a ground for divorce, is not here involved. *Ozmore v. Ozmore*, 41 Ga. 46; 14 Cyc. 642. If, however, there is no breach of the condition after condonation and cohabitation, the forgiveness stands as complete and absolute. The condoning party cannot forgive the acts, and cohabit voluntarily with the forgiven one, and at the same time reserve the right to assert them as a means of obtaining a divorce, if there be no further misconduct, or as a screen to prevent a divorce being obtained on account of subsequent breaches of marital duty by such condoning party. To permit this would be to attach a different condition to condonation from that which the law attaches, and to make forgiveness such only in name. Condonation is not revocable at will.

It was argued that section 2429 of the Civil Code 1895, above cited, closes with the words: "And in all cases, the party sued may plead in defense the conduct of the party suing, and the jury may, on examination of the whole case, refuse a divorce." This statement follows certain provisions to the effect that "if the adultery, desertion, cruel treatment, or intoxication complained of shall have been occasioned by the collusion of the parties and with the intention of causing a divorce, or if the party complaining was consenting thereto, or if both parties have been guilty of like conduct, or if there has been a voluntary condonation and cohabitation subsequent to the acts complained of, and with notice thereof, then no divorce shall be granted." The last clause of the section (quoted first above) was not intended to destroy entirely the effects of the condonation, so that a person, after condoning a ground for divorce and cohabiting with the offender, could at some later period, and with no further reason, desert the person so forgiven, persist in such desertion for the statutory period, and yet prevent a divorce by reason of the condoned acts. If there were a breach of the implied condition on the part of the person whose offense had been condoned, or if there were other acts or grounds authorizing the refusal of the divorce, this could be pleaded and proved for the consideration of the jury. The charge of the court on this subject was not erroneous.

2. The court charged the jury that, if they found a total divorce for the plaintiff, they would put their verdict in a certain form, "and, in that event, you would not allow the defendant alimony." This in effect instructed the jury, as a rule of law, that, if they should find a total divorce in favor of the husband against the wife, they would allow the latter no alimony. At common law (including in that term the canon or ecclesi-

astical law) the ecclesiastical courts did not grant total divorces except for such cause as rendered the marriage void *ab initio*. This was rather an adjudication that there had never been a binding marriage than a dissolution of one originally valid. Partial divorces were granted on account of adultery and cruel treatment. Prior to 1858 in England no judicial divorces dissolving the bonds of matrimony, if originally valid, were allowed. Parliament exercised that authority. In its origin alimony was the method by which the spiritual courts enforced the duty of support owed by a husband to his wife during such time as they were legally separated. It was not an incident to declaring the marriage void *ab initio*, since, if there were no marriage, the duty of maintenance had not been undertaken. The question of awarding alimony upon the dissolution of a valid marriage for a postnuptial cause could not therefore have been decided in England prior to the time when the common law was adopted in this state. In regard to partial divorces it has been declared that where the wife, by her fault, forfeited all claim upon her husband for necessities or other support, and he obtained a divorce from her on that ground, she could not, after this fact had been adjudged against her, have alimony from him. Thus where a divorce was granted to a husband on account of the adultery of the wife, she was held to be entitled to no alimony: 3 Bl. Com. 94. As late as 1859, in *White v. White*, 24 Jurist, 28, upon the granting of a petition for a judicial separation presented by a man against his wife, on account of her violent and cruel conduct towards him, Cresswell, Judge Ordinary, held that the wife was entitled to no permanent alimony, saying that he found no precedent for granting it in such case. But in 1864, in *Prichard v. Prichard*, Law Times Reports, 789, Wilde, Judge Ordinary, overruled the decision in the *White Case* and another similar case, saying: "I am aware of the cases to which you allude, but I think if there is no precedent I ought to make one."

It has been decided by a number of courts that, in the absence of any statute, if a divorce be granted to a husband against the wife, she is not entitled to alimony. This at times worked a great hardship on the wife, especially under the common law, where the marital right of the husband attached to her property; and, while it was said to be strict justice, it was also said that it sometimes drove the wife to starvation or a life of shame. The English Parliament adopted a practice, when granting to a husband a total divorce, of requiring him to make some provision for his wife. In England, and in a number of the United States, statutes have been enacted which authorize the courts to grant alimony to wives against whom judgments of divorce are rendered, or to require some other provision to be made by the husbands, when the courts deem it best. In

some of these statutes the provision is express, in others the terms are general; but the courts have construed them to have the effect above indicated. Where, under the statute, discretion is vested in the court, it is to be exercised with care. In such jurisdictions it has been said to be the exception, rather than the rule, that the wife shall cause the matrimonial tie to be sundered by reason of her own conduct, and still have alimony; but, on the other hand, that the wife may have collaborated with her husband in acquiring the property held by the latter, that she may have greatly aided in establishing his fortune, that her conduct may not have been justifiable, so as to prevent a divorce, and yet the conduct of the husband may not have been exemplary. She may have no property, and be broken in health. In other words, under such statutes, while the law does not hold out to a wife who deserts the matrimonial domicile the promise of a right to alimony, but rather discourages divorces coupled with pecuniary claims upon the part of the party at fault, yet there may be circumstances which may render it just and proper that some alimony should be allowed to the wife, although the divorce should be granted against her. In such instances the judge or the jury, as the case may be, in passing upon the question of alimony should take into consideration the situation and circumstances of the parties, the property owned by them respectively, the conduct of each, and all the facts which would throw light on the proper exercise of the discretionary power. 2 Bish. Mar. & Div. § 861 et seq., and citations.

The question is: Where does Georgia take position on this subject? At first the Legislature granted total divorces. The first general rule in regard to the matter which the writer has found laid down is contained in the Constitution of 1798 (article 3, § 9), where it was declared: "Divorces shall not be granted by the Legislature, until the parties shall have had a fair trial before the superior court, and a verdict shall have been obtained, authorizing a divorce upon legal principles. In such cases, two-thirds of each branch of the Legislature may pass acts of divorce accordingly." Marbury & Crawford's Dig. 29. By the act of December 5, 1806 (Cobb's Dig. p. 224), it was declared that in all cases where the jury "shall determine in favor of a conditional divorce, they shall by their verdict or decree make provision, out of the property of which the husband may be possessed, for the separate maintenance and support of the wife and the issue of such marriage, which verdict or decree the said court shall cause to be carried into effect according to the rules of law, or according to the practice of chancery, as the nature of the case may require." By amendment to the Constitution divorces were made final and conclusive upon the concurrent verdicts of two special juries, authorizing a divorce

upon such legal principles "as the General Assembly may by law prescribe." The last of these amendments doubtless resulted from the decision in *Head v. Head*, 2 Ga. 191. See, also, Cobb's Dig. 1123. By the act of February 22, 1850 (Cobb's Dig. p. 226), the grounds of divorce, both total and partial, were declared. These are now embodied in Civ. Code 1895, § 2426 et seq. The Constitution of 1861 contained the following provision: "The superior court shall have exclusive jurisdiction in all cases of divorce, both total and partial; but no total divorce shall be granted except on the concurrent verdicts of two special juries. In each divorce case, the court shall regulate the rights and disabilities of the parties." Code 1861, § 4974. Thus the entire subject of granting divorces and alimony became fixed by constitutional provision in the superior court, and ceased to be a matter of legislative grant. By the act of 1806 (Cobb's Dig. p. 225) requirement had been made that the party applying for a divorce should file a schedule of the property owned by the parties respectively, and that, after all just debts had been paid, it should be subject to a division or equal distribution between the children of such parties, unless the jury should think proper to allow either party a part thereof. When the first Code was adopted, instead of providing for a division of the property, it was declared that: "In all suits for divorce, the party applying shall render a schedule, on oath, of the property owned or possessed by the parties at the time of the application—or at the time of the separation, if the parties have separated—distinguishing the separate estate of the wife, if there be any, which shall be filed with the petition, or pending the suit, under the order of the court. The jury rendering the final verdict in the cause may provide permanent alimony for the wife, either from the corpus of the estate or otherwise, according to the condition of the husband and the source from which the property came into the coverture." Code 1861, § 1676. This language, "in all suits for divorce * * * the jury * * * may provide permanent alimony for the wife," has been preserved and again adopted in section 2435 of the Civil Code of 1895, although the husband's marital right no longer attaches to the wife's property. Perhaps the possibility that the labor and services of the wife may have contributed to build up the fortune of the husband may have been in the legislative mind. Thus it will be seen that the trend of legislation in Georgia has not been to restrict the powers of the jury or to confine them rigidly to the rule that, if a divorce shall be granted to the husband against his wife, no provision for her support shall be made. The authority given to the jury by the act of 1806 to divide the property among the children, but to make an allowance to either party, should they think proper, and the later provisions in regard to the powers of the jury, negative the idea of an absolute lim-

itation in regard to alimony if a divorce should be granted to the husband.

In *Campbell v. Campbell*, 90 Ga. 687, 16 S. E. 960, Mr. Justice Simmons said: "A wife is entitled to support by her husband until the right is forfeited by her own misconduct; and in some cases alimony has been allowed her even where the divorce was in favor of the husband." He also said that in this state the right of a wife to a provision by the husband in her favor is the same, whether the divorce is from bed and board only or a total dissolution of the marriage—at least if a valid marriage has subsisted. In that case the divorce was granted on the application of the wife. We have not overlooked the fact that section 2462 of the Civil Code 1895 says that: "If the jury, on the second or final verdict, find in favor of the wife, they shall also, in providing permanent alimony for her, specify what amount the minor children shall be entitled to for their permanent support, * * * and this they may also do if, from any legal cause, the wife may not be entitled to permanent alimony, and the children are not in the same category." We do not think that the expression, "if the jury, on the second or final verdict, find in favor of the wife," means that in no event can alimony be awarded unless the wife shall obtain a divorce. In such a case, the law provides, in awarding alimony to her, for specifying the amount to which the minor children should be entitled; and also for finding alimony for the children, should she be debarred from obtaining it for any legal reason. That section was derived from the act of October 28, 1870 (Acts 1870, p. 413). Its title was "An act to extend the provision for alimony to the family of the husband; to provide for the custody of the children, and for other purposes, connected therewith." Under section 2478 of the Civil Code, the husband is bound for necessities furnished to his wife when living separate from him; but, if she voluntarily abandons him without sufficient provocation, notice by the husband shall relieve him of all liability for necessities furnished to her. This deals with the authority of the wife, as matter of right, to charge her husband with necessities, when living separate from him. It does not deal with divorce cases, or the power of the judge to award temporary alimony, or absolutely prevent a jury from allowing permanent alimony in a proper case. They may allow it or refuse it, or may allow less than full maintenance, according to circumstances.

The construction of statutes of one state often throws little light on the construction of those of another, as a slight difference in language may make a great difference in construction. But an examination of the statutes of other states and their construction by the courts show that the trend of authority is in harmony with this decision. In *Deenis v. Deenis*, 79 Ill. 74, a statute was under consideration which declared that, "when a di-

vorice shall be decreed, it shall and may be lawful for the court to make such order touching the alimony and maintenance of the wife, the care, custody, and support of the children, or any of them, as from the circumstances of the parties and the nature of the case shall be fair, reasonable, and just." It was held that alimony might be allowed, notwithstanding the divorce was granted for the fault of the wife. The opinion of Mr. Justice Scholfield strongly presents the grounds of equity and justice for such a construction. In *Spitler v. Spitler*, 108 Ill. 120, the former ruling was adhered to; but it was said that it was not the object of the Legislature in adopting the provision of the statute relating to alimony to abrogate the general principles or policy of the law relating to that subject, but rather to clothe the court with power to mitigate occasional hardships that might otherwise occur. In *Graves v. Graves*, 108 Mass. 314, 317, a somewhat similar statute of Massachusetts was construed, and it was held that alimony might be awarded to the wife upon granting to the husband a divorce for her fault. Gray, J., clearly stated the reason for giving such a construction to the statute.

An application for temporary alimony is made to the presiding judge pending the litigation. He is vested with considerable discretion on the subject. It is sometimes granted where permanent alimony is ultimately refused, on the ground that the wife must be maintained and furnished reasonable opportunity for pressing her suit or defending herself against charges made against her. If she willfully deserts her husband without cause, this may furnish a ground for refusing temporary alimony, in the discretion of the judge; and in some cases, where the separation was clearly shown to have resulted from the adultery of the wife, or to have been without any shadow of excuse, and there were other circumstances of hardship in requiring the husband to thus support her, it has been held to be an abuse of discretion to allow her alimony. *Vinson v. Vinson*, 94 Ga. 492, 19 S. E. 898; *Kendrick v. Kendrick*, 105 Ga. 38, 31 S. E. 115; *Williams v. Williams*, 114 Ga. 772, 40 S. E. 782.

In this case the evidence of the wife tended to show bad conduct on the part of the husband; that she had always helped support the family by sewing; that her eyesight was failing, and her health was becoming so poor that she was scarcely able to do any work, and was not able to support herself without assistance; and there was evidence tending to show that the husband was able-bodied and earned about \$18 per week. It was admitted in the pleadings that neither the husband nor the wife had any property. We do not mean that courts or juries should make matrimonial dissensions attractive as a source of profit. The reverse is true. It was declared by McCay, J., as long ago as 1872 (Hill

v. HUL, 47 Ga. 332, 336), that "suits for divorce and alimony ought not to be encouraged."

The jury might perhaps have found against the present plaintiff's application for alimony; but under the evidence the judge erred in declaring, as a fixed rule of law, that, if the jury found a divorce for the husband on the ground of desertion, the wife would be entitled to no alimony.

4. The verdict was somewhat unusual in form; but it is unnecessary to deal with that point, as the case is to be tried again on its merits.

Judgment reversed.

FISH, C. J., and ATKINSON, J., dissent.
The other Justices concur.

FISH, C. J. I am constrained to dissent from the proposition announced in the second headnote to the opinion of the majority of the court. I understand the rule to be that, in the absence of a statute to the contrary, permanent alimony will not be awarded a wife when a decree for divorce is rendered against her. 14 Cyc. 767; 2 Am. & Eng. Enc. Law, 118 (3). The provisions of sections 2435, 2462, and 2478 of the Civil Code of 1895, quoted in the opinion, when construed in pari materia, do not, in my opinion, change the rule. If, under the law of this state, a husband is not bound for necessities furnished his wife if she be living in adultery with another man (Civ. Code 1895, § 2478), and if temporary alimony cannot be awarded a wife where the separation has been caused solely by adultery on her part (Williams v. Williams, 114 Ga. 772, 40 S. E. 782), I am unable to understand why the husband should be required to support her by the payment of permanent alimony when he procures a divorce from her because of her adultery, or because of her guilt in any other respect authorizing a divorce. I am authorized by Justice ATKINSON to state that he concurs in this dissent.

(134 Ga. 788)

CLARK, County Treasurer, v. EVE.
(Supreme Court of Georgia. July 13, 1910.)

(Syllabus by the Court.)

1. STATUTES (§ 124*)—SUBJECTS AND TITLES.

The act of 1904 (Acts 1904, p. 201) prescribed the salary for the judge of the city court of Savannah and defined his duties, which were purely judicial. The act of 1881 (Acts 1880-81, p. 574) established the city court of Richmond county, provided for the appointment of a judge and a solicitor, prescribed the salary for the judge, and defined his duties, which were purely judicial. The act of 1883 (Acts 1882-83, p. 524) declared that the judge of the city court of Richmond county should be ex officio commissioner of roads and revenue for that county, and declared his duties as such relating to county matters. The act of 1886 (Acts 1886, p. 264) prescribed the compensation for his duties in

the management of the county business. All of these acts were in effect at the date of the passage of the act approved August 15, 1905. (Acts 1905, p. 100), the caption and body of which are as follows: "An act to fix the salary of the judges of the city courts of the state in counties where there are cities having a population of not less than 39,000 nor more than 75,000, to provide for the payment of such salary, and for other purposes. Section 1. Be it enacted by the General Assembly of the state of Georgia, and it is hereby enacted by authority of the same, that from and after the passage of this act, the judge of the city courts in all counties having therein a city with a population of not less than 39,000 nor more than 75,000, according to the United States census of 1900, shall have an annual salary of \$5,000, payable in monthly installments, out of the treasury in such counties in the same manner as the judges of said courts are now paid. The salary herein provided for shall cover all duties incident to, or connected with, the office of judge of the city courts of the state, whether said duties are provided for in local or general acts. Section 2. Be it further enacted, that all laws or parts of laws in conflict with this act be and the same are hereby repealed as far as they conflict." At the date of the passage of the act just quoted, only the counties of Chatham and Richmond had therein cities having population of not less than 39,000 nor more than 75,000 according to the United States census of 1900. Held, that the existence of the several acts above mentioned at the time of the passage of the act of 1905, supra, did not render the latter act obnoxious to article 3, § 7, par. 8, of the Constitution (Civ. Code, § 5771), which provides that no law shall pass which refers to more than one subject-matter; nor to article 3, § 7, par. 8, of the Constitution (Civ. Code, § 5771), which prohibits the passage of an act which contains in the body thereof matter not expressed in the caption.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 184, 186; Dec. Dig. § 124.*]

2. COUNTIES (§ 151*)—LIMITATION OF INDEBTEDNESS—SUBMISSION OF QUESTION TO VOTERS.

The act of 1905, above set out, does not violate article 7, § 7, par. 1, of the Constitution (Civ. Code, § 5893), on the ground that it creates a new debt of \$5,000 a year in favor of the judge of the city court of Richmond county without the assent thereto of two-thirds of the qualified voters of the county.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 218; Dec. Dig. § 151.*]

3. STATUTES (§ 8½*)—LOCAL ACTS—PUBLICATION OF NOTICE—LEGISLATIVE QUESTION.

If it be conceded that the act of August 15, 1905, supra, was a local act of the character requiring publication, under the provisions of article 3, § 7, par. 16, of the Constitution (Civ. Code, § 5778), the question of whether or not it had been duly published was a legislative question, and will not be inquired into by the courts. Speer v. Athens, 85 Ga. 49, 11 S. E. 802, 9 L. R. A. 402; Burge v. Mangum, 134 Ga. —, 67 S. E. 857; White v. City of Atlanta, 134 Ga. —, 68 S. E. 103.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 6; Dec. Dig. § 8½.*]

4. COUNTIES (§ 190*)—TAXATION—POWER TO LEVY—"EXPENSES OF COURT."

The act approved August 15, 1905 (Acts 1905, p. 100), was not violative of article 7, § 8, par. 2, of the Constitution (Civ. Code, § 5892), on the ground that the section of the Constitution referred to restricted the purposes for which county taxes might be levied in such manner as to exclude from them the power to

levy a county tax for the purpose of paying the salary of the judge of the city court of Richmond county. Among the purposes for which county taxes might be levied under that provision of the Constitution is one for the payment of "expenses of court." Article 3, § 1, par. 1, of the Constitution (Civ. Code, § 5831), provides that the judicial powers of this state shall be vested in a supreme court, superior courts, courts of ordinary, justices of the peace, commissioned notaries public, and such other courts as may be established by law. Paragraph 5 of the same article (Civ. Code, § 5836), providing for writs of error, declares that they may be taken from the superior courts and from the city courts of Atlanta and Savannah, and such other like city courts as may be established in other cities. Thus the power to create local city courts is recognized in the Constitution. At the time of the adoption of the constitutional provision above mentioned, city courts were in existence, and the salaries of the judges were paid by local taxation. The recognition of such courts by the Constitution also embraces the recognition of the organization thereof and the manner of payment of the salaries of the judges. The several provisions of the Constitution above mentioned should be construed together, and, so construing them, salaries of judges of the city courts may be properly classed as expenses of court within the meaning of the Constitution relative to the levy of taxes by counties.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 300; Dec. Dig. § 190.*]

5. CONSTITUTIONAL QUESTION IMMATERIAL.

Attacks were made upon the constitutionality of the act of July 31, 1906 (Acts 1906, pp. 58, 59). This act purports to amend the act of August 15, 1905, quoted in the first headnote, by striking therefrom the words "nor more than 75,000," thus leaving the act of 1905 applicable to all counties having cities therein with a population of not less than 39,000. The act did not purport to do more. At the time of its passage the only city in the county of Richmond having a population of not less than 39,000 was the city of Augusta, which had a population of 39,441. Hence the act of 1905 was applicable to the county of Richmond, without regard to the amending act of 1906; and it becomes immaterial to inquire into the constitutionality of the latter act upon any ground of attack.

6. COUNTIES (§§ 165, 197*)—CLAIMS—COMPENSATION OF JUDGES—NECESSITY FOR WARRANT—PAYMENT—MANDAMUS.

Formerly it was provided that justices of the inferior courts "must audit all claims against their respective counties, and every claim, or such part thereof as may be allowed, must be registered by the clerk, and said justices must give the claimant an order on the treasurer for the amount." Irwin's Code 1867, § 540. By subsequent acts of the Legislature all of the powers of the justices of the inferior court in Richmond county relative to county matters were vested successively in other county officers, and finally, by the act approved August 19, 1907 (Acts 1907, p. 324), the board of commissioners of roads and revenues for the county of Richmond, became vested with those powers. The act of 1825 (Cobb's Dig. p. 211, § 4), which has never been repealed, declared: "It shall be the duty of the county treasurer to pay without delay all warrants passed by the inferior court and directed to him, provided he has funds so to do, and shall upon paying same take receipt upon such order for his justification, and shall keep the same on file in his office." For a number of years, while the plaintiff was judge of the city court of Richmond county and ex officio commissioner of roads and revenue in Rich-

mond county, he drew his salary by orders approved by himself as county commissioner and presented to the county treasurer as warrants, and no salary was paid to him without a warrant. *Held*, that the enactments above referred to, and the custom observed in the matter of collecting from the treasurer of the county the salary of the judge of the city court and ex officio commissioner of roads and revenues above described, were not sufficient to justify the treasurer of Richmond county in refusing payment of the salary of the judge of the city court of Richmond county for the month of December, 1909, on the ground that he failed to present a formal warrant for the same.

(a) Under the provisions of the act approved August 15, 1905 (Acts 1905, p. 100), as applicable to the county of Richmond, the salary of the judge of the city court of Richmond became fixed by law, payable out of the county treasury in monthly installments; and it was unnecessary for the judge of the city court to have his claim for salary audited and a warrant on the county treasurer issued therefor. See *Gamble v. Clark*, 92 Ga. 696, 19 S. E. 54; *Lamb v. Toomer*, 91 Ga. 621, 17 S. E. 966; *Chatham County v. Gaudry*, 120 Ga. 121, 47 S. E. 634, and citations. Upon the refusal to pay, mandamus will lie against the treasurer of the county to compel payment of any part of the salary when by law it is payable and after it has been demanded, although at the time of making demand no formal warrant had issued therefor.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 246, 247, 309-311; Dec. Dig. §§ 165, 197.*]

Error from Superior Court, Richmond County; D. W. Meadow, Judge.

Mandamus by William F. Eve against W. A. Clark, treasurer of Richmond county. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. F. Eve, being judge of the city court of Richmond county, instituted suit for a writ of mandamus against Walter A. Clark, as treasurer, to compel the payment of the sum of \$416.68, alleged to be due as his salary for the month of December, 1909. The claim was based on the act approved August 15, 1905 (Acts 1905, p. 100), as amended by the act approved July 31, 1906 (Acts 1906, p. 58), it being alleged that the acts referred to provided for the payment of a salary amounting to \$5,000 annually, payable in monthly installments, out of the treasury of the county. The defendant filed a plea in bar, and also a demurrer, in which the acts of the Legislature above mentioned were attacked as being void, on the ground that they were violative of the Constitution in several particulars fully set forth. The defendant also filed an answer, wherein certain of the allegations of the petition were admitted and others denied; and set up further that there was no legal duty upon the treasurer to pay the demand referred to in the plaintiff's petition, because under the several acts defining the duties of the treasurer he was required to pay only such demands as were audited and ordered paid by the board of county commissioners, and that the plaintiff's demand had not been approved by the county commission-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

ers and ordered paid. Later, the defendant amended his answer, alleging that during his tenure of office, which commenced in 1897, the plaintiff had been commissioner of roads and revenues of the county, and that it had been customary for the plaintiff to present warrants issued by the county commissioners for the payment of his salary, and that he had never been paid any salary except upon warrant. In the amendment further reasons were urged as showing the unconstitutionality of the acts of the Legislature relied upon by plaintiff to establish the amount of his salary. On the trial the judge passed an order making the mandamus absolute, and required the defendant to pay over the sum demanded. The defendant excepted.

Salem Dutcher and Wm. H. Fleming, for plaintiff in error. J. R. Lamar and Austin Branch, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(134 Ga. 798)

CLARK, County Treasurer, v. HAMMOND.
(Supreme Court of Georgia. July 14, 1910.)

(Syllabus by the Court.)

JUDGES (§ 22*)—COMPENSATION.

Under a proper construction of article 6, § 13, pars. 1, 2, of the Constitution of 1877, salaries of the judges of the superior courts are payable exclusively from the state treasury. In so far as the Act of 1904, p. 73, as amended by the Acts of 1905, p. 100, and the Act of 1906, p. 56, purports to supplement salaries of the judges of the superior courts from county treasuries it is void.

[Ed. Note.—For other cases, see Judges, Dec. Dig. § 22.*]

Error from Superior Court, Richmond County; B. T. Rawlings, Judge.

Mandamus by H. C. Hammond against W. A. Clark, Treasurer of Richmond County. Judgment for plaintiff, and defendant brings error. Reversed.

Henry C. Hammond, being judge of the superior courts of the Augusta circuit, instituted suit for a writ of mandamus against Walter A. Clark, as treasurer of Richmond county, to compel the payment of \$106.66, alleged to be due for part of his salary as judge for the month of December, 1909. It was alleged that the petitioner was entitled to a salary of \$5,000 per annum, \$3,000 to be paid by the state and \$2,000 by the county of Richmond, under certain acts of the Legislature. The defendant filed a plea in bar and a demurrer, in which the acts of the Legislature relied upon by the plaintiff as authorizing the payment of that part of the salary alleged to be due were attacked as being void on the ground that they were violative of the Constitution in several particulars fully set forth. The defendant also filed an

answer, wherein certain of the allegations of the petition were admitted and others denied, and set up further that there was no legal duty upon the treasurer to pay the demand referred to in the plaintiff's petition, because under the several acts defining the duties of the treasurer he was required to pay only such demands as were audited and ordered paid by the board of county commissioners, and that the plaintiff's demand had not been approved by the county commissioners and ordered paid. On the trial a certain document was admitted in evidence over objection and exception taken. The judge passed an order making the mandamus nisi absolute, and required the defendant to pay over the sum demanded. The defendant excepted.

Salem Dutcher and Wm. H. Fleming, for plaintiff in error. J. R. Lamar and Austin Branch, for defendant in error.

ATKINSON, J. 1. The law relied on as a basis for the writ of mandamus was the act approved August 6, 1904 (Acts 1904, p. 73), as amended by the act approved August 15, 1905 (Acts 1905, p. 100), and later by the act approved July 31, 1906 (Acts 1906, p. 56). As thus amended the act declared, among other things, the following: "That the judges of the superior courts of all the judicial circuits, which are now or may hereafter be established in this state, having therein a city with a population of not less than 34,000 inhabitants, according to the United States census of 1900, shall receive a salary of five thousand dollars per annum, the difference in amount between the sum paid said judges out of the treasury of the state, and said five thousand dollars to be paid out of the treasury of the counties in which said cities are located, as other court expenses of said counties are paid; provided, that the provisions of this act shall not affect the salaries of such judges as are now in commission." One ground of attack upon the validity of this statute was that it was violative of article 6, § 13, par. 1, of the Constitution of the state of Georgia (Civ. Code 1895, § 5864), because under that provision of the Constitution salaries of the judges of the superior courts were required to be paid out of the treasury of the state exclusively, and that the Legislature was prohibited from making any part of the salary chargeable upon the county treasury. The provision of the Constitution referred to is as follows: "The judges of the Supreme Court shall have, out of the treasury of the state, salaries not to exceed three thousand dollars per annum; the judges of the superior courts shall have salaries not to exceed two thousand dollars per annum; the Attorney General shall have a salary not to exceed two thousand dollars per annum; and the Solicitors General each shall have salaries not to exceed two hun-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dred and fifty dollars per annum; but the Attorney General shall not have any fee or perquisite in any cases arising after the adoption of this Constitution; but the provisions of this section shall not affect the salaries of those now in office." Under the view we take of the case, the decision is controlled by the construction to be placed upon this clause of the Constitution. Article 3, § 2, of the Constitution of 1798, declared: "The judges shall have salaries, adequate to their services, established by law, which shall not be increased or diminished during their continuance in office; but shall not receive any other perquisites or emoluments whatever, from parties or others, on account of any duty required of them." Watkins' Dig. p. 89. Thus it was declared at that early date that judges of the superior courts should have salaries, but nothing was said as to the source from which they should be paid. Subsequent enactments by the Legislature provided the amount of the salaries, and designated that they were "payable quarterly out of any money in the treasury." Act 1804 (Clayton's Dig. p. 178); Act 1819 (Cobb's Dig. p. 1023). Later, the act of 1857 (page 129) increased the salaries of the judges of the superior courts, but did not specify expressly the source from which they should be paid. In 1865 the Constitution again dealt with the matter, making provision with reference thereto substantially the same as those contained in the Constitution of 1798, as appears in the foregoing excerpt. See Const. 1865, art. 4, § 3, par. 1 (Irwin's Code 1867, § 4975). The Constitution being silent as to the source from which the salary should be paid, provision was made, in section 8 of the act approved March 13, 1866 (Acts 1865-66, p. 11), for a standing appropriation to pay the salaries of all the officers of this state, whose salaries are fixed by law, out of the general taxes. This included, among others, the salaries of the judges of the superior courts. It thus appears that up to 1866 the salaries of the judges of the superior courts had never been paid elsewhere than out of the state treasury, though the Constitution had not declared in express terms the source from which they should be paid. It was not until 1868 that the Constitution declared, in so many words, that they were payable from the state treasury. By article 5, § 10, par. 1, of the Constitution of 1868 (Code 1873, § 5113), it was declared: "The judges of the Supreme and superior courts, and the Attorney and Solicitors General shall have, out of the state treasury, adequate and honorable salaries on the specie basis, which shall not be increased or diminished during their continuance in office. The district judges and district attorneys shall receive, out of the treasuries of the several counties of their districts, adequate compensation, on the specie basis, which shall not be increased or diminished during their term of office; but said judges shall not receive any other perquisites, or emoluments what-

ever, from parties, or others, on account of any duty required of them." The introduction of district courts into the state's judicial system, with the salaries of the judges intended to be payable out of the county treasuries, furnished a sufficient reason for the makers of the Constitution to exercise greater particularity in specifying the source from which judicial salaries should be paid. As the different courts were intended to be paid from separate sources, the source from which each was intended to be paid was expressly and explicitly stated. After the district courts were abolished (Acts 1871-72, p. 68), the fact of their introduction in the manner above indicated no longer afforded a reason for the same particularity in designating the source from which the salaries of the judges of the other courts should be paid. No other law was made on the subject by any of the lawmaking powers until action was taken by the constitutional convention which assembled in 1877. At that time the provision was made which we are now undertaking to construe. In the debates before the convention no reference was made to the source from which the salaries of the judges of the superior courts should be paid. See Small's Notes of the Constitutional Convention of Georgia, pp. 246, 247.

It thus appears from the history of the subject, as derived from the provisions of all the Constitutions and acts of the Legislature with reference thereto, that there was an uninterrupted practice upon the part of the lawmaking powers, up to the time of the adoption of the Constitution of 1877, of making provision for payment of the salaries of the judges of the superior courts out of the treasury of the state. There was never any suggestion that the salaries might be paid from different sources, but the uniform practice was to provide for payment of each salary as a whole from one source—the treasury of the state. When the Constitution of 1877 came to deal with the subject, the district court no longer being a factor, the language was varied somewhat, as set forth in article 6, § 13, par. 1, of that Constitution, as quoted above. In that clause of the Constitution of 1877, the words "out of the state treasury" were employed in immediate connection with the provision for salaries of the judges of the Supreme Court, but were not repeated in such connection with any of the other salaries mentioned. This change in the phraseology in the Constitution of 1877 from that of previous Constitutions was no doubt the result of the introduction into the Constitution of 1865 of district courts, and the abolition of those courts by the act of 1871, *supra*. As stated before, the salaries of the judges of the district courts were intended to be paid out of the county treasuries, and consequently particular language was employed in the Constitution of 1865, but when those courts were abolished in 1872, and there was no longer a necessity

for payment of salaries from county treasuries, the language of the Constitution of 1877 on the subject was again changed, so that it more nearly resembled the language employed in previous Constitutions. Except for the advent and passing from the judicial system of the state of the district courts, the language of the Constitution of 1877, in regard to the payment of salaries of the judges of the superior courts, would probably have been as embraced in the Constitution of 1798, and substantially repeated in the Constitution of 1865, which merely provided that salaries should be paid without designating the source of payment. The omission of the Constitution of 1877 to repeat the words "out of the state treasury" in immediate connection with the salaries of each of the officers, other than the judges of the Supreme Court, could hardly be said to signify any intent that those salaries might be paid from any other source than the state treasury. The language of the act of 1906, quoted above, which is attacked as being unconstitutional, recognizes that the salaries theretofore payable to judges of the superior courts were payable out of the state treasury, and refers to that fact in express language. The uniform practice, for so many years, of paying from the state treasury the salaries of the judges of the superior courts under legislative enactments and constitutional sanction indicates a marked design upon the part of the framers of the Constitution that the salaries should be paid from that source; otherwise it would have been expressly prohibited. Another indication of such design is the provision in the Constitution for the levy of an ad valorem tax upon all property in the state for the support of the state government and the public institutions, which included the superior courts. Article 7, § 1, par. 1, of the Constitution of 1877 (Civ. Code 1895, § 5882). Again, the Constitution of 1877 made provision for the levy of an ad valorem tax by counties, but expressly restricted it to certain purposes. Article 7, § 6, par. 2 (Civ. Code 1895, § 5892). The language of this provision of the Constitution was: "The General Assembly shall not have power to delegate to any county the right to levy a tax for any purpose, except for educational purposes in instructing children in the elementary branches of an English education only; to build and repair the public buildings and bridges; to maintain and support prisoners; to pay jurors and coroners, and for litigation, quarantine, roads, and expenses of courts; to support paupers and pay debts heretofore existing." It could not be contended that any of the purposes specified contemplated the payment of the salaries of the judges of the superior courts, unless it should be the provision for payment of "expenses of court." We shall see presently that this provision does not refer to salaries of judges of the superior courts. As

it did not, and the other purposes to which the levy of the county tax had been restricted by the Constitution did not authorize the levy of a county tax to pay salaries of judges of the superior courts, there was no constitutional provision for the payment of salaries of the judges of the superior courts out of the county treasuries. Thus an additional light is afforded, tending to show, by the language of article 6, § 13, par. 1, of the Constitution of 1877, a design to limit the payment of salaries of judges of the superior courts to funds derived from the treasury of the state. The paragraph of the Constitution of 1877 which succeeded and immediately followed article 6, § 13, par. 1, declared: "The General Assembly may at any time, by a two-thirds vote of each branch, prescribe other and different salaries for any, or all of the above officers, but no such change shall affect the officers then in commission." While by this language the Legislature was authorized to designate other and different salaries, there was no express declaration that they should be paid elsewhere than from the state treasury. A salary for a different amount, either larger or smaller than one existing, would satisfy the words "other" and "different," whether it be paid from the state treasury or some other source. Giving the words their ordinary significance, if there was no change in amount, but only a change in the source from which it was to be paid, it would be more appropriate to say that the officer received the same salary, but obtained it from a different source. In order to give effect to the words "other and different," as employed, it is not necessary to say that the salary which the Legislature was authorized to provide should be paid from a different source than that contemplated in the preceding paragraph of the Constitution. It might be suggested that, on account of the inequality of labor imposed upon the different judges of the superior courts, the framers of the Constitution would not have prescribed a uniform salary for them. Whatever bearing this argument might have upon the construction to be placed upon article 6, § 13, par. 1, of the Constitution, its effect is greatly overcome by reference to an ordinance adopted by the constitutional convention, which declared: "There shall be sixteen judicial circuits in this state, and it shall be the duty of the General Assembly to organize and proportion the same in such manner as to equalize the business and labor of the judges in said several circuits, as far as may be practicable. But the General Assembly shall have power hereafter to reorganize, increase, or diminish the number of circuits; provided, however, that the circuits shall remain as now organized, until changed by law." Civ. Code 1895, § 5946. This ordinance shows a design upon the part of the members of the convention that there should be equalization as nearly as possible of labor imposed upon the judges, with uniform-

ity of salary, rather than unequal labor and unequal salary.

It was urged that the salaries of the judges of the superior courts might be supplemented from the county treasuries on the ground that the salaries of the judges are "expenses of court," and as such are authorized to be paid under the provisions of article 7, § 6, par. 2, of the Constitution of 1877. That provision of the Constitution does not purport to deal with the source from which salaries of the judges might be paid, but only declares for what purposes county taxes might be levied, and includes among them "expenses of court." There are other expenses attending the holding of courts in the several counties; and this power of counties to tax for "expenses of court" would not fail for want of subject-matter upon which to operate, if the provisions should not be held applicable to salaries of judges of the superior courts. The case of *Anderson v. Ryan*, 82 Ga. 559, 9 S. E. 331, involving the payment of the salary of the judge of a county court out of a county treasury, and *Adam v. Wright*, 84 Ga. 720, 11 S. E. 893, involving the payment of the insolvent fees of the Solicitor General out of the county treasury, and *Adam v. Cohen*, 84 Ga. 725, 11 S. E. 895, involving the payment of the fees of a solicitor of a county court out of a county treasury, and *Chatham County v. Gaudry*, 120 Ga. 121, 47 S. E. 634, involving the payment of a certain amount out of the county treasury to a committee of citizens appointed by the grand jury to inspect the record of county officers, have been cited as supporting the contention that the salaries of the judges of the superior courts might be paid out of the county treasury as "expenses of court." No constitutional question was raised or decided in *Anderson v. Ryan*. The constitutional questions made in the other cases were different from that under discussion in the case at bar. The salaries of judges of the superior courts were not involved in either, and in none of them were construed or applied article 6, § 13, pars. 1 and 2, of the Constitution of 1877. It is not necessary to decide all that the term "expenses of court" might embrace, but in view of the other provisions of the Constitution mentioned in this opinion, it does not include the salaries of the judges of the superior courts. What has been said relates exclusively to the salaries of the judges of the superior courts, and is not intended to apply to the salaries of judges of county courts, city courts or other courts, which existed at the time of the adoption of the Constitution, or which may have been subsequently created by law, as authorized in article 6, § 1, par. 1, of the Constitution of 1877 (Civ. Code 1895, § 5831). That provision of the Constitution declared: "The judicial powers

of this state shall be vested in a Supreme Court, superior courts, courts of ordinary, justices of the peace, commissioned notaries public, and such other courts as have been or may be established by law." At the time of its adoption the city courts of Atlanta and Savannah were in existence, and the salaries of the judges were payable from sources other than the state treasury. The same may be said of the county courts. The provision for other courts in this article of the Constitution, at a time when such courts as city courts and county courts actually existed, and the salaries of the judges thereof were being paid from local sources, was a distinct recognition that as to such courts the salaries of the judges were not intended to be paid by the state. Under the act of 1875 (Acts 1875, p. 40), the salary of the judge of the city court of Atlanta was payable from the treasury of Fulton county. The salary of the judge of the city court of Savannah, under the act of 1819 (Cobb's Dig. p. 617) and the act of 1853-54 (Acts 1853-54, p. 281), was payable out of the city treasury. The salaries of the judges of the county courts, under the act approved January 19, 1872 (Acts 1871-72, p. 288), were payable by local taxation in the several counties. The reasoning which favors the constitutionality of local taxation for the payment of the salaries of judges of other courts might have had some bearing upon the question relative to the payment of the salaries of the judges of the superior courts, if the construction of article 6, § 13, par. 1, were doubtful, and if at the time of the adoption of the Constitution of 1877 such salaries were payable under any existing statute in part or wholly from the county treasuries; but the statutes relative to the payment of the judges of the superior courts were not of that character. On the contrary, under them such salaries were payable exclusively from the state treasury.

Under a proper construction of the Constitution the salaries of the judges of the superior courts are payable exclusively from the treasury of the state; and so much of the act of 1904, as amended by the subsequent acts of 1905 and 1906, hereinbefore mentioned, as purports to authorize such salaries to be supplemented by funds from county treasuries is void. Owing to the difference in the Constitutions and statutes involved, rulings of courts from other states are not very helpful; but see, on the general subject, *County of Shelby v. Six Judges*, 3 Tenn. Cas. 508; *Colbert v. Bond and Glisson v. Calloway*, 110 Tenn. 370, 75 S. W. 1061; also cases cited in 23 Cyc. 528 (7); and in *American Digest* (Cent. Ed.) §§ 76, 78, pp. 1649, 1652.

Judgment reversed. All the Justices concur.

(134 Ga. 721)

MOODY v. MUSCOGEE MFG. CO. et al.
(Supreme Court of Georgia. July 13, 1910.)

(*Syllabus by the Court.*)

1. JUDGMENT (§ 870*)—JURY (§ 19*)—REVIVAL—SCIRE FACIAS—CONSIDERATION OF RECORD—RIGHT TO JURY TRIAL.

Upon a petition for scire facias to revive a dormant judgment, wherein the plaintiff alleges that the judgment was rendered in a named cause in the same court, a transcript of which is not attached as an exhibit, but full reference to the cause is prayed, and the defendant by his pleadings invokes a construction of the record in aid of his defense, he cannot complain that the court considers such record in determining whether the judgment was void for uncertainty, or whether it was final or interlocutory.

(a) Even if the defendant's answer be construed to be a plea of nul tiel record, he was not entitled to a jury trial on the issue whether a given judgment had been rendered, as such issue is for decision by the court on an inspection of the record.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 870; * Jury, Dec. Dig. § 19.*]

2. JUDGMENT (§ 217*)—FINALITY OF DETERMINATION.

A decree may be partly final and partly interlocutory; final as to its determination of all issues of law and fact, and interlocutory as to its mode of execution. A final decree disposing of all the substantial equities of the case is not made interlocutory by the mere reservation of the right to direct the mode of its execution.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 394; Dec. Dig. § 217.*]

3. JUDGMENT (§ 222*)—ESSENTIALS—CERTAINTY AND DEFINITENESS.

Every judgment must be certain and definite as to its amount. This element of certainty is present when the exact amount of the judgment may be ascertained by the subtraction of one named sum from another named sum, as provided in the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 402; Dec. Dig. § 222.*]

4. BANKRUPTCY (§ 423*)—DEBTS DISCHARGED—“JUDGMENTS IN ACTIONS FOR FRAUD.”

Subdivision 2, § 17, of the original bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), providing “that judgments in actions for fraud or obtaining property by false pretensions or false representations” are not released by a discharge in bankruptcy, comprehends judgments rendered in actions, the gist of which is the actual fraud of the defendants. In determining this question the courts will look to the pleadings and judgment; and if the relief granted in the judgment is based upon actual, as distinguished from constructive, fraud of the bankrupt, the bankrupt shall not be discharged from its obligation, notwithstanding the action may not be strictly ex delicto in form.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 423.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3844, 3845.]

Error from Superior Court, Fulton County; H. M. Reid, Judge.

Suit by the Muscogee Manufacturing Company and others against M. H. Moody, administratrix of John T. Moody. From the judgment, defendant brings error. Affirmed as to certain parties, and reversed as to others. See, also, 66 S. E. 908.

In the fall of 1908 the Muscogee Manufacturing Company and 19 other parties, whose names will hereafter appear, filed their several petitions against John T. Moody in the superior court of Fulton county, alleging that at the March term, 1898, an equitable petition was filed by the Park Woolen Mills et al. against Moody & Brewster, a firm composed of John T. Moody and G. S. Brewster, in which case Brewster was not served; that petitioners were parties plaintiff to the cause and on June 30, 1900, a final verdict and decree were rendered in the case, under which each petitioner was given a judgment for an amount, which was stated; that no fi. fa. was ever issued upon the judgment; that none of the principal, interest, and costs had been paid; and that by reason of the lapse of time the judgment was dormant; wherefore they prayed that scire facias be issued, and that judgment thereon be revived. Full reference to the cause in which the judgment was rendered was made. The defendant Moody answered the scire facias in each case, admitting that an equitable petition was filed in the superior court of Fulton county by the Park Woolen Mills et al. against Moody & Brewster, a firm composed of himself and G. S. Brewster, in which case Brewster was not served; “that on June 30, 1900, a final decree was rendered in said cause;” and that no fi. fa. had ever been issued upon this decree. He alleged that the judgment, if ever valid, is now dormant; that the alleged judgment sought to be revived in each instance is void for vagueness, indefiniteness, and uncertainty, in that the judgment is not, in practical effect, awarded for any definite sum, and the amount for which the judgment should have been or might have been rendered cannot be determined, either from the judgment or the pleadings in the cause of the Park Woolen Mills et al. against Moody & Brewster, since the amount stated in the alleged judgment for each one of the plaintiffs is subject to uncertain deductions or credits which must be proved by aliunde evidence; that the several plaintiffs are not entitled to revive their alleged judgments, for the reason that, if ever valid, the judgments have been released by the discharge in bankruptcy of J. T. Moody, granted on May 3, 1902, in a voluntary bankruptcy proceeding, in which the several plaintiffs were listed as creditors of Moody in his schedule filed in that proceeding; and that the debt of each plaintiff was a provable debt in bankruptcy. The defendants in error severally demurred to the answer, on the grounds: (a) The answer set up no legal reason why the judgment should not be revived; (b) the record discloses that the judgment rendered in the case of Park Woolen Mills et al. against Moody & Brewster is neither vague, indefinite, nor uncertain; (c) the discharge in bankruptcy granted to John T. Moody on May 3, 1902, did not

apply to the judgments rendered in favor of the several plaintiffs, because the judgments were based upon fraud; (d) the defendant is not entitled under the facts set up in his answer to a trial by jury. The answer was amended, alleging that the decree of June 30, 1900, in the case of Park Woolen Mills et al. against Moody & Brewster, referred to in the petitions for scire facias, did not contain a final judgment against the defendant or the firm of Moody & Brewster; that the alleged judgment was interlocutory only, and did not finally fix and settle the rights of the parties to the litigation, but left the rights to be determined at some future date, the cause being retained for that purpose; that no final judgment was ever rendered; and therefore that the plaintiffs have no judgments in their favor, capable of being revived against the defendant. The demurrers to the answer were renewed, and sustained by the court, who struck the answers as amended, and entered up judgment reviving the alleged dormant judgments in favor of the respective applicants.

The cause of the Park Woolen Mills et al. v. Moody & Brewster (wherein the decree of June 30, 1900, was rendered and to which reference is made in the several petitions for scire facias and the answers thereto) was an equitable petition by the creditors, alleging, in substance, that in 1897 and 1898 J. T. Moody and G. S. Brewster were engaged in several businesses under different trade-names in the city of Atlanta, and in the latter part of 1897 they entered into a general dry goods and notion business, opening several stores in Atlanta, and were traders engaged in such business; that the defendants were insolvent; that Brewster had absconded; that Moody, in behalf of the partnership, had on the previous day executed a large number of mortgages, approximating \$77,000; that the goods covered by these mortgages were goods bought from complainants and other creditors, and utilized by the defendants as a basis for loans to pay antecedent debts not arising from the purchase of the goods, the genuineness of which debts was not admitted; that these acts amounted to a fraud upon defendants' creditors; that the goods of petitioners were purchased by Moody & Brewster without any intention at the time to pay for same; that the mortgages are void, and petitioners had a right to identify and reclaim their goods. The prayers were: That the defendants be restrained from further changing the status of their business; that a receiver be appointed; that the assets of the firm be marshaled; that they be allowed to reclaim their goods as against all of the mortgages, except one which was not attacked; and that they have a judgment for whatever goods they could not claim. The original petition was amended by alleging that the firm of Moody & Brewster had been operating in many lines of business under dif-

ferent names (stating them); that they had indiscriminately used the money from each of the concerns operated by them and the dry goods business for the furtherance of their interests; and that the business of one could not be separated from that of the other; and by further alleging fraud in certain transactions between J. T. Moody and his sister, in that Moody had conveyed to her certain land, which conveyances were made for the purpose of hindering, delaying, and defrauding creditors, and in a similar transaction with the nephew of the absconding partner, G. S. Brewster. The petition was again amended, making the Laurel Mills Manufacturing Company and the Tennessee Woolen Mills, two of the plaintiffs in the present litigation, parties to the case, and alleging that the defendants purchased goods from interveners, representing themselves to be solvent, and that the goods were sold upon the credit of these statements, when as a matter of fact the defendants had no intention of paying for the goods, and fraudulently concealed this intent. This amendment adopted all of the prayers of the original petition. Numerous other creditors filed their interventions (20 of them being parties to the present litigation), all of them, except as hereinafter noted, setting up substantially (and severally expressly adopting) the allegations and prayers of the original bill, and alleging in substance as follows: That they sold and delivered to Moody & Brewster goods amounting to a certain sum, as shown by their attached bill of particulars; that in order to obtain this credit the defendants made fraudulent statements, to the mercantile agencies, of their wealth and financial responsibility, for the purpose of having said statements communicated to petitioners (interveners in each case), which statements were actually communicated, upon the faith of which petitioners sold the goods; that these statements were made and the goods purchased under a scheme to defraud, and with no intention to pay for the goods; that the defendants engaged in the general scheme of purchasing a large quantity of goods, far in excess of their needs, procuring them on credit by false representations, with the deliberate purpose and intention of placing mortgages upon them to further their general scheme of fraud, and prefer certain creditors. The prayers were that it be adjudged that the title to the goods did not pass, because of the fraud, and that they be allowed to identify and recapture their goods, and have judgment for such as may not be reclaimed. The substance of the interventions of the Third National Bank of Atlanta and the Leibig Manufacturing Company appear in the last division of the opinion. The questions of the priorities of liens held by the various interveners, as between themselves, were also raised by some of the interveners. The defendant Moody answered for

himself individually, and for the firm. The allegations of the various interventions, as well as the original petition, respecting the amounts of indebtedness, the dates, amounts, and execution of the various mortgages as set out, were all admitted. He denied all allegations of fraud or false statements or representations in the procurement of the goods; and alleged that they did represent themselves to be solvent and fully able to pay, that they were at the time solvent, and that the firm had been rendered insolvent since that time on account of the conduct of Brewster, who had absconded.

The court appointed a receiver to take charge of the assets, and referred the case to an auditor, with direction to hear the evidence and various contentions of the parties and determine their rights. The auditor filed a report covering the various issues, and exceptions were filed by certain creditors relating to contests with other creditors over the funds. These exceptions were passed upon by a jury, and a decree was entered in general accord with the auditor's report as modified by the verdict upon the issues raised by the exceptions. On June 30, 1900, a decree was entered, adjudging that the various partnerships under which Moody & Brewster did business were insolvent, and the members thereof were likewise insolvent; "that on or about January 1, 1898, Moody & Brewster, under whatsoever style they were doing business, and as individuals, were insolvent; and that on or about said date they entered into a general scheme having for its purpose the purchase of goods and the obtaining of credit, both for the money and goods, to defraud those with whom they might deal, and that they then and thereafter purchased goods and obtained credits with no intention to pay therefor, and with intent generally to defraud their creditors; and as to individual instances where parties to said cause have been found by the auditor to be entitled to rescind their sales and reclaim goods identified, the auditor's report as to them is hereby adopted and made a part of this decree, both as to findings of a general scheme to defraud and as to special frauds perpetrated upon particular parties." After fixing the priority of certain liens in accordance with the auditor's report, the decree then proceeds: "The following complainants and interveners in said cause, having chosen to rescind their sales, and having identified certain goods in the hands of the receiver, are decreed to be entitled to rescind said sales because of fraud practiced upon them by Moody & Brewster, and to be entitled to reclaim the proceeds of the goods so identified by them and sold by the receiver; subject, nevertheless, to their proportionate part of such costs as are hereinafter taxed against them, and subject to such other prior claims and liens as in this decree have been found to be

superior to their right of reclamation, which they are hereby likewise charged with proportionately. The amounts realized from the sale of said goods are respectively set opposite the names of the parties." Then follow the names of these interveners, and the amounts opposite their names: Abegg & Rush, \$1,381; Atlanta Woolen Mills, \$3,276.14; Cleveland Woolen Mills, \$90.43; Glen Falls Shirt Company, \$500.17; Laurel Mills Manufacturing Company, \$1,917.17; Owensboro Woolen Mills, \$4,553.83; Old Kentucky Woolen Mills, \$1,800.47; Porter Bros. & Co., \$138.61; Roaring Springs Blank Book Company, \$384.64; Strauss, Sach & Co., \$209.81; E. T. Steele & Co., \$946.49; Scheuer Bros., \$374.38; Silverstein, Hecht & Co., \$1,620.07; Tennessee Woolen Mills, \$1,394.59. The next paragraph of the decree is: "The following complainants and interveners, who under previous orders of this court have been allowed to take from the possession of the receiver certain goods identified by them, are hereby decreed to be entitled to reclaim said goods and to retain the same, but are hereby required to pay into the hands of the receiver such a proportion of the costs and expenses and liens, which are by this decree fixed as prior to their right of reclamation, as may be necessary to comply with the terms of this decree, less 10 per cent. of the invoice cost thereof already paid into the hands of the receiver under the orders of court. The invoice cost of the goods so taken out by them is respectively set opposite their names as follows: "Guiterman Brothers, \$586.11, were the only interveners, parties to the present litigation, who reclaimed their goods under this paragraph of the decree." The Atlanta Woolen Mills were also "decreed to recover of and from the Fourth National Bank of Atlanta the following accounts, proceeds of goods sold by it to Moody & Brewster, or, where the same have been collected by said bank, the full proceeds of such collection; said accounts being as follows." Then follows a list of such accounts, giving the amount of each account, aggregating \$1,822.04. In the twenty-eighth paragraph the Cleveland Woolen Mills were "decreed to recover of the Fourth National Bank of Atlanta the following accounts, proceeds of goods sold by it to Moody & Brewster, where said accounts or any of them have been collected by said bank, the full proceeds thereof collected by said bank shall be paid by said bank to said receiver, said accounts being as follows." Then follows a list of the accounts, aggregating \$2,174.22. It is "further ordered and decreed that the following named accounts are the proceeds of the goods of the Berkeley Chemical Company which were sold by it to Moody & Brewster under such fraudulent circumstances as hereinbefore found as authorized them to rescind said sale upon discovery of said fraud, and to reclaim said goods or their

proceeds wherever found, except in the hands of innocent purchasers for value and without notice; and that said Berkeley Chemical Company is hereby awarded the open accounts hereinafter set forth, and the receiver is directed to turn over said accounts to said Berkeley Chemical Company. And the Fourth National Bank is decreed not to be entitled to any part of said open accounts which it may have received as security for the pre-existing indebtedness to said bank at the time of the failure of the said Moody & Brewster, or the cash collections on any such open account so received. The items of said accounts as appearing by the books of Moody & Brewster, as shown on page 152 of the brief in evidence in said cause, being as follows." These items aggregate \$3,440.50. The next paragraph was as follows: "It is further ordered, adjudged, and decreed that the following parties are entitled to recover of the defendants, Moody & Brewster, by general judgment the gross amounts which are respectively set opposite their names, which amounts and judgments are to be respectively, credited with any sums which any of said parties received from the receiver in this under this decree, and from collateral securities which they may have held as security therefor, namely." Then follow: Abegg & Rusch, \$1,764.37; Atlanta Woolen Mills, \$5,675.52; Berkeley Chemical Company, \$25,121.48; Cleveland Woolen Mills, \$2,589.94; Glens Falls Shirt Company, \$630.65; Gutterman Bros., \$659.23; Leibig Manufacturing Company, \$14,756.70; Laurel Manufacturing Company, \$3,724.52; Muscogee Manufacturing Company, \$1,338.57; Mechanics' National Bank, \$21,036.48; Owensboro Woolen Mills, \$5,552.39; Old Kentucky Woolen Mills, \$2,378.90; Porter Bros. & Co., \$374.65; Roaring Springs Blank Book Company, \$496.31; Strauss, Sach & Co., \$345.23; Steele & Co., \$1,050.26; Schuer Bros., \$700.62; Silverstein, Hecht & Co., \$3,032.78; Tennessee Woolen Mills, \$1,917.51; Third National Bank, \$8,500. Then follows: "For the balances for which general judgments are hereby rendered, the clerk of the court shall, upon application, issue separate executions." After giving directions to the receiver as to the disposition of funds in his hands, the decree concluded with the following paragraph: "The right is reserved to make such further orders, judgments and decrees as may be necessary to carry into effect the true intent and meaning of this decree."

The auditor's report was filed on the 8th of December, 1899, and the decree of the court entered up thereon on June 30, 1900. After this date the court passed different orders for the direction of the receiver in disposing of a small balance of property of Moody & Brewster, and direction as to other matters; and the receiver on March 11, 1901, filed his final report of disbursements and receipts, which was approved by the court, and the receiver discharged.

Anderson, Felder, Rountree & Wilson, Candler, Thomson & Hirsch, Howard Van Epps, and T. F. Corrigan, for plaintiff in error. J. E. & L. F. McClelland, King & Spalding, Slaton & Phillips, and J. L. Hopkins & Son, for defendants in error.

EVANS, P. J. (after stating the facts as above). 1. In reaching its decision and in granting its judgment sustaining the demurrers to the defendant's answer to the scire facias, the court considered and treated as a part of the record in the case the entire proceedings, orders, and decrees, including the final report of the receiver and the orders thereon, in the case of Park Woolen Mills et al. v. Moody & Brewster, over the objection that they were not a part of the record in the scire facias proceeding. The defendant filed no demurrer to the various petitions complaining that the exhibits were not attached. Scire facias to revive a dormant judgment is not an original action, but a continuation of the suit in which the judgment was obtained. Civil Code, § 5380. The defendant may plead nul tiel record in bar of the relief sought, in which case the plaintiff must produce the record, and the court will try that issue on an inspection of the record. But in each of the scire facias petitions in this case the plaintiff alleged that the Park Woolen Mills et al. filed their petition against Moody & Brewster, in the same court to the March term, 1898, in which case each applicant intervened, and that on June 30, 1900, a final decree and verdict were rendered in favor of intervener for a stated amount and "full reference to the case above mentioned is made." In his answer to the petition for scire facias the defendant admitted the filing of the petition of the Park Woolen Mills et al. v. Moody & Brewster, service thereof on him, that applicant intervened in the cause, and "that on June 30, 1900, a final verdict and decree was rendered in said cause." But defendant denied that applicant was given a judgment for any amount. He also further averred that the judgment was void for uncertainty and vagueness. By amendment the defendant averred that the decree of June 30, 1900, referred to in the petition for scire facias, did not contain a final judgment against the defendant, but that the judgment was interlocutory merely, and left the rights of the parties to be finally determined at some future day, the cause being retained for that purpose; he also demanded a trial by jury on this issue. It is not the province of a jury to declare upon the legal effect of a judgment. *Stewart v. Sholl*, 99 Ga. 539, 26 S. E. 757. So that, even if the defendant's answer had been strictly a plea of nul tiel record, the fact as to whether a given judgment had been rendered is determinable by the court only on inspection of the record. *Ibid*. Under the pleadings in this case there was no necessity for the production of the record as evidence, because it was before

the court as part of the pleadings. The petition for scire facias prayed reference to the record, and the defendant invoked a ruling in its behalf upon that record. The record was not attached as an exhibit, but was a record of the court which was trying the scire facias proceeding. The third equity rule (Civil Code, § 5694) requires that all exhibits shall be filed with the petition or answer. But where the exhibits referred to are voluminous pleadings and records of the court where the case is pending, the court may consider such records as if they were attached as exhibits. *Graham v. Dahlonga Gold Mining Company*, 71 Ga. 296; *Millbank v. Penniman*, 73 Ga. 136. It was said in *Lyons v. Planters' Loan & Savings Bank*, 86 Ga. 485, 12 S. E. 882, 12 L. R. A. 155, that it is doubtful whether the equity rule touching exhibits to pleadings is applicable in its full force since the act of 1887, establishing uniformity in pleading, but that in all events, where there is no probability that the defendant was unacquainted with the contents of the record, and has suffered no substantial disadvantage in the omission to set it out as an exhibit, a judgment otherwise correct will not be reversed for this lack of formality. To which we may add, that where the record was referred to as on file, and the defendant by his pleadings invoked a construction of the record, he cannot complain that the court considered such record in determining whether the judgment was void for vagueness, or because it was only interlocutory.

2. The general practice under our system of pleading is to enter only one final decree on the merits of an equity cause. The practical advantage of concluding all issues in a single comprehensive decree is the prevention of a review of litigated cases by piecemeal. However desirable it may be to conclude a litigation with one judgment, the law does not require it, nor is it always possible to dispose of complicated equitable causes in one final decree. As said by Judge Lewis in *Booth v. State*, 131 Ga. 756, 63 S. E. 505: "It is difficult sometimes in actions on the equity side of the court, especially in cases of receivership, to determine whether an order is administrative in its character, resting in the sound discretion of the chancellor, or final in its nature. To be final it does not necessarily mean that the judgment disposes of the entire case. A judgment may be rendered separable from a judgment disposing of the entire case, and yet be a judgment that is final as to some of the substantial rights of the parties as contended for in their pleadings. It is final when, as to the subject-matter of the judgment, any of the substantial rights of the parties litigant are finally settled by the judgment." A decree which settles all of the substantial equities in a case must be regarded as a finality upon such questions. A decree may be partly final and partly interlocutory; final as to its determination of all issues of fact and law, and

interlocutory as to its mode of execution. *Adams v. Sayre*, 76 Ala. 509; *Merle v. Andrews*, 4 Tex. 200; *Gray v. Cook*, 24 How. Prac. 432. The original action which was eventuated in the decree of June 30, 1900, was an equitable petition by creditors against alleged fraudulent and insolvent debtors, to rescind their sales of goods on account of fraud, to reclaim all goods which they could identify, and to recover judgment for whatever goods they could not claim, and for other relief, special and general. From time to time various creditors intervened, and in their respective interventions set forth a gigantic scheme of the debtors to defraud every one they could induce to extend them credit. The debtors had sold some of the goods and hypothecated the accounts and notes representing such sales with other creditors, and just before the filing of the petition the debtors had executed several mortgages. There were conflicting equities between the creditors. The whole matter was referred to an auditor, who filed his report, which as to conflicting equities of the creditors was modified by a verdict on exceptions thereto. This was the general aspect of the case when the court entered the decree of June 30, 1900. Every substantial equity had been established and adjusted between the parties. The fraud of the defendants was adjudicated; the value of the goods which were fraudulently procured was found; the value of the goods reclaimed by each creditor was found; and finally it was adjudicated that each of the various creditors was to have judgment for the difference between the value of the goods out of which each was defrauded and the sum named in the decree as having been received by each from reclamation of goods, and for which sum—easily ascertained by the arithmetical process of subtraction—the clerk was directed to issue execution upon application of the several creditors. This is our interpretation of the decree—an interpretation which seems so clear to us that neither judicial precedent nor an elaborate analysis of all of its terms would be profitable or necessary to prove its accuracy.

But it is urged that the concluding paragraph of the decree, wherein "the right is reserved to make such further orders, judgments, and decrees as may be necessary to carry into effect the true intent and meaning of this decree," renders it a mere decretal or interlocutory order. We do not think so. Every substantial equity and all the rights of the parties had been finally adjudicated, and in the administration of such a large estate, and with so many parties with overlapping equities, it was more than likely that minor matters might arise respecting its mode of execution; and this reservation was intended to cover such. All subsequent orders, including that which finally discharged the receiver, related simply to the mode of executing the decree, and demonstrates that our construction is not only correct, but was

the one acted upon by the court. The rule is well established that a final decree disposing of the substantial equities of the case is not made interlocutory by the mere reservation of the right to direct the mode of its execution. 23 Cyc. 673; *Campbell v. Crutcher*, 3 Tenn. Ch. 253; *Mead v. Christian*, 50 Ala. 561; *Jones v. Wilson*, 54 Ala. 50.

3. Nor is the decree of June 30, 1900, void for vagueness, indefiniteness, and uncertainty, in that judgment is awarded for no definite sum. It is fundamental that a judgment should be certain and definite, or be capable of being made so by proper construction. 23 Cyc. 671. The action was a creditor's bill; the parties who intervened as creditors were numerous; the overlapping equities of the creditors, and the multitude of issues, necessarily required considerable space in the statement of the various adjudications of the equities. It was stated in one paragraph of the decree that each creditor was entitled to a general judgment for the gross amount opposite his name, to be credited with any sums received under the decree and from the collateral securities awarded to them. Other paragraphs stated the amount which each creditor received from reclamations and from collateral securities. So that the calculation as to the amount of the judgment awarded to each creditor was but the simple process of subtraction, and a palpable illustration of the maxim "Id certum est quod certum reddi potest." Whether the decree was constructed with a view to condensation, or to tabular classification, or to conform to the peculiar literary style of the draughtsman, is mere conjecture. The mode of ascertaining the amount is given with precision; the mathematical process is simple and accurate, and the result is just as intelligible and certain as if the calculation had been made and the result incorporated in the decree. A verdict or judgment for a given sum as principal with interest thereon from a given date, has always been regarded as not wanting in certainty. The problem of ascertaining the difference between two numbers is by no means as complex as that of the calculation of interest.

We have carefully gone over the calculations of the amount awarded to each defendant in error. We find the several amounts correctly stated in the petition for *scire facias* of the following parties: Abegg & Rusch; Guiterman Bros.; Glens Falls Shirt Company; Mechanics' National Bank; Leibel Manufacturing Company; Laurel Mills Manufacturing Company; Muscogee Manufacturing Company; Old Kentucky Woolen Mills; Owensboro Woolen Mills; E. T. Steele & Co.; Silverstein, Hecht & Co.; Berkeley Chemical Company; Porter Bros. & Co.; Third National Bank of Atlanta. With respect to the other petitions for *scire facias*, the amount awarded by the decree is incorrectly stated. To the Roaring Springs Blank Book Company judgment was awarded for

\$496.31, less \$384.61, to wit, \$111.67; to Strauss, Sach & Co. judgment was awarded for \$345.23, less \$209.81, to wit, \$135.42; to the Tennessee Woolen Mills judgment was awarded for \$1,917.51, less \$1,394.59, to wit, \$522.92; to Schuer Bros. judgment was awarded for \$700.62, less \$374.38, to wit, \$226.24. In the decree it was provided, inasmuch as some of the goods reclaimed by the Atlanta Woolen Mills had been manufactured into the finished product, that the cost of manufacturing, to wit, \$598.69, should first be paid; after deducting this sum from the proceeds of the reclaimed goods, \$3,276.14, the net credit of \$2,677.45, and the \$1,822.04, the amount of collaterals turned over, both credits aggregating \$4,499.49, should be deducted from the gross amount, \$5,875.52, leaving \$1,176.03 as the amount for which judgment was rendered. The Cleveland Woolen Mills was awarded a judgment for \$2,589.94, less the amount of their accounts representing \$2,174.22 of their goods, which had been sold by the defendants, leaving a net recovery of \$315.72. The amounts which have been thus erroneously calculated should be corrected by these figures.

4. Was the defendant Moody acquitted of the judgments of the defendants in error by his discharge in bankruptcy? The original bankruptcy act of 1898 permitted a discharge from all provable debts, with certain exceptions, one of which was from a "judgment in an action for fraud or obtaining property by false pretenses or false representations." Section 17, subd. 2, of the bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]). This provision of the bankrupt act was amended in 1903, but as the bankrupt's discharge was obtained prior to the amendment, the question for decision is not affected by the amendment, but must be determined by the provisions of the original act. The authorities seem to be uniform in holding that in order to constitute a judgment as recovered for fraud, so as to prevent its release by section 17, subd. 2, of the bankruptcy act of 1898, the fraud and deceit must have been the gist of the action. The authorities further hold that the fraud must be positive fraud or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud, which may exist without an imputation of bad faith. The bankruptcy act of 1867 did not require claims for frauds to be reduced to judgment, as does the act of 1898, as a condition to prevent their release by a discharge in bankruptcy. "The reason for this change, as suggested by Mr. Justice Brown, in delivering the opinion in *Crawford v. Burke* [195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147], may be that Congress did not intend to offer any inducement to change unliquidated claims into actions for fraud, and therefore limited the exception from the operation of the discharge to such cases only as had been litigated and reduced to actual

judgment. When such is the case, we think a correct interpretation of the law does not require a close examination into the form of the action to determine whether technically it is one *ex delicto* or otherwise, but the real question is, Was the relief granted in the judgment based upon actual, as distinguished from constructive, fraud of the bankrupt? If the judgment is thus founded, whatever is the form of the action, it is the intent and purpose of the law that the bankrupt shall not be discharged from it, but shall still rest under its obligation, so far as the bankrupt law is concerned." *Bullis v. O'Beirne*, 195 U. S. 620, 25 Sup. Ct. 123, 49 L. Ed. 340. We will now proceed to analyze the proceedings and decree in the case of *Park Woolen Mills et al. v. Moody & Brewster*, to ascertain if the judgment of the various defendants in error are predicated upon the actual fraud of *Moody & Brewster*. The original petition was in the nature of a creditor's bill, broader in scope than the statutory proceeding under the insolvent trader's act. At the time the action was commenced the insolvent trader's act (Civ. Code, § 2716 et seq.) permitted the administration of the assets of an insolvent trader by a court of equity upon the application of one or more creditors representing one-third in amount of the unsecured debts of the insolvent trader. The absence of the jurisdictional averment that the moving creditors represented one-third in amount of the unsecured indebtedness, together with charges of positive fraud by the debtors (which is not required in the statutory action) strongly tends to characterize and classify the proceeding as a creditor's bill under the old established chancery practice. Creditors' bills are very generally employed to settle up the estates of insolvent debtors, to prevent a multiplicity of suits by creditors, to set aside fraudulent conveyances, to marshal the assets of the debtor, and to administer them according to equitable principles. In the original petition it was alleged that the goods of the petitioners were fraudulently purchased by *Moody & Brewster*, with no intention of paying therefor, and *inter alia* the plaintiffs prayed that they be allowed to reclaim their goods and have judgment for whatever goods they could not claim. In the subsequent amendments, and in the interventions of all creditors who had sold merchandise to the defendants, a general scheme to defraud all creditors, and a specific scheme to defraud the particular creditor, were averred. In all of them reclamation of goods sold was claimed on the ground that the title did not pass on account of the debtors' fraud, and judgment was asked in some for the value of the goods, in others "for whatever goods they cannot claim"; that is to say, the value of the goods fraudulently converted.

The dominant note in every intervention, as well as in the original petition, was for the rescission of the sales on the ground of fraud. The creditors' right to reclaim their

goods depended upon their right to a rescission of the sale. The pleadings, the auditor's report, and the decree show the point of pressure to have been the effort of each creditor to identify and retake his goods, and keep them out of the general fund. Indeed, the general fund obtained from other sources was a negligible quantity. The fight on this line was between the creditors, *Moody* being hardly an interested spectator. After filing an answer he became passive and inactive; not even excepting to the auditor's finding that he had perpetrated such a colossal fraud. The attitude of the parties to the various issues is referred to as illustrating that the contending parties in the heat of the conflict regarded the defendants' fraud as the gravamen of the suit. It is wholly inconsistent that the plaintiffs should be entitled to reclaim such of their goods as could be identified, and also have a judgment for the contract price, less the goods reclaimed. A sale cannot be affirmed in part and repudiated in part. The primary relief sought being the reclamation of the goods, we must construe that the excess judgment was for damages sustained from failure to recapture the balance of the goods which had been fraudulently converted. The cost of the goods may be considered in connection with other facts, in estimating the damages sustained; though evidence of cost alone may be insufficient to prove market value. *Watson v. Loughran*, 112 Ga. 837, 38 S. E. 82. The coincidence between the judgment rendered and the invoice price demonstrates neither that the court treated the recovery as based on the contract, nor that the decree was without evidential support other than the invoice value of the goods. The decree suggests at least three very strong indications that the recovery was based on the fraud of the defendants: First, the court took pains to especially adjudge the defendants' fraud; second, reclamations based on rescission were allowed; third, no notice was taken of any interest prior to the decree. We therefore reach the conclusion that the gravamen of the action was the fraud of the defendants. Was that fraud positive or actual fraud? It would be idle to again repeat the character of the fraud, so inadequately summarized in general terms in the statement of facts. Such fraud is actual, and not constructive. *Ames v. Moir*, 138 U. S. 306, 11 Sup. Ct. 311, 34 L. Ed. 951; *Forsyth v. Vehmeyer*, 177 U. S. 177, 20 Sup. Ct. 623, 44 L. Ed. 723.

It appears from the intervention of the *Leibig Manufacturing Company* that whatever fraud may have been perpetrated upon it by *Moody & Brewster* it was waived, and the judgment rendered upon its intervention was simply for the balance due them on its notes. It appears that on the day before the filing of the creditors' bill *Moody & Brewster* executed a mortgage to secure one of the notes due the *Leibig Company*. This mort-

gage covered fertilizers which it had sold to Moody & Brewster, and also embraced other fertilizers which were purchased by Moody & Brewster elsewhere. The Leibig Manufacturing Company originally intervened for the purpose of protesting against the temporary receiver's taking possession of the fertilizers covered by its mortgage. It was allowed to proceed with the foreclosure, and amended its intervention by showing the net amount it had received from the proceeds of the foreclosure sale. It also further amended its intervention, asking judgment upon another note, adopting only so much of the allegations of the original petition as was necessary for the relief for which it prayed. Thus it appears that at the very time of the failure of Moody & Brewster the Leibig Manufacturing Company took a mortgage upon goods including some sold by it; and, when the creditors filed their petition alleging the fraudulent scheme of Moody & Brewster, instead of disaffirming the sale, it ratified the sale by insisting upon proceeding with the foreclosure of the mortgage, and received the proceeds thereof. If the original transaction between it and Moody & Brewster was infected with fraud, it was waived by its subsequent conduct. We therefore think that the judgment as to it was not based on the fraud of Moody & Brewster, as that fraud, if any, had been purged, by the voluntary action of this intervenor.

It also affirmatively appears from the intervention of the Third National Bank of Atlanta that its debt was created by a loan made in the usual course of business, secured by certain collaterals, supposed at the time that the loan was made to be sufficient; but, on account of the decline of the price of cotton, it was not able to collect from the collaterals a sufficient amount to discharge its loan; and judgment was asked for the balance due on the note, including the principal and interest. No fraud was alleged to have entered into this transaction, and therefore this debt was released by the discharge in bankruptcy.

The judgments in all the cases, except the two wherein the Leibig Manufacturing Company and the Third National Bank of Atlanta are defendants in error, are affirmed; and as to these two the judgments are reversed. All the Justices concur.

(124 Ga. 667)

NIAGARA FIRE INS. CO. v. JORDAN.
(Supreme Court of Georgia. June 23, 1910.)

(Syllabus by the Court.)

INSURANCE (§ 143*)—INSURANCE POLICY.

Where, on oral application for a policy of insurance to indemnify the applicant against loss by fire for the period of one year, the proper agent of the insurer agrees to issue to the

applicant a policy of insurance as contracted for, but by mistake of the insurer's agent another's name is inadvertently inserted therein as the insured, and the policy is delivered to the applicant by the insurer, who collects the premium, and the applicant retains the policy without discovering the mistake until after sustaining a loss by fire, nearly three months thereafter, equity will reform the policy, so as to make it accord with the oral agreement between the parties.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 265-272; Dec. Dig. § 143.*]

Error from Superior Court, Muscogee County; S. P. Gilbert, Judge.

Action by B. B. Jordan against the Niagara Fire Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

B. B. Jordan filed suit against the Niagara Fire Insurance Company to reform a policy of insurance issued by the defendant to Jordan Bros., on the ground that it purported to insure the interest of Jordan Bros. in certain property, when it should have insured the interest of plaintiff, who had been a member of the firm of Jordan Bros., but had purchased the interest of his partner at the time of the issuance of the policy of insurance, and to enforce the payment of this policy. The court overruled the defendant's demurrer, and the exception is to this judgment. Omitting formal allegations, the petition as amended stated the cause of action as follows:

"Your petitioner shows that on the 7th day of May, 1907, the said defendant did contract and enter into a contract of insurance with your petitioner to insure a stock of goods of petitioner, bearing the number 17-748, which said policy of insurance was issued by its local agent, James W. Woodruff; said policy above described being for the sum of five hundred and no/100 (\$500) dollars, covering a stock of merchandise located at No. 1127 Broad street in the city of Columbus, said state and county, on a general stock of merchandise, consisting of boots, shoes, slippers, overshoes, and all other merchandise not more hazardous and usual to the trade. Petitioner shows that at the date last above mentioned, and at the time he contracted with said defendant, he was the sole and exclusive owner of the property so insured, and that his ownership in said property did not change from said date of insurance until the 8th day of February, 1908. Petitioner shows that said contract was made by and with your petitioner, B. B. Jordan, in his own right, and by and through a mistake on the part of said company's agent and this petitioner, which mistake was made by the agent drafting said insurance contract, instead of putting the name of petitioner in said contract as being insured, the name Jordan Bros. was put in said contract by the said draftsman, which mistake originated by and through the fact that a firm by the name of

Jordan Bros., of which petitioner was formerly a member, did business in the same storehouse prior to December 6, 1906. Said mistake was a mutual mistake, in that it was overlooked by your petitioner until February 8, 1908, at which time a loss occurred under said policy. Your petitioner shows that on the 6th day of December, 1906, the said firm of Jordan Bros. was dissolved, and that notices of dissolution were duly published in the newspapers published in Columbus, in said state and county, and that your petitioner, by virtue of said dissolution, succeeded Jordan Bros. and became the sole and exclusive owner of the property heretofore owned by Jordan Bros., located in the storehouse heretofore described.

"Your petitioner shows, further, that on the 19th day of November, 1907, he was the sole and exclusive owner of the property covered by policy 12,748, issued by defendant, and that the said defendant, at the time of the issuance of said policy, well knew that the said firm of Jordan Bros. had been dissolved, and your petitioner had succeeded it, and that the making of the said policy payable to Jordan Bros., instead of B. B. Jordan, was caused through a clerical error or inadvertence or mistake on the part of defendant, through its agent, and through no fault of petitioner. That on the 19th day of November, 1907, in consideration of the payment by the said B. B. Jordan to the defendant of the sum of seven and 75/100 dollars as premium paid to defendant, defendant did issue its certain policy of insurance in writing, insuring said property above mentioned against loss or damage to petitioner by fire from the 19th day of November, 1907, at noon, to the 19th day of November, 1908, at noon, a copy of which policy is hereto attached and made a part hereof, marked 'Exhibit A,' and to which leave of reference is prayed. That on the 8th day of February, 1908, said stock of goods above described in said policy of insurance was destroyed by fire, without the fault of your petitioner, and the loss to your petitioner occasioned thereby was the sum of five hundred and no/100 dollars, said insurance policy covering said stock and loss to the amount of five hundred and no/100 dollars.

"Petitioner gave to the defendant immediate notice of loss, and otherwise performed all of the duties imposed upon him by the terms of said policy. Petitioner, within the time prescribed by said policy, made demand upon defendant for the amount due upon said policy, and, although said defendant had agreed and undertaken to pay such loss as might occur under said policy, the said defendant did in writing deny any and all liability to your petitioner under said policy, thereby waiving proof of loss. Nevertheless petitioner in good faith did forward and furnish to defendant proof of loss within the time prescribed in said policy, and that the said defendant still failed to pay said amount, or any part of said loss. Petitioner shows

that he has now fully complied with all of the terms and conditions of the policy that it was incumbent upon him to do; but that the said defendant wholly and totally fails and refuses to comply with its part of the contract, and to pay your petitioner the loss sustained, or any part thereof."

The prayers were: "(a) That said policy, No. 12,748, issued by defendant, be reformed, and the mistake of inserting Jordan Bros. be corrected, and the name B. B. Jordan be inserted as the assured, so that the policy shall read, 'does insure B. B. Jordan,' instead of 'does insure Jordan Bros.' (b) That he have judgment against said defendant for the sum of five hundred and no/100 dollars, with interest thereon since the 8th day of April, 1908, at the rate of 7 per cent. per annum, with costs of suit," and for general relief. A copy of the policy was attached.

The substance of the demurrers was: That no cause of action was alleged; that, it appearing from the petition that that policy was a renewal of a former policy issued to Jordan Bros., and no notice of a change of ownership in the property insured from Jordan Bros. to B. B. Jordan having been alleged to have been given to the defendant, the petition failed to set up any reason which would authorize a reformation of the contract of insurance by a change of the parties; that no mutual mistake is alleged; that the petition shows the plaintiff guilty of laches in discovering the alleged mistake; and that the petition fails to allege any oral or written agreement to issue the policy to B. B. Jordan.

Charlton E. Battle and Howell Hollis, for plaintiff in error. Bowden & Goldstein and Carson & McCutchen, for defendant in error.

EVANS, P. J. (after stating the facts as above). The substance of the petition is that the plaintiff orally applied to the proper agent of the defendant for a policy of insurance on his stock of merchandise indemnifying him against loss by fire, and the defendant's agent orally agreed to issue to him the policy applied for, but by the inadvertence of the agent in preparing the policy the name of the late firm of Jordan Bros. was substituted for that of the plaintiff. The merchandise of the plaintiff was destroyed by fire during the period of time covered by the policy, and the plaintiff seeks a reformation of the policy and a judgment for the loss sustained by fire according to the terms of the policy as reformed. It is well settled that a written contract which misstates the terms of an oral agreement on which it is founded may be reformed. The agent's inadvertent substitution of Jordan Bros. for the insured under the circumstances alleged in the petition, and the plaintiff's acceptance of the policy in reliance on the agent to issue it according to his engagement, make a case of mutual mistake relievable in equity. Ger-

man Fire Insurance Co. v. Gueck, 130 Ill. 345, 23 N. E. 112, 6 L. R. A. 835; Cook v. Westchester Fire Ins. Co., 60 Neb. 127, 82 N. W. 315; Jamison v. State Ins. Co., 85 Iowa, 229, 52 N. W. 185; Taylor v. Glens Falls Fire Ins. Co., 44 Fla. 273, 32 South. 887.

The mistake in the policy was not discovered until after the fire which occurred a little less than three months after the policy was issued. It is contended that the plaintiff's failure to inspect the policy, which was in his possession for nearly three months, amounts to such laches and negligence on his part as to preclude any right of reformation of the policy. The trend of authority is that a mere failure of the insured to read his policy does not amount to such laches as will debar him from having such policy reformed for mistake therein. Fitchner v. Fidelity Mutual Fire Ins. Ass'n, 103 Iowa, 276, 72 N. W. 530; Taylor v. Glens Falls Fire Ins. Co., supra; Phoenix Ins. Co. v. Gurnee, 1 Paige (N. Y.) 278, 19 Am. Dec. 431. A policy of insurance is issued by the insurer and signed by him or his agent. It is not contemplated that the insured shall sign it. In the insurer's promise to deliver an accurate policy, according to his oral agreement with the insured, the insured has a just expectation that there will be no designed variance. A man should not be permitted for his pecuniary advantage to impute it to another as gross negligence that the other trusted to his fidelity to his promise. Palmer v. Hartford Fire Ins. Co., 54 Conn. 488, 9 Atl. 248. The case is quite different from those instances where a man, who has negligently signed a contract, endeavors to be relieved of its obligation by setting up his own negligence. The fact that the policy as actually made out was in the plaintiff's hands for nearly three months, and until after the fire occurred, is a circumstance to be weighed by the jury as bearing on the truth of the allegation that the policy did not pursue the oral contract. But, as was said in Bidwell v. Astor Ins. Co., 16 N. Y. 266: "There is no rule of law which fixes the period within which a man may discover that a writing does not express the contract which he supposed it to contain, and which bars him of relief for delay in asserting his rights, short of the period fixed by the statute of limitations."

We are cited to the case of Thomson v. Southern Mutual Ins. Co., 90 Ga. 73, 15 S. E. 652, as authority for the proposition that the plaintiff was guilty of such gross laches in discovering the mistake in the policy that he is not entitled to the equitable relief of reformation. In that case it appeared that a policy of insurance on a dwelling house,

with a vacancy clause in it of 30 days, had been renewed for several years from year to year under a general request made by the insured of the agent of the insurance company, each renewal having been made by the delivery of a receipt for the premium without the issuance of a new policy, and the agent, acting on the same general request, having in the last transaction discontinued this mode of renewal, the company in the meantime having adopted a new form of policy, with a vacancy clause limited to 10 days; and it was held that it was not a fraud against the insured, against which equity will relieve, that the agent, without giving any notice to the insured, delivered to him a policy in the new form, without informing him of the change, this policy having been thereafter retained by the insured for four months without reading it, and he never having read it until after the destruction of the premises by fire. In that case there was no pretense that there was any mutual mistake as to forms or contents of the policy, but the holder of the policy sought to reform it into one like the company had previously issued to him, basing his right to relief upon an inference of fraud from the pleaded facts. The court ruled that, inasmuch as the means of preventing a false inference was within the hands of the holder of the policy, he ought to have used them, and that the facts alleged did not make a case of fraud relievable in equity.

In all other respects the petition set forth a cause of action, and the demurrer was properly overruled.

Judgment affirmed. All the Justices concur.

(194 Ga. 673)

SCOTTISH UNION & NATIONAL INS. CO.
OF LONDON, ENGLAND, v. JORDAN.

(Supreme Court of Georgia. June 23, 1910.)

(Syllabus by the Court.)

REFORMATION OF INSURANCE POLICY.

This case is controlled by the decision in Niagara Fire Insurance Company v. Jordan (this day delivered) 68 S. E. 611.

Error from Superior Court, Muscogee County; S. P. Gilbert, Judge.

Action by E. B. Jordan against the Scottish Union & National Insurance Company of London, England. Judgment for plaintiff, and defendant brings error. Affirmed.

Charlton E. Battle and Howell Hollis, for plaintiff in error. Carson & McCutchen and Bowden & Goldstein, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(134 Ga. 818)

KLASSING et al. v. PAVLOSKI.

(Supreme Court of Georgia. July 14, 1910.)

*(Syllabus by the Court.)***1. TROVER AND CONVERSION (§ 67*)—INSTRUCTIONS.**

The plaintiff brought an action of trover to recover an iron safe and other personalty. Upon the trial there was evidence tending to show that the plaintiff owned the property sued for about eight years prior to the filing of the suit, at which time he left the property in the possession of one of the defendants, and that this defendant held for the plaintiff a portion of such property, without claiming any title thereto, until about six months before the suit was filed, when such defendant made a sale of a part thereof and converted it to her own use. *Held*, where there was evidence tending to show what was, several years prior to the conversion, the value of some of the property sold and converted about six months prior to the filing of the suit, and the evidence did not show that it was of equal or greater value between the time of the conversion and the time of the trial, it was error upon the trial of the suit, wherein the plaintiff elected to take a money verdict, for the court to charge the jury that if the plaintiff was entitled to recover any of the property sued for, he was entitled "to recover the highest proven value of this property, under the evidence in this case"; it not appearing that the court instructed the jury that the highest proven value recoverable by the plaintiff was such value between the time of the conversion and the date of the trial. Such charge was liable to mislead the jury into the belief that they were authorized to find the highest value shown by the evidence to exist prior to the conversion.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 295-303; Dec. Dig. § 67.*]

2. REVIEW ON APPEAL.

The other charge complained of was not error requiring a new trial for any reason assigned.

3. PLEADING (§ 433*)—DEFECTS AND OBJECTIONS—PETITION—AIDED BY VERDICT.

Where the plaintiff, in an action of trover, in his petition asserts that the defendants are in possession of certain personalty of a named value, and refuse to deliver it to the plaintiff, or to pay him the profits thereof, and in an affidavit to obtain bail he states that "he does verily and bona fide claim said personal property," and there is no demurrer to said petition, or other objection during the trial, on the ground that the petition fails to assert title in the plaintiff, or other right to recover, and defendants, in answering, assert title to such of the property sued for as they are in possession of, such failure of the plaintiff to assert in his petition title to the property, or other right to recover, furnishes no reason for setting aside a verdict in favor of the plaintiff.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.*]

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by Frank Pavloski against Henrietta Klassing and others. Judgment for plaintiff, and defendants bring error. Reversed.

Denny & Harris and Dean & Dean, for plaintiffs in error. F. W. Copeland and Hal Wright, for defendant in error.

HOLDEN, J. Judgment reversed. All the Justices concur.

(Ga. App. 92)

TIPTON v. STATE. (No. 2,674.)

(Court of Appeals of Georgia. July 19, 1910.)

*(Syllabus by the Court.)***1. HOMICIDE (§ 340*)—WRIT OF ERROR—REVIEW—HARMLESS ERROR—INSTRUCTIONS.**

The assignments of error as to the court's instructions upon the subject of assault with intent to murder are immaterial, because they were not harmful to the defendant, as is apparent from the fact that the jury found the defendant guilty merely of shooting at another.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.*]

2. HOMICIDE (§ 309*)—INSTRUCTIONS—GRADE OR DEGREE OF OFFENSE.

That the judge casually referred to involuntary manslaughter as one of the species included within the general term "manslaughter" affords no ground for reversal, in view of the fact that no reference whatever was made to the subject of involuntary manslaughter in directing the attention of the jury to the applicability of the facts as they might find them to the law.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309.*]

3. CORRECT CHARGE.

The defendant's defense of justification was fairly presented to the jury.

4. REVIEW ON APPEAL.

While some minor errors appear in the record, none of them could have prejudiced the rights of the defendant. Viewing the record as a whole, the defendant had a fair and legal trial, and no reason appears why the case should again be tried.

Error from Superior Court, Walker County; Jno. W. Maddox, Judge.

Charles Tipton was convicted of crime, and he brings error. Affirmed.

J. E. Rosser, F. W. Copeland, Earl Jackson, and W. M. Henry, for plaintiff in error. Jno. W. Bale, Sol. Gen., for the State.

RUSSELL, J. Judgment affirmed.

(3 Ga. App. 77)

HILL v. STATE. (No. 2,405.)

(Court of Appeals of Georgia. July 19, 1910.)

*(Syllabus by the Court.)***1. ARREST (§ 65*)—ON CRIMINAL CHARGES—AUTHORITY UNDER WARRANT—PERSON ASSISTING OFFICER.**

An officer charged with the execution of process may deputize another person to serve process within his presence, and the arrest will be legal if made in the presence of the officer to whom the warrant is directed, although the latter may be in possession of the warrant itself, and although the party making the arrest would not ordinarily be authorized to execute the warrant.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 166-169; Dec. Dig. § 65.*]

2. CRIMINAL LAW (§§ 393, 394*)—SCOPE OF POWER OF PERSON EXECUTING.

As a possessory warrant not only directs the arrest of the defendant, but is also the seizure of the property specified in the warrant, one who is lawfully engaged in executing a possessory warrant, directing the seizure of a pistol, is authorized to seize the property therein described; and, if such seizure results in

the disclosure of the pistol, which was theretofore concealed upon the person of the defendant, the evidence of that fact is not inadmissible upon the ground that the defendant has been compelled to criminate himself, or upon the ground that the evidence of the defendant's guilt was obtained by illegal seizure and search of his person.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 871-876; Dec. Dig. §§ 393, 394.*]

Error from Superior Court, Marion County; S. P. Gilbert, Judge.

Ike Hill was convicted of crime, and brings error. Affirmed.

W. D. Crawford, for plaintiff in error. Geo. C. Palmer, Sol. Gen., for the State.

RUSSELL, J. Judgment affirmed.

(8 Ga. App. 92)

CLARY v. STATE. (No. 2,682.)

(Court of Appeals of Georgia. July 19, 1910.)

(Syllabus by the Court.)

1. JURY (§ 90*)—COMPETENCY OF JUROR—RELATIONSHIP TO ACCUSED.

The court did not err in overruling the objection to the juror who was challenged on account of relationship. If the juror's great-grandmother and the great-grandfather of the father of the accused were brother and sister, the relationship was not within the ninth degree. See 2 Blackstone's Commentaries, 207; Smith v. State, 2 Ga. App. 576, 59 S. E. 311; Ledford v. State, 75 Ga. 857.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 413, 414; Dec. Dig. § 90.*]

2. CRIMINAL LAW (§§ 449, 481*) — OPINION EVIDENCE—EXPERT WITNESSES—QUALIFICATIONS—QUESTION FOR COURT OR JURY.

It is not error to allow even a nonexpert witness to give his opinion; the witness having fully stated the facts upon which the opinion was based. The probative value of the opinion is for the jury. Whether a particular witness has such learning and experience in a particular art, science, or profession as to be designated as an expert, or such as to entitle him to be deemed prima facie an expert, is a matter addressed to the sound discretion of the court; and this discretion will not be controlled, except where it is manifestly abused. Whether the learning, skill, and experience of a particular witness really entitles his testimony to be considered as that of an expert is at last to be determined by the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1034, 1070; Dec. Dig. §§ 449, 481.*]

3. CRIMINAL LAW (§ 730*) — ARGUMENT OF COUNSEL—ACTION OF COURT.

The court having rebuked the counsel for stating in his argument to the jury that, if the defendant was disposed to be honest and fair, he would have remunerated the prosecutor for the loss of his horse, and in connection therewith having instructed the jury that they should not consider anything outside of the testimony, said by either of the counsel, and having directed the counsel to confine themselves to the law and the evidence, it was not error to overrule the motion for a mistrial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

4. CHARGE NOT PREJUDICIAL.

The charge of the court to which exception is taken affords the plaintiff in error no just

grounds for complaint. To require the jury to be satisfied to a moral and reasonable certainty that the defendant willfully drove the horse faster or a greater distance than he was able to go was not only in accord with the language of the statute, but was also more favorable to the accused than if the word "willful" had been omitted, because, by the use of this word, the jury was impliedly told that if the driving was unintentional, or merely negligent, the accused should not be convicted.

Error from Superior Court, Wayne County; C. B. Conyers, Judge.

L. M. Clary was convicted of crime, and brings error. Affirmed.

Jas. R. Thomas, for plaintiff in error. J. H. Thomas, Sol. Gen., Robt. L. Bennett, and Jas. W. Poppell, for the State.

RUSSELL, J. Judgment affirmed.

(8 Ga. App. 84)

DENTON v. McMILLAN. (No. 2,470.)

(Court of Appeals of Georgia. July 19, 1910.)

(Syllabus by the Court.)

PROCESS (§ 152*) — CLERICAL MISTAKE — EFFECT.

Suit was brought against a firm and the individual members composing the firm. In the petition the firm's name was correctly stated, as well as the correct names of the individual members. The process directed to one of the individual members incorrectly gave the initial of his middle name. The judgment followed the process in this respect, but the execution issued thereon stated the correct initial. Held, that the clerical misnomer did not invalidate the process or judgment, and was amendable.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 152.*]

Error from City Court of Hazelhurst; J. C. Bennett, Judge.

Action by A. L. McMillan against J. M. Denton and others. Judgment for plaintiff, and on levy of execution J. M. Denton filed an affidavit of illegality. Judgment against the affidavit, and said defendant excepted. Affirmed.

McMillan brought suit against Denton, Pittman & Co., a firm composed of J. M. Denton, W. R. Pittman, and J. D. Pittman. The suit was against the firm and against the individual members thereof. The allegations of the petition show that suit was against J. M. Denton, specifically naming him as a member of the firm. Process issued against the firm and the individual members named; but the process as to the defendant, J. M. Denton, was directed to J. H. Denton, and personal service was made upon J. M. Denton. No defense was filed, and judgment was duly rendered against the firm and the individual members served. The judgment against the defendant Denton named him J. H. Denton instead of J. M. Denton. On this judgment an execution was issued against Denton, Pittman & Co., and J. M. Denton, W. R. Pittman, and J. D. Pittman, and was lev-

led on certain land described as the property of J. M. Denton. J. M. Denton filed an affidavit of illegality, on the ground that there was no process against him and no valid judgment against him, because of the misnomer in the initial of his middle name in the process and judgment. On the trial of the illegality J. M. Denton testified that his correct name was J. M. Denton; that he had never been known as J. H. Denton; that he was the member of the firm of Denton, Pittman & Co., who had been sued and personally served with the process. The plaintiff in execution, at the conclusion of the evidence, presented to the court a written motion to reform and amend the judgment by inserting therein the correct initial of the middle name of the defendant. Defendant demurred to the motion. The court overruled the demurrer and allowed the amendment, and the defendant excepted. The judge, without a jury, found against the affidavit of illegality, and the defendant excepted.

King & Dell and W. W. Bennett, for plaintiff in error. Price & Grant, for defendant in error.

HILL, C. J. The court properly allowed the amendment of the judgment. It was clearly a mere clerical error, and amendable. Even without the amendment, the process and judgment were valid. The law does not regard the middle name or initial of the middle name material, unless there are two persons of the same name. Kelly v. Fudge, 2 Ga. App. 759, 59 S. E. 19; Hicks v. Riley, 83 Ga. 332, 9 S. E. 771. Here the defendant removed all doubt of any mistake as to the identity of the person who was sued as a member of the firm of Denton, Pittman & Co., by stating that he was the member of the firm and he had been served personally with process. He had no doubt that he was the person sued, and must have regarded the incorrect giving of the initial of his middle name as a simple clerical error. In addition to his knowledge, he was so informed by the copy of the petition served on him. The misnomer did not mislead him, deprived him of no right, and resulted in no possible injury to him.

Judgment affirmed.

(8 Ga. App. 119)

LAMPLEY v. STATE. (No. 2,741.)
(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

No error of law is complained of. The evidence, although circumstantial, points clearly to the defendant's guilt, and excludes every reasonable hypothesis of his innocence.

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

Kid Lampley was convicted of crime, and brings error. Affirmed.

W. H. Gurr, for plaintiff in error. J. A. Laing, Sol. Gen., and R. B. Arnold, for the State.

HILL, C. J. Judgment affirmed.

(8 Ga. App. 117)

HEAD v. STATE. (No. 2,715.)
(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The criticisms made as to excerpts from the charge, when considered in connection with the entire charge, contain no substantial merit. No error of law was committed on the trial, and the evidence clearly and fully supports the verdict.

Error from City Court of Monticello; A. S. Thurman, Judge.

Frazier Head was convicted of crime, and brings error. Affirmed.

A. Y. Clement, for plaintiff in error. Greene F. Johnson, Sol., for the State.

HILL, C. J. Judgment affirmed.

(8 Ga. App. 113)

MOORE v. STATE. (No. 2,542.)
(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

VERDICT NOT SUPPORTED BY EVIDENCE — ADULTERY.

The evidence was insufficient to authorize the conviction of the defendant, and a new trial should have been granted. The decision is controlled by the ruling in Thompson v. State, 5 Ga. App. 7, 62 S. E. 571, and Winkles v. State, 4 Ga. App. 559 (2), 61 S. E. 1128.

Error from City Court of Carrollton; Jas. Beall, Judge.

J. A. Moore was convicted of crime, and he brings error. Reversed.

S. Holderness, J. O. Newell, and Edgar Watkins, for plaintiff in error. C. E. Roop, Sol., for the State.

RUSSELL, J. Judgment reversed.

(8 Ga. App. 87)

CUNNINGHAM v. STROM. (No. 2,553.)
(Court of Appeals of Georgia. July 19, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 639*)—INSUFFICIENT PROOF OF EVIDENCE—AFFIRMANCE.

This case is here on a direct bill of exceptions, in which the only valid assignment of error is that the finding of the court, without the intervention of a jury, is without any evidence to support it. No proper brief of the written and oral evidence is in the bill of exceptions, or made a part of the record. What purports to be a brief is all the evidence in extenso, both material and immaterial, and also all the testimony which the court excluded from evidence; and as the only questions made depend upon a consideration of the evidence, the judge

ment of the lower court must be affirmed. Civ. Code, §§ 5528, 5529; *Wheeler v. Albany & Northern R. Co.*, 6 Ga. App. 270, 64 S. E. 1114; *Huntley v. Nixon*, 6 Ga. App. 46, 64 S. E. 279, and cases cited.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2787; Dec. Dig. § 639.*]

Error from City Court of Cordale; E. F. Strozler, Judge.

Action between S. E. Cunningham and W. W. Strom. From the judgment, Cunningham brings error. Affirmed.

M. E. Land and Shipp & Sheppard, for plaintiff in error. Walter F. Hall, for defendant in error.

HILL, C. J. Judgment affirmed.

E. E. LOWE CO. v. CUNDELL LUMBER CO.
(No. 2,579.)

(Court of Appeals of Georgia. July 19, 1910.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

No error of law is complained of, and no question of law is made by the record. The issues involved only questions of fact, and the evidence fully supports the verdict.

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action between the E. E. Lowe Company and the Cundell Lumber Company. From the judgment, the Lumber Company brings error. Affirmed.

Sharp & Sharp, for plaintiff in error. Dean & Dean, for defendant in error.

HILL, C. J. Judgment affirmed.

(8 Ga. App. 81)

LOUISVILLE & N. R. CO. et al. v. PFERDMENGES, PREYER & CO. (No. 2,453.)

(Court of Appeals of Georgia. July 19, 1910.)

(Syllabus by the Court.)

1. ELECTION OF REMEDIES (§ 12*)—ACTION IN TORT—DISMISSAL—WANT OF JURISDICTION—EFFECT.

Where the assignee of a bill of lading has the option to sue the carrier either in tort or for a breach of the contract, and elects the former remedy, and the case is dismissed for want of jurisdiction, the election to proceed in tort does not prevent a subsequent suit on the contract.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 15; Dec. Dig. § 12.*]

2. CARRIERS (§ 59*)—BILL OF LADING—NEGOTIABILITY—BONA FIDE HOLDER—RECITALS—CONCLUSIVENESS.

The recitals contained in a bill of lading as to the delivery of the goods, and their quality, quantity, or condition, are binding upon the carrier, when the bill of lading was intended to be negotiated, and is held by a bona fide transferee for value.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 170-178; Dec. Dig. § 59.*]

Error from City Court of Washington; Wm. Wynne, Judge.

Action by Pferdmenges, Preyer & Co. against the Louisville & Nashville Railroad Company and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

This was a suit to recover damages for a breach of contract of carriage, based on the following state of facts: The railroad company issued to the Washington Cotton Company, in Wilkes county, Ga., its bill of lading, reciting that the company had received 100 bales of cotton to be transported to Savannah, Ga., to be delivered to the order of the shippers, notifying the plaintiffs, Pferdmenges, Preyer & Co. This bill of lading was attached to a draft for the value of the 100 bales of cotton, drawn on the plaintiffs at Savannah. Before the cotton was received at Savannah, plaintiffs paid this draft, secured the bill of lading, demanded of the railroad company the 100 bales of cotton, and received only 96 bales. They thereupon sued the railroad company, in the city court of Washington, to recover the value of the 4 bales. It was not clear from the allegations of the petition whether the suit was in tort or for breach of the contract of carriage, and the court, at the instance of the defendant, required an election, and plaintiffs elected to proceed in tort for a conversion. The evidence did not affirmatively show any tort in Wilkes county, but did show that the conversion, if anywhere, was in Chatham county, and, in order to avoid a dismissal for want of jurisdiction, the plaintiffs voluntarily dismissed the suit. The present suit for a breach of the contract was then instituted by the plaintiffs, who had become the owners of the cotton by paying the draft. The defendant set up the proceedings in the former suit in a plea to the jurisdiction, contending that an election had been properly required and that the plaintiffs were conclusively bound by the election they had made. The court sustained a demurrer to the plea to the jurisdiction, and the defendant excepted. The defendant filed a plea seeking to contradict the recitals contained in the bill of lading as to the number of bales of cotton that had been delivered to the railroad. The plea was stricken, because it was an effort to contradict the bill of lading in the hands of a bona fide transferee for value. The defendant excepted.

Jos. B. & Bryan Cumming and W. A. Slaton, for plaintiff in error. Saml. H. Sibley, for defendants in error.

HILL, C. J. 1. The demurrer to the plea to the jurisdiction was properly sustained. The question of jurisdiction is usually determined by the allegations of the petition. The suit in this case was based on a contract made in Wilkes county, and the court

had jurisdiction, regardless of what defenses the defendant may have had to the suit. Civ. Code 1895, § 2334; Central of Ga. Ry. Co. v. Crapps, 4 Ga. App. 550, 61 S. E. 1126. If the election made by the plaintiffs in the previous suit prevented them from suing the railroad company on the contract, this was a matter that should have been made by plea in bar, and not to the jurisdiction; for, under the allegations of the petition and the law applicable thereto, the court certainly had jurisdiction. Irrespective, however, of this reason for approving the judgment, we do not think the facts as alleged in the plea to the jurisdiction constituted any defense. When the election to proceed in tort was made in the previous case, and it appeared that the tort complained of was committed in Chatham county, it was clear that the court in Wilkes county was without jurisdiction (Brooke v. L. & N. R. Co., 3 Ga. App. 492, 60 S. E. 218); and, as the court was without jurisdiction, the proceedings could never amount to such an election as would bar the plaintiffs from bringing a suit of which the court did have jurisdiction. The remedy in tort in that court was no remedy at all, and, of course, could not be a choice of inconsistent remedies. Board of Education v. Day, 128 Ga. 167, 57 S. E. 359. And after having invoked the dismissal of the first suit, for want of jurisdiction, the defendant company is bound by the proposition that the court did not have jurisdiction of that case. Haber-Blum-Bloch Hat Co. v. Friesleben, 5 Ga. App. 123, 62 S. E. 712.

Was there any real inconsistency as to the two suits? While a cause of action for a breach of a contract of carriage is legally different from that for a conversion of the goods, and while the two causes of action cannot be commingled in the same suit (Civ. Code 1895, § 4944), still there is no inconsistency in the substance of them. Both suits in a sense, are based on the contract. If suit is brought against the railroad company for a conversion of goods which it contracted to carry and deliver, and subsequently it is discovered that there was no conversion, but that the goods were lost or destroyed, there would be no inconsistency in withdrawing the suit and subsequently suing for a breach of the contract in failing to carry and deliver. While one may be compelled to elect whether a particular suit shall proceed as one in tort or in contract, and the facts of that particular suit must abide by the election, it does not follow that the election made in that suit extinguishes all other remedies. The case of Kennedy v. Manry, 6 Ga. App. 816, 66 S. E. 29, and others of like character relied upon by the plaintiff in error, are not in point. In those cases the question was as to avoiding a sale, or affirming the sale and suing for the proceeds. The plaintiff in such case must either affirm

or disaffirm; and, when once the option is exercised, it is binding and conclusive. The doctrine of election is designed to clarify the issue to be tried, and, to accomplish this purpose, it prohibits a litigant from pursuing more than one remedy in the main suit. But if he selects the wrong remedy, and fails, he is not thereby prevented from pursuing the right remedy to a successful result.

2. The plea seeking to contradict the bill of lading as to the number of bales of cotton that had been delivered to the railroad company was properly stricken. The plaintiffs were the assignees or transferees for value of this bill of lading, and had the right to sue on it. Askew v. Sou. Ry. Co., 1 Ga. App. 79, 53 S. E. 242. While a bill of lading is in some sense a receipt, and open to dispute between the parties, yet, when it is intended for negotiation, its recitals, in the hands of a bona fide transferee for value, operate as estoppels against the carrier. The bill of lading in this case was issued by the railroad company, with the intent that it should be negotiated. The purchasers of the cotton bought on the faith of the declaration of the railroad company that it had received 100 bales of cotton. If this statement was not true, the company might have some remedy against the shipper; but this does not relieve it from liability to the assignees of the bill of lading. It is a universal rule that carriers cannot contradict the recitals contained in their bills of lading as to the delivery of the goods, or their description, quantity, or condition, as against the rights of bona fide transferees for value. Bank of Sparta v. Butts, 4 Ga. App. 308, 61 S. E. 298; King v. The Lady Franklin, 8 Wall. 325, 19 L. Ed. 456, and cases in note. Judgment affirmed.

(3 Ga. App. 79)

BLUMENFELD v. PALMER HARDWARE CO. (No. 2,441.)

(Court of Appeals of Georgia. July 19, 1910.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF (§ 90*) — SALE OF GOODS—"ACCEPTANCE AND RECEIPT."

Where one person orally sells to another merchandise of greater value than \$50, with the understanding that it is to be a cash transaction, and the seller, in pursuance to the direction of the purchaser, weighs up the articles and puts them aside in a designated portion of his storeroom or warehouse, where they are to be turned over to the purchaser's drays, and the purchaser refuses to send for and pay for the articles, *held*, that there is no such acceptance and receipt of the merchandise as is contemplated by the seventh paragraph of the statute of frauds (Civ. Code 1895, § 2693), and as to make the transaction enforceable under the statute.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 174, 175; Dec. Dig. § 90.*]

2. SALES (§ 342*)—ACTION FOR PRICE.

Even if, in such a case, the expending of time and labor by the seller in causing the ar-

ticles to be weighed and set aside amounted to such part performance as to give the seller any rights against the purchaser, it was not adequate to convert the transaction into an executed sale, so as to authorize suit on open account for the agreed price of the goods sold.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 949; Dec. Dig. § 342.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by the Palmer Hardware Company against Moses Blumenfeld. Judgment for plaintiff, and defendant brings error. Reversed.

A. L. Alexander, for plaintiff in error.
Wm. B. Stephens, for defendant in error.

POWELL, J. The Palmer Hardware Company sued Blumenfeld on an account for the purchase price of certain stove and plow castings, amounting to \$68.41. The defendant pleaded the statute of frauds. The proof showed that the hardware company sold these iron castings to Blumenfeld at the price of 75 cents per hundred, and that they were to be weighed up and set aside for him in a designated portion of the plaintiff's warehouse. The plaintiff did cause the castings to be weighed and set aside, at an expense of several dollars. It was a cash sale. The merchandise was to be paid for at the time of delivery. Either as a matter of accommodation or because it had agreed to do so (and as to this the parties were in conflict), the plaintiff had the castings loaded on drays and tendered them to the defendant, together with the bill. He rejected the articles and declined to abide the contract.

"The acceptance and receipt of merchandise of a greater value than \$50, under an oral contract of sale, which is contemplated by Civ. Code 1895, § 2693, par. 7, as relieving the contract from the operation of the statute of frauds, must be such a transfer of the physical possession of the property as places the goods beyond the control of the vendor, and within the control of the vendee.' Tender and refusal to accept are not sufficient to take the case out of the statute. Brunswick Grocery Co. v. Lamar, 116 Ga. 1, 42 S. E. 366." Miller v. Smith, 6 Ga. App. 447, 448, 65 S. E. 292. Even if ordinarily the setting aside of the merchandise in a designated place in the plaintiff's warehouse, after it had been inspected by the defendant, would have amounted to delivery and acceptance, still no such constructive acceptance and delivery could be implied in the present case, because the intention of the parties was that it should be a cash sale; i. e., that the goods were not to pass beyond the control of the vendor into the control of the vendee until the purchase money was paid. No waiver of this portion of the contract can be implied in the present case; for, even in its final act of tendering the castings on the drays, the sel-

ler sent a bill for collection of the purchase price along with the goods.

2. We deem it unnecessary to decide whether the plaintiff's having gone to the expense of weighing up the iron and setting it aside would amount to such part performance of the contract as to give the plaintiff any rights under the transaction; for we think it clear that the contract never thereby became executed. The plaintiff's suit was on an open account for the purchase price of the merchandise, and not for damages on account of the defendant's breach of any executory contract or for the expenses incurred by the plaintiff in causing the articles to be weighed up and set aside at the defendant's request. On this feature, the case falls within the principle announced in Dilman v. Patterson Co., 2 Ga. App. 213, 58 S. E. 365.

Judgment reversed.

(8 Ga. App. 96)

FAIN v. CITY OF ATLANTA. (No. 2,692.)
(Court of Appeals of Georgia. July 19, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 552*)—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY.

The evidence, being wholly circumstantial, and not inconsistent with the defendant's innocence, was insufficient to authorize the defendant's conviction, and for that reason the certiorari should have been sustained, and the judgment of the recorder's court set aside as contrary to law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1257, 1259-1262; Dec. Dig. § 552.*]

2. INTOXICATING LIQUORS (§ 236*)—ILLEGAL SALE—EVIDENCE.

Mere possession of three gallons of corn whisky in half-pint flasks kept in the owner's dwelling, without any evidence of a sale or an attempted sale on the part of the owner, is not such a circumstance as will authorize the conclusion, based upon moral and legal certainty, that such liquor was kept for the purpose of sale. Nor does the fact that the conduct of two persons engaged by the accused to carry this liquor from his dwelling to another dwelling for safe-keeping during the owner's absence was suspicious (which conduct was not in the presence of the accused) affect the issue as to the guilt or innocence of the accused, where there is nothing in the evidence to support the inference of a sale.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 309; Dec. Dig. § 236.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

J. V. Fain was convicted of a violation of an ordinance of the City of Atlanta. From an order overruling a certiorari, defendant brings error. Reversed.

Moore & Branch, for plaintiff in error.
Jas. L. Mayson and W. D. Ellis, Jr., for defendant in error.

RUSSELL, J. Judgment reversed.

(8 Ga. App. 80)

**RIVER VIEW LAND & IMMIGRATION CO.
v. JONES.** (No. 2,596.)

(Court of Appeals of Georgia. July 19, 1910.)

*(Syllabus by the Court.)***1. WORK AND LABOR (§ 14*) — ACTION FOR SERVICES—QUANTUM MERUIT.**

Where one person contracts to sell to another real estate in exchange for the performance of personal or professional services, or on like consideration, and the services are performed, and the vendor, instead of making a deed to the land as promised, offers to rescind, and the vendee, accepting the proposal of rescission, sues for the recovery of the amount due him as a result of the rescission, he is entitled to recover the reasonable value of the services performed, not exceeding the value, if any, placed upon them by the parties at the time of making the agreement.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 29-33; Dec. Dig. § 14.*]

2. GROUNDS FOR REVERSAL.

In the present case there were some inaccuracies in the charge of the court; but, as the amount of the plaintiff's recovery was clearly estimated by the jury in accordance with the proposition stated in the foregoing headnote, which was the material and controlling law point in the case, there is no reason for reversing the judgment.

Error from City Court of Fitzgerald; E. Wall, Judge.

Action by A. H. Jones against the River View Land & Immigration Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Otis H. Elkins, for plaintiff in error. Chas. B. Teal and J. J. Bull, for defendant in error.

POWELL, J. Judgment affirmed.

(8 Ga. App. 87)

BARBER et al. v. HUNTER, BEN & CO.
(No. 2,568.)

(Court of Appeals of Georgia. July 19, 1910.)

*(Syllabus by the Court.)***APPEAL AND ERROR (§ 554*)—DISMISSAL—DELAY IN SERVING BILL OF EXCEPTIONS.**

The bill of exceptions was certified by the judge on February 1, 1910, and service was acknowledged February 14, 1910, in the following language: "Due and legal service of the within bill of exceptions acknowledged; copy and all other and further notice and service waived." There was no other service of the bill of exceptions, and no other waiver of service. *Held*, the writ of error must be dismissed, because not served upon the defendant in error within 10 days after the bill of exceptions was signed and certified, as required by Civ. Code 1895, § 5547. *Myers v. Hamil*, 130 Ga. 607, 61 S. E. 403.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 554.*]

Error from City Court of Reidsville; C. L. Morgan, Judge.

Action between L. M. Barber and others and Hunter, Ben & Co. From the judgment, Barber and others bring error. Dismissed.

L. L. Thomas, for plaintiffs in error. E. C. Collins, for defendant in error.

HILL, C. J. Writ of error dismissed.

(8 Ga. App. 84)

SMITH et al. v. GOODE & NICHOLS FURNITURE CO. (No. 2,464.)

(Court of Appeals of Georgia. July 19, 1910.)

*(Syllabus by the Court.)***RELIGIOUS SOCIETIES (§ 29*)—PURCHASES BY TRUSTEES—LIABILITY OF SOCIETY.**

The pastor and trustees of the "Colored Methodist Episcopal Church in America," located at Griffin, Ga., unincorporated, bought a piano for the use of the church. It was placed in the church, and was used in religious services for two years, until the "pedals were worn slick." *Held* that, irrespective of the authority of the pastor and trustees who purchased the piano, its use by the church for so long a period conclusively shows a ratification of the purchase, and the property of the church, held by trustees, is subject to the debt contracted for the piano. *Kelsey v. Jackson*, 123 Ga. 113, 50 S. E. 951; *Haney Co. v. Hightower Institute*, 113 Ga. 289, 38 S. E. 761; *Wright v. Vineyard Methodist Church*, 72 Minn. 78, 74 N. W. 1015.

[Ed. Note.—For other cases, see *Religious Societies*, Cent. Dig. § 196; Dec. Dig. § 29.*]

Error from City Court of Griffin; W. M. Clark, Judge.

Action by the Goode & Nichols Furniture Company against Wilkins Smith and others. Judgment for plaintiff, and defendants bring error. Affirmed.

W. E. H. Searcy, Jr., for plaintiffs in error. Wm. H. Beck, for defendant in error.

HILL, C. J. Judgment affirmed.

(8 Ga. App. 109)

SMITH v. SWINT. (No. 2,442.)

(Court of Appeals of Georgia. July 25, 1910.)

*(Syllabus by the Court.)***JURY (§ 25*)—RIGHT TO JURY TRIAL—SUFFICIENCY OF DEMAND.**

Under the act creating the city court of Waynesboro, "either party in any civil cause shall be entitled to a trial by a jury upon his entering his demand therefor, by himself or his attorney in writing, on, or before the call of the docket at the term to which the cause is returnable." Acts 1903, p. 181, § 22. When the attorney for the defendant enters on the plea, when filed, a timely demand for a trial by a jury the defendant is not deprived of this right because the demand does not appear on the docket or on the minutes. A written demand, entered on the plea, is a substantial compliance with the statute.

[Ed. Note.—For other cases, see *Jury*, Dec. Dig. § 25.*]

Error from City Court of Waynesboro; Wm. H. Davis, Judge.

Action by J. R. Swint against W. H. Smith. Judgment for plaintiff, and defendant brings error. Reversed.

I. S. Peebles, Jr., and C. B. Garlick, for plaintiff in error. H. J. Fullbright, for defendant in error.

HILL, C. J. This was a suit on promissory notes. Defense, partial failure of consideration. Verdict for the plaintiff. The defendant made a motion for a new trial on the general grounds, which was overruled. In this court he expressly abandons his motion for a new trial, and insists only on an exception pendente lite which was properly made and filed. This exception is that the court erred in sustaining a motion to strike the demand for a jury trial, alleged to have been made by the defendant.

The facts relating to this demand appear from the record as follows: Upon the plea filed at the appearance term had been written the following entry: "Georgia, Burke County. And now at the appearance term of said cause comes the defendant, through his attorney at law, and enters this his demand for a trial by jury in said case. This Sept. 1, 1909. [Signed] C. B. Garlick, Deft's Attorney." This demand was not entered by the judge on the docket, or by the clerk on the minutes; and it did not appear, other than by the entry itself, when in fact the demand was made. There was no evidence that it was not written on the plea by the attorney for the defendant at the date it purports to have been so entered. Under the act creating the city court of Waynesboro, all causes returnable to a monthly term of the court are triable at that term of the court, "provided always that either party in any case shall be entitled to a trial by a jury in said court upon his entering his demand therefor by himself or his attorney, in writing on or before the call of the docket at the term to which the cause is returnable," etc. Acts 1903, pp. 180, 181, §§ 10, 22. When the case was soundered for trial at the next quarterly term subsequent to the monthly term to which it had been filed, the court sustained the motion to strike the demand for jury trial, because it did not appear from the docket or the minutes of the court that any demand had been made on or before the call of the docket at the term to which the cause was returnable.

It will be noticed that the act does not require the demand to be entered either on the docket or on the minutes of the court. Unquestionably the better practice would be to have it entered on both, or at least on the minutes. But the statute only requires in general terms that the demand shall be entered in person or by attorney "on or before the call of the docket at the term to which the cause is returnable." Here it is not denied that the demand for a jury trial was entered on the plea, when filed, on or before the return term. The statute declares that the party entering the timely demand "shall be entitled to trial by a jury in said court." We

cannot think that this right is lost by a failure to enter the demand on the docket or the minutes. Where the demand is entered on the pleadings filed in the case, it could, if necessary, be ordered entered on the minutes nunc pro tunc, or the judge could enter the demand on the docket at any time. The place where the demand is entered is a mere formality; the fact of the demand is the essential. The law, which deals with substance, and not form, will not deprive a litigant of his right to a jury trial on demand, without substantial reason. Suppose the clerk failed to enter the demand on the minutes, or the court neglected to put it on the docket; would this deprive the party of his right when it was undisputed that a timely demand had been entered in writing on the pleadings in the case? Here the case was in order for trial at the September monthly term to which it was returnable; but the clerk placed the case on the docket at the next regular quarterly term for trial by a jury. The clerk must, therefore, have had notice at the monthly term of the demand for a jury trial.

It is said by learned counsel for defendant in error that the plaintiff in error was not hurt by the failure to give him a trial by jury; that by abandoning the general grounds of his motion for a new trial he concedes that the verdict was right under the evidence. Ordinarily a complainant must show injury, as well as error, to warrant a reversal. But he may be entitled on timely demand to a trial of the facts by a jury. These arbiters of facts may have taken a different view of the evidence than that entertained by the trial judge. In our opinion, when a party has claimed his right to a jury trial in conformity with the statute regulating such right, he is entitled to have it, although it appears that the case was fairly tried by the judge, and full and ample justice done between the parties. 24 Cyc. 176. We conclude that the judge erred in sustaining the motion to strike the demand for a jury trial.

Judgment reversed.

(8 Ga. App. 116)

CENTRAL OF GEORGIA RY. CO. v.
BASHINSKI. (No. 2,633.)

(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

CARRIERS (§ 181½*)—LOSS OF GOODS—ACTIONS
—COMMON-LAW LIABILITY.

There was no error in refusing a nonsuit or in declining to grant a new trial. The action was based upon the carrier's common-law liability, and the case is controlled by the ruling of this court in *Ohlen v. Atlanta & West Point Railroad Company*, 2 Ga. App. 323, 58 S. E. 511. The suit could not have been brought upon the defendant's statutory liability as the last connecting carrier, because, according to the petition, there were only two carriers concerned with the shipment, and the first of these was a steamship company. When the statement of the petition that the goods were delivered to

a named steamship company is considered in connection with the distinct allegation that the defendant company received the shipment from the steamship company in apparent good order, it is apparent that the reference to the steamship company is made merely as part of the history of the case. It was evidently so treated by the defendant in the court below, because no demurrer to the petition was filed.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 181½.*]

Error from City Court of Sandersville; E. W. Jordan, Judge.

Action by H. M. Bashinski against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. L. Gamble and T. W. Evans, for plaintiff in error. J. C. Harman and W. E. Armistead, for defendant in error.

RUSSELL, J. Judgment affirmed.

(8 Ga. App. 118)

BURDEN v. STATE. (No. 2,735.)

(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 139*)—USE AT ASSEMBLAGE FOR DIVINE WORSHIP.

It is a violation of the law in this state for a person to have in his possession, custody, or control any intoxicating liquor at any place where people have assembled for divine worship, whether he carry it there or procure it from another after arriving there. Under sections 438-440 of the Penal Code of 1895, persons who go to churches must not carry liquor or have liquor either on their insides or on their outsides.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 139.*]

Error from City Court of Sylvester; J. B. Williamson, Judge.

Oscar Burden was convicted of crime, and brings error. Affirmed.

L. D. Passmore, for plaintiff in error. J. H. Tipton, Sol., for the State.

POWELL, J. Judgment affirmed.

(8 Ga. App. 114)

WOODWARD LUMBER CO. v. WATSON, VAN SANT & CO. (No. 2,548.)

(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

1. GARNISHMENT (§ 140*)—ANSWER IN BEHALF OF CORPORATION.

An answer in behalf of a corporation, by its bookkeeper, who answers positively to the facts therein stated, is sufficient; and the striking of such answer, because not made and verified by the corporation, was erroneous. Walker v. Swift Fertilizer Works, 3 Ga. App. 283, 59 S. E. 850.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 268; Dec. Dig. § 140.*]

2. GARNISHMENT (§§ 131, 148*)—ANSWER SETTING UP EXEMPTION OF DEBT.

A garnishee, in his answer admitting indebtedness, may set up that the amount of in-

debtedness admitted is exempt from process of garnishment because it is wages due to a daily laborer; and, where the exemption is so set up, the court cannot, in the absence of any traverse, render judgment against the garnishee. Walker v. Swift Fertilizer Co., supra; Pioneer Co-operative Co. v. Eagle & Phoenix Mfg. Co., 67 Ga. 38; Emmons, McKee & Co. v. Southern Bell Tel. Co., 80 Ga. 760, 7 S. E. 232.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 260; Dec. Dig. §§ 131, 148.*]

Error from Superior Court, Fulton County; G. L. Bell, Judge.

Action between the Woodward Lumber Company and Watson, Van Sant & Co. From the judgment, the lumber company brings error. Reversed.

E. V. Carter, for plaintiff in error. John A. Boykin and W. H. Underwood, for defendants in error.

HILL, C. J. Judgment reversed.

(8 Ga. App. 124)

McKENZIE v. STATE. (No. 2,760.)

(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

1. REVIEW ON APPEAL.

The assignments of error are without merit. The evidence authorized the conviction of the defendant, and there was no error in refusing a new trial.

2. CRIMINAL LAW (§ 378*)—EVIDENCE—GOOD CHARACTER—REBUTTAL.

In view of the fact that the defendant, by means of cross-examination of a witness for the state, put his character in issue, it was not error to admit the record of the defendant's conviction of the offense of simple larceny in another case. Henderson v. State, 5 Ga. App. 495, 63 S. E. 535. The rule which permits the prosecution to rebut evidence adduced for the purpose of proving defendant's good character is not affected by the fact that the witness used for the purpose of showing good character was called to the stand by the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 842; Dec. Dig. § 378.*]

3. LARCENY (§ 3*)—PRINCIPAL AND AGENT (§ 69*)—INTENT—TAKING IN PAYMENT OF DEBT—CONVERSION BY AGENT TO SELL.

The fact that the owner of the property had not consented to its conversion was sufficiently shown by the circumstances under which the property was moved, as well as by the unequivocal testimony of the agent of the owner that he had entire charge of her business, and that he had not consented. The jury were authorized to believe the statement of the defendant to the effect that the owner had consented to his converting the property to his own use; but they were not required to believe the statement in preference to the sworn testimony, corroborated as it was by the circumstances of the taking. One cannot collect a debt due him by taking the property of another in payment thereof without the owner's consent; nor can an agent appointed to sell, in the absence of express authorization to that effect, be himself the buyer. MacKenzie v. Minis, 132 Ga. 330, 63 S. E. 900, 23 L. R. A. (N. S.) 1003.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 5, 39, 42; Dec. Dig. § 3; Principal and Agent, Dec. Dig. § 69.*]

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

John McKenzie was convicted of crime, and ue brings error. Affirmed.

Robt. McMillan, for plaintiff in error. W. A. Charters, Sol. Gen., J. C. Edwards, and G. P. Charters, for the State.

RUSSELL, J. Judgment affirmed.

(8 Ga. App. 111)

SOUTHERN RY. CO. v. STEARNES.
(No. 2,473.)

(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

DAMAGES (§ 113*)—MEASURE—INJURY TO ANIMAL.

Where a horse has been temporarily totally disabled for work, and also permanently injured, the measure of damage is the diminution in the market value of the horse caused by the permanent effects of the injuries, the reasonable hire of the horse during the period of temporary total disability, and the cost incurred in keeping and treating the horse for the injuries, the aggregate of these amounts not to exceed the value of the horse before the injury, with interest thereon.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 280; Dec. Dig. § 113.*]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by Gus Stearnes against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. M. Rudolph and Maddox, McCamy & Shumate, for plaintiff in error. M. C. Tarver, for defendant in error.

HILL, C. J. This was a suit brought against the railroad company to recover damages for injuries to a horse. The justice rendered a judgment for \$70, and the defendant appealed to a jury in the superior court. The jury found a verdict for \$60, and the defendant's motion for a new trial was overruled.

The evidence as to the negligence of the defendant and contributory negligence of the plaintiff was in conflict, and the verdict settles the question of liability. The evidence showed that the horse was temporarily totally disabled from doing any work, and there was evidence of permanent disability and consequent diminution in value. There was also proof of the amount of the hire of the horse and the cost of keeping and treating him for the injuries. The court instructed the jury in effect that the measure of damages was the difference in the value of the horse before and after the injuries, lost hire while not able to work from the injuries, and the expense of looking after and treating the horse during its disability.

This instruction is objected to, because it allows the plaintiff to recover triple damages; it being contended that the true meas-

ure was the diminution in value, and nothing more. The measure of damages as stated by the instructions is in accordance with the rule declared by the Supreme Court in *Telfair County v. Webb*, 119 Ga. 916, 47 S. E. 218, *Atlanta & West Point R. Co. v. Hudson*, 62 Ga. 680, and *Atlanta Cotton Seed Oil Mills v. Coffey*, 80 Ga. 150, 4 S. E. 759, 12 Am. St. Rep. 244. It is true that the court should also have charged that the aggregate of items of damages should not exceed the value of the horse with interest thereon; but the failure to do so in this case, under the evidence, resulted in no injury to the defendant, as the aggregate amount of the damages proved and found by the jury did not equal the proved value of the horse.

The other two assignments of error are without merit.

Another trial is asked for because of alleged newly discovered evidence. This newly discovered evidence tends to show that the horse was not as seriously injured as claimed by the plaintiff and as proved on the trial. A counter showing was made, and we do not think the trial judge abused his discretion in refusing a new trial on this ground. It is not probable that the evidence alleged as newly discovered, in view of the counter showing, would change the result.

Judgment affirmed.

(8 Ga. App. 124)

HOPKINS v. STATE. (No. 2,756.)

(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 941*) — NEW TRIAL — GROUNDS.

The alleged newly discovered evidence is cumulative and impeaching in character, and the trial judge did not abuse his discretion in refusing to grant a new trial on that ground.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2328-2330; Dec. Dig. § 941.*]

2. REVIEW ON APPEAL.

No error of law is complained of, and the evidence supports the verdict.

Error from Superior Court, Banks County; C. H. Brand, Judge.

Claud Hopkins was convicted of crime, and brings error. Affirmed.

W. W. Stark, for plaintiff in error. Clifford Walker, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

(8 Ga. App. 12.)

EDGE v. STATE. (No. 2,772.)

(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

1. JURY (§ 116*) — CHALLENGE TO ARRAY — CHALLENGE TO POLL — GROUNDS.

That the panel of jurors heard the argument on the trial of one jointly indicted with

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the defendant is not a ground for challenge to the array; nor is it ground for peremptory challenge to the poll. The objection goes to the qualification of each juror, and is fully met by the questions and answers on the voir dire, where there is no other or fuller investigation before the judge as a trior.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 542, 543; Dec. Dig. § 116.*]

2. REVIEW ON APPEAL.

No error of law appears, and the evidence fully supports the verdict.

Error from Superior Court, Cobb County; N. A. Morris, Judge.

P. W. Edge was convicted of crime, and brings error. Affirmed.

Clay & Morris, for plaintiff in error. J. P. Brooke, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

(8 Ga. App. 87)

LOEB v. CITY OF ATLANTA. (No. 2,041.)
(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 236*)—KEEPING FOR SALE—SUFFICIENCY OF EVIDENCE.

The circumstances were not inconsistent with the theory of innocence, and, as there is no proof in the record of any sale or attempted sale of intoxicating liquors by the accused, his conviction was unauthorized, and the certiorari should have been sustained. The fact that, upon removing with a hammer and chisel the window casing, ceiling, and wainscoting of the defendant's place of business, which had previously been occupied at various times by other persons, several bottles said to contain whisky were found between the two walls of the building, the defendant disclaiming all interest in said property and denying any knowledge that it was in the wall, is not a circumstance conclusive of his guilt of the offense of keeping intoxicating liquors for sale. Especially is the discovery of liquor under such circumstances not inconsistent with the theory of his innocence, when there is a lack of any direct evidence that the liquors were owned by him, or by him concealed, and when no circumstances appear which tend to show that he was engaged in the unlawful sale of intoxicants. The quantity of liquor alone is an inconclusive circumstance. *Walker v. City of Dawson*, 7 Ga. App. 417, 66 S. E. 984.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 309; Dec. Dig. § 236.*]

Powell, J., dissenting.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Sam Loeb was convicted of keeping intoxicants for sale, and he brings error. Reversed.

F. M. Huges and Morris Macks, for plaintiff in error. W. P. Hill, J. L. Mayson, and W. D. Ellis, Jr., for the State.

RUSSELL, J. Judgment reversed.

POWELL, J., dissents.

(8 Ga. App. 118)

STEWART v. STATE. (No. 2,738.)
(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 236*)—KEEPING ON HAND AT PLACE OF BUSINESS.

The evidence showing that the defendant kept a quantity of intoxicating liquor on hand in a house used both as a residence and as a place of business, and that he had it there at a time when several members of the public were admitted, though the place was nominally closed for business at the time, and there being enough testimony to support the inference that the members of the public were going to the place for the purpose of getting some of the liquor, the jury was authorized to convict the defendant of keeping the liquor on hand at his place of business. *Land v. State*, 5 Ga. App. 98, 62 S. E. 665.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 309-311; Dec. Dig. § 236.*]

Error from City Court of Oglethorpe; R. L. Green, Judge.

Henry Stewart was convicted of keeping intoxicants on hand at his place of business, and brings error. Affirmed.

Jere M. Moore, for plaintiff in error. Jule Felton, Sol., for the State.

POWELL, J. Judgment affirmed.

(8 Ga. App. 124)

WARTHEN v. STATE. (No. 2,758.)
(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

1. REFUSAL OF CONTINUANCE PROPER.

There was no error in refusing to continue the case. The decision is controlled by the ruling of this court in *Howard v. State*, 7 Ga. App. 61, 65 S. E. 1076.

2. CRIMINAL LAW (§ 824*)—INSTRUCTIONS—REQUESTS.

The circumstances were sufficient to authorize the inference that the defendant was betting as well as playing cards, and as the game in which the defendant was charged to have been engaged was not alleged to have been played in any particular manner or denominated by a specific name, the court was not required, in the absence of a request, to instruct the jury that they would have to be satisfied as to the particular kind of game the accused was playing, and the name of such game, before they would be authorized to convict.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 824.*]

Error from City Court of Sandersville; E. W. Jordan, Judge.

Macon Warthen was convicted of crime, and brings error. Affirmed.

John R. Cooper, for plaintiff in error. J. E. Hyman, Sol., for the State.

RUSSELL, J. Judgment affirmed.

(86 S. C. 426)

STATE v. AYERS.

(Supreme Court of South Carolina. July 21, 1910.)

1. CRIMINAL LAW (§ 761*)—INSTRUCTIONS ASSUMING UNCONTESTED FACTS.

Where accused admitted that he intentionally struck decedent on the head with a stick, a charge assuming as a fact that accused intentionally struck decedent was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1754; Dec. Dig. § 761.*]

2. CRIMINAL LAW (§ 761*)—INSTRUCTIONS ASSUMING FACTS.

Where accused admitted that he struck decedent on the head with a stick, and the evidence showed that decedent died shortly thereafter on the same day, and a physician who made a post mortem examination testified that death was due to a blood clot on the brain, and there was no evidence to the contrary, a charge indicating as a fact the existence of a clot on the brain, though technically erroneous, was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1754; Dec. Dig. § 761.*]

Appeal from General Sessions Circuit Court of Calhoun County; Ernest Gary, Judge.

John Ayers was convicted of manslaughter, and he appeals. Affirmed.

J. M. Walker, for appellant. Solicitor Huldebrand, for the State.

WOODS, J. The defendant, having been convicted of manslaughter on an indictment charging him with the murder of Malley Whitmore, appeals on the ground that there was error for which a new trial should be granted in the following instruction to the jury: "If the clot on the brain caused the death of the deceased and you can trace that back to the blow, the defendant would be held responsible under this theory of the law, under the theory that the law holds a man responsible for an unlawful act intentionally done. Just as you would say of a soldier on a battlefield who was shot in the leg and gangrene would set in, or pneumonia would set in from the wound, and he would die, you would say that he was killed from a gunshot wound in battle, even though he died from pneumonia; the gunshot wound would be the cause of his death. If one strikes another a blow and so disarranges the anatomy that death results from complications that set in, within a year and a day after the blow was inflicted, you charge the death to the blow as the proximate cause."

The first error alleged is that the court assumed as a fact that the defendant intentionally struck the deceased. It is impossible that such an assumption could have affected the result, because the defendant himself admitted that he intentionally struck the deceased two blows with a stick, giving as his excuse that deceased was advancing on him and menacing him with a drawn pistol.

The other error assigned is that the court

assumed that there was a clot of blood found on the brain of deceased. Indicating in the charge, as a fact, the existence of a clot on the brain of the deceased was no doubt a technical error. But to order a new trial for such an inadvertence would in this case be trifling with the administration of justice. It is true that the defendant did not admit that the blows struck by him produced death, or a clot on the brain, or any other evil consequence; but he admitted that the deceased was struck by him two blows on the head with a stick, and that he died shortly thereafter on the same day. Dr. Dreher, who made the post mortem examination, testified that death was due to a blood clot found on the brain. There was not a particle of evidence to the contrary, nor did anything appear in the whole case indicating the least doubt of the truth of the physician's statement. No jury under these circumstances could have considered that there was any issue as to the existence of the clot of blood. Thus, it is perfectly clear that the allusion of the circuit judge to the existence of the clot on the brain of the deceased could not have affected the verdict.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(86 S. C. 313)

C. B. CROSLAND CO. v. PEARSON.

(Supreme Court of South Carolina. July 14, 1910.)

1. TRIAL (§ 194*)—INSTRUCTIONS—CHARGE ON THE FACTS.

Under the rule that a charge stating the issues raised by the pleadings is not a charge on the facts, in violation of Const. art. 5, § 26, an instruction in an action on an account for goods sold and delivered, that the only issue in the case was who made the contract, to whom did plaintiff intend to sell, and who intended to buy, was not a charge on the facts.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.*]

2. APPEAL AND ERROR (§ 215*)—OBJECTION TO INSTRUCTIONS—NECESSITY.

Where the trial judge in his charge states the issues erroneously, counsel must call his attention to the errors, or he waives the right to make it the basis of an exception on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215;* Trial, Cent. Dig. §§ 683-685.]

3. TRIAL (§ 194*)—INSTRUCTIONS—CHARGE ON THE FACTS.

A charge in an action on an account for goods sold and delivered, that if defendant went to plaintiff's store and got the goods, and if her daughter went there and got the goods, and the agreement was that defendant should pay for them, it was of no consequence how the goods were charged on the daybooks, but the jury might look at the books to throw light on the transaction, was not a charge on the facts.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.*]

4. ACCOUNT, ACTION ON (§ 22*)—BOOK ACCOUNT—EVIDENCE.

An account for goods sold and delivered may be proved, not only by the books of original

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

entry, but by the personal knowledge of a witness or the admission of the debtor, and the liability of a debtor may be established by testimony that he had agreed to be liable for the account, and had afterwards acknowledged its correctness.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. §§ 69-73; Dec. Dig. § 22.*]

5. WITNESSES (§ 258*)—EVIDENCE—ADMISSIBILITY.

Where, in an action for goods sold and delivered, the books of account were introduced in evidence without objection, and the testimony proved inferentially that witnesses were connected with the seller of the goods, it was not error to allow the witnesses to testify from the books of original entry.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 258.*]

6. ACCOUNT, ACTION ON (§ 22*)—EVIDENCE—SUFFICIENCY.

In an action on an account for goods sold and delivered, evidence held to justify a finding of a specified sum, as balance on account for a specified year.

[Ed. Note.—For other cases, see Account, Action on, Dec. Dig. § 22.*]

Hydrick and Woods, JJ., dissenting in part.

Appeal from Common Pleas Circuit Court of Marlboro County; Geo. W. Gage, Judge.

Action by the C. B. Crosland Company against Rachel M. Pearson. From a judgment for plaintiff, defendant appeals. Affirmed.

Newton & Owens, for appellant. Townsend & Rogers, for respondent.

GARY, A. J. This is an action upon an account, for goods sold and delivered by the plaintiff to the defendant. The jury rendered a verdict in favor of the plaintiff for \$395.40, which was afterwards reduced to \$387.85, and the defendant appealed.

The first exception assigns error on the part of his honor, the presiding judge, in charging the jury that "there is only one pivotal issue in this case before you, and that is, Who made this contract, to whom did Crosland intend to sell the goods, and who intended to buy them," on the ground that the charge was in violation of article 5, § 26 of the Constitution, which provides that "judges shall not charge juries, in respect to matters of fact, but shall declare the law."

It is not a charge on the facts to state the issues raised by the pleadings. *Miles v. Tel. Co.*, 55 S. C. 403, 33 S. E. 493. If the presiding judge states the issues erroneously, it is the duty of counsel to call his attention to such error; otherwise he waives the right to make it the basis of an exception on an appeal to the Supreme Court. *State v. Still*, 68 S. C. 37, 46 S. E. 524, 102 Am. St. Rep. 657.

The second exception is as follows: "Because his honor erred in charging the jury, 'It is a matter of no consequence as to how they were charged on these daybooks,' error being that this was a charge upon facts, and further error that this took from the jury the right to consider the original entry; the

evidence being the charge that was made in the books referred to." The words of his honor, the presiding judge, set out in this exception, are only part of a sentence. His charge in this respect, was as follows: "If Mrs. Pearson went to the store and got the goods, and if her daughters went there and got the goods, and the intention and agreement was that she should be liable for the goods, it is a matter of no consequence as to how they were charged on these daybooks. You may look at these books, to throw light upon the transaction, but if the agreement between the parties, to wit, Mrs. Pearson and Crosland, was that she was to get the goods, and she was to be liable for the goods, and Crosland sold them upon that agreement, why these entries in the daybooks are not conclusive." His honor simply meant to charge the jury, that it was immaterial to whom the goods were charged on the daybooks, if there was an agreement between the plaintiff and the defendant that she was to be liable for them. An account may be proved not only by the book of original entry, but also by the personal knowledge of a witness, or the admissions of the debtor. *Walker v. Laney*, 27 S. C. 150, 3 S. E. 63. The ruling of the presiding judge is sustained by the case of *Lorick v. Caldwell*, 85 S. C. 94, 67 S. E. 143.

The third exception is as follows: "Because the verdict is not in accordance with the proven facts in this case, particularly there was no sufficient proof, nor any proof, for the items of balance of account for 1906, in the sum of \$14.66, which item was necessarily included, and made a part of the verdict of \$395.40." It is only necessary to refer to the following testimony of Frank Crosland to show that this exception cannot be sustained: "Q. When the settlement was due in 1906, was any objection made by her or any one in her behalf? A. No, sir; never since we have done business with her. Q. How much balance was left from the 1906 account? A. Fourteen dollars and something. Q. Does your book show it? A. Yes, sir. The Court: Was the balance struck, and after it was struck did she admit that it was due? A. Yes, sir. Q. How much was that balance? A. Fourteen dollars and sixty-six cents."

The fourth exception is as follows: "Because the jury erred in finding that the defendant was liable for the items, in the sum of \$217.54, which were purchased by Moses Pearson and children of Moses Pearson, and was so entered on the books of original entry. We have already shown, that charging an account upon the books of original entry is not conclusive. There was testimony tending to show not only that the defendant had agreed with the plaintiff to be liable for the account, but afterwards acknowledged its correctness, thus showing that there was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

testimony sustaining the verdict, in which case, as this is an action at law, the facts are not reviewable by this court.

The fifth exception is as follows: "Because his honor erred in not granting the motion to strike from the record and the testimony the evidence of R. B. Crosland and Frank Crosland; it being respectfully submitted that there was no evidence to show that R. B. Crosland and Frank Crosland were connected in any way with the C. B. Crosland Company." The exception falls to point out wherein it was incumbent on the plaintiff to show that the Croslands were connected in any way with the C. B. Crosland Company. The appellant's attorneys have, however, argued as if the exception had assigned error on the part of the presiding judge, in the following particular: "In allowing the witnesses R. B. Crosland and Frank Crosland to testify from books which purported to be books of original entry of the plaintiff, when the same had not been duly authenticated, and the two witnesses had not been shown to be connected in any way with the plaintiff." Even if the exception had raised this question, it could not be sustained, as the books were introduced in evidence without objection, and the testimony tended to prove, at least inferentially, that the Croslands were connected with said company.

The sixth exception is as follows: "Because his honor erred in overruling motion to strike from the record all the account for 1906, it being submitted that it was error to submit the same, over objection of counsel for defendant, who insisted upon proof of the balance, and the items out of which that balance grew, and the plaintiff had served bill of particulars concerning same." What was said, in considering the third exception, disposes of the question presented by this exception.

It is the judgment of this court that the judgment of the circuit court be affirmed.

WOODS, J., concurs in the result and in the separate opinion of HYDRICK, J.

HYDRICK, J. I concur, except in the reasons given for overruling the first exception.

While it is generally true that stating the issues is not charging upon the facts, for, in doing so, the judge does not state the allegations of the pleadings as facts, but merely as what the parties respectively allege the facts to be; still, I can see how a judge might charge upon the facts, even in stating the issues. And if he should do so, it might be reversible error.

If there had been really more than one issue of fact in this case, I think it would have been error to charge as complained of. But a careful examination of the record convinces me that there was really only one issue of fact for the jury, and the one stated by the judge. To be sure, under the pleadings, every item of the account was in issue, but

they had all been regularly proved, and the only items contested by the defendant in evidence had been voluntarily deducted from the account. Therefore, unless the jury disregarded the uncontradicted testimony of plaintiff's witnesses, given in proof of the items, they were bound to find for plaintiff the amount so proved, if they found the defendant liable for the account.

(88 S. C. 348)

METZ v. CRITCHER et al.

(Supreme Court of South Carolina. July 18, 1910.)

MECHANICS' LIENS (§ 78*)—"CONSENT" OF OWNER—NECESSITY OF PROTEST.

Civ. Code 1902, § 3008, provides that any person to whom a debt is due for materials furnished and used in the erection of any building, by virtue of an agreement with "or by consent of the owner of such building," shall have a lien. Section 3011 provides that the owner of any such building, in process of erection, other than the party by whom or in whose behalf a contract for materials has been made, may prevent the attachment of any lien for materials not then furnished by giving notice, in writing, to the person furnishing such material that he will not be responsible therefor. A contractor purchased lumber of plaintiff to be used in defendant's house, but the only evidence that the owner knew from whom the lumber was obtained was his direction to one of plaintiff's teamsters to tell plaintiff to send him good lumber. *Held*, that the word "consent," as used in the statute, implies "choice," and implies an agreement which, but for the consent, could not exist, and which the party consenting has a right to forbid, and that section 3011 does not necessitate a notice that the owner of a building will not be responsible for the material used therein, unless he had given his consent, as provided by section 3008, and that a lien did not exist on defendant's property for the lumber furnished by plaintiff, as he gave no consent to have plaintiff furnish the lumber.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 111; Dec. Dig. § 78.*

For other definitions, see *Words and Phrases*, vol. 2, pp. 1437-1441; vol. 3, p. 7612.]

Appeal from Common Pleas Circuit Court of Barnwell County; W. B. Gruber, Special Judge.

Action by A. B. Metz against W. E. Critcher and W. B. Oswald. A verdict was directed for defendant Oswald, and plaintiff appeals. Affirmed.

See, also, 83 S. C. 406, 65 S. E. 394.

James M. Patterson, for appellant. Bates & Simms, for respondents.

WOODS, J. The appeal in this proceeding to foreclose a mechanic's lien depends on whether the circuit court erred in directing a verdict for the defendant Oswald on the ground that there was no evidence tending to establish his liability. The plaintiff testified that he sold lumber to the defendant W. E. Critcher, and that there was a balance of \$324.65 unpaid; that he had been paid for all lumber sold to Critcher except that used by Critcher in building a house on land of the defendant Oswald. The plaintiff

admitted that he sent the lumber on Critcher's order and charged it to Critcher on his books; that he made no contract with Oswald, and gave him no previous notice that he was about to furnish lumber to be used in building a house for him. The only evidence tending to show that Oswald even knew of the source from which Critcher was obtaining the lumber was the statement of one of plaintiff's wagoners that Oswald said to him, as he drove by his store, "to tell Mr. Metz to send him good lumber; that he did not want any with knots in it."

For the plaintiff to establish a lien on the building of Oswald, the owner, it was necessary for him to show that he had met the requirements of section 3008 of the Civil Code of 1902, by evidence that Oswald had agreed or consented that he should furnish the lumber, and that it was furnished under such agreement or consent. That section provides: "Any person to whom a debt is due for labor performed or furnished, or for materials furnished and actually used in the erection, alteration, or repair of any building or structure upon any real estate, by virtue of an agreement with, or by consent of, the owner of such building or structure, or any person having authority from, or rightfully acting for, such owner, in procuring or furnishing such labor or materials, shall have a lien upon such building or structure, and upon the interest of the owner thereof in the lot of land upon which the same is situated, to secure the payment of the debt so due to him, and the costs which may arise in enforcing such lien under this chapter, except as is provided in the following sections."

The meaning of the word "consent" as here used, has been stated in two cases. Chief Justice McIver, in delivering the opinion of the court in *Geddes v. Bowden*, 19 S. C. 1, says: "The word 'consent' ordinarily implies choice, and one can scarcely be regarded as giving his consent to that which he has no right to object to. In the experience of life a man is oftentimes compelled to accept results, in the sense that he makes no opposition or objection thereto, for the reason that he has no right or power so to do, but he cannot, in any proper sense of the term, be regarded as consenting to them, unless he has the right and power to exercise a choice to consent or object thereto. As is well said by Mr. Chief Justice Simpson, in *Gray v. Walker*, 16 S. C. 147, in construing this statute: 'Consent here, we think, implies something more than a mere acquiescence in a state of things already in existence. It implies an agreement to that which, but for the consent, could not exist, and which the party consenting has a right to forbid.'"

This section as thus construed is not in the least inconsistent with section 3011, which is as follows: "The owner of any such building or structure in process of erection, or be-

ing altered or repaired, other than the party by whom or in whose behalf a contract for labor or materials has been made, may prevent the attaching of any lien for labor thereon not at the time performed, or materials not then furnished, by giving notice, in writing, to the person performing or furnishing such labor, or furnishing such materials, that he will not be responsible therefor."

It is not necessary for the owner of the property to give notice under section 3011 that he will be responsible for the labor or material, unless the labor or material was to be furnished by virtue of his agreement or consent, as provided by section 3008. The meaning of the two sections construed together is that under section 3008 a lien may be put upon property for material or labor expended thereon, when the owner agrees or consents that it shall be so expended; but under section 3011, if the owner is not himself the party by whom or in whose behalf the contract for labor or material has been made, but has made himself responsible by the agreement or consent mentioned in section 3008, he may give notice that he will not be responsible for labor or material furnished after the date of such notice, and thus prevent his liability extending to labor or material furnished after that time. Section 3011 applies only when the owner, having become liable under section 3008, wishes to terminate his liability.

Oswald never became liable under section 3008, for there is no evidence that he had any opportunity or any right either to object or to consent to the contract between Metz and Critcher. The message sent by the wagoner asking Metz to furnish good lumber does not indicate that Oswald did anything more than recognize a contract already made between other persons, which he could not prevent. It was a mere request which he had no power to enforce; and the utmost inference that could be drawn from it was that Oswald acquiesced in a state of things already in existence. A verdict in his favor was therefore inevitable under the law, as laid down in the cases above cited.

The judgment of this court is that the judgment of the circuit court be affirmed.

HYDRICK, J. I concur in the result. See opinion on former appeal in this case, 83 S. C. 405, 65 S. E. 394.

(38 S. C. 409)

HARRIS et al. v. HARRIS et al.
(Supreme Court of South Carolina. July 21, 1910.)

EXECUTORS AND ADMINISTRATORS (§ 327*)—
SALE OF REAL ESTATE—POWER OF COURT.

The court has power to order a sale of real estate held by executors in a will directing them to collect the rents thereof, and divide the same among testator's wife and children, until

the youngest child should reach maturity, and then to sell the land and divide the proceeds among the wife and children, and to order a reinvestment of the proceeds, after careful investigation, so that the rights of the remaindermen may be fully protected.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1344; Dec. Dig. § 327.*]

Appeal from Common Pleas Circuit Court of Abbeville County; Robt. Aldrich, Judge.

Action by Annie C. Harris, Executrix, and another against William W. Harris and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Frank B. Gary, for appellants. Wm. P. Greene, for respondents.

WOODS, J. By his will John A. Harris, late of the county of Abbeville, devised certain of his real estate to his wife for life, directing his executors at her death to sell it and divide the proceeds among his children. He provided that all his other lands should be kept together, his executors to collect the rents and profits and divide among his wife and children, until the youngest child should reach majority, and that then the executors should sell the land and divide the proceeds among his wife and children.

This action was brought by the widow, as executrix, and in her own right, and J. C. Harris, as executor, against the children of the testator to have a lot of the land sold by order of the court and the proceeds of sale reinvested. The circuit court ordered the sale and reinvestment and the defendants appeal on the ground (1) that the court had no power to make an order which would in any wise disarrange the testator's scheme with respect to the property as expressed in his will; and (2) that even if the court possessed such power it was in this case improperly exercised.

There can be no doubt of the power of the court of common pleas to order a sale of specific property, held either under a trust or under a direct limitation vested or contingent, and a reinvestment of the proceeds of sale. *Bofil v. Fisher*, 8 Rich. Eq. 1, 55 Am. Dec. 627; *De Leon v. Barrett*, 22 S. C. 412; *Powers v. Bullwinkle*, 33 S. C. 293, 11 S. E. 971. Such power, it is true, should be exercised with great caution and after careful investigation by the court, for in such matters the interests of remaindermen, especially infants, may be readily sacrificed, and the court imposed upon by intentional wrong or negligence of guardians ad litem or other persons. In this case, examination of the record shows the utmost good faith, careful investigation by the court, and conclusive proof that the change of investment would be of great advantage to all the parties concerned, including the minor children.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(86 S. C. 344)
STATE ex rel. McINVAILLE v. ROUSE,
Magistrate.

(Supreme Court of South Carolina. June 18, 1910.)

1. MANDAMUS (§§ 7, 27*)—WHEN REMEDY LIES—JUDICIAL FUNCTIONS.

Mandamus lies to compel a judicial officer to perform a plain ministerial duty, but is somewhat discretionary with the court.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 5, 63; Dec. Dig. §§ 7, 27.*]

2. MANDAMUS (§ 61*)—MINISTERIAL FUNCTIONS—ISSUANCE OF WARRANT.

Issuance of a warrant on information on oath that an offense has been committed is ordinarily a ministerial duty, as affecting the propriety of mandamus to compel performance of it.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 122; Dec. Dig. § 61.*]

3. MANDAMUS (§ 61*)—ISSUANCE OF WARRANTS—JUDICIAL DISCRETION.

If the judge applied to for mandamus to compel a magistrate to issue a second warrant of arrest for fraudulent violation of a contract for personal service considered that the warrant charged the same offense of which accused was convicted under the first warrant, and that justice would not be promoted by another arrest, he had discretion to refuse the writ.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 122; Dec. Dig. § 61.*]

4. MASTER AND SERVANT (§ 67*)—FRAUDULENT VIOLATION OF CONTRACT—CONSTITUTIONAL LAW.

Cr. Code 1902, § 357a, enacted Feb. 25, 1904 (24 St. at Large, 428), relating to convictions for violating farm labor contracts referred to in sections 355 and 357, is unavailable to an employer seeking mandamus to compel issuance of a warrant for fraudulent violation of such a contract, since the statute has been declared to be unconstitutional.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. § 67.*]

Appeal from Common Pleas Circuit Court of Darlington County; R. W. Memminger, Judge.

Application by the State on the relation of I. T. McInville for mandamus against C. R. Rouse, Magistrate. From an order refusing the writ, relator appeals. Affirmed.

Miller & Lawson, for appellant. Macfarlan & Thornwell, for respondent.

JONES, C. J. This appeal is from an order of the circuit court refusing to grant writ of mandamus against a magistrate requiring him to issue a warrant of arrest for fraudulent and malicious violation of a contract for personal service.

In December, 1909, Manning Albert entered into a contract by which he agreed to work on a farm for the relator during the year 1910. He refused to enter upon service thereunder and subsequently entered into a contract to serve E. D. Summer for that year. A warrant was issued by Magistrate Rouse on January 4, 1910, charging that Albert fraudulently and with intent to injure McInville failed and refused to render

personal service in violation of his contract on the 1st, 3d, and 4th days of January, 1910. Albert was arrested and on trial pleaded guilty and was sentenced to pay a fine of \$25 or to serve 30 days on the chain gang. This trial was held on January 7, 1910. Albert paid the fine and was discharged that day. On January 6, 1910, while Albert was in custodia legis under the above warrant, the relator presented an affidavit and requested the magistrate to issue a warrant against Albert for refusal to render service under the contract on the 5th and 6th days of January, 1910. The magistrate refused to issue the warrant, on the ground that Albert had already been convicted for the same offense under the former warrant. Upon hearing the return showing the facts as stated above, Judge Memminger refused the writ in a short order without stating his reasons therefor.

Appellant presents the following exceptions:

1. Because his honor erred in holding that mandamus would not lie to compel the issuance of a warrant, and in refusing the writ on said ground.

2. Because his honor erred in holding that the issuance of the warrant was discretionary with the magistrate, whereas he should have held that the issuance thereof was ministerial and compellable by mandamus.

3. Because his honor erred in holding that the magistrate could prejudice the plea of former jeopardy in refusing to issue the warrant, and in denying the writ on said ground, whereas he should have held that the defense of former jeopardy could be interposed by the defendant only after the issuance of the warrant.

4. Because his honor erred in holding that the act of the General Assembly (24 St. at Large, 428), providing punishment for violation of labor contracts, etc., was without force and effect, and utterly null, and that the magistrate was not required by said act to issue said warrant, whereas, it is respectfully submitted, his honor should have held that the said act made it mandatory on the magistrate to issue said warrant, in that (a) said act was not impaired by *Ex parte Hollman*, 79 S. C. 11, 60 S. E. 19, 21 L. R. A. (N. S.) 242, (b) that said act has not been repealed by any subsequent act, either expressly or by implication, (c) that said act did not violate section 24, art. 1 of the Constitution of the United States and the act passed in pursuance thereof, known as the "Peonage Statute," nor the fourteenth amendment of the Constitution of the United States, nor section 5, art. 1, of the Constitution of this state.

5. Because his honor held that two different, distinct, and independent violations of the labor contract constituted but one offense, whereas he should have held that said violations constituted several offenses, con-

viction for one of which would not bar prosecution for another, and he erred in not so holding and granting the writ accordingly.

There is nothing in the record that would authorize this court to assume that Judge Memminger made the rulings mentioned in the exceptions alone. The only question fairly arising is whether there was error in refusing the writ upon the facts stated in the record. We think there was no error. It may be conceded that mandamus will lie to compel a judicial officer to perform a plain, ministerial duty, and that the issuance of a warrant, upon information on oath that a criminal offense has been committed, is ordinarily a ministerial duty. The writ, however, is not demandable as of right, but rests to some extent in the discretion of the court. *State v. Turner*, 32 S. C. 350, 11 S. E. 99; *Abbeville v. McMillan*, 52 S. C. 73, 29 S. E. 540; 19 Ency. Law (2d Ed.) 753. If Judge Memminger considered that the second warrant which was sought really charged the same offense of which Albert was convicted under the first warrant, and that justice would not be promoted by another arrest and trial, it was within his discretion to refuse the writ. Such was very probably his ground for refusal, and we are satisfied with his action.

The Act of 1908 (25 St. at Large, p. 1060) provides: "Section 1. That any person who shall hereafter contract with another to render to him personal service of any kind, and thereafter fraudulently, or with malicious intent to injure his employer, fail or refuse to render such service as agreed upon, shall be deemed guilty of a misdemeanor." The undisputed facts show that while Albert entered into the labor contract he did not in fact undertake to perform any service thereunder, but repudiated the contract by entering into service for another. His breach of the first contract was complete, continuous, and uninterrupted from the beginning. This was not a case in which there was a breach, then a restoration of service under the contract, and then another breach; but is the case of a single and continuous breach throughout the period covered by both warrants, and could not be split up into as many offenses as there are days or hours in the year.

Appellant can receive no aid from the amendment known as section 357a of the Criminal Code, enacted February 25, 1904 (24 St. at Large, p. 428), because the amendment by its terms relates to convictions for violation of farm labor contracts referred to in sections 355 and 357, Criminal Code, which statute was declared unconstitutional in *Ex parte Hollman*, 79 S. C. 9, 60 S. E. 19, 21 L. R. A. (N. S.) 242. The act of 1908 covering this subject does not contain the provisions of section 357a.

The judgment of the circuit court is affirmed.

(86 S. C. 324)

RAFIELD v. ATLANTIC COAST LINE R. CO. et al.

(Supreme Court of South Carolina. July 18, 1910.)

1. VENUE (§ 46*)—STATUTES—TRANSFER OF ACTION FOR TRIAL.

Code Civ. Proc. 1902, § 147, providing that the court may change the place of trial when the county designated is not the proper county, confers jurisdiction to the extent of changing the place of trial, where the county designated is not the proper county, and the court in an action against a nonresident of the county may not dismiss the action for want of jurisdiction, but may remove the case to the proper county for trial.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 68; Dec. Dig. § 46.*]

2. VENUE (§ 72*)—CHANGE OF VENUE—ISSUES—QUESTION FOR JURY.

Where the complaint in an action against a railroad company alleged that defendant was a foreign corporation operating a line through the county in which the action was brought, wherein it had agents for the transaction of its business, and defendant, in support of its motion to transfer the case to another county for trial, showed by affidavit that it did not control the line in the county within which the action was brought, any further than that it operated trains over the line owned by another railroad company, and that it had no place of business along the line, the court must determine the issue of fact whether the company operated a line of railroad in the county in which the action was brought, so that on the court finding that the complaint was true, it could properly refuse to transfer the case.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 127; Dec. Dig. § 72.*]

3. APPEAL AND ERROR (§ 1024*)—QUESTIONS REVIEWABLE—FINDINGS ON MOTION TO TRANSFER CASE TO ANOTHER COUNTY.

The findings of the court on a motion to transfer a case on the ground that defendant is a nonresident of the county are not reviewable by the Supreme Court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3836; Dec. Dig. § 1024.*]

4. APPEARANCE (§ 23*)—GENERAL APPEARANCE.

An appearance by defendant for the purpose of questioning the jurisdiction of the court, and an answer pleading only to such jurisdiction by alleging that the court has no jurisdiction because defendant is a nonresident of the county, etc., are not a waiver of the right to object that the action was brought in the wrong county.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 111, 112; Dec. Dig. § 23.*]

Appeal from Common Pleas Circuit Court of Lexington County; John S. Wilson, Judge.

Action by Lucretia Rafeld, an infant, by her guardian ad litem, Mattie Rafeld, against the Atlantic Coast Line Railroad Company and another. From an order refusing to transfer the case from Lexington county to Richland county for trial, defendants appeal. Affirmed.

Graham & Sturkie, Barnard B. Evans, and Eford & Dreher, for appellants. Barron, Moore & Barron, R. B. Herbert, and Lyles & Lyles, for respondent.

GARY, A. J. This is an appeal from an order refusing to transfer the above-stated case, from Lexington county to Richland county, for trial.

The following statement appears in the record: "The plaintiff brought this action by her guardian ad litem for injuries received while riding on the car of the defendant the Columbia Electric Street Railway, Light & Power Company on the 26th day of June, 1909, by reason of collision with the train of defendant Atlantic Coast Line Railroad Company. Said accident occurred in the city of Columbia, in Richland county. This action was commenced by service of summons and complaint on both the defendants, on July 19, 1909."

The allegations of the complaint, material to the questions involved, are as follows: "That the defendant the Atlantic Coast Line Railroad Company is a foreign corporation, chartered and existing under the laws of some state unknown to this plaintiff, but at the times hereinafter mentioned, was, and is now, operating and controlling as lessee thereof, a railroad extending from the city of Columbia, S. C., to the city of Greenville, in the state aforesaid, passing through the county of Lexington, where it has agents and stations for the transaction of its business, and at the times hereinafter mentioned the defendant Atlantic Coast Line Railroad Company was, and is now, the owner of locomotives, cars, and other appurtenances of said railroad; and owns and operates other railroads in said state; and that the said Columbia Electric Street Railway, Light & Power Company is a corporation duly chartered and existing, under and by the laws of this state, and at the times hereinafter mentioned, was, and is now, the owner, operator, and controller of a street railroad in the city of Columbia, S. C., and owns and operates the cars and other appurtenances of said railroad, and owns property in the county of Lexington aforesaid. That the defendant Atlantic Coast Line Railroad Company is a carrier of passengers and freight, on and over its railroads, for hire. * * *"

The Atlantic Coast Line R. R. Co. served the following answer: "The defendant Atlantic Coast Line Railroad Company appearing only for the purpose of questioning the jurisdiction of this honorable court, and pleading only to such jurisdiction, answering the complaint herein, alleges: That no cause of action exists against it, as alleged in the complaint, of which this court has jurisdiction, for the reason that neither of the defendants named is a resident of the county of Lexington. This defendant is a corporation created and existing under the laws of the state of Virginia, is a citizen of said state, and has no railroad track, as owner or lessee, office or agent, upon whom process can be served in the county of Lexington, and does no busi-

ness in said county; nor did it have such track, office, or agent at the time of the commencement of this action."

The answer of the Columbia Street Railway Light & Power Company was similar, except in the allegation, that it "is a resident of the county of Richland, and does no business in the county of Lexington, but is a domestic corporation, and has its principal and only place of business in Richland county."

The attorneys for each of the defendants, served the following notice upon the plaintiff's attorney: "Please take notice that on Monday, the 1st day of November, 1909, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, at Lexington courthouse, upon the pleadings herein, and the annexed affidavits, the undersigned will move before his honor, Judge J. S. Wilson, for an order dismissing the above-stated case for want of jurisdiction, and failing in that, for an order removing said case to Richland county, and for leave to answer the complaint when so removed."

The affidavit of Wm. G. Childs, which was annexed to the notice of motion, contains the following statements: "That he is president of the Columbia, Newberry & Laurens Railroad Company, which runs from the city of Columbia to Laurens, S. C., passing for a considerable distance through the county of Lexington. That the passenger traffic and service, done by one train each way daily on said railroad through Lexington county, is carried on by the said Columbia, Newberry & Laurens Railroad Company, with engines, cars, and crews, which are the property of the Atlantic Coast Line Railroad Company, but that while said trains and crews are on the road of the said Columbia, Newberry & Laurens Railroad Company in Lexington county, they are operated solely under and by the rules, orders and control of the officers of the said last-named railroad company, the same paying to the said Atlantic Coast Line Railroad Company a stipulated sum per train mile per month for the use by the said Columbia, Newberry & Laurens Railroad Company of the said trains; and the said monthly rental is paid, irrespective of the amount of revenue made by the said Columbia, Newberry & Laurens Railroad Company on account of the use by it of the said trains; that the said Atlantic Coast Line Railroad Company does not own or control, by lease or otherwise, the railroad of the said Columbia, Newberry & Laurens Railroad Company through the county of Lexington, over which the aforesaid cars of the Atlantic Coast Line Railroad Company are operated as aforesaid. That the said Atlantic Coast Line Railroad Company has no agent or place of business along the said railroad in Lexington county as aforesaid. That with the exception of the two trains rented from the Atlantic Coast Line Railroad Company, as aforesaid, the entire traffic over the said railroad in Lexington county is handled and

conducted by the engines, crews, and employes of the said Columbia, Newberry & Laurens Railroad Company."

The plaintiff submitted the affidavit of H. A. Lorick in which he says: "That he is a merchant residing at Irmo, in the county of Lexington, said state of South Carolina; that he has been in the merchandise business at that place for eight years; that he sees passenger trains and locomotives passing over the railroad at said place with the following words printed or painted on said locomotives and passenger cars, 'Atlantic Coast Line,' and that said railroad extends from Columbia, S. C., to Laurens, S. C.; that the ticket agent at Irmo sells tickets to passengers on said trains of the Atlantic Coast Line, and that deponent has frequently bought tickets from the station agent at said place to points on said railroad, and was conveyed in the cars of the Atlantic Coast Line."

We do not deem it necessary to refer to the other affidavits which accompanied the notice of motion.

His honor, the presiding judge, made the following order: "A motion having been made to transfer the above-stated case to Richland county for trial, and after hearing the arguments, for and against said motion, it is ordered: That said motion be, and the same is hereby, refused."

The defendants appealed upon exceptions, the first of which is as follows: "It is respectfully submitted that his honor, Judge Wilson, erred in refusing the motion of both the defendants for an order dismissing the case for want of jurisdiction, since it appeared that neither defendant has now, or had at the time of the bringing of the action, any agent in Lexington county on whom process could be served, and maintained no office and owned and operated no railroad in said county, and that both defendants were therefore nonresidents of said county."

Section 147 of the Code provides "that the court may change the place of trial, in the following cases: (1) When the county designated for that purpose in the complaint, is not the proper county." In construing this section of the Code the court uses the following language in the case of Steele v. Exum, 22 S. C. 276: "There may be a full jurisdiction, or a limited jurisdiction in courts, determined by the law which confers it. In cases of the kind before the court, we think that section 147 has conferred upon the courts of this state jurisdiction, to the extent of changing the place of trial, in cases falling under the sections referred to."

It was ruled in the case of Geisler v. Sanders, 26 S. C. 70, 1 S. E. 159, that, as the defendant was not a resident of the county in which he was sued, the court of common pleas for that county, while without jurisdiction to try the case on its merits, had the right to order its removal to the proper county. The language therein used by the

court, was as follows: "As we understand the order of his honor, the motion to transfer was refused, because, in his judgment, the court in Chester 'had no jurisdiction in the case' and consequently that he could not hear the motion, and it was on that ground that the complaint was dismissed. Under *Steele v. Exum*, supra, this was error." Thus showing that the court was without jurisdiction to *dismiss* the complaint. This exception is overruled.

The second exception is as follows: "It is respectfully submitted that his honor, Judge Wilson, erred in refusing motion of defendants for an order removing said case to Richland county, and for leave to answer the complaint when so removed, when it appeared that neither defendant maintained any office in Lexington county, was in any way represented by an agent residing in said county, or owned, operated, or leased any railroad in said county, or was a resident of said county."

The allegations of the complaint hereinbefore set out, and the denial thereof by the defendants in their answers, raised an issue as to the questions assumed in this exception. The affidavit of Lorick tends to sustain the allegations of the complaint. *Bush v. Ry.*, 63 S. C. 96, 40 S. E. 1029.

In the case of *Ransom v. Anderson*, 9 S. C. 438, the court quotes with approval the following language from *Wayland v. Tysen*, 45 N. Y. 281: "The court has no power to strike out as sham an answer consisting of a general denial of the material allegations of the complaint," basing its ruling upon the principle that a denial of the material allegations of the complaint raises an issue of fact, which must be referred to the jury for trial. There is no difference in principle between that case and the one under consideration. Furthermore, the findings of fact which were necessarily involved, in the conclusion announced by the circuit judge are not reviewable by this court, as the action is legal in its nature.

There is another reason why this exception cannot be sustained. The question of jurisdiction relates to the person, and not the subject-matter. *Jenkins v. Ry.*, 84 S. C. 343, 66 S. E. 409. The answers denying the allegations of the complaint put in issue material questions of fact. The defendants therefore waived the right to raise the objection that the court did not have jurisdiction to try the case upon the merits. *Graveley v. Graveley*, 20 S. C. 104; *Oliver v. Fowler*, 22 S. C. 534. This exception is also overruled.

It is the judgment of this court that the order of the circuit court be affirmed.

JONES, C. J. I concur upon the grounds mentioned, except as to waiver. The appearance and answer being expressly limit-

ed to the question of jurisdiction, there was no waiver.

WOODS and HYDRICK, JJ., concur in the result and in the remarks of the Chief Justice.

(86 S. C. 387)

STATE v. DALBY.

(Supreme Court of South Carolina. July 18, 1910.)

1. CRIMINAL LAW (§ 1134*)—CONSTITUTIONAL LAW (§ 42*)—APPEAL AND ERROR—QUESTIONS FOR REVIEW—CONSTITUTIONALITY OF LAW.

Where accused is indicted under the common law, and is sentenced under Cr. Code 1902, § 78, providing that where no punishment is provided by statute, the court shall award such sentence as is conformable to the common usage in this state, he cannot question the constitutionality of an act relating to the offense for which he was indicted and sentenced, and his exceptions to the refusal of the court to quash the indictment, on the ground that the act is unconstitutional, present only speculative questions, which the court on appeal will not consider.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1134;* Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. § 42.*]

2. ASSAULT AND BATTERY (§ 53*)—AGGRAVATED ASSAULT—USE OF DEADLY WEAPON.

Assault and battery of an aggravated nature may be committed without the use or presence of a deadly weapon.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 73, 74; Dec. Dig. § 53.*]

3. CRIMINAL LAW (§ 1208*)—SENTENCE—DISCRETION OF COURT.

A sentence imposed under Cr. Code 1902, § 78, providing that where no punishment is provided by statute the court shall award such sentence as is conformable to the common usage in the state, according to the nature of the offense, is wholly within the discretion of the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3281-3295; Dec. Dig. § 1208.*]

Appeal from General Sessions Circuit Court of Charleston County; Robt. Aldrich, Judge.

James Dalby was convicted of an assault and battery, and appeals. Affirmed.

Alonzo E. Twine, for appellant. Solicitor John E. Peurifoy, for the State.

HYDRICK, J. Appellant was indicted for an assault and battery with intent to rape, and convicted of an assault and battery of a high and aggravated nature. From sentence to five years at labor upon the public works of the county, or in the state penitentiary, he appeals.

The defendant moved to quash the indictment, which was in the usual form, on the ground that the statute under which it is laid is unconstitutional. The act referred to is entitled, "An act to prescribe the punishment for rape and assault with intent to ravish, and provide for taking deposition of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

female witness in such cases." 26 Stat. 206. The act merely prescribes the punishment for rape and assault with intent to ravish, and for the taking of the deposition of the female alleged to have been assaulted. It provides also for the presence of the accused at the taking of the deposition, and his right to cross-examination, just as if the testimony were taken in open court.

The indictment was not laid under the statute, but under the common law. The record does not show that the testimony of the prosecutrix was taken by deposition, under the provision of the act. As the defendant was not convicted of rape or of assault with intent to ravish, but only of assault and battery of a high and aggravated nature, the sentence was not imposed under or by virtue of the provisions of the act in question, but under section 78 of the Criminal Code, which is as follows: "In cases of legal conviction, where no punishment is provided by statute, the court shall award such sentence as is conformable to the common usage and practice in this state, according to the nature of the offense, and not repugnant to the Constitution."

It appears therefore that appellant is not in a position to question the constitutionality of the act upon any ground, because it does not appear that any right of his has been affected by its provisions, and the exceptions to the refusal of the court to quash the indictment on that ground present only speculative questions, which this court will not consider. *Cantwell v. Williams*, 35 S. C. 602, 14 S. E. 549; *Lowrimore v. Mfg. Co.*, 60 S. C. 153, 38 S. E. 430.

The next assignment of error is in instructing the jury that "any violent seizure of the person of another was aggravated assault and battery, whereas he should have charged that a seizure, no matter how violent, unaccompanied with a deadly weapon, would not amount to aggravated assault and battery." An examination of the charge shows that this exception was taken under a misapprehension. Nowhere does the judge charge as alleged in the exception. On the contrary, he did charge that a violent seizure of the person of another might not be even a common assault and battery, and illustrated by saying if one violently seized the person of another to prevent him from falling into the water, or from being run over by a street car, it would not be an assault and battery, showing that an unlawful intent is necessary to constitute the offense.

As to the last part of the exception, it is only necessary to say that it is not the law that an assault and battery must be made with or accompanied by the use of a deadly weapon to make it an assault and battery of a high and aggravated nature. This offense may be committed in many ways, unaccompanied by the use of a deadly weapon. The

use of a deadly weapon, however, is usually held to make an assault one of an aggravated nature.

The sentence, being imposed under the provisions of the Code above quoted, was, within the terms of that section, wholly within the discretion of the court.

Judgment affirmed.

(86 S. C. 135)

ROUNTREE v. ATLANTIC COAST LINE RY. CO. et al.

(Supreme Court of South Carolina. July 13, 1910. On Petition for Rehearing, Aug. 8, 1910.)

1. MASTER AND SERVANT (§ 286*)—ACTION FOR PERSONAL INJURIES—SAFE PLACE—EVIDENCE—PEREMPTORY INSTRUCTION—REFUSAL OF.

Where, in an action for personal injuries, there was evidence that plaintiff's employer had not provided a safe place for him to work in, a peremptory instruction for defendant was properly refused.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1010; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 289*)—ACTION FOR PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where, in an action for personal injuries, there was evidence that the car from which plaintiff fell and was injured had many times been used by him and his fellow workmen when it was empty, to ride over the same track at the rate of between 20 and 30 miles an hour without accident, it was a question for the jury whether plaintiff's riding in it was such a danger as a reasonably prudent man would not have subjected himself to, regardless of the orders of his superior.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1129; Dec. Dig. § 289.*]

3. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—ERROR FAVORING PARTY COMPLAINING—INSTRUCTIONS.

Where, in an action for personal injuries, an instruction assumed that there was evidence of a rule prohibiting employees to ride on the car from which plaintiff fell and was injured, yet, as the assumption was in defendant's favor, it could not complain.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4056-4058; Dec. Dig. § 1033.*]

Appeal from Common Pleas Circuit Court of Barnwell County; R. C. Watts, Judge.

Action by W. P. Rountree, by guardian ad litem, against the Atlantic Coast Line Railway Company and J. F. Owens. Judgment for plaintiff, and defendants appeal. Affirmed.

P. A. Willcox, J. T. Barron, Wyman & Wyman, and Lucian W. McLeMore, for appellants. R. C. Holman, R. A. Ellis, and E. J. Best, for respondent.

WOODS, J. The plaintiff, while in the employment of the defendant railroad company, fell from a dump or dummy car loaded with cross-ties, and in this action recovered a verdict of \$3,333 for the resulting injuries, under the allegation that the fall was due to defendant's negligence. The circuit court or-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dered a new trial, unless the plaintiff should remit \$1,111 from the verdict. The plaintiff complied with the order and entered judgment for \$2,222, the reduced amount.

The main position relied on by defendants in support of the appeal is that the circuit court erred in refusing the motion for direction of a verdict in favor of defendants, made on the following grounds: "(1) In that the accident and injury to the plaintiff were due to the entire negligence of the plaintiff. (2) In that the accident and injury to the plaintiff were due to the contributory negligence of the plaintiff. (3) In that the accident and injury to the plaintiff were due to a mere accident, without any negligence on the part of this defendant." The defendants assigned error also in the refusal of a motion for a nonsuit, made on the same grounds.

The question here is, Did the evidence make any one of the inferences stated as the grounds of defendants' motions inevitable? If not, then the issues of sole negligence of the plaintiff, of contributory negligence, and of accident without negligence, could not be decided by the court and were properly submitted to the jury.

A short statement of the evidence adduced on behalf of the plaintiff will show that there were substantial issues of this kind. The plaintiff was one of a gang of laborers working on the track of the Atlantic Coast Line Railroad Company under the defendant J. F. Owens, as section master. On the 3d day of February, 1908, these laborers were engaged in the work of transporting cross-ties in a dump or dummy car, a small car propelled by hand. This was loaded under the direction of Owens, who went forward to watch for and signal any approaching train. The run of the car was downgrade and Owens ordered the plaintiff and the other laborers to ride upon it, though the safest way of taking it, as plaintiff knew, was to walk by the track and control the speed by hand. All the laborers got on the car and while it was moving at a high rate of speed, entirely beyond control, the jar caused some of the cross-ties to fall, carrying the plaintiff with them. Some cars of this kind are provided with a crowbar which is put through a hole cut in the car floor and used as a brake. This one had no hole cut for that purpose, and was not provided with a crowbar; but even if these provisions had been made to control its motion, they would have been of no use on this occasion, because the manner of loading the car would have made the hole inaccessible.

If this evidence is credible, manifestly it tended to show that the plaintiff was not provided with a reasonably safe place in which to work, and that he was required to load and ride on the car by a superior agent having the right to direct his services. Defendant's counsel in the effort to meet this difficulty contend that, taking the evidence

of the plaintiff as true, no other inference is possible than that the plaintiff, with no emergency before him, recklessly obeyed an order requiring him to do an obviously dangerous act beyond the peril reasonably incident to his employment. There was certainly evidence from which the jury might have drawn such an inference, but it cannot be said that the evidence admitted of no other. Whether the risk of riding on a loaded and uncontrolled dump or dummy car downgrade should be regarded so great that a reasonably prudent man would not have obeyed an order requiring it, would depend on circumstances. The grade might be so steep and long that there could be no doubt of the obvious folly of the undertaking; but here the evidence was that the car reached its destination safely after a run of about 2½ miles, in which it attained an estimated speed of 20 to 30 miles an hour; and that the plaintiff and other witnesses, employees of the railroad company, with the acquiescence of their superiors, had many times before used cars like this in the same way without accident. The court could not, in view of this evidence, take the case from the jury on the ground that no other inference could be drawn than that the danger was so imminent and obvious that a man of ordinary prudence would have refused to obey the order of his superior requiring him to incur it. Therefore, under the principle laid down in *Stephens v. Southern Ry. Co.*, 82 S. C. 542, 64 S. E. 601, there was no error in refusing to instruct the jury to find a verdict for the defendant, and in refusing a motion for a new trial.

There is one other point requiring notice. The defendant complains of the following instructions: "Now, I charge you further, as a matter of law, that even if there was a rule forbidding any of the hands riding on the dummy car, if the jury conclude that that rule was habitually violated with the knowledge and acquiescence of the master or foreman in charge, and he allowed plaintiff to do that, and had knowledge of it and acquiesced in it and permitted it, then it is for the jury to say whether or not, under these circumstances, that rule was qualified or abrogated, or waived or done away with. I say, if there was a rule forbidding the hands to ride on that car—yet, it is for the jury to say whether or not that rule, in their opinion, was habitually violated with the knowledge of the foreman or master, and he acquiesced in it and allowed it, and made no objection to it—then it is for you to say whether, under those circumstances, the rule was not suspended, or whether it was rescinded or abrogated." The contention is that, while this may be a sound legal proposition, it had no application in this case. It is true there was no evidence of any rule promulgated by the company against riding downgrade in a loaded car such as this. But the defendants cannot complain that the court

assumed that there was evidence of such a rule, for the assumption was favorable to the defendants.

The judgment of this court is that the judgment of the circuit court be affirmed.

On Petition for Rehearing

PER CURIAM. Careful examination of the petition for rehearing does not convince us that there was any material issue arising on the record overlooked or disregarded in the judgment of the court.

The petition for rehearing is therefore dismissed, and the order heretofore granted, staying the remittitur, revoked.

(86 S. C. 442)

CITY OF GREENVILLE v. PRIDMORE.

(Supreme Court of South Carolina. July 28, 1910.)

1. MUNICIPAL CORPORATIONS (§ 62*)—DISTRIBUTION OF GOVERNMENTAL POWERS—CONSTRUCTION OF CONSTITUTION.

The constitutional requirement with respect to the separation of the three departments of government refers to the state government and state officers, and not to the government of municipal corporations and their officers, and hence, that a mayor had participated in the enactment of an ordinance relating to the traffic in intoxicating liquors would not preclude him from presiding in the mayor's court, on the trial of one for violating the ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 62.*]

2. MUNICIPAL CORPORATIONS (§ 114*)—VALIDITY—AMENDMENT OF PRIOR ORDINANCE.

An ordinance begun, "Be it ordained by the mayor and city council of the city of G., in council assembled and by authority of the same, that section No. 3, of an ordinance ratified on the 2d day of May, 1905, be amended * * * so that when amended, the ordinance shall read as follows," and was followed by a complete ordinance requiring no reference to any other ordinance for its interpretation or enforcement. *Held*, that this was not an amendment of the former ordinance, but was a complete enactment, not dependent for its validity on the validity of the former ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 114.*]

3. MUNICIPAL CORPORATIONS (§ 111*)—ORDINANCES—EFFECT OF PARTIAL INVALIDITY.

Civ. Code 1902, § 2004, requires sentence in the mayor's court to be in the alternative. An ordinance provided for punishment for its violation as follows "any persons violating any of the provisions of this ordinance shall be fined not less than \$20 nor more than \$50 or imprisoned 30 days, or both fined and imprisoned at the discretion of the mayor." *Held*, that though so much of the ordinance as purported to confer power to impose both a fine and imprisonment was void, the ordinance was not rendered entirely invalid, since, without the provision, the ordinance remained complete, providing for punishment in the alternative.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 248-251; Dec. Dig. § 111.*]

Appeal from Common Pleas Circuit Court of Greenville County; John S. Wilson, Judge.

A. F. Pridmore was convicted of violating

an ordinance of the City of Greenville, and he appeals. Affirmed.

Adam O. Welborn, for appellant. Hodges & Daniel, for respondent.

WOODS, J. The defendant was convicted in the mayor's court of the city of Greenville on the charge of violating a city ordinance of October 5, 1909, relating to the traffic in intoxicating liquors. The sentence was that he pay a fine of \$25 or be imprisoned for 30 days. An appeal to the circuit court resulted in affirmance, and the defendant now appeals to this court.

By his first exception the defendant relies on the same position taken in *Spartanburg v. Parris*, 85 S. C. 227, 67 S. E. 246, namely, that the mayor, having participated as a legislator in the making of the ordinances, was prohibited by the Constitution from acting in a judicial capacity in the trial of persons accused of violating them. In that case it was held that the constitutional requirement with respect to the separateness of the three departments of government refers clearly to the government of the state and to state officers, and not to the government of municipal corporations and to the officers of such corporations.

The other position taken in support of the appeal is that the ordinance itself is void, because it is a mere amendment of an ordinance which, under the statute law of the state, the city council had no power to make. The ordinance begins in these words: "Be it ordained by the mayor and city council of the city of Greenville, in council assembled and by authority of the same, that section No. 3, of an ordinance ratified on the 2d day of May, 1905, be amended by striking out the words, 'or both fined and imprisoned at the discretion of the mayor,' so that when amended said ordinance shall read as follows: * * * " Then follows an ordinance complete in every particular, requiring no reference to any other ordinance either for its interpretation or enforcement. Even if it be assumed that the ordinance of May, 1905, was void, the vice of it would not extend to the ordinance of October, 1909, for while it is true the latter ordinance purports to be an amendment of the former, it was not a mere amendment, but a complete law in itself.

But the ordinance of May 5, 1905, was not so contrary to the statute law of the state as to be void. It provided for punishment in these words: "Any persons violating any of the provisions of this ordinance shall be fined not less than \$20, nor more than \$50, or imprisoned 30 days, or both fined and imprisoned at the discretion of the mayor." Section 2004 of the Civil Code, construed in *Town of Union v. Hampton*, 83 S. C. 46, 64 S. E. 1017, requires the sentence in the ma-

yor's court to be in the alternative. Therefore so much of the ordinance as purported to confer on the mayor power to impose a sentence of both fine and imprisonment was void. This, however, did not make void the entire ordinance, for after striking out that provision, the ordinance remains complete in every respect, expressing the main purpose of the city council in respect to both the evil to be prevented and the penalties to be inflicted. *Utsey v. Hlott*, 30 S. C. 360, 9 S. E. 338, 14 Am. St. Rep. 910; *State v. Johnson*, 76 S. C. 39, 56 S. E. 544; *Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. Ed. 377; *Shevlin-Carpenter Co. v. Minnesota* (U. S. Sup. Ct., May 31, 1910) 218 U. S. 57, 30 Sup. Ct. 663, 54 L. Ed. —.

The judgment of this court is that the judgment of the circuit court be affirmed.

(86 S. C. 353)

BEAUFORT LAND & INVESTMENT CO. v. NEW RIVER LUMBER CO.

(Supreme Court of South Carolina. July 18, 1910.)

1. TRESPASS (§§ 20, 43*)—TRESPASS TO REAL ESTATE—TITLE OF PLAINTIFF.

One in possession of land not acquired by the disseisin of another may hold the land and recover of the latter damages for the invasion of the possession and for cutting timber thereon, unless the latter proves title in himself or a license from one shown to be the true owner, and though the former alleges both title and possession, he may recover on proof of possession and the invasion thereof without proving a title.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 38, 108, 109; Dec. Dig. §§ 20, 43.*]

2. ADVERSE POSSESSION (§ 115*)—QUESTION FOR JURY.

Where, in trespass for cutting timber, defendant's chain of title through written instruments only extended back to 1867, and was not connected with a grant from the state, the jury must determine whether there had been such possession by defendant as to presume a grant from the state, or such adverse possession as would complete his title.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 691-701; Dec. Dig. § 115.*]

3. ADVERSE POSSESSION (§ 106*)—TITLE.

Where plaintiff in trespass to real estate relied not only on written instruments, but on the claim of presumption of a grant from 20 years' possession, and on adverse possession, the jury could find that he had a perfect title from the presumption of 20 years' possession, or from adverse possession, so as to authorize a recovery on the theory that he could not recover without proof of title.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 604-623; Dec. Dig. § 106.*]

4. EVIDENCE (§ 274*)—DECLARATIONS—ADMISSIBILITY.

Declarations made by an owner of land as to the lines thereof are admissible only if made while he owned the land.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1121, 1126; Dec. Dig. § 274.*]

Appeal from Common Pleas Circuit Court of Beaufort County; J. W. De Vore, Judge.

Action by the Beaufort Land & Investment Company against the New River Lumber Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

W. J. Thomas and W. L. Clay, for appellant. W. Huger Fitz Simons, for respondent.

WOODS, J. The verdict and judgment were in favor of the defendant. The numerous exceptions submitted on behalf of the plaintiff, relating mainly to alleged errors in the charge of the circuit judge, will be more clearly understood after a brief statement of the pleadings.

The complaint alleges "that the plaintiff is the owner in fee and in possession of that tract of land known as the 'Crapse Purchase' or 'Wiggin Land,' containing 1,800 acres, more or less, according to a plat made by O. P. Law, surveyor, April 17, 1885, and has the following distances and bearings; * * * that the defendant, its agents, and servants at numerous times have entered on the land with force and arms and cut much valuable timber and committed irreparable waste thereon, and, disregarding plaintiff's warnings, threatened to continue the acts of trespass; that the said acts of defendants are without any right or authority whatever and contrary to law and are an irreparable loss to plaintiff; that the defendant could not respond in damages, and that plaintiff has already been damaged to the amount of \$2,000." The prayer is for judgment for \$2,000 and for an injunction against further trespass.

The defendant by its answer, in addition to a general denial, alleges 20 years' possession in itself and its grantors, and specifically denies that the plaintiff and those under whom it claims have been in possession of the land within 20 years, or within 10 years, prior to the commencement of the action; it alleges further that any right which the plaintiff may have had accrued more than 10 years before the commencement of the action; and that the land is the property of W. R. Pritchard and others, who conveyed to the defendant the timber thereon, and that defendant's entry was made under that conveyance.

Under these pleadings the court charged: "I charge you that before you can render a verdict in behalf of the plaintiff for damages in this case you must be satisfied from the evidence that the plaintiff has a complete and perfect title to the land described in the complaint." The plaintiff contends that while this is a correct statement of the law in an action to recover possession of land, it was erroneous in this action, which was not to recover possession, but for damages for a trespass, and that therefore the

charge should have been to the effect "that if the plaintiff has satisfied you that it was in actual possession of the tract of land described in the complaint, and that defendant has committed trespass within the lines of said tract, then the plaintiff will be entitled to recover, unless the defendant has satisfied the jury that it has good title in itself to the land upon which the alleged trespass was committed, or that it did the acts complained of as trespass by the permission or under a license from the real owner of the land."

The important question is thus raised whether a plaintiff alleging both title and possession is entitled to recover damages upon proof of his possession and the invasion of it by the defendant, without proving also that he has a perfect title. The question must be answered in the affirmative. One person who finds another in possession of land cannot, by seizing the possession or invading it, put him whose possession he seized or invaded to proof of his title. In such a case possession is *prima facie* evidence of title and he who invades it must establish his title. If this were not so, a holder of land could be put to proof of title against the world by any one who might choose to trespass or squat upon his lands. This conclusion is well supported by authority. When the plaintiff alleges an invasion of his possession this gives character to the action, as one in the nature of the old action of trespass *quare clausum fregit*. *Couch v. Burke*, 2 Hill, Law, 534; *Connor v. Johnson*, 59 S. C. 115, 37 S. E. 240.

The court in *Young v. Watson*, 1 McMul. 449, intimated by the words we have italicized that the possession of a plaintiff of which he had been deprived by the entry of a defendant would support even an action of trespass to try title, for the court said, as to the mere prior possession of the plaintiff: "It cannot be allowed to prevail against the actual possession of the defendant, *who did not enter upon the plaintiff*, and which, for aught that appears, might be as rightful as that which the plaintiff formerly held;" and Judge O'Neill, in a concurring opinion, said: "When the plaintiff's possession, actual or constructive, is entered upon, I think such possession is evidence of title to put the defendant to prove his title." In *Connor v. Johnson*, *supra*, the court held that the action was in the nature of trespass *quare clausum fregit*; that is, an action for the invasion of the possession of plaintiff, where the complaint alleged the plaintiff to be in possession *under a paper title*, and that the defendant had trespassed, and the answer denied all the allegations, including, of course, the allegations of plaintiff's possession and his paper title, and set up title in defendant. In such an action it was held that it was only necessary for the plaintiff to show possession, and that for defendant to prevent a recovery it was not sufficient to show that

the plaintiff had no title, but that he must show title in himself. That case seems conclusive of the point under discussion. To the same effect is *Hillhouse v. Jennings*, 60 S. C. 401, 38 S. E. 599, where the court says: "We may say, however, that when the allegations of the complaint are such as would have sustained an action of trespass *quare clausum fregit* under the former practice, peaceable possession alone is sufficient to support the action, and throws upon the defendant the burden of proving the better title." *Watts v. Blalock*, 17 S. C. 163; *Turner v. Poston*, 63 S. C. 244, 41 S. E. 296. In the case last cited the reason for the rule is thus well stated: "If the defendant in this case had brought his action against the plaintiff, he could not have recovered on such a title as he has shown in this case, and he cannot be allowed to put himself in a better position by committing a trespass on the plaintiff. The right of possession is a very sacred one, and the court will not allow the repose which it gives to be endangered by giving improper advantages to a trespasser. If defendant had a good title he should have resorted to the courts, where he could have obtained any redress to which by law he was entitled." The same principle has been laid down by the Supreme Court of the United States in *Burt v. Panjaud*, 99 U. S. 180, 25 L. Ed. 453; *Bradshaw v. Ashley*, 180 U. S. 59, 21 Sup. Ct. 297, 45 L. Ed. 423, and other cases. The cases relied on by defendant's counsel are very clearly distinguished, and are in no sense opposed to the rule stated.

In *Geiger v. Kaigler*, 15 S. C. 262, the action was exclusively for the recovery of the possession of land; the allegation of the complaint being that the defendant had acquired possession in 1863, many years before the action was brought, from the executor of the will under which plaintiffs claimed. There was no allegation that the plaintiffs had ever been in possession. The defendant denied that Henry J. Geiger, who made the will under which plaintiffs claimed, had ever been seised of the land; and, for a second defense, alleged that he had purchased the land from the executor of the will of Henry J. Geiger, who was empowered to sell; that he had paid the purchase money and had been in the possession since 1863. As there was no proof of the second defense, it was held that it could not be considered. In this state of the case the court held: "This action was brought, as stated, expressly to recover the land in dispute, upon the ground that the plaintiffs had title to the same; and even if the old rule as to the necessity of proving title should now be held to be modified so as to allow a person deprived of the possession of land, under proper allegations, to recover that possession without proof of title, it can have no application to this case. *Here prior possession* cannot stand for title, although it is an action in the form prescribed by the Code, and not technically trespass to try title

under the statute. The plaintiffs staked themselves upon their title, and they must recover, if at all, upon the strength of that title." This is very far from holding that a person in possession cannot recover from one who disseises him or undertakes to assert ownership by cutting timber or otherwise invading the possession.

Heyward v. Farmers' Co., 42 S. O. 138, 19 S. E. 963, 20 S. E. 64, 28 L. R. A. 42, 46 Am. St. Rep. 702, was an action for injunction to restrain trespass. The circuit judge in granting the injunction required the plaintiff to "institute on the law side of the court such action as he may be advised by his counsel for the purpose of determining the question as to title to the land described in the complaint." From this order there was no appeal. The action was brought under this order, and therefore the plaintiff, as the actor, was bound by the order to do what it required, namely, to assert and prove his title to the land. In addition to this, the state was a party defendant, entitled to stand upon its prima facie ownership of the soil. It was on these considerations that the court held that the plaintiff, though alleging his own possession and a trespass thereon, was obliged to prove title. The case is obviously taken out of the general rule by its peculiar facts.

In *Bank v. Peterkin*, 52 S. O. 236, 29 S. E. 546, 68 Am. St. Rep. 900, the plaintiff brought an action to foreclose a mortgage, and the record does not indicate that there was any allegation of possession either in the mortgage or the mortgagor. The defendant set up paramount title and possession of a part of the land originating before the mortgage was given. The holding that on the legal issue of title the plaintiff had the burden of proof, therefore, does not affect the question now under consideration.

The case of *Love v. Turner*, 71 S. O. 322, 51 S. E. 101, was held to be not an action in the nature of trespass *quare clausum fregit*, but an action to recover possession of real estate. There the complaint alleged: "That the said defendant continues to assert her claim of title against this plaintiff to said premises, to deny plaintiff's right therein, and asserts her determination to prevent the use and enjoyment of said premises by the plaintiff, or persons holding under plaintiff, and to continue to use and occupy it for her own benefit; rendering it necessary for plaintiff to apply to this court for relief and for the protection of his title." There was no allegation that the plaintiff was in possession, and that his possession had been invaded by acts of trespass. On the contrary, the plaintiff insisted that the action was to recover possession.

It is true that in *Shettlesworth v. Hughey*, 9 Rich. Law, 387, *Parker v. Leggett*, 12 Rich. Law, 200, and *Sims v. Davis*, 70 S. O. 362, 49 S. E. 872, it was held that the verdict was decisive of the title in an action of damages for

trespass brought by one in possession when the title was put in issue. But in none of these cases is it held that on the trial of the issue the plaintiff in possession must assume the burden of proving his title against the world. As we have seen, possession not obtained by a tortious act is prima facie evidence of title, and upon this the plaintiff may rest until the defendant justifies his invasion of the possession by proving either title in himself or a license to enter from the true owner.

We conclude therefore that if the plaintiff held possession of the land not acquired by the disseisin of the defendant, it was entitled to hold the land and to recover of the defendant damages for invasion of its possession and for the cutting of timber, unless the defendant proved a title in himself, or a license from one proved to be the true owner, and that the court was in error in charging otherwise.

The court was also in error in charging that if the land in dispute was covered by defendant's chain of title, then the defendant had shown perfect title to the land, unless its title had been defeated by adverse possession. The defendant's chain through written instruments only extended back to 1867 and was not connected with a grant from the state. Hence it was not for the court to say that the chain of title was perfect; since the jury must necessarily determine whether there had been such possession as to presume a grant from the state, or such adverse possession as would complete its title.

The exception alleging error in the following instruction must also be sustained: "I charge you that if the written instrument introduced by plaintiff does not cover the land described in this complaint he cannot recover. If the written chain of title introduced here by plaintiff does not cover and embrace and convey the land described in the complaint he cannot recover, and if it is not covered by his written chain, written instruments here, that would be a failure on the part of the plaintiff to establish a written title or written chain of title to the land." The plaintiff relied not only on written instruments, but on the claim of presumption of a grant from 20 years' possession, and on adverse possession. Even under the theory of the case adopted by the circuit judge that the plaintiff could in no event recover without proof of perfect title, the jury might have found a perfect title in the plaintiff from the presumption of 20 years' possession, or from adverse possession for 10 years.

The court excluded evidence of the declarations of Mr. Pritchard, one of the persons under whom the defendant claims, as to the land lines and as to trespassing on the lands of the plaintiff. These declarations, if made while Mr. Pritchard was owner of the property, were competent. *Ellen v. Ellen*, 16 S. C. 182; *Levi v. Gardner*, 53 S. C. 24, 30 S. E. 617.

We have covered in the discussion a number of the exceptions not particularly mentioned. The remaining exceptions are hypercritical and unsubstantial.

It is the judgment of this court that the judgment of the circuit court be reversed and the cause be remanded to that court for a new trial.

(86 S. C. 331)

CAROLINA BOND & INVESTMENT CO. et al. v. CALDWELL.

(Supreme Court of South Carolina. July 18, 1910.)

WILLS (§ 498*)—CONSTRUCTION—"ISSUE."

Testator devised all her property to L. and her four children named in trust for the sole benefit "of the lawful issue" of L.'s children named, "without power to sell"; the said L. and her children "having a life interest, share and share alike, in the annual products of said farm." The will provided that "when the youngest devisee of the real estate shall attain the age of 21 or marry there shall be a division of said real estate." At the time of testator's death two of L.'s children were dead; one dying unmarried and without issue, and the other leaving four children. The other two children of L. were living; neither of them being married. Held that the word "issue" is either a word of purchase or of limitation, and its use in one sense excludes the other; that it was used in the will as a word of purchase; that the children named took life interests and their children took in fee on testator's death; and that grandchildren of the children named took nothing under the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1087, 1088; Dec. Dig. § 498.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3778-3782; vol. 8, p. 7693.]

Appeal from Common Pleas Circuit Court of Richland County; Geo. E. Prince, Judge.

Action by the Carolina Bond & Investment Company against Howard Caldwell. A demurrer to the answer was sustained, and defendant appeals. Affirmed.

Clark & Clark and Logan & Edmunds, for appellant. W. T. Aycock, for respondent.

GARY, A. J. This is an action for specific performance of contract, and the appeal is from an order sustaining a demurrer to the answer, on the ground that it did not state facts sufficient to constitute a defense.

The exceptions assign error on the part of his honor, the presiding judge, in construing the will of Dr. A. W. Kennedy. The fifth, seventh, and eighth clauses of the will, are as follows:

"Fifth. All my real estate and all improvements thereon at the time of my death, and all stock on my farms near Columbia at my death, including horses, mules, cattle, hogs and all other domestic animals, all farming implements, all farming products thereon at my death I give, devise and bequeath unto the survivors, at my death, of the following persons, viz.: Unto Lettie Chick and her children, Walker Kennedy, Butler Kennedy,

John Kennedy and Mary Kennedy, to have and to hold the same in common, in trust, nevertheless, for the sole use, benefit and behoof of the lawful issue of the said Walker, Butler, John and Mary, without power to sell; the said Lettie, Walker, Butler, John and Mary having a life interest, share and share alike, in the annual products of said farm: Provided, that they, the said Lettie, Walker, Butler, John and Mary will permit my foreman, George Kennedy, to occupy during his life, the house in which he now resides on my farm, near the city of Columbia, on condition that he, the said George, even though he become infirm and an invalid, to have, during his life, one-tenth of the annual products of the said farms, one-tenth of the fruit from the orchard, with the privilege of raising poultry and hogs and of keeping one cow, he feeding, at his own expense all such domestic animals, and of using necessary firewood, and of getting water from the spring near his house.

"Seventh. It is my will that the said Walker, Butler, and John shall work on said farm, but should they prefer to furnish a good hand each, they may go away and shall still receive their annual share. * * *

"Eighth. When the youngest devisee of the real estate shall attain the age of twenty-one, or marry, there shall be a division of said real estate, and the said George, should he still survive, shall receive the one-tenth for life of said real estate, and the one-tenth of the yearly produce of the orchard; at his death his share to go to the other devisees of the real estate above described, share and share alike, and the remaining nine-tenths of the said last mentioned division, shall be held by the said Lettie, Walker, Butler, John and Mary, in trust for the sole use, benefit and behoof of the lawful issue of the said Walker, Butler, John and Mary; the said Lettie, Walker, Butler, John and Mary having a life interest, share and share alike, in the products of the same."

The facts are thus stated by the circuit judge: "At the time of the testator's death, Walker and Butler, aforesaid, were dead; the former unmarried and without issue; the latter, Butler, leaving four children alive at said time. John and Mary were living, neither of them being married or having issue. Some years later, to wit, June 8, 1897, these four children of Butler Kennedy commenced an action for partition of the real estate mentioned in the said will; the defendants being John Kennedy, then unmarried and without issue, and the said Mary, then the wife of Summerfield Perrin, with her children, the same being all her issue. At the time this action was brought, four grandchildren of Butler Kennedy were in esse, none of whom were parties to the action, nor in esse when the testator died. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

action proceeded to a final decree, wherein it was held that the four children of Butler Kennedy (the plaintiffs), all of whom were living at the testator's death, had a fee-simple estate in one-third of the said real estate under the said will. The decree also fixed the rights of the other parties, but I am not concerned with them, under the view of this will adopted. A sale of the said real estate was ordered, the said lands were sold, and by successive conveyances, they have come into the possession and ownership of the plaintiffs in the action before me. The defendant has agreed to purchase these lands, and the plaintiffs have agreed to sell the same to him, as appears in the complaint and answer, but the defendant alleges in his answer that the four grandchildren of Butler Kennedy had interests in the land when the action for partition was brought, and that by reason of the failure to make them parties to the cause, they still have interests in the said land. The plaintiffs demur to the answer of defendant, and submit the view that these four grandchildren of Butler had no interest in the said land, and were not necessary parties to the action. Lettie Chick was also dead at the time the testator departed this life in 1882. In sustaining the demurrer to the answer the circuit judge assigned the following reasons: "The trust attempted to be created in this will is a dry trust, there being nothing for the trustee to do, and the word 'issue' as used therein is synonymous with 'children.' The children of Lettie Chick took life estates, and Butler Kennedy's children took their interests, at the testator's death in fee, subject to the use of the land by the life tenants or the survivor of them. The grandchildren of Butler Kennedy, mentioned in the answer, took nothing under the will, and were not necessary parties to the action for partition referred to."

The appellant's exceptions are as follows:

"1. Because his honor erred, it is respectfully submitted, in holding that the word 'issue,' as used in the will, was synonymous with 'children,' the error being that there was nothing in the will to indicate that the testator intended to so limit the meaning and use of the word; but, on the contrary, the same was used in a most general sense.

"2. Because his honor erred in finding and holding that the children of Lettie Chick took life estates; the error being that the estates devised were enlarged to fees conditional, which vested in the two children of Lettie Chick at the death of the testator.

"3. Because his honor erred in finding and holding that 'Butler Kennedy's children took their interest at the testator's death in fee, subject to the use of the land by the life tenants, or the survivor of them'; the error being that the estates devised by the will, having been enlarged to fees conditional, and Butler Kennedy having predeceased the testator, the estate lapsed as to him, and his children

took nothing thereunder, and the estate intended for the issue of Butler Kennedy reverted to the testator, and would pass to his heirs at law.

"4. Because his honor erred in finding and holding that the children of Butler Kennedy took their interests, at the testator's death, subject to the use of said lands by the life tenants, or the survivor of them, and that the grandchildren of Butler Kennedy took nothing under the will; the error being that if life estates were vested in the children of Lettie Chick, the remainders did not vest at the death of the testator, but could only vest upon the death of the last life tenant, and all children and grandchildren of Butler Kennedy, in esse at the time of the death of the last life tenant, would take under the will.

"5. Because his honor erred in finding and holding that the grandchildren of Butler Kennedy were not necessary parties to the action for partition, referred to in the answer; the error being that the words 'lawful issue' include an indefinite line of descent, and unless there is something in the will (which there is not) to indicate that the testator intended to limit the meaning of the word 'issue,' the grandchildren of Butler Kennedy, in esse at the time of the commencement of this action, had an interest in the property devised, which interest could not be divested, unless the parties were properly before the court."

We proceed to consider the exceptions in regular order.

First exception. In *Mendenhall v. Mower*, 16 S. C. 303, it is said: "The word 'issue' is susceptible of three meanings: (1) It may describe a class of persons, who are to take as joint tenants with the parties named; (2) it may be descriptive of a class, who are to take at a definite and fixed time as purchasers; and (3) it may denote an indefinite succession of lineal descendants, who are to take by inheritance. Whenever this word is used, either in a deed or will, it must be used in one of these senses. The difficulty in most cases is to determine in which of these senses it has been employed." "Issue" is either a word of purchase or of limitation, and if in the present case it be shown that it is not a word of limitation, then it necessarily follows that it must be construed as a word of purchase.

In discussing the rule in *Shelley's Case*, the court, in *Austin v. Payne*, 8 Rich. Eq. 9, uses this language: "Although it is well settled to apply to equitable as well as legal interests, yet it is equally well established that, in order thus to coalesce, the estate of the ancestor and the limitation to the heirs must be of the same quality; that is, both legal and both equitable. Thus, it frequently happens that a testator devises land in trust for a person for life, and, after his death, in trust for the heirs of his body; but gives the trustees some office, in regard to the tenant for life, that causes them to retain the legal

estate during his life, but which, ceasing at his death, does not prevent the limitation to the heirs of the body from being executed in them. In such cases, by the rule thus stated, they, that is, the heirs, are purchasers.' 2 Jarm. on Wills, 243. Let us apply these principles to the deed of McDaniel. It is recited in the deed that Rosa Manning Payne was the wife of the defendant, Wesley Payne, and it is provided that she shall enjoy the rents, etc., during her natural life, *to her sole use*. If the purposes of the deed, in any possible event, require that the legal estate should remain in the trustees, the use is not executed by the statute, but the legal estate remains in the trustees, and the interest of the cestui que trust is merely equitable. Upon this principle it has been often decided that a trust to permit a feme covert to receive the rents for her separate use vests the estate in the trustees." See, also, Jackson v. Jackson, 56 S. C. 346, 33 S. E. 749, and Young v. McNeill, 78 S. C. 143, 59 S. E. 986.

There are several reasons why the use was not executed in the present case: (1) The provision that the trustees were "without power to sell" indicates that the children of Lettie Chick were not expected to enter upon the full enjoyment of their beneficial interests immediately after the testator's death, but at a future period; (2) the provision in the seventh clause of the will likewise tends to show the necessity for the legal title to remain in the trustees, at least until the period therein fixed for the division of the property; (3) the provision that Walker, Butler, John, and Mary Kennedy were only to have life interests in the annual products of the farm, indicated that they were not vested with the full powers of life tenants, but merely had a right to a support and maintenance out of the property; (4) the provision in the eighth clause of the will that there should be a division of the real estate when the youngest devisee should attain the age of 21 years, or marry, is inconsistent with the theory that the life estates of Lettie Chick's children were enlarged to fees conditional; thereby showing that "issue" must be construed as a word of purchase. We would also rely upon the provision made for George Kennedy, to show that the use was not executed but for the fact, it seems, that he died before the testator.

Second exception. It was the intention of the testator that Butler Kennedy and the other devisees mentioned in the foregoing clauses of his will should sustain a dual relation to the property therein mentioned, (1) that of trustee, and (2) that they should take a beneficial interest during their lives. The devise to the "issue" of Butler Kennedy did not lapse, for the reason that they did not claim through him, but directly from the testator. The death of Butler Kennedy during the lifetime of the testator defeated the beneficial interest which he would have taken under the will, but in no respect affected the

power of the surviving trustees to hold the entire property in trust for the lawful issue of all the children of Lettie Chick, for in section 5 of his will the testator says: "I give, devise, and bequeath unto the survivors at my death, of the following persons, viz.: Unto Lettie Chick and her children, Walker Kennedy, Butler Kennedy, John Kennedy, and Mary Kennedy, to have and to hold the same in common, in trust nevertheless for the sole use, benefit, and behoof of the lawful issue of the said Walker, Butler, John, and Mary," thus showing that the surviving trustees were not to hold simply for the benefit of the issue of the children, who survived the testator, but for the issue of the four children.

Third exception. As it has been shown that the lapse of Butler Kennedy's beneficial interest did not affect the rights of his issue, this exception cannot be sustained.

Fourth exception. The rule in regard to the right of a grandchild to take under a will, when the testator used the word "children," is thus stated in Izard v. Izard, 2 Desaus. 309: "The word 'children' used in a will shall not be construed to mean 'grandchildren,' unless a strong case of intention or necessary implication requires it." The case of Ruff v. Rutherford (Bailey, Eq. 7) is to the same effect, where it is stated that grandchildren do not take under a bequest to *children*, except where there are no children, or there are strong and conclusive circumstances to show that such was the intention of the testator. No such facts exist in the present case.

Fifth exception. Having reached the conclusion that the grandchildren of Butler Kennedy did not take any interest under the will, it was of course unnecessary that they should be made parties to the action for partition.

It is the judgment of this court that the judgment of the circuit court be affirmed.

WOODS, J. (concurring). The question which determines this appeal is whether, under the will of A. W. Kennedy, the grandchildren of testator's son, Butler Kennedy, took as devisees, and were therefore proper parties to an action for partition brought by the children of Butler Kennedy for partition of the lands devised by the will. I concur in the result reached by Mr. Justice GARY, but do not agree with him as to the construction of the will.

As it seems to me the will should be thus construed: First, the trustees named and the survivor of them had no duty to perform with respect to "the issue" of the testator's children, who were to have the land after his children had enjoyed the annual product for their lives; and as to such issue the use was executed. Second, "the issue" of the children did not mean the indefinite lineal descendants of the children of the testator, for the intention of the testator to point out particular issue is clearly

shown by the provision for a division of the land "when the youngest devisee of the real estate shall attain the age of twenty-one or marry." This distinguished the case from *Whitworth v. Stuckey*, 1 Rich. Eq. 404, *Betha v. Betha*, 48 S. C. 440, 28 S. E. 716, and other cases of that kind. Hence the issue of the children took as purchasers and not by descent; and there was no fee conditional in the children of the testator. Third, this narrows the inquiry to what particular issue of his children the testator meant to make his devisees. There can be no doubt that all the lineal descendants of the children of the testator were entitled to share in the devise to the issue of testator's children. *Gourdin v. Deas*, 27 S. C. 492, 4 S. E. 64; *Vale Royal Mfg. Co. v. Santee River Cypress Lumber Co.*, 84 S. C. 81, 65 S. E. 955. The word "issue" therefore cannot be construed to mean "children," but must be held to denote all who answered to the description of issue of testator's children at some particular time. What was that time? Manifestly the time of partition was not intended as it was in *Rutledge v. Rutledge*, Dud. Eq. 201, and *Gourdin v. Deas*, 27 S. C. 479, 4 S. E. 64, for the provision of the will that the partition shall take place when the youngest devisee shall attain the age of 21 years, or marry, clearly indicates that before that time all the devisees should have been ascertained. The testator having thus excluded the idea that the devisees entitled to take as issue of his children should be ascertained at the period of distribution, and having expressed no other time for the ascertainment of those entitled to take as issue of his children, the law fixes the date of the testator's death as the time of ascertainment. *Myers v. Myers*, 2 McCord, Eq. 256, 16 Am. Dec. 648; *Waddell v. Waddell*, 68 S. C. 335, 47 S. E. 375.

The question here is between the children and grandchildren of Butler Kennedy, who died before his father, the testator. The children, being the only issue in existence at the time of the death of the testator, were entitled as devisees to the exclusion of the grandchildren born afterwards. It follows that the grandchildren had no interest in the land and were not proper parties to the action for partition instituted by the children of Butler Kennedy.

For these reasons I think the judgment of the circuit court should be affirmed.

(36 S. C. 425)

DIXON v. CHIQUOLA MFG. CO.

(Supreme Court of South Carolina. July 27, 1910.)

1. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—BURDEN OF PROOF—KNOWLEDGE OF DEFECTS

The law imputes to the master knowledge of latent dangers in instrumentalities, and re-

quires him to show in an action for a servant's injuries, caused by defects therein, that he could not have discovered the danger by due diligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 905; Dec. Dig. § 265.*]

2. MASTER AND SERVANT (§ 89*)—INJURIES TO SERVANT—SCOPE OF EMPLOYMENT.

The scope of a servant's duties is determined by what he was employed to do, and what he actually did with his employer's knowledge and consent, and an employé who was in the habit of performing certain duties when injured is not a volunteer in performing such duties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 153; Dec. Dig. § 89.*]

3. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

In an employé's action for injuries, evidence held to make it a question for the jury whether plaintiff was guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1089; Dec. Dig. § 289.*]

Appeal from Common Pleas Circuit Court of Anderson County; S. W. G. Shipp, Judge.

Action by C. W. Dixon against the Chiquola Manufacturing Company. From an order of nonsuit, plaintiff appeals. Reversed in part, and remanded for new trial.

Tilman & Watson and Paget & Watkins, for appellant. Wm. G. Sirrine and Bonham, Watkins & Allen, for respondent.

GARY, A. J. This is an action for damages alleged to have been sustained by the plaintiff through the negligence of the defendant.

The allegations of the complaint, material to the questions involved, are as follows: "That at the times hereinafter mentioned plaintiff was working in the weaverroom of the defendant, which is situated on the first floor of its cotton mill. Defendant had installed in this room a system of pipes, which connect with the boiler, and which distribute steam over the said room, when the humidifiers need assistance, to preserve the proper humidity and temperature. There is a main pipe running from the boiler room, which enters the weaverroom through the wall of the mill. This main pipe runs along the side of the wall, parallel with the floor of the weaverroom, and at different places pipes have been joined to the main pipe which are perpendicular thereto, and which run up the walls of the mill some five or six feet, and are equipped at the end with a mouth, through which the steam comes into the weaverroom. Also connecting with this main pipe is a drainpipe which runs through the wall of the mill into the open air, and which drains the water from the condensed steam out of the main pipe. There is a valve at the point where the main pipe enters the weaverroom, and each of the perpendicular pipes have valves, to regulate the influx of steam from the boiler into the room. On February 3, 1908, plaintiff went to his work in the mill as

usual. The weather was very cold and had been for the several days previous. About 9 o'clock that morning plaintiff, feeling that the room needed steam to bring about the proper humidity and temperature so that the work of weaving could be properly done, went to one of these perpendicular pipes. Plaintiff and the other weavers had been accustomed to turn the valves to these pipes, when it was necessary, all of which was well known to defendant, its agents, and servants. Plaintiff turned this valve to let in more steam, and, instead of steam coming out of the pipe, hot water poured out on plaintiff and injured him. Plaintiff is informed and believes that the direct and proximate cause of his injury was as follows: The cold weather had caused the drainpipe to freeze up, and there was no way for the water from the condensed steam to find an outlet, and, as a consequence, hot water had collected in the main pipe, and when the valve was opened which controlled the perpendicular pipe, this water was forced out and scalded plaintiff. Plaintiff further alleges, on information and belief, that the defendant, its agents, and servants, had failed to inspect the drainpipe as was its duty. * * *

The defendant denied the allegations of negligence, and set up as a defense that plaintiff's injury was caused by his own negligence; and in that connection alleged that "on the day that plaintiff is alleged to have been injured, the overseer in charge of the room had caused steam to be turned in said pipes before the mill began work for the day, but finding one of the drainpipes clogged by ice, had turned off said steam, and while working at the drainpipe from the outside of the mill, defendant is informed and believes, that plaintiff, without authority, went to the main valve, which controlled the movement of steam into the said system of pipe, and opened the same allowing steam to flow into the same from the boiler room, thereby not only acting in violation of orders, but endangering said overseer." The defendant also interposed the defense of contributory negligence.

At the conclusion of the testimony for the plaintiff, a motion for a nonsuit was made by the defendant's counsel, upon the following grounds: "(1) There is no testimony showing that the defendant was guilty of any wanton, reckless, or willful negligence. (2) The testimony permits of but one inference, to wit, that plaintiff was injured by his own negligence. (3) The plaintiff testifies that he was in the habit of turning on the steam and knew that water would come out with the steam, if the outlet pipe was frozen. He made no effort at inquiry, he says, to ascertain whether the outlet was frozen or not, though he knew it was freezing weather and it could be reasonably anticipated that the pipe would freeze. He therefore assumed the risks incident to his employment. (4) There is no testimony tending to show that the ap-

pliances were defective, or not properly constructed, or that the injury was due to the freezing of the pipe. (5) There is no evidence showing that defendant was guilty of any negligence which was a proximate cause of the injury. (6) The testimony tends to show that it was no part of plaintiff's duty to turn on the steam, and for his voluntary act, done without defendant's knowledge, defendant is not responsible."

His honor, the presiding judge, granted the following order: "Upon hearing the motion for a nonsuit in the above-entitled case, and after argument, it is ordered: That the motion be granted on the first ground, to wit, that there is no testimony tending to show wanton or willful negligence on the part of the defendant. As to the other grounds. There is no testimony showing that it was the duty of plaintiff to open the valve in the steam pipe, nor that he was directed to do so by any agent or officer of the defendant company, having authority to give him orders. He opened the valve voluntarily and without the knowledge or permission of defendant, and there was no obligation on its part to warn him of a danger of which he was fully cognizant, and which he assumed. It is further ordered, that the motion for nonsuit, as stated in defendant's second ground for said motion, be and the same is hereby granted."

The plaintiff did not appeal from the order of nonsuit, as to the cause of action for punitive damages.

The practical question presented by the exceptions is, whether there was error on the part of his honor, the presiding judge, in granting the order of nonsuit, as to the cause of action for compensatory damages, on the second ground, which was as follows: "The testimony permits of but one inference, to wit, that plaintiff was injured by his own negligence." The reasons assigned by the presiding judge for this conclusion are stated in his order, one of which, viz.: That the plaintiff assumed the risk, was neither set up as a defense, nor made a ground of the motion for nonsuit.

The plaintiff testified as follows: "Q. I believe you stated that you had been accustomed as a weaver to turn that steam into the room? A. Yes, sir. Q. How about cutting it off? A. Yes, sir; I would cut it off too, and the other weavers had to work it all of the time. Q. They had been at it all of the time? A. Yes, sir. Q. What bosses were above you in that room, and what were they called? A. The overseer and Mr. Beacham; and Mr. Snipes, the section hand. Q. They were both over you? A. Yes, sir; Mr. Snipes was the section hand on the lower department. Q. Had they ever seen you turn that steam into the room and cut it off? A. Yes, sir. Q. How many times? A. I couldn't say. I had been accustomed to turning it on ever since I had been there. Q. How long had you been weaving at that mill altogether? A. I had been working there three

years, or a little over. Q. Had you been warned or forbidden to turn them on and off? A. No, sir. Q. Not a single time? A. No, sir; I never had. Q. Had you ever been told to do it? A. I had been told by Jim Holder. He was a section hand, and he had charge of 100 looms that he kept repaired, when they would get out of fix, and I had complained about the weaver between me and the wall having it cut off; and he told me time and again to turn it on whenever I needed it, and he said he guessed I could turn it on as fast as he could cut it off. Q. Who was he? A. He was a section hand. He kept the looms fixed. Q. He had some authority as section hand? He was not the overseer, but had some authority over the help? A. Yes, sir. Q. Was there any man particularly whose duty it was to turn the steam off and on in the pipes? A. No, sir. If there was, I never heard of it. Q. Did you say you had a conversation with Mr. Beacham about your accident there? A. Yes, sir; I did the morning he come to my house. Q. How long after the accident? A. I don't know, sir; but I think it was about the 1st of April. Q. What was it you did tell him? A. He asked me about how it occurred, and he went on to say that I would not have got scalded if the steam pipe had not been frozen, that he had not inspected them that morning, and that he had not had time; and said he was accustomed to inspecting the pipes on cold mornings that way, but that morning he had not had time."

On cross-examination he thus testified: "Q. It was your duty to turn on that steam that morning? A. Yes, sir; we had been doing it. Q. It was as much your duty to look after that pipe as any one's? A. Yes, sir. Q. Had you had orders to turn it on? A. I had, by Jim Holder, the section hand. Q. And you did it without any inspection, didn't you? A. I couldn't inspect the pipe. I would had to have gone outside of the mill to inspect it. Q. Why didn't you get out and see if it was frozen? A. That was not my duty, and they didn't allow hands to go out of the mill. Q. When you were uncertain about your duty you would ask the superior—the overseer? A. Yes, sir. Q. Why didn't you do it in that instance? A. Well, I had been accustomed to turning it on the pipe, and there was no danger before, and I didn't think of any danger. Q. And the reason you didn't inspect it, and didn't ask any one anything about it, you thought there was no danger? A. No, sir. I didn't think there was any danger."

The law imputes to the master knowledge of latent danger in instrumentalities, and casts upon him the burden of proving that he could not have discovered the danger, by the exercise of due diligence. *Wood v. Mfg. Co.*, 66 S. C. 482, 45 S. E. 81; *Roach v. Mining Co.*, 71 S. C. 79, 50 S. E. 543; *Gunter v.*

Mfg. Co., 15 S. C. 443; *Lasure v. Mfg. Co.*, 18 S. C. 275; *Jennings v. Mfg. Co.*, 72 S. C. 411, 52 S. E. 113; *Green v. Railway*, 72 S. C. 398, 52 S. E. 45. "The scope of a servant's duties is to be defined by what he was employed to perform, and by what, with the knowledge and approval of his master, he actually did perform, rather than by the mere verbal designation of his position, and where it is shown that the servants were in the habit of performing the work at which plaintiff was injured, he is not to be considered a mere volunteer." 26 Cyc. 1090. Applying these principles to the foregoing testimony, it clearly appears that the exceptions raising this question must be sustained.

It is the judgment of this court that the judgment of the circuit court be reversed (except as to the cause of action for punitive damages), and that the case be remanded to that court for a new trial.

WOODS, J. In concurring in the opinion of Mr. Justice GARY it seems to me important to notice one position relied on by the respondent which is not referred to in the opinion. That position is that the evidence of the plaintiff gives no ground to infer that the unexpected escape of the hot water from the pipe by which the plaintiff was injured, was due to the negligence of the defendant. If this were so, then the case would be one where, nothing being proved beyond an injury resulting from failure of an instrumentality in ordinary use, negligence of the master could not be inferred. *Green v. Southern Ry.*, 72 S. C. 398, 52 S. E. 45; *Gentry v. Southern Ry.*, 66 S. C. 256, 44 S. E. 728; *Edgens v. Gaffney Mfg. Co.*, 69 S. C. 529, 48 S. E. 538. But the principle of these cases does not apply, for there was evidence that the condensation of the steam into hot water would have been discovered by proper inspection and that there was no inspection.

(36 S. C. 523)

BING v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. July 18, 1910. On Petition for Rehearing Aug. 6, 1910.)

1. NEW TRIAL (§ 76*)—REVIEW—REFUSAL OF NEW TRIAL—EXCESSIVE DAMAGES.

A carrier being liable for punitive damages for willful refusal to stop its train at a station where it is evident that there is a passenger to get on, it cannot be said a verdict of \$600 for a passenger who, because of the failure of the train to stop, was obliged to hire a conveyance, was so excessive as to warrant the conclusion that refusal of a new trial was an abuse of discretion.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 153-156; Dec. Dig. § 76.*]

2. CARRIERS (§ 276*)—FAILURE TO STOP TRAIN FOR PASSENGER—ACTION—EVIDENCE.

Plaintiff, suing for failure of defendant's train to stop at a station where he was waiting to board it, may testify that he told the station agent that he had a ticket and that the train did not stop for him, and asked what he should do about it, and that the agent replied the ticket was good on that road for the next 24 hours, and gave him no further satisfaction; it being the duty of the ticket agent to give passengers information about trains and answer reasonable inquiries on the subject, and the right of the passenger to ask information as to any relief the carrier could give him, and likewise his duty to seek such information, so as to enable him to minimize his damages.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 276.*]

3. TRIAL (§ 191*)—INSTRUCTIONS.

The instruction in an action for failure of a train to stop at a station at which plaintiff was waiting to board it, in which the evidence was conflicting as to whether it did stop: "Did that train * * * entirely stop * * * and did it do so for a sufficient length of time for B. to get on? * * * If it did not, then the railroad company has violated the law," was not erroneous as charging that plaintiff was a man of ordinary reason and prudence, using due diligence to board the train, when it was a question for the jury whether a man by ordinary reason and prudence, acting with due diligence, could have boarded the train; there being no evidence that plaintiff was not an ordinarily active person, and the context plainly showing it was meant that plaintiff could not recover, if the train was stopped long enough to give him, as an ordinary passenger, a reasonable opportunity to board the train.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

Appeal from Common Pleas Circuit Court of Barnwell County; Geo. W. Gage, Judge.

Action by Frank Bing against the Atlantic Coast Line Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

J. T. Barron, Wyman & Wyman, and Douglas McKay, for appellant. R. C. Holman and W. H. Townsend, for respondent.

WOODS, J. The plaintiff obtained a verdict and entered judgment for \$650 on a complaint which alleged that the defendant sold him a ticket from Dumbarton to Barnwell and then willfully refused to stop the train for which the ticket had been bought, thus making it necessary for him to make the journey by a hired conveyance.

We notice, first, the error assigned in the refusal to grant the motion for a new trial made on the ground that the amount of the verdict showed that the jury acted from caprice or passion, or prejudice. The testimony shows that the witnesses on one side or the other were either perjurers or victims of a singular failure of memory, or of the senses of sight and hearing. The plaintiff and two witnesses on his behalf testified that they were standing at or very near the station, and that the train did not stop at all; the conductor of the train, the railroad agent, and a passenger testified with

equal positiveness that the train did stop long enough to let off and take on passengers. The verdict is a large one, but this court cannot interfere with it, unless it is without support in the evidence. The jury accepted the evidence that the defendant's agent, in violation of the statute, failed to stop the train when it was evident to him that there were passengers to get off and on. For such a conscious breach of duty the defendant would be liable for punitive damages. The granting or refusal of a new trial absolute or a new trial nisi for excess in the verdict was a matter within the discretion of the circuit court; and this court is not convinced that the verdict was so excessive as to warrant the conclusion that the circuit judge abused his discretion in refusing a new trial.

The plaintiff was allowed to testify over the objection of defendant's counsel as follows, about a conversation with Thompson, the defendant's subagent at Dumbarton: "Q. Was he or not acting as agent? A. Yes, sir; and I went back to him and said: 'I have got a ticket to go to Barnwell and the train did not stop, and what will I do about it?' and he says: 'That ticket is good on this damn road for the next 24 hours to come,' and that was all of the satisfaction that he gave me." The evidence was clearly admissible. It was the obvious duty of defendant's ticket agent at Dumbarton to give passengers information about trains and to answer all reasonable inquiries on that subject. It was the right of the plaintiff to ask information as to any relief the defendant could give him, and it was his duty to the defendant to seek this information, so as to enable him to minimize his damages. *Taber v. Seaboard Air Line Ry.*, 81 S. C. 317, 62 S. E. 311; *Berley v. Seaboard Air Line Ry.*, 83 S. C. 411, 65 S. E. 456; *Cobb v. Telegraph Co.*, 85 S. C. 430, 67 S. E. 549.

The court gave this instruction: "Did that train of cars on that day entirely stop at Dumbarton, and did it do so for a sufficient length of time for Frank Bing to get on? If it did that ends the case. If it did not, then the railroad company has violated the law." In the exceptions it is submitted that this was erroneous, because it was a "charge instructing the jury that Frank Bing was a man of ordinary reason and prudence, using due diligence to board the train; whereas, it should have been for the jury to determine if a man by ordinary reason and prudence, acting with due diligence, could have boarded said train."

The distinction made by the exception is too refined. There was nothing in the evidence to show that Bing was not an ordinarily active person, and the context plainly shows that the court meant that he could not recover, if the defendant stopped its train long enough to give him, as an ordi-

nary passenger, a reasonable opportunity to board the train.

It is the judgment of this court that the judgment of the circuit court be affirmed.

On Petition for Rehearing.

PER CURIAM. Careful examination of the petition for rehearing does not convince us that there was any material issue arising on the record overlooked or disregarded in the judgment of the court.

The petition for rehearing is therefore dismissed, and the order heretofore granted staying the remittitur revoked.

(86 S. C. 532)

BURCKHALTER v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. July 18, 1910. On Petition for Rehearing, Aug. 6, 1910.)

Appeal from Common Pleas Circuit Court of Barnwell County; Geo. W. Gage, Judge.

Action by D. C. Burckhalter against the Atlantic Coast Line Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

J. T. Barron, Wyman & Wyman, and Douglas McKay, for appellant. R. C. Holman and W. H. Townsend, for respondent.

WOODS, J. This appeal involves substantially the same questions as the appeal in the case of Bing v. Atlantic Coast Line Railroad Company, 68 S. E. 645, and the judgment of affirmance in that case is conclusive of this.

The judgment of this court is that the judgment of the circuit court be affirmed.

On Petition for Rehearing.

PER CURIAM. Careful examination of the petition for rehearing does not convince us that there was any material issue arising on the record overlooked or disregarded in the judgment of the court.

The petition for rehearing is therefore dismissed, and the order heretofore granted staying the remittitur revoked.

(86 S. C. 533)

BANK OF MARION v. SOUTHERN EXPRESS CO.

(Supreme Court of South Carolina. July 18, 1910. On Petition for Rehearing Aug. 6, 1910.)

CARRIERS (§ 136*)—LOSS OF PROPERTY—ACTION—DIRECTION OF VERDICT—WHEN.

In a suit to recover an alleged shortage in the amount contained in a package of money when delivered by the express company to the consignee, there being some evidence to establish plaintiff's case, the court properly refused to direct a verdict for defendant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 596-598; Dec. Dig. § 136.*]

Appeal from Common Pleas Circuit Court of Marion County; R. C. Watts, Judge.

Action by the Bank of Marion against the Southern Express Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Willcox & Willcox and Jas. W. Johnson, for appellant. Mullins & Hughes and M. C. Woods, for respondent.

JONES, O. J. The complaint alleged that on December 6, 1908, at Marion, S. C., plaintiff bank delivered to defendant carrier a package containing \$3,000 for transportation and delivery to the Murchison National Bank at Wilmington, N. C., and that when said package was delivered to the Murchison National Bank the package was short and contained only \$2,280, and demanded judgment for the amount of the shortage with interest.

The answer, after general denial, alleged "that on December 6, 1908, the plaintiff delivered to defendant at its office in Marion, S. C., a sealed package, said to contain \$3,000; that said package was consigned to the Murchison National Bank, Wilmington, N. C.; that defendant did not count the money placed in said package by plaintiff, and does not know what it contained, but this defendant alleges that it transported said package to Wilmington, in the state of North Carolina, and there delivered same to the consignee in precisely the condition it was in when it was delivered to defendant, the seal of said package unbroken and its contents intact."

The verdict and judgment was for the plaintiff for the amount claimed.

The exceptions allege error in the court's refusal to direct a verdict for the defendant and to grant a new trial, on the ground that the evidence showed conclusively that the package under seal was delivered in the same condition as when received. Without going into details, it is sufficient to say that there was some testimony tending to establish the case of the plaintiff. There was sharp conflict between the testimony for the plaintiff and the defendant, but the issue as to when and where the shortage occurred was peculiarly one for the jury.

The judgment of the circuit court is affirmed.

WOODS, J., did not sit in this case.

On Petition for Rehearing.

PER CURIAM. After careful consideration of the within petition we do not discover that any material issue has been overlooked or disregarded.

It is therefore ordered that this petition be dismissed, and the stay of remittitur heretofore granted be revoked.

(134 Ga. 813)

HARDIN v. CASE.

(Supreme Court of Georgia. July 14, 1910.)

*(Syllabus by the Court.)***CONTRACTS (§ 10*) — CORPORATIONS (§§ 118, 121*)—ACTION FOR BREACH—SUFFICIENCY OF PETITION—UNILATERAL CONTRACTS.**

The plaintiff sued the defendant to recover \$500 principal and 8 per cent. interest thereon from the _____ day of _____, 1907, and in his petition made substantially the following allegations: Defendant agreed to pay plaintiff, for his five shares of stock in the corporation herein-after named, \$500, and to pay interest at the rate of 8 per cent. per annum on each sum from the date of the issue of the stock. The plaintiff was to have one year from July 1, 1907, to decide whether or not he would accept "said agreed and proposed sum for his said stock." As evidence of the agreement a writing was signed by both parties, of which the following is a copy: "This certifies that I, Geo. F. Case, do agree to pay to J. T. Hardin 8 per cent. interest on his 500 shares of Central Marble & Milling Company stock from date of issue of stock to date of purchase of stock, provided said stock does not pay this amount of interest or better; further I do agree to purchase said stock at any time said J. T. Hardin wishes to dispose of same at par value within one year from date of this agreement. [Signed] Geo. F. Case. J. T. Hardin." The plaintiff alleged that "at divers times between July 1, 1907, and July 1, 1908, he approached the said Geo. F. Case, and offered to and undertook to comply and accept said agreement, and deliver to said Case said stock as contemplated in said agreement, and did demand at divers times of said Case the price and money he obligated himself to pay petitioner for said stock, which the said Case refused to do, and still refuses to do. Petitioner now and here offers and proposes to surrender to the said Case his said stock in the said Central Marble & Milling Company, and to comply in every way with his agreement." In said contract it was agreed "that petitioner was to suffer and permit the said Geo. F. Case to control and vote said stock from and after date of said agreement in all the meetings of the stockholders of the said company, which petitioner agreed to and permitted. Other features of the said contract were to the effect that petitioner was to have, which was to be paid by the said Geo. F. Case, a full return of all money invested by him in said stock, with interest thereon, which stock the said Case was instrumental in selling to petitioner originally, and of his own motion proposes to take petitioner's stock from off his hands." *Held:*

(1) The petition was not subject to general demurrer.

(2) The petition was not subject to demurrer on the ground that "the contract sued on and set out in plaintiff's petition is unilateral, and with [neither] party to the same is under any legal obligation to perform the same," or on the ground that "the said contract is wanting in mutual covenants and without any consideration on the part of plaintiff to do any act beneficial to the defendant or hurtful to himself."

(a) It being agreed by the plaintiff, in the contract, "that petitioner was to suffer and permit the said Geo. F. Case to control and vote said stock for and after date of said agreement in all the meetings of the stockholders of the said company, which petitioner agreed to and permitted," the agreement by the defendant to buy the shares of stock was not originally without consideration.

(b) The contract was not unilateral, and there was no want of mutuality, when the plaintiff,

within one year from the time of its execution, offered the defendant the shares of stock and demanded the price the defendant agreed to pay therefor. *Brown v. Bowman*, 119 Ga. 153, 46 S. E. 410; *Sivell v. Hogan*, 119 Ga. 167, 46 S. E. 67; *McCaw Mfg. Co. v. Felder*, 115 Ga. 408, 414, 415, 41 S. E. 664; *Perry v. Paschal*, 103 Ga. 134, 29 S. E. 703; *Morrow v. Southern Express Co.*, 101 Ga. 810, 28 S. E. 998; *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723; *Huggins v. Southeastern Lime & Cement Co.*, 121 Ga. 311, 48 S. E. 933; *Larned v. Wentworth*, 114 Ga. 208, 39 S. E. 855; *Cooley v. Moss*, 123 Ga. 707, 51 S. E. 625.

(3) The petition not being subject to any of the grounds of the demurrer filed thereto, the court committed error in sustaining the demurrer and dismissing the petition.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 24-40; *Dec. Dig. § 10*; * *Corporations*, Cent. Dig. § 504; *Dec. Dig. §§ 116, 121*.*]

Error from Superior Court, Cherokee County; N. A. Morris, Judge.

Action by J. T. Hardin against George F. Case. Judgment of dismissal, and plaintiff brings error. Reversed.

J. P. Brooke, for plaintiff in error. L. E. Tate, for defendant in error.

HOLDEN, J. Judgment reversed. All the Justices concur.

(124 Ga. 339)

GRANGER et al. v. KNIGHT et al.

(Supreme Court of Georgia. July 15, 1910.)

*(Syllabus by the Court.)***1. EXCEPTIONS, BILL OF (§ 39*) — TIME FOR TENDERING.**

A direct assignment of error upon a ruling made during the trial of a civil case is presented too late for consideration by the Supreme Court, when it first appears in a bill of exceptions tendered more than 30 days after the adjournment of the term at which such ruling was made; and unless it affirmatively appears that a bill of exceptions embracing such an assignment of error was, with respect thereto, tendered in due time, this court is without jurisdiction to pass upon that assignment.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. § 54; *Dec. Dig. § 39*.*]

2. NEW TRIAL (§ 18*)—GROUNDS—RULINGS ON AMENDMENT OF PLEADINGS.

Rulings of the trial court upon the question of the allowance or disallowance of amendments to pleadings cannot constitute a ground of a motion for a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 28; *Dec. Dig. § 18*.*]

3. PARTNERSHIP (§ 199*)—ACTIONS BY PARTNERS ON DEBT DUE FIRM.

A verdict in favor of the plaintiffs in a suit brought by two of the individual members of a firm, which was composed of three members, to recover for services performed and money expended, is without evidence to support it; the evidence showing that, if any recovery upon the contract which was the basis of the suit could be had, it should be for the firm, and not for the two members thereof who brought the suit.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 362; *Dec. Dig. § 199*.*]

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Action between A. O. Granger and others and J. M. Knight and others. From the judgment, Granger and others bring error. Reversed.

Paul F. Akin, for plaintiffs in error. Thos. W. Milner & Son, for defendants in error.

BECK, J. Judgment reversed. All the Justices concur.

(134 Ga. 816)

WADSWORTH v. WADSWORTH.

(Supreme Court of Georgia. July 14, 1910.)

(*Syllabus by the Court.*)

1. TRIAL (§ 253*)—INSTRUCTIONS—EXCLUDING THEORIES.

Under order of the court of ordinary, an administrator advertised for sale certain land of which he was in possession as the property of his intestate, to which the widow of the intestate filed a claim. Upon the trial the plaintiff was allowed to file an equitable plea, alleging, among other things, that his intestate was in possession of the property under a contract of purchase from a named vendor, with all of the purchase money paid except \$40 at the time the claimant obtained a deed to the land from such vendor, and that the claimant "had actual notice of these facts" when the deed was made to her, and praying that the court direct the sale of the land, and that out of the proceeds thereof the \$40, with legal interest, be paid to the claimant, and the remainder be distributed among the heirs at law of the intestate. The jury rendered a verdict in favor of the claimant, and the plaintiff excepted to an order of the court refusing his motion for a new trial. *Held*, there being evidence from which the jury would be authorized to conclude that the allegations above set forth, embraced in the equitable pleading of the plaintiff, were true, and that the claimant paid to the vendor the balance of the purchase money of the land due him by the intestate in pursuance of an agreement between her and the intestate, that she would take a deed from the vendor to the land and hold title thereto to secure such amount, the court committed error in failing to charge the jury that, if they believed this theory of the case to be true, they should find a verdict, in accordance with the prayer above set forth, that the land be sold, "and that out of the proceeds thereof the \$40 with legal interest, be paid to the claimant."

(a) The charge, "Take the case, and if you find that the deed was delivered, and that it embraces this land, she would have a title, and the issue should be found in favor of the claimant," excluded from consideration by the jury the theory of the case above referred to, upon which the jury was authorized to make a finding; and for this, if for no other reason, it was error.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 253.*]

2. APPEAL AND ERROR (§§ 231, 728*)—OBJECTIONS BELOW—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error, complaining that the court committed error in allowing a witness to deliver certain evidence upon the trial of the case on the ground "that the witness was incompetent to testify to such facts," cannot be considered, as it does not appear that such objection to the competency of the witness was made on any specified ground.

(a) An assignment of error that the court committed error in allowing the opposite party

to read to the jury answers to certain questions contained in interrogatories, on the ground that they were leading, cannot be considered, when neither the questions referred to, nor the substance thereof, are made to appear in the assignment of error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. §§ 231, 728;* Trial, Cent. Dig. §§ 194-210.]

3. EXECUTORS AND ADMINISTRATORS (§ 344*)—PROCEEDINGS TO SELL LAND—CLAIM BY THIRD PERSON—ADMISSIBILITY OF EVIDENCE.

One assignment of error is that the court erred in excluding the following testimony of a witness: "In a conversation with the claimant [R. M. Wadsworth], she told me that she wished he, meaning the administrator, Leo Wadsworth, had let it stay like the will was. I [witness] asked her what the will said. She said the will said that at the death of Wadsworth the land was to go to her for life, then to Jack Patterson's wife, but the mule was to go to the children." As the alleged statements of the claimant testified to were susceptible of a meaning that tended to show that she preferred a life estate in the land to the interest she obtained by virtue of the deed, the testimony was admissible to illustrate the question as to whether or not she held title to the land only to secure a debt.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 344.*]

4. REVIEW ON APPEAL.

Under the evidence and the pleadings, no error requiring a new trial appears from the other grounds of the motion for a new trial.

Error from Superior Court, Pike County; E. J. Reagan, Judge.

Proceedings by Leo Wadsworth, administrator, to sell land, in which R. M. Wadsworth filed a claim. Judgment for claimant, and the administrator brings error. Reversed.

E. C. Armistead, for plaintiff in error. E. F. Dupree, for defendant in error.

HOLDEN, J. Judgment reversed. All the Justices concur.

(134 Ga. 817)

HILLIARD v. KING.

(Supreme Court of Georgia. July 14, 1910.)

(*Syllabus by the Court.*)

1. CONTRACTS (§ 324*)—BREACH—NATURE OF ACTION.

Where a contractor had built a house for another, and, claiming that the building contract had been fully complied with demanded payment of the part of the contract price which remained unpaid, and the owner, insisting that the contract was not completed, in that the plastering in the house was defective as to material and workmanship and was not in accordance with the specifications, refused to pay the balance of the contract price, and the contractor thereupon, in order to obtain payment of the balance, executed a writing wherein it was stipulated that he did thereby "warrant the plastering throughout the said house for a term of 12 months, and, should any defect in workmanship or material develop, I guarantee to put same in perfect condition, and should I neglect to attend to and do said work promptly Dr. C. C. King [the owner] has and is hereby empowered to have said work done at my expense,"

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the owner could maintain an action for damages for a breach of this written undertaking, where defects in workmanship or material developed within the period of time specified, in case the contractor failed and neglected to put the plastering in the condition contemplated in the undertaking, and he was not limited to the remedy of having the imperfect and defective work completed and then suing the contractor for the expense incurred.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 324.*]

2. EVIDENCE (§ 506*)—SUBJECT OF EXPERT TESTIMONY—CHARACTER OF WORK DONE UNDER CONTRACT.

Where one of the questions for determination by the jury was whether certain plastering done by the contractor fulfilled the requirements of given specifications in the building contract, it was competent for an expert to testify as to whether or not it "came up to the specifications."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2309; Dec. Dig. § 506.*]

3. REVIEW ON APPEAL.

The portions of the charge excepted to are not open to the criticisms made, and the evidence authorized the verdict.

Error from Superior Court, Greene County; D. W. Meadow, Judge.

Action between H. C. Hilliard and O. C. King. From the judgment, Hilliard brings error. Affirmed.

Samuel H. Sibley and J. B. Park, for plaintiff in error. Jas. Davison, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(134 Ga. 342)

EQUITABLE MFG. CO. v. GEE BROS. & CO.

(Supreme Court of Georgia. July 15, 1910.)

(Syllabus by the Court.)

1. FRAUD IN CONTRACT.

The plea in the case contained sufficient allegations of fraud in the procurement of the contract sued on to withstand a general demurrer, and under the evidence introduced in support of the plea the jury were authorized to find in favor of the defendant upon this issue. Davis Sewing Machine Co. v. Crutchfield, 117 Ga. 873, 45 S. E. 228; Wood v. Cincinnati Safe Co., 96 Ga. 120, 22 S. E. 909; Chapman v. Atlanta Guano Co., 91 Ga. 821, 18 S. E. 41.

2. REVIEW ON APPEAL.

No material errors are made to appear in the charge of the court relative to the issue referred to in the foregoing headnote.

3. APPEAL AND ERROR (§ 1072*)—REVIEW—HARMLESS ERROR—REFUSAL OF NEW TRIAL.

That issue having been determined in favor of the defendant, and no reason for disturbing that finding appearing, the judgment refusing plaintiff a new trial should not be disturbed by this court, irrespective of the other question raised in the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4233½; Dec. Dig. § 1072.*]

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Action by Gee Brothers & Co. against the Equitable Manufacturing Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Jas. Davison and Brown & Shipp, for plaintiff in error. Samuel H. Sibley, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

(3 Ga. App. 33)

HARKER v. STATE (No. 2,633.)

(Court of Appeals of Georgia. July 19, 1910.)

(Syllabus by the Court.)

1. DEMURRER TO INDICTMENT.

There was no error in overruling the demurrer. That portion of the accusation which charged that the accused sold cocaine "by himself, servants, and agents" was properly treated as surplusage; and the disjunctive "or" was properly used for the purpose of exhaustively excluding the accused from coming within any possible exception by reason of which the sale would be legal.

2. CRIMINAL LAW (§ 758*)—INSTRUCTIONS—STATEMENT BY ACCUSED—CREDIBILITY.

While it is the better practice, in charging the jury upon the subject of the defendant's statement, to use the exact language of the Code, an instruction: "Under the law the defendant is permitted to make a statement. This statement is not under oath. It is within the province of the jury trying the case to believe the unsworn statement of the defendant in preference to the sworn testimony in the case, if, after weighing it and considering it, they believe it entitled to more weight and credit"—is not erroneous. It does not restrict the discretion of the jury in believing the statement, if for any reason they see proper to do so. The omission of an instruction to the effect that the statement shall have only such force as the jury may think right to give it cannot be injurious to the defendant, because this language only draws the attention of the jury to the fact that the statement is not evidence, and that they are not bound to treat it as such.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1786; Dec. Dig. § 758.*]

3. CRIMINAL LAW (§ 1038*)—APPEAL—RENEWAL OF INSTRUCTIONS.

In the absence of a request calling the attention of the court to specific points upon which the defendant relied, the exceptions to the charge are without merit. The evidence amply authorized the conviction of the defendant, and there was no error in refusing a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. § 1038.*]

Error from City Court of Richmond County; W. F. Eve, Judge.

E. W. Harker was convicted of crime, and he brings error. Affirmed.

See, also, 6 Ga. App. 774, 65 S. E. 963.

Austin Branch, for plaintiff in error. Jas. O. C. Black, Jr., Sol., and John M. Graham, for the State.

RUSSELL, J. Judgment affirmed.

(8 Ga. App. 78)

ASHLEY v. REYNOLDS. (No. 2,431.)

(Court of Appeals of Georgia. July 19, 1910.)

*(Syllabus by the Court.)***JUDGMENT (§ 151*)—DEFAULT—VACATION—PROCEDURE.**

An affidavit of illegality was filed to the levy of an execution, and the case was duly returned to the court from which the execution issued. When the case was called in its order for trial, the plaintiff in execution and his attorney were voluntarily absent without leave. The affiant made no motion to dismiss the levy, but asked to submit the evidence in support of the illegality to the jury; he having made a timely demand for a trial by a jury. The court allowed him to do so, and at the conclusion of the evidence directed a verdict sustaining the illegality. Subsequently, during the same term of the court, the attorney for the plaintiff in execution made a written motion to have the verdict and judgment so rendered vacated and set aside, and the trial judge, without notice or service of this motion, passed an order setting aside the verdict and judgment. *Held*, that this was error. If for any reason the judgment rendered on the verdict sustaining the illegality was erroneous, it could have been set aside and vacated only on a regular motion for a new trial, filed and served, and heard by the trial judge. Irrespective of the merits of the illegality, the verdict sustaining it was final and conclusive, until set aside by legal motion for a new trial. The judge was not authorized summarily to set the verdict aside and vacate the judgment duly entered thereon.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 296, 306; Dec. Dig. § 151.*]

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action between J. W. Ashley and R. O. Reynolds. From the judgment, Ashley brings error. Reversed.

Sharp & Sharp, Hugh Reed, and W. M. Henry, for plaintiff in error. M. B. Eubanks, for defendant in error.

HILL, C. J. Judgment reversed.

(8 Ga. App. 78)

HALEY v. VANDIVER et al. (No. 2,418.)

(Court of Appeals of Georgia. July 19, 1910.)

*(Syllabus by the Court.)***BILLS AND NOTES (§ 378*)—ACTIONS—PLEADING.**

This was a suit in a justice's court on a promissory note, against the maker, by the holder, who was not the payee. The defendant pleaded failure of consideration, and by an amendment to the plea set up that the note had been "materially changed and altered, in that the words 'or bearer' had been inserted in said note since the making thereof, and without the consent or authority of defendant." On motion of the plaintiff this plea as amended was stricken, and judgment entered for the plaintiff. On certiorari this action of the justice's court was sustained by the judge of the superior court, and the defendant excepted. *Held*, the plea as amended set up a good defense. The note when made was not negotiable. The alteration alleged made it apparently negotiable or transferable by delivery. If this note as executed was not negotiable, the rule as to bona

fide purchasers before maturity and without notice did not apply to the defense. If the note, when made, was payable to the named payee or bearer, title passed by delivery, and the maker could not set up the defense of failure of consideration as against the bona fide holder. The alteration, therefore, was material, and, if made as alleged in the amended plea, the negotiability of the note was a forgery, and in effect the plea amounted to a plea of non est factum. The plea as amended was sworn to, and, as it set out a good defense, the judge of the superior court erred in not sustaining the certiorari and remanding the case for another trial.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 988; Dec. Dig. § 378.*]

Error from Superior Court, Franklin County; C. H. Brand, Judge.

Action by S. E. Vandiver and others, for use, etc., against J. S. Haley. Judgment for plaintiffs, and defendant brings error. Reversed.

Adams & Brown, for plaintiff in error. Geo. L. Goode and Jesse M. Wood, for defendants in error.

HILL, C. J. Judgment reversed.

(8 Ga. App. 91)

TISON et al. v. SOUTH GEORGIA RY. CO.

(No. 2,649.)

(Court of Appeals of Georgia. July 19, 1910.)

*(Syllabus by the Court.)***1. COURTS (§ 188*)—CITY COURTS—JURISDICTION—WARRANTS TO EJECT INTRUDERS.**

The city court of Quitman has jurisdiction to try warrants to eject intruders. Acts 1904, p. 188; McDonald v. Vaughn, 130 Ga. 398, 60 S. E. 1060. A warrant to eject an intruder is similar in nature to a warrant brought to dispossess a tenant holding over, and does not involve title to the land, for the reason that possession is the only subject of controversy, and the award of possession the only result of the litigation. Harper v. Tomblin, 127 Ga. 390, 56 S. E. 433.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 188.*]

2. EVIDENCE (§ 208*)—ADMISSIONS—PLEADINGS—ADMISSIBILITY IN SUBSEQUENT PROCEEDINGS.

There was no error in admitting in evidence the admissions of the party under whom the defendant claimed possession, as contained in her petition filed in another court, even though the petition was not verified. Lamar v. Pearre, 90 Ga. 377 (1), 17 S. E. 92.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 714, 716; Dec. Dig. § 208.*]

3. ADVERSE POSSESSION (§ 100*)—EXTENT.

Possession under a duly recorded deed will be construed to extend to all the contiguous property embraced therein. Civ. Code 1895, § 3587. Consequently there was no error in allowing a witness who was shown to have been for a period exceeding seven years in possession of the entire lot, including the property of which the defendant was in possession, to testify to the fact of his possession and the nature of that possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 547, 575-580; Dec. Dig. § 100.*]

4. LANDLORD AND TENANT (§ 25*)—LEASE—ATTESTING WITNESSES—ATTORNEY AT LAW.

There was no error in admitting in evidence a lease attested by an attorney of one of the parties. An attorney at law, who has no financial interest in the subject-matter, is not disqualified or incompetent to attest as a subscribing witness a paper beneficial to his client. *Austin v. Southern Home B. & L. Association*, 122 Ga. 439 (6), 50 S. E. 382.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 71; Dec. Dig. § 25.*]

5. FORCIBLE ENTRY AND DETAINER (§ 9*)—RECOVERY AGAINST MERE INTRUDER—PRIOR POSSESSION.

Recovery from a mere intruder can be had upon prior possession alone. *McKay v. Kendrick*, 44 Ga. 608 (3). In view of the evidence of the prior possession of the plaintiff, the judgment was authorized, if not demanded, and there was no error in refusing a new trial.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. § 39; Dec. Dig. § 9.*]

Error from City Court of Quitman; W. H. Lane, Jr., Judge pro hac.

Action by the South Georgia Railway Company against A. J. Tison and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Grover C. Edmondson, for plaintiffs in error. Branch & Snow, for defendant in error.

RUSSELL, J. Judgment affirmed.

(8 Ga. App. 98)

KENNEDY v. MAYOR, ETC., OF CITY OF SAVANNAH. (No. 2,076.)

(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 741*)—CLAIMS FOR DAMAGES—"NOTICE."

Only such substantial compliance with the provisions of the act of 1899 (Acts 1899, p. 74), requiring notice to be given to municipal corporations of claims for damages against them, is necessary as will enable the municipality to fully investigate the claim, and to determine whether it prefers to adjust the claim without suit, or to contest its validity in the courts.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1562; Dec. Dig. § 741.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4839-4844; vol. 8, p. 7733.]

2. MUNICIPAL CORPORATIONS (§ 741*)—CLAIMS FOR DAMAGES—"NOTICE."

The requirement that the notice shall state the negligence which caused the damage was sufficiently complied with in this case, and it was error to nonsuit the plaintiff upon the ground that the statement of the cause of the injury was not sufficiently specific. One who claims damages against a municipality is not required to do more than to state definitely and specifically all the facts upon which he bases his claim. The form of the notice is not amenable to the strict rules of pleading. It is intended only to state such facts as will enable the municipality to promptly investigate for itself the merits of the claim.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1562; Dec. Dig. § 741.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by R. F. Kennedy against the Mayor, etc., of the City of Savannah. Judgment of nonsuit, and plaintiff brings error. Reversed.

Osborne Lawrens and E. H. Abrahams, for plaintiff in error. Samuel B. Adams, for defendant in error.

PER CURIAM. Judgment reversed.

(8 Ga. App. 114)

SHEPHERD v. STATE. (No. 2,563.)

(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 67*)—CONTRACT OF EMPLOYMENT—FRAUDULENT INTENT.

Intent to defraud is the paramount, controlling, and ever-essential element which determines the guilt of one accused of a violation of the labor contract law of 1903 (Acts 1903, p. 90). It is the duty of the court, even in the absence of a written request, to instruct the jury that, in order to authorize the conviction of one accused of a violation of this act, the intention to cheat and swindle the prosecutor must have existed on the part of the defendant at the time the money was advanced. Failure to so charge the jury is reversible error. *Mulkey v. State*, 1 Ga. App. 521 (1), 57 S. E. 1022.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 75; Dec. Dig. § 67.*]

2. MASTER AND SERVANT (§ 67*)—CONTRACT OF EMPLOYMENT—FRAUDULENT INTENT.

The present intent to defraud cannot be asserted as to a payment made without the consent of the employee, nor as to an advancement made without reference to the contract.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 67.*]

Error from City Court of Ashburn; R. L. Tipton, Judge.

Tom Shepherd was convicted of violating the labor contract law, and he brings error. Reversed.

John B. Hutcheson, for plaintiff in error. J. A. Comer, Sol., for the State.

RUSSELL, J. The defendant was convicted in the lower court of a violation of the labor contract law of 1903 (Acts 1903, p. 90), and he excepts to the judgment overruling the motion for a new trial.

In addition to the general grounds of the motion for a new trial, the defendant assigns error upon the failure of the court to specifically instruct the jury that they must be satisfied from the evidence that the intention to cheat and swindle the prosecutor existed on the part of the defendant at the time the money or other things of value were advanced, before they would be authorized to convict. The presence of the intent to defraud at the time the advances are procured, as was pointed out in *Patterson v. State*, 1 Ga. App. 782, 58 S. E. 284, is the only thing which prevents the punishment for violation of the act of 1903 from being mere imprison-

ment for debt, and therefore violative of the Constitution; and in *Mulkey v. State*, 1 Ga. App. 521, 57 S. E. 1022, we expressly held that it is the duty of the court to instruct the jury, even in the absence of a written request, that, in order to authorize a conviction, the intention to cheat and swindle the prosecutor must have existed on the part of the defendant at the time the money was advanced. Upon a review of the charge, we find that this principle, while perhaps hinted at, was not clearly presented in the charge of the court, and we are therefore of the opinion that the defendant should have another trial.

2. It seems that the accused was advanced 30 cents worth of meal, 50 cents worth of meat, 5 cents worth of salt, 5 cents worth of tobacco, and 10 cents worth of rice. It was also claimed that the prosecutor advanced him \$27.25 in money. As to \$20 of this sum, it is very apparent that it was not made with any reference to the contract. The prosecutor testified that he "found that another fellow had credited him for \$20, and he paid him out—that this \$20 was paid after the trade was made." Explanatory of this testimony, Mr. Wells testified that on Monday, following the Friday night when the trade was made between the prosecutor and the defendant, a Mr. Gardner, from Worth county, came and said he was going to have the defendant arrested. Wells testified that, rather than have Shepherd arrested, he said to Shepherd that he would pay the money for him, and he asked the defendant, if Fletcher (the prosecutor) did not pay it, if he would work it out with him (Wells). The defendant agreed, if Wells would advance the money to pay Gardner, that he would work it out with Wells, and a contract to that effect was drawn up. When Fletcher came up, he asked the defendant if he would work it out, and, upon his replying that he would, Fletcher paid Wells the \$20 which the latter had advanced at the defendant's request.

It is apparent, from this testimony in regard to the \$20, that it was originally advanced by Wells, and not by Fletcher; that the defendant had already bound himself to Wells to work it out in some manner and for some period of time not disclosed (because the contract between Wells and the defendant is not in evidence); and it appears, from the inquiry of the prosecutor as to the defendant's working it out, that this advance merely affords the basis of another and different contract from the one originally made. However this may be, as the attention of the jury was not called specifically to the fact that there must be an intention to defraud the party, who is shown to have sustained loss and damage at the time of the advancement, a new trial, regardless of other matters, must result.

Judgment reversed.

(8 Ga. App. 117)

SPURGEON v. STATE (No. 2,724.)

(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

1. REVIEW ON APPEAL.

The evidence authorized the defendant's conviction of voluntary manslaughter. Indeed, the evidence seems to preponderate in favor of this theory of the case.

2. HOMICIDE (§ 340*)—WRIT OF ERROR—HARMLESS ERROR—INSTRUCTIONS.

There was no material error, if error at all, in the judge's telling the jury that there are two kinds of manslaughter, voluntary and involuntary, though there was no theory of the evidence indicating involuntary manslaughter. The judge did not submit any issue as to involuntary manslaughter to the jury, and they did not render any verdict as to that offense.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 340.*]

3. HOMICIDE (§ 300*)—INSTRUCTIONS—CHARACTER OF PARTIES.

The court did not err in charging the jury as follows: "The character of the deceased for violence, and the character of the defendant for peaceableness, if the evidence discloses such, you will consider along with the other evidence in the case in arriving at your verdict." The language was not erroneous of itself, and was sufficiently complete, in the absence of a request for further instructions on the subject.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 300.*]

4. HOMICIDE (§ 295*)—CRIMINAL LAW (§ 823*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

The court did not err in charging the jury: "After the difficulty in the supply room, if they had a difficulty and fight in there, had ceased, if it should appear, from the evidence, Haney [the deceased] declined any further struggle, and started off about his business, then the evidence as far as relates to that difficulty in the supply room would be immaterial, unless you should believe that the difficulty in there generated in the mind of the defendant in this case that sudden, violent, impulse of passion supposed to be irresistible, and that he acted under the influence of that passion, and pursued Haney with his knife, assaulted him, and killed him; and if you should believe the defendant did that, Haney having declined any further struggle with him, you should be authorized to find the defendant guilty of voluntary manslaughter;" the instruction being pertinent to one theory of the evidence, and the court having fully instructed the jury as to the law to govern their deliberations in considering other theories which might also be deduced from the evidence.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 295; * Criminal Law, Dec. Dig. § 823.*]

5. EXCEPTIONS WITHOUT MERIT.

The other exceptions are without merit.

Error from Superior Court, Floyd County; John W. Maddox, Judge.

W. D. Spurgeon was convicted of crime, and he brings error. Affirmed.

Sharp & Sharp and F. W. Copeland, for plaintiff in error. John W. Bale, Sol. Gen., for the State.

POWELL, J. Judgment affirmed.

(8 Ga. App. 101)

GUTHRIE v. HENDLEY. (No. 2,371.)
(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 132*)—MOTION—APPROVAL OF BRIEF OF EVIDENCE.

A motion for a new trial is not complete before the brief of evidence has been approved. Where the court in its order specifically limits the time within which the brief of evidence must be presented, and no brief is presented within that time, it is not error to dismiss this incomplete and defective motion for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 273-275; Dec. Dig. § 132.*]

2. NEW TRIAL (§ 132*)—PROCEEDINGS TO PROCURE—DUTY TO FURNISH BRIEF OF EVIDENCE.

A movant for a new trial is not confined to the record prepared by the stenographer, or dependent upon it for the preparation of the brief of evidence necessary to complete his motion, and the fact that the stenographer may have failed to make a copy of the testimony submitted at the trial, when offered as an excuse for counsel's nonperformance of his duty to prepare a brief of evidence, is entitled to no more value than the court sees proper to give it under the circumstances. The duty of preparing the brief of evidence is upon the movant, and is not dependent upon whether a stenographer was or was not engaged to take the testimony in the case. Where, by an order passed in term time, the hearing of the motion for a new trial was fixed for a day certain, and the time granted for the preparation and presentation of the brief of evidence necessary to complete the motion was expressly limited to that day, and no brief of evidence was prepared according to the terms of the order or within the time allowed therein, it was especially not error at a later day to dismiss this motion for a new trial, instead of granting a continuance, when it was admitted that the brief of evidence had not even then been prepared. This is true, although the stenographer had not copied the notes of the testimony, and the judge who presided in the trial of the case had died. The fact that there was no judge qualified to hear the motion or to extend the time for hearing upon the day on or before which a brief of evidence was required to be presented afforded no excuse for the movant's negligence and non-compliance with the terms of the original order of the court.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 273-275; Dec. Dig. § 132.*]

Error from City Court of Nashville; R. Eve, Judge.

Action between S. F. Guthrie and J. H. Hendley. From the judgment, Guthrie brings error. Affirmed.

J. P. Knight, for plaintiff in error. Hendricks & Christian, for defendant in error.

RUSSELL, J. We think that the court properly dismissed the motion for a new trial in this case. Counsel for plaintiff in error relies upon the decision of this court in the case of *James v. Flannery Co.*, 6 Ga. App. 811, 66 S. E. 153, as sustaining his contention that the court erred in dismissing the motion. It is easily to be seen, from a comparison of the orders granted by the court in the two cases, that nothing ruled in the *Flannery*

Case is in conflict with what we now hold. In fact our decision in both cases is based upon the same principle, to wit, that the order of the judge which extends the time for perfecting a motion for a new trial must control and fix the right of the parties to the motion in that respect. In the *Flannery Case* we held that, as the judge provided that the movant should have until the hearing, "when-ever it may be," to prepare and present for approval a brief of the evidence, and as the motion was regularly continued, with the rights of the movant preserved, the movant had until the hearing to present his brief of evidence, because the order granted in term time expressly said so. In the present case the trial judge did not use any such language in allowing the movant an extension of time in which to complete the motion by presenting for approval a brief of the evidence. After setting the motion to be heard on the 9th day of August, 1909, he ordered "that the movant have until the hearing as set out to prepare and present for approval a brief of the evidence in said case, and the presiding judge may enter his approval thereon at any time, either in term or vacation." It is apparent, from the two orders, that the facts in this case and in the *Flannery Case* are dissimilar.

1. It is well settled that, strictly speaking, a motion for a new trial is not pending before the court until a brief of the evidence has been prepared and presented to the judge, and approved by him. *Tallaferro v. Columbus Railway Company*, 130 Ga. 570, 61 S. E. 228, and cit.; *Baker v. Johnson & Harris*, 99 Ga. 374, 27 S. E. 706; *Pinnebad v. Pinnebad*, 129 Ga. 267, 58 S. E. 879. Where the court in its order specifically limits the time within which the brief of evidence must be presented, and no brief is presented within that time, it is not error to dismiss this incomplete and defective motion for a new trial. In the present case, as we construe the order of Judge Peebles, the movant had until the 9th day of August to complete his motion by making out a brief of testimony and presenting it to the judge. He might present this brief either in term time or vacation, and have it approved by the judge and file it. According to the terms of the order, when he did this, if the motion now completed was not heard, there was a provision in the order, as well as of law, by which it might stand continued from term to term. It is clear, however, that unless the judge in term time had granted an order extending indefinitely the time within which the brief of the evidence should be presented as a necessary part of the motion, the order of the judge as written would have to be complied with by the movant at his peril.

2. It appears from the recitals in the bill of exceptions that this motion for a new trial came on for a hearing on December 3,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

1909, before his honor, Judge Eve, judge of the city court of Tifton, presiding in the city court of Nashville. Counsel for the movant moved a continuance of the case upon the following grounds: "(1) That Judge H. B. Peeples, before whom the case was tried on June 19, 1909, was dead, having died on July 7, 1909. (2) That W. D. Bule, who was sole counsel for the movant at the trial, was qualified and sworn in as judge of the city court of Nashville to fill the unexpired term of Judge Peeples on August 4, 1909. (3) That at the time this motion for a new trial was originally set to be heard on the 9th day of August, 1909, in term time at Nashville, Ga., at 10 o'clock a. m., there was no qualified judge in the county of Berrien to hear said motion, nor from whom an order could be procured extending the time for hearing. (4) That the stenographer who reported the case had not furnished counsel for movant with a record of the evidence, and it was therefore impossible for him to prepare a brief of the evidence." The facts contained in these grounds of the motion for a continuance were stated by counsel to be true and were not contested. The stenographer stated that he was not requested to write out the evidence until four or five months after the trial, and that owing to the fact of Judge Peeples' death and the election of Judge Bule, the original counsel representing Guthrie, and his own illness, with consequent absence from home, and to the fact that he had mislaid a part of the record, and on account of the extreme length of the record, it was impossible for him to furnish counsel for the movant with the record at that time, but that he would have it prepared and ready within a day or two. As further reason for a continuance counsel for the movant stated that he was not employed to represent the movant in the motion for a new trial until the October term, 1909.

By the consent of the movant's counsel the decision of the court upon the motion for a continuance was suspended, and counsel for the respondent (defendant in error here) moved to dismiss the motion, stating that, if the motion to dismiss was not well taken, counsel was willing to agree to a continuance. The written motion to dismiss, filed by counsel for defendant in error, was based upon the following grounds: "(a) Because no brief of the evidence was filed during the term of the court at which the case was tried, or within 30 days after the trial or the filing of the motion for a new trial. (b) The motion for new trial was presented for approval, and was approved and filed, on June 9, 1909, and the hearing set for August 9, 1909; the movant having until that day only to present for approval the brief of the evidence. No brief was presented on the date the motion was set to come on for hearing, nor was an order taken allowing further time in which

to prepare and present for approval a brief of the evidence. (c) No brief of the evidence was presented to the court for approval on December 3, 1909, and no order was taken on August 9, 1909, or thereafter, continuing the hearing and allowing the movant further time in which to prepare and present for approval a brief of the evidence. Defendant has waived no right, and moves to dismiss the motion for new trial for the want of a properly approved brief of the evidence, and insists upon dismissing the motion for the want of the same. (d) The motion for new trial was filed before the judgment in the case was rendered and signed, and is therefore prematurely filed."

Without considering the first and last grounds, it is sufficient to say that either the second or the third ground was sufficient to authorize the dismissal of the motion for a new trial. The movant was required, by the terms of the order granting an extension of time, to present his brief of evidence for approval on or before August 9, 1909, and he had not done so; but even if, by any construction, it could be held that the terms of the order tended to grant an extension (such as was expressly given in the Flannery Case) until the hearing, the movant did not then have any brief of evidence and was asking for time in which to prepare one. None of the facts stated upon the motion for a continuance afforded any just excuse for the movant's failure to prepare a brief of evidence. Three weeks passed before the judge who tried the case died. There was nearly a month thereafter before the movant's original counsel became judge of the city court, and five days even after Judge Bule's election still remained in which the movant might have had a brief of evidence prepared by another attorney, and yet he did not employ counsel to take the place of Judge Bule until two months after that time. There is nothing in the insistence that by reason of Judge Bule's disqualification a qualified judge could not be obtained. Under the provisions of Civ. Code, §§ 4327-4329, even if a judge of another city court could not be obtained, nor any judge of the superior court induced to come, a judge pro hac vice could have been selected with the consent of the respondent, who could have continued the hearing, because it had been set for a day in term time, or who could have approved the brief of evidence (if that had been insisted upon), as well as any other except the deceased judge who had tried the case. If the movant had his brief of evidence prepared, and counsel for the opposite party would not agree with him upon some attorney to act as judge pro hac vice, then it would have been the duty of the clerk to select one. If however, as we stated above, there had been any good reason why the brief of evidence was not presented at the time fixed for that pur-

pose in the original order of the trial judge, the plaintiff in error still has no reason to complain at the dismissal of the motion under the circumstances and upon the showing made before Judge Eve; for nearly six months had then elapsed, and, no matter how the original order might be construed, the case was up for a hearing, and the movant still had no brief of evidence prepared, nor had he made any effort to prepare one for presentation. Consequently the motion for a new trial was so fatally defective that its dismissal was demanded.

It is apparent to us, as it must have been to the judge in the court below, that the attorneys for the movant depended entirely upon the stenographer to prepare the brief of evidence. We therefore think it not inappropriate to make a few remarks upon the subject of counsel's duty with relation to the brief of evidence. In the progress of our modern civilization the stenographer has become an almost indispensable adjunct in the administration of justice; but, as related to counsel, the fact that the stenographer fails to do his duty, or is unavoidably prevented from doing it, is only of such value, when offered as the excuse or reason why counsel has not done his, as the court to whom the excuse is addressed sees proper to attach to it. The nonperformance of a duty by the stenographer would not generally afford any reason why counsel, upon whom is imposed the duty of preparing a brief of evidence in the motion for a new trial, has not discharged this duty. It is, of course, much easier to prune down the record prepared by an official stenographer than to prepare for one's self a brief of the testimony. But in any trial, if the stenographer is the employé of the movant or his counsel, the stenographer's failure to perform his duty would be no excuse for the principal; and if he is not an employé of the movant—for instance, if it is the official stenographer—he owes no duty to the parties litigant other than as directed by the trial judge. Custom in different jurisdictions may vary, limiting or ex-

tending the duty of the official stenographer to furnish copies of the record to the counsel engaged in a case; but in every case the practice is subject to be changed by the presiding judge, and the showing must in every case be addressed to a discretion upon his part, which cannot be controlled by reviewing courts. It was not shown in this case that Judge Peebles had given any direction, general or special, by which the stenographer was required to furnish copies of the record to the counsel for the movant, nor does this appear from his order fixing the date of the hearing. Primarily, counsel for the movant is supposed to prepare his own brief of evidence, and in our opinion the salient points in a case would be more distinctly stated, and more matter wholly immaterial matter would be omitted, if counsel prepared the brief of evidence without regard to the stenographer's notes. We are certain that generally the brief would be briefer, and the briefer the better.

Judgment affirmed.

(8 Ga. App. 106)

DODD v. STATE. (No. 2,447.)

(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

MOTION FOR NEW TRIAL PROPERLY DISMISSED.

The discretion of the trial judge in dismissing the motion for a new trial for failure to file the brief of the evidence within the time provided by his order was not abused. The decision is controlled by the ruling of this court in *Guthrie v. Hendley* (this day decided) 68 S. E. 654.

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Land Dodd was convicted of crime, and he brings error. Affirmed.

Clay & Morris, for plaintiff in error. J. P. Brooke, Sol. Gen., for the State.

RUSSELL, J. Judgment affirmed.

(86 S. C. 571)

NEVILS v. ATLANTIC COAST LINE R. CO.
(Supreme Court of South Carolina. Aug. 15, 1910.)

APPEAL AND ERROR (§ 1078*)—FAILURE TO ARGUE EXCEPTIONS.

Appellant's attorney having filed no argument, exceptions will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Appeal from Common Pleas Circuit Court of Charleston County; G. E. Prince, Judge.

Action by Norris S. Nevils against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff appeals. Dismissed.

Logan & Grace, for appellant. W. Huger Fitzsimmons, for respondent.

HYDRICK, J. This case was submitted on January 2, 1910. By the order of submission, appellant's attorneys were to have 60 days in which to file printed argument and respondent's attorneys 20 days in which to reply. Appellant's attorneys have failed to file any argument.

This court has often ruled that it will not consider an exception which has not been argued. As none of the exceptions in this case have been argued, none of them will be considered.

Appeal dismissed.

(86 S. C. 539)

WYATT v. CELY.

(Supreme Court of South Carolina. Aug. 12, 1910.)

1. EVIDENCE (§ 130*)—RELEVANCY—RES INTER ALIOS ACTA.

In a suit to enjoin the obstruction of an alleged alley, a deed between others, in which the recitations stated that there was no such alley, was inadmissible as *res inter alios acta*, amounting to nothing more than the declarations or admissions of the parties to the deed, and incompetent to show notice to plaintiff that no such alley existed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 403; Dec. Dig. § 180.*]

2. APPEAL AND ERROR (§ 1057*)—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

The exclusion of a deed when offered in evidence to prove certain facts recited therein, if erroneous, was cured by the subsequent admission of testimony to show the same facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4194; Dec. Dig. § 1057.*]

3. MUNICIPAL CORPORATIONS (§ 697*)—OBSTRUCTION OF ALLEY—EVIDENCE.

Where, in a suit to enjoin the obstruction of an alley, plaintiff claimed that an alley shown on the plat had never been opened because it was obstructed by a house, and it was indisputable that if the house, which had obstructed the alley as laid out, and which had been destroyed by fire, had been rebuilt as it originally stood, there could have been no alley as shown by the plat, the question whether there would have been such an alley, if the

house had been rebuilt where it stood when burned, was properly excluded.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 697.*]

4. EVIDENCE (§ 249*)—ADMISSIONS—PARTNERS.

In an action to enjoin the obstruction of an alley, declarations made by plaintiff's partner who had no interest in plaintiff's lot, with reference to the alley, were inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 965; Dec. Dig. § 249.*]

5. MUNICIPAL CORPORATIONS (§ 698*)—ALLEYS—OBSTRUCTION—DAMAGES.

A private person, in order to recover damages for the obstruction of a public alley, must prove some damage to himself, different both in degree and kind from that suffered by the public by reason of the obstruction.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1506; Dec. Dig. § 698.*]

6. MUNICIPAL CORPORATIONS (§ 648*)—RIGHT OF WAY—PRESCRIPTION.

A right of way by prescription over an uninclosed city lot arises in favor of the public from the continuous use thereof by the public for 20 years, without proof that such use was adverse.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1421; Dec. Dig. § 648.*]

7. APPEAL AND ERROR (§ 216*)—OBJECTIONS NOT RAISED BELOW.

Defendant cannot object on appeal to the form in which an issue was submitted, where no objection to the form was made at the time, and no request made for its submission in any other form.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216; * Trial, Cent. Dig. § 627.]

8. APPEAL AND ERROR (§ 237*)—REVIEW—EVIDENCE—INSUFFICIENCY.

An objection that there was no evidence to sustain either of plaintiff's causes of action relied on cannot be reviewed, where the objection was not first raised by a motion for nonsuit, or for direction of a verdict, as required by circuit court rule No. 77.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1386-1388; Dec. Dig. § 237; * Trial, Cent. Dig. §§ 228-252.]

Appeal from Common Pleas Circuit Court of Greenville County; C. O. Featherstone, Judge.

Action by John G. Wyatt against Alice M. Cely. Judgment for plaintiff, and defendant appeals. Affirmed.

B. A. Morgan, for appellant. Othrair Dean & Cothran, for respondent.

HYDRICK, J. This action was brought to enjoin the obstruction of an alley in which plaintiff claimed an easement on the grounds:

(1) That it was appurtenant to his lot, because it was substituted for another way which had been dedicated to the use of his lot; (2) by prescription in himself and his grantors; (3) by prescription in the public.

The following issue was submitted to a jury: Is the plaintiff entitled to an easement in the land in dispute as claimed in the complaint? To which the jury answered "Yes." Thereupon, a perpetual injunction was issued.

To clearly understand some of the questions presented by the appeal, it will be necessary to have in mind the location and description of the lots affected by this litigation, and the origin and history of the alley. About the year 1876, a lot in the city of Greenville, owned by the heirs of John McKay, was subdivided and sold for partition. It was a parallelogram in shape, fronting 109 feet on Pendleton street, which was on the south, and extending back to Rhett street, on the north. For the purposes of the sale, it was divided into four lots and an alley, and platted accordingly. The alley was eight feet wide and was laid off on the eastern edge of the lot and extended from Pendleton to Rhett street. Three lots were laid off on Pendleton street, each fronting thereon $33\frac{1}{3}$ feet and extending back 100 feet. These were numbered on the plat from west to east 8, 9, and 10; number 10 being next to the alley. The balance of the original lot was numbered 11. There was testimony tending to show that the lots were sold with reference to this plat.

At the time of the sale, there was a house on lot No. 10, which covered nearly the whole width of that lot and extended four feet into the alley. This alley therefore was never opened. The house was subsequently destroyed by fire, being owned at the time by J. A. Speegle. The plaintiff contended that an alley eight feet wide on the west side of lot No. 10 was substituted for the one shown on the plat on the east side of that lot. This substituted alley extends back only 100 feet to the back line of the lots fronting on Pendleton street and there connects with an alley which runs east to River street. The defendant now owns lot No. 10, and was proceeding to build thereon and obstruct the alley, when this action was brought.

The defendant offered in evidence a deed, dated May 10, 1883, from Frank Hammond (who owned the property east of the McKay property) to J. A. Speegle, in which he recites that he had that day sold a lot to Speegle, and grants him a way from said lot to Rhett street, provided J. M. McGhee, who was then the owner of lot No. 10, would not consent that an alley be opened through said lot to Pendleton street. The deed was excluded on the ground that it was *res inter alios acta*, and amounted to nothing more than the declarations or admissions of Hammond and Speegle that there was no alley over lot No. 10 at that time. The court further held that the record of that deed was not competent as evidence to show notice to plaintiff that no alley existed at that time. The deed was properly excluded for the reasons stated. We do not see how the record of this deed could be notice to plaintiff of the declarations therein contained. The title to this lot was not derived through that deed and could in no wise be affected by the recitals therein. But Mr. Hammond, the maker

of the deed, did testify, without objection, to everything that could have been inferred from the recitals of the deed. He said he went to McGhee, and asked him to put an alley through there; that he at first consented, but afterwards declined; that he then offered to pay him to do so, and he declined. The same, in substance was testified to by W. H. Charles, a witness for plaintiff, on cross-examination by defendant. So that, even if the deed had been competent, its exclusion would not, under the circumstances, have been reversible error.

Defendant asked R. A. Means this question: "Would there have been an alleyway leading from Pendleton street to the back of this lot (lot 10), if Mr. Speegle had rebuilt his house where it stood when it was burned?" The answer was excluded. We see no error in this ruling, because it was admitted on all sides that this house covered nearly the entire width of lot No. 10, and extended four feet into the alley originally laid off. Therefore, it followed as an indisputable fact that, if it had been rebuilt as it originally stood, there could have been no alley on lot No. 10. The contention of the plaintiff was not that the alley shown on the plat was ever opened, but that, inferentially, because it could not be opened on account of the house, from the conduct of the parties in interest afterwards, an alley on the western side of that lot was substituted for the one originally laid off.

Defendant offered to prove by W. H. Cely certain declarations made to him by S. M. Wyatt, plaintiff's partner in the livery business, conducted on plaintiff's lot, with regard to the alley and an offer to buy it. Clearly these declarations were incompetent. The partner had no interest in the lot, and his declarations or implied admissions were not competent to bind the owner of the lot.

Error is imputed to the court in allowing plaintiff to testify to consequential damages to the livery business of the partnership, conducted on this lot, by the obstruction of the alley. As the jury found no damages, and as they were explicitly instructed that to succeed in this action on the ground that the alley was a public way, plaintiff must prove some damage to himself different not only in degree but in kind from that suffered by the public by reason of the obstruction thereof. The exceptions raising this point appear to be without force. The instruction as to the kind of damages which plaintiff was bound to prove to succeed on the ground that the alley was a public way was clearly in accord with the law as declared by this court. *Gray v. Ry.*, 81 S. C. 370, 62 S. E. 442, and cases cited.

The next assignment of error is in charging the jury that a right of way by prescription over an uninclosed city lot arises in favor of the public from the continuous use thereof by the public for 20 years, and that it need not be shown also that such use

was adverse. That this was a correct statement of the law, see *State v. Rodman*, 86 S. C. 154, 68 S. E. 343, and cases cited.

Appellant complains of the form of the issue submitted to the jury, contending that it is impossible to tell from the finding on what ground the easement was established. It does not appear that appellant made any objection to the form in which the issue was submitted, or requested its submission in any other form. Therefore she cannot now complain. *Williams v. Haile Gold Mining Co.*, 85 S. C. 1, 66 S. E. 117, 1057.

The last exception charges error in refusing a motion for a new trial, made upon the ground that there was no evidence to sustain either of the causes of action. It does not appear that any motion for nonsuit or for the direction of the verdict was made upon that ground. Therefore, under rule 77 of the circuit court, which requires this ground of objection to be raised first by motion for nonsuit, or for the direction of a verdict, the point is not properly before this court. But waiving the objection, we find that there was evidence tending to establish each of the causes of action.

Judgment affirmed.

(86 S. C. 445)

REMBERT v. EVANS.

(Supreme Court of South Carolina. July 28, 1910.)

1. DEEDS (§ 105*)—CONSTRUCTION—GRANTEES—"HEIRS OF THE BODY."

A trust deed in consideration of the grantor's affection for his daughters M. F. and E. M. conveyed property to their husbands, in trust for the daughters' sole use and benefit and of children now born of the body of the said E. M., and the children thereafter born of the bodies of the said M. F. and E. M., without being subject to their husbands' debts. In case of the death of M. F. without children, the deed gave her husband a life estate in one-half of the profits, which, after his death should revert to E. M. and "the heirs born of her body," and also gave a life estate to the husband of E. M. upon his wife's death, which should go on his death to his children on the body of E. M. *Held*, that the deed, construed as a whole, showed an intention by the grantor to provide for his daughters and their children, and the words quoted "heirs born of her body" meant the children of E. M., who took a fee upon the death of M. F.; it being permissible to construe the words "heirs of the body" to mean "children" when the context clearly shows such meaning was intended.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 417; Dec. Dig. § 105.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3267-3271.]

2. DEEDS (§ 133*)—CONTINGENT ESTATES.

Upon the death of M. F. the interest of the children of E. M. was contingent, since, if she died leaving children, the children of E. M. would take no interest in the land held in trust for M. F.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 368-371; Dec. Dig. § 133.*]

3. REMAINDERS (§ 14*)—WILLS (§ 7*)—CONTINGENT REMAINDERS.

Contingent remainders may be transmitted by devise or assignment.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 10; Dec. Dig. § 14;* Wills, Cent. Dig. § 11; Dec. Dig. § 7.*]

Appeal from Common Pleas Circuit Court of Richland County; J. W. De Vore, Judge.

Action by George R. Rembert against W. Boyd Evans. From a judgment for plaintiff, defendant appeals. Affirmed.

E. J. Best, for appellant. Washington Clark and Shand & Shand, for respondent.

WOODS, J. In this action for specific performance, the defendant admits his contract to purchase the land described in the complaint, but denies that the plaintiff can make a good title. The issue thus made depends upon the construction of a deed of trust made by Jesse De Bruhl to Samuel Fair and J. Foster Marshall, on January 7, 1853. The consideration of the deed was love and affection of the grantor for his daughters, Mary D. Fair, wife of Samuel Fair, and Elizabeth A. Marshall, wife of J. Foster Marshall. The trust was thus declared in the granting clause immediately preceding the description of the land and negroes conveyed: "In trust and for the use, behoof and sole benefit of the said Mary D. Fair and Elizabeth A. Marshall and the children now born of the body of the said Elizabeth A. Marshall and the children hereafter to be born of the bodies of the said Mary D. Fair and the said Elizabeth A. Marshall and not in any wise to be subject to the debts, liabilities or contracts of their present husbands or any other future husbands." After the usual clause of warranty, the trust is thus further set out: "And it is further agreed by these presents that the above-mentioned real and personal estate is held by the trustees aforesaid as joint tenants in common for the sole benefit, use and behoof of the said Mary D. Fair and the children to be born of her body, and for the sole benefit, use and behoof of the said Elizabeth A. Marshall and her children now born or to be hereafter born of her body. And it is expressly understood by these presents, that one-half of the net profits after paying all the debts and contracts made in behalf of the said plantation arising from the said plantation and negroes shall be divided equally between the said trustees for the use, benefit and behoof of their respective wives, and that in case the said Mary D. Fair shall die without child or children, then the profits of said land and negroes above given in trust for her shall be held and enjoyed by her husband, Samuel Fair, for and during the term of his natural life, not in any wise subject to his present debts, liabilities or contracts, or any other future debts, liabilities or contracts, and aft-

er his death to revert to the said *Elizabeth A. Marshall and the heirs born of her body*. And it is further agreed by these presents that in case of the death of the said *Elizabeth A. Marshall* the portion of said land and negroes given in trust for her and children shall be held and enjoyed by her husband, J. Foster, for and during the term of his natural life, not in any wise to be subject to his present debts, liabilities or contracts, or any other future debts, liabilities or contracts and after his death to go to *his children begotten on the body of his present wife, Elizabeth A. Marshall*. And it further agreed by these presents that the trustees aforesaid are hereby empowered to grant, bargain and sell the above-described tract of land or any part of the above-named negroes and their future increase, whenever they may deem it advisable for the use, benefit and behoof of the said Mary D. Fair and the said *Elizabeth A. Marshall*. And it is further agreed by these presents that the above-named trustees shall have power and they are hereby authorized whenever they may deem it advisable to bargain, sell and convey to the other, one-half of the above-mentioned real and personal estate, and that the proceeds of such sale shall be invested in any other real or personal property for the sole use and benefit of the cestui que trust for whose benefit such sale and transfer was made. And it is further agreed by these presents that the above-mentioned plantation and negroes and their future increase shall be under the exclusive management and control of the said J. Foster Marshall to make all necessary contracts appertaining to the same and to be allowed a reasonable compensation for the trouble and time he may expend in aid about the same, and that he be required to make annually a return to the said Samuel Fair for his receipts and expenditures and to divide with the said Samuel Fair one-half of the net profits arising from said plantation. And the said Samuel Fair and J. Foster Marshall, trustees as aforesaid, doth on their several parts accept the trust aforesaid and covenant and agree to and with the said Jesse De Bruhl and they hereby bind their heirs, executors and administrators to execute and carry out the above-mentioned trusts, according to the true intent and meaning of these presents."

By a declaration of trust dated 16th of June, 1863, Samuel Fair, one of the trustees, undertook to substitute for trust funds used by him certain lots in the city of Columbia. These are the lots which the plaintiff has contracted to convey to the defendant. In *Brazel v. Fair*, 28 S. C. 370, 2 S. E. 293, it is held that the substitution was attempted without authority, but that the lots became a part of the trust property by election of the cestui que trust to affirm the substitution.

An agreed statement of facts appears in

the record, setting forth in detail all the facts with respect to the family history and the conveyance of the land which, in any view, could possibly bear on the case. As we see the case, only a very short summary of the facts is necessary. Colonel J. Foster Marshall was killed at Second Manassas in 1862; and *Elizabeth A. Marshall* died in 1868, survived by six children, Samuel F., William J., J. Foster, J. Q.; *Eliza D.*, and Mary F. Marshall. Samuel Fair and Mary D. Fair died childless, the former in 1870, and the latter in 1891. At the death of Mrs. Fair, all the children of Mrs. Marshall were living except *Eliza*, who died unmarried, and Mary F., who married George Wilson and died childless. J. Q. Marshall by purchase and devise acquired all the interests of his brothers and sisters and of George W. Wilson, the husband of his deceased sister, *Eliza D. Wilson*, in the land. J. Q. Marshall contracted to sell the land to the Phoenix Investment Company; but he died before making the conveyance, leaving a will by which he devised all of his property to his wife, Jane Brooks Marshall. Afterwards Mrs. Marshall, as sole devisee, made the conveyance under which plaintiff claims. The main question, then, is whether J. Q. Marshall had acquired a good fee-simple title to the land.

From the foregoing statement it will be seen that the land here involved fell under the clause of the trust deed which provided that upon the death of Mary D. Fair, childless, the share of the land and negroes assigned to her was to be enjoyed by her husband, Samuel Fair, for his life, "and after his death to revert to the said *Elizabeth A. Marshall and the heirs born of her body*." If this clause created a fee conditional in Mrs. Marshall, as the defendant contends, the issue as to title would be quite serious for the reason that at the period of distribution, the death of Mrs. Fair in 1891, some of the children of Mrs. Marshall had children who would answer to the description of heirs of her body; and these grandchildren of Mrs. Marshall did not convey to J. Q. Marshall. The circuit court held, however, that the words "heirs born of her body" meant the children of Mrs. Marshall; that they took in fee simple; and that in acquiring the interests of all who could claim under them J. Q. Marshall acquired a complete fee-simple title. We think this is the correct construction. The deed taken as a whole shows by the words we have italicized that the grantor meant to provide for his daughters and their children. The first general and comprehensive expression of the scope of the trust is that it is to be for the benefit of his daughters and their children. Then when in the deed the terms and conditions of the trust are to be more specifically stated, the same purpose and scheme is expressed. The deed is inartificial and indicates on its face that

the grantor was not attempting to use words in their technical sense. Having several times expressed that his purpose was to provide for children born of the bodies of his daughters, it is not natural to suppose that there was an intention to express in this clause by the phrase "heirs born of her body" a different intention. The words "heirs of the body" may be construed to mean children when the context clearly shows that was the meaning intended. *Duckett v. Butler*, 67 S. C. 130, 45 S. E. 137, and authorities cited.

Here there was no intervening life estate, but a direct grant to Mrs. Marshall "and the heirs born of her body" and the words "heirs of her body" have often been construed to mean children, and not heirs of the body in indefinite succession. *Reeves v. Cook*, 71 S. C. 275, 51 S. E. 93; *Holeman v. Fort*, 3 Stroh. Eq. 66, 51 Am. Dec. 665; *Bailey v. Patterson*, 3 Rich. Eq. 156; *Lott v. Thompson*, 36 S. C. 38, 15 S. E. 278; *Shaw v. Robinson*, 42 S. C. 342, 20 S. E. 161. When the expression is viewed in the light of the general and specific scheme of the trust as clearly indicated in the entire deed, there is no room to doubt that the words "heirs born of her body" should be construed to mean children.

Had the conveyance been direct to Mrs. Marshall and her children, they would have taken nothing more than a life estate because there was no limitation to Mrs. Marshall and her children and their heirs. But the conveyance was to a trustee, and the statute did not execute the use because the trustees were vested with the power to sell the land at their discretion, and this made it necessary for them to hold the fee. *Blount v. Walker*, 31 S. C. 13, 9 S. E. 804. Upon the death of Mrs. Fair the trustee could have nothing further to do, and by devolution the legal title of the children of Mrs. Marshall in fee would become complete. *Bratton v. Massey*, 15 S. C. 277; *Foster v. Glover*, 46 S. C. 522, 24 S. E. 370.

It is true that until the death of Mrs. Fair the interest of the children of Mrs. Marshall was contingent, for if Mrs. Fair had died leaving children the children of Mrs. Marshall would have taken no interest in this land. Nevertheless these contingent remainders were transmissible by devise or assignment. *Allston v. Bank*, 2 Hill, Eq. 235; *Roundtree v. Roundtree*, 26 S. C. 450, 2 S. E. 474; *Bank v. Garlington*, 54 S. C. 413, 32 S. E. 513; *Earle v. Maxwell*, 86 S. C. 1, 67 S. E. 962. Therefore it did not affect the validity of the title of J. Q. Marshall that he acquired the interest of his brothers and sisters by devise and conveyance before the death of Mrs. Fair; having acquired all these contingent interests, upon the death of Mrs. Fair the legal title became complete in him.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(88 S. C. 461)

CARR v. MOUZON et al.

(Supreme Court of South Carolina. Aug. 2, 1910.)

1. EJECTMENT (§ 15*)—TITLE FROM COMMON SOURCE—PRIORITY OF DEEDS.

Where both parties claim from the same grantor, the older deed is entitled to priority.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 59-62; Dec. Dig. § 15.*]

2. REMAINDERS (§ 14*)—CONTINGENT REMAINDERS—ASSIGNMENT.

A contingent remainder is assignable.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 10; Dec. Dig. § 14.*]

3. APPEAL AND ERROR (§ 1064*)—INSTRUCTIONS—PREJUDICE.

Where, in an action to recover land, the issue was not whether plaintiff had been in possession for 20 years, but whether the possession for 20 years had been adverse, or was permissive, an instruction that plaintiff show 20 years' adverse possession in M. after conveyance of his interest in 1861, even if erroneous, was not prejudicial to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219-4224; Dec. Dig. § 1064.*]

4. ADVERSE POSSESSION (§ 60*)—PERMISSIVE POSSESSION—PAPER TITLE.

On an issue whether the possession of M., under whom plaintiff claimed, was adverse or permissive, it was proper to charge that permissive possession could not avail against a paper title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 282-314; Dec. Dig. § 60.*]

5. ADVERSE POSSESSION (§ 85*)—ASSERTION OF TITLE—DEED OR MORTGAGE.

The giving of a deed or mortgage by one in possession of land is ordinarily evidence of assertion of title.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 85.*]

6. TRIAL (§ 244*)—INSTRUCTIONS—SINGLING OUT EVIDENCE.

The court did not err in refusing to single out and emphasize a particular portion of the evidence on the subject of adverse possession, in an action to recover land.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. § 244.*]

7. TENANCY IN COMMON (§ 15*)—EXCLUSIVE POSSESSION—OUSTER.

A parol partition between tenants in common, and exclusive possession of one of the cotenants thereunder, is evidence of ouster from which adverse possession of the tenant who holds under such partition may begin against the others and ripen into a title.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. § 15.*]

8. ADVERSE POSSESSION (§ 85*)—PARTITION.

A parol partition between tenants in common and possession thereafter is only evidence of adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 85.*]

9. APPEAL AND ERROR (§ 499*)—RECORD—VERBAL REQUEST TO CHARGE.

A verbal request to charge not shown by the record to have been made cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295-2299; Dec. Dig. § 499.*]

10. ADVERSE POSSESSION (§ 104*)—PRESUMPTION OF GRANT.

Presumption of the acquisition of title by deed or grant arises from adverse possession for 20 years, and cannot arise from permissive possession however long continued.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 595-602; Dec. Dig. § 104.*]

11. ADVERSE POSSESSION (§ 68*)—NATURE OF POSSESSION—STATUTES.

Code Civ. Proc. 1902, § 101, provides that in every action to recover real property, or the possession thereof, the person establishing the legal title shall be presumed to have been in possession thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to be in subordination to the legal title, unless it appears that such premises have been held and possessed adversely to such legal title for 10 years before the commencement of the action. Sections 102-105 require that possession, in order to be available as adverse, shall continue for 10 years under a claim of title. *Held* that, where an occupancy is a mere trespass without claim of title, it cannot ripen into a good title, however long continued.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 387-393; Dec. Dig. § 68.*]

Appeal from Common Pleas Circuit Court of Williamsburg County; T. S. Sease, Judge.

Action by W. H. Carr against S. R. Mouzon and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Lee & Askins, for appellant. Kelly & Hinds, for respondents.

WOODS, J. The appeal is from a judgment in favor of the defendants in an action to recover possession of land. On the 2d day of July, 1860, L. W. Mouzon conveyed by quitclaim deed to his brothers John P. Mouzon, Dunkin K. Mouzon, and Samuel R. Mouzon all his right, title, and interest in two tracts of land in Williamsburg county referred to in the deed as lands "more particularly mentioned in the will of Samuel R. Mouzon, deceased," the father of grantor and grantees. This deed was recorded on May, 27, 1861. A tract of 245 acres, part of the land embraced in this deed, is the subject of controversy in this action. The defendants John P. Mouzon, Dunkin K. Mouzon, the grantees in this deed, and the other defendants, heirs of the grantee, Samuel R. Mouzon, are in possession of the land. The plaintiff claims through L. W. Mouzon by later conveyances as follows: (1) Deed of conveyance from L. W. Mouzon to B. B. Mouzon dated October 10, 1900, covering the tract of 245 acres except a small lot conveyed to a church; (2) mortgage of B. B. Mouzon to A. S. Coker dated October 9, 1907; (3) deed of conveyance from H. O. Britton, clerk, to the plaintiff, dated November 3, 1908, under a judgment of foreclosure under the above-stated mortgage.

If the cause depended on the paper title alone, the plaintiff could have no chance of

recovery, because both parties claim through L. W. Mouzon, and it is not denied that the defendants have the older deed from him. Plaintiff's counsel, it is true, contended that the defendants had not acquired title from L. W. Mouzon because at the time he conveyed in 1860 he had, under the will of his father, only a contingent interest in the land. The will is not in the record, and the court cannot assume that the interest of L. W. Mouzon was contingent; but, even if such an assumption could be allowed, the result would be the same, for it is well settled that a contingent remainder is assignable. *Allston v. Bank*, 2 Hill, Eq. 235; *Roundtree v. Roundtree*, 26 S. C. 450, 2 S. E. 474; *Bank v. Garlington*, 54 S. C. 413, 32 S. E. 513; *Earle v. Maxwell*, 86 S. C. 1, 67 S. E. 962; *Rembert v. Evans*, 68 S. E. 659.

The plaintiff's case, then, depends upon evidence offered by him of adverse possession for a period of 10 years under the statute, or for 20 years from which a reconveyance to L. W. Mouzon from the holders of the title would be presumed. The evidence on both sides was clear to the effect that in 1876, after the execution of the deed of 1861 by which L. W. Mouzon conveyed to his brothers his interest in the lands devised by his father, there was a partition of the lands among all the brothers; that in the partition the tract in dispute was set apart to L. W. Mouzon; and that he remained in possession of it for more than 20 years before he sold to B. B. Mouzon. The practical issue was thus narrowed down to the inquiry whether the possession of L. W. Mouzon was adverse to his grantees who held the legal title, or in subordination to the legal title and merely permissive. On this issue the plaintiff proved that L. W. Mouzon asserted title in 1892 by executing a deed purporting to convey a lot to a church, and in 1898 by executing a mortgage to W. M. Kinder. In addition to this, there was strong parol evidence to the effect that L. W. Mouzon held the land as his own, in that he collected rents, sold timber, and spoke of the land as his own. On the other side the defendants S. R. Mouzon and D. K. Mouzon testified that the land devised was divided, and the tract in dispute set apart to L. W. Mouzon entirely as an act of kindness on the part of his brothers; the agreement being that by permission of the true owners he should have the use of it for his support. There was evidence from another witness that he had heard L. W. Mouzon say that the land belonged to his brothers. In reply H. H. Kinder, one of the persons who had made the division of the land by request of the brothers, testified that he heard nothing of any agreement that L. W. Mouzon was to hold the land assigned to him in subordination to the title of his brothers.

The exceptions to the charge are very numerous and elaborate; but from the above statement it will be obvious that the material inquiry is whether there was error in stating to the jury the law bearing on the subject of 10 years' adverse possession under the statute, and 20 years' adverse possession from which a grant is presumed, as distinguished from permissive possession in subordination to the legal title. Short reference to the numerous points made by the exceptions will be sufficient to show that there was no error in submitting the issue to the jury.

1. The instruction as to the effect of recording papers was in precise accord with the statute, and certainly did not convey the impression that the defendant was entitled to hold the land under the deed of 1861, without respect to the issue of adverse possession; for the charge as to the right to recover against the legal title on proof of adverse possession for the requisite period was several times repeated.

2. The charge was clear and explicit as to the difference between adverse possession for 10 years under the statute and adverse possession for 20 years which will presume a deed or a grant; but, even if the charge had required that the plaintiff must show 20 years' adverse possession in *L. W. Mouzon* after conveyance of his interest in 1861, the error would have been of no consequence, for the issue was not whether he had been in possession for 20 years, but whether the possession for 20 years was adverse or permissive.

3. There is no foundation for the exception that the charge was to the effect that the plaintiff could not recover on any adverse possession but his own. In the first request of the plaintiff given to the jury as the law, it was clearly stated that the plaintiff could recover on the possession of *L. W. Mouzon* adverse to the defendants. The issue being whether the possession of *L. W. Mouzon* was adverse or permissive, it was proper for the court, in connection with a similar request, to instruct the jury that permissive possession could not avail against the paper title. It is not perceived how this could be regarded a charge on the facts.

4. It is true that the giving of a deed or mortgage by one in possession of land is ordinarily evidence of the assertion of title, but it was not error for the court to refuse to single out and emphasize this portion of the evidence on the subject of adverse possession.

5. Parol partition between tenants in common and exclusive possession of one of the co-tenants thereunder is evidence of ouster, from which adverse possession of the tenant who holds under such partition may begin against the others and ripen into a title. *Ewing v. Burnet*, 11 Pet. 41, 9 L. Ed. 624; *Few v. Killer*, 63 S. C. 154, 41 S. E. 85; *Green v. Cannady*, 71 S. C. 317, 51 S. E. 92.

But even parol partition is only evidence of adverse possession. There was no request that the court should charge specifically on the effect of parol partition between tenants in common. Indeed, *L. W. Mouzon*, having conveyed away his interest, was not a tenant in common, and any charge on that subject would have been inapplicable. Regarding the setting apart of the land as a gift to him by his brothers, or as a partition by them waiving their rights under the deed of 1861, the question would then remain: What was the nature of the gift or the extent of the waiver? If the gift or the waiver was understood by the parties to extend only to the use of the land by *L. W. Mouzon* for his life, in subordination to the title he had made to his brothers, there could be no adverse possession. This issue was fully submitted to the jury.

6. Even if there were no other obstacle to the consideration of certain verbal requests to charge set out in the exceptions, it would be sufficient to say that the record does not show that such requests were made.

7. The presumption of the acquisition of title by deed or grant arises from adverse possession for 20 years; it cannot arise from permissive possession, however long continued. The circuit judge did not err in so charging. *Trustees v. Meetze*, 4 Rich. Law, 52; *McClure v. Hill*, 2 Mill, Const. 425; *Trustees v. Jennings*, 40 S. C. 180, 18 S. E. 257, 891, 42 Am. St. Rep. 854.

The remaining point is made by the following exception: "That his honor erred in charging the jury defendant's eighth request to charge, as follows: 'Where a party enters upon land and takes possession without claim of title, his acceptance is subservient to the paramount title, not adverse to it. It is nothing more than a trespass, and, no matter how long continued, can never ripen into a good title, and, where the occupant expressly disclaims title, he cannot, of course, acquire title by adverse possession. The claim must be of title or ownership in fee. A claim simply of an unexpired term of years is not in hostility to, but in accord with, the true title.' The error being that title by adverse possession is founded in trespass, and, in charging the jury that a trespass, 'no matter how long continued, can never ripen into a good title,' the court erred, and thereby excluded from its consideration the possession of *L. W. Mouzon*, prior to the date of his deed to *B. B. Mouzon*, and, in effect, told the jury that, if *L. W. Mouzon's* possession was founded in trespass, it could not ripen into a good title, and in so charging, it is submitted, the court erred."

Sections 102 to 105 of the Code of Civil Procedure clearly require that possession, to be available as adverse in an action for the recovery of real estate, shall continue for 10 years under a claim of title. The claim of title may be inferred from particu-

lar actions or the general course of conduct of the occupant in dealing with the land; it is not necessary to prove express notice to the owner of the claim of title. By section 101 of the Code of Procedure it is further enacted: "In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for ten years before the commencement of the action."

It is therefore true, as said by the court, that an occupancy which is a mere trespass without claim of title cannot ripen into a good title. There was in this case no proof of any trespass whatever, for the witnesses on both sides testified that L. W. Mouzon under whom plaintiff claims was in possession of the land for 20 years; that he entered and remained in possession for 20 years with the full consent of the holders of the legal title in pursuance of a parol partition. If this possession after the partition was under a claim of L. W. Mouzon that the land was his own either by virtue of the parol partition or otherwise, then the plaintiff was entitled to recover. On the other hand, if the possession of L. W. Mouzon was not under a claim that the land was his own, but was in subordination to the legal title, the plaintiff could not recover. Examination of the entire case and analysis of the issues involved leads to the conviction that this issue was fairly submitted to the jury. The equitable issue as to the deed from L. W. Mouzon to B. B. Mouzon is not involved in the appeal.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(86 S. C. 493)

KENNEDY v. KENNEDY et al.

(Supreme Court of South Carolina. August 2, 1910.)

1. EXECUTION (§ 259*)—SALE OF LAND—REGULARITY—PRESUMPTIONS.

Where possession under an execution sale had been maintained for 20 years and the execution book showing the proceedings in the sheriff's office is missing, it will be presumed that all proceedings with reference to such sale were regular.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 740-742; Dec. Dig. § 259.*]

2. EXECUTION (§ 244*)—SALE OF LAND—REQUISITES—ENTERING A JUDGMENT.

Entering a judgment in the "abstract of judgments" is not a prerequisite to a valid sale of land thereunder; failure to do so being a mere irregularity of which no one but the de-

fendant in the action in which the judgment was recovered can take advantage.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 673-680; Dec. Dig. § 244.*]

3. EXECUTION (§ 320*)—SHERIFF'S DEED—RECITALS.

In general, the recitals in a sheriff's deed that an execution was issued and that a levy made thereunder, is not evidence of the facts recited, except where there is privity between the parties.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 940-945; Dec. Dig. § 320.*]

4. EXECUTION (§ 304*)—DEEDS—RECITALS—STATUTES.

Provisions of the Code relating to the effect of recitals in sheriffs' deeds, adopted March 1, 1870, were inapplicable to a deed based on an execution lodged in the sheriff's office on January 21st of that year.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 304.*]

5. APPEAL AND ERROR (§ 930*)—PRESUMPTIONS.

Where the testimony was susceptible of more than one inference, it cannot be successfully contended that the jury disregarded the character of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3757; Dec. Dig. § 930.*]

6. ADVERSE POSSESSION (§ 100*)—POSSESSION OF PART UNDER INVALID DEED—"AS BEING A CONVEYANCE OF THE PREMISES."

An instruction that possession of a part of a tract of land under a claim made under an invalid deed would give possession of the whole was correct, under Code Civ. Proc. § 102, providing that whenever the occupant, or those under whom he claims, entered under claim of title founded on a claim that a written instrument was a conveyance of the premises and there has been a continued possession of the premises included in such instrument, or some part thereof, under such claim for 10 years, the premises so included shall be deemed to have been held adversely; the words "as being a conveyance of the premises" indicating that the extent of the claim is not dependent on the validity of the instrument.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 560-562; Dec. Dig. § 100.*]

7. TRIAL (§ 253*)—INSTRUCTIONS—ISSUES.

Where plaintiff's husband claimed title by adverse possession as well as through a sheriff's deed, a request to charge that if plaintiff failed to prove that the judgment debtor was the owner of the land in dispute when the alleged sale was made, then the sheriff's title to the purchaser conveyed no right, and the purchaser transmitted to his heirs no right in the land, and a subsequent conveyance of the tract to plaintiff's husband operated to convey to him no right, was properly refused as eliminating the issue of adverse possession.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 618-623; Dec. Dig. § 253.*]

8. TRIAL (§ 194*)—INSTRUCTIONS—CHARGE ON FACTS.

A request to charge that in order to trace title claimed by plaintiff through the sheriff of C. district to plaintiff's husband, plaintiff was required to show that the defendant named in the execution and sheriff's deed was at the time of the alleged sale the owner of the land, and having failed to make such proof, plaintiff could take nothing by the sheriff's deed was properly refused as a charge on the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

9. TRIAL (§ 159*)—WANT OF EVIDENCE—OBJECTIONS.

Under circuit court rule 77, an objection that there was no proof that plaintiff's deceased husband, under whom she claimed title, had paid any taxes on the land during his life should be made by motion for nonsuit, or the direction of a verdict.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 159.*]

10. APPEAL AND ERROR (§ 1064*)—INSTRUCTIONS—PREJUDICE.

Where, in an action to recover land, plaintiff testified that defendant K. cultivated the land by permission of her husband, since deceased, under whom she claimed, K. was not prejudiced by an instruction that if plaintiff's husband had title to the land either because he took possession in 1883, as plaintiff claimed, and held continuously from that time under some arrangement by which he was to redeem it from E., or because of his claiming it by adverse possession, or because of his deed in 1894 from E.'s heirs, if he had title of land, and defendant K. held the land in pursuance of such agreement, that would be holding it in subordination to the husband's title.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

Appeal from Common Pleas Circuit Court of Clarendon County; J. C. Klugh, Judge.

Action by E. Maria Kennedy against Mary L. Kennedy and others. Judgment for plaintiff, and defendant, H. A. Kennedy, appeals. Affirmed.

Exceptions referred to in the opinion are as follows:

1. Because the Honorable J. C. Klugh, presiding judge, erred in refusing the motion for a new trial, which was based upon the following ground: "That the jury disregarded the law as charged by the court, and rendered a verdict contrary thereto, in that the jury were charged: That in establishing title under a sheriff's deed it must appear that there was a valid judgment and execution, and that there was a levy and sale under the execution. That the judgment of Epps v. Kennedy was recovered in Williamsburg county, where debtor and creditor resided, and in order to make valid sale it must appear that the judgment was docketed in Clarendon county and execution issued thereon, and having been so charged, the jury were bound, as a matter of law and of fact, to have found that the judgment had never been docketed or filed in Clarendon county; for it appears from the recitals in the sheriff's deeds and from the proof that the judgment was never lodged in Clarendon county. Nevertheless, the jury disregarded the law so charged, and their verdict shows that it is based upon the finding of the validity of the sale under the Epps judgment, as there is no proof to support the verdict as to the title acquired by actual adverse possession of the whole, or of any possession of a part of the premises under a deed of conveyance, which would give title to the whole"—in that the charge to the jury, as recited in

the motion for a new trial was the law of the case, by which the jury was governed, even though the law as so declared may be erroneous, and the jury disregarded such charge; for it appears, both negatively and affirmatively from the deeds of Gamble, acting sheriff, and Clark, sheriff, and from the other testimony, that the judgment recovered in Williamsburg county was never lodged or docketed in Clarendon county, and under the charge as delivered by the court, the jury should have so found, and the jury did not so find, and this is evidenced from the fact that in order to find a verdict for the entire premises, the jury must have found that it was a valid deed, for there is no evidence to support the verdict to the effect that title was acquired by actual adverse possession of the whole premises or of any possession of a part of the premises under a deed of conveyance which would give title to the whole; and the jury were charged that it was the theory of those claiming the land against H. A. Kennedy that their title came through David Epps, under the sheriff's deed, and that excluded the idea of any title from any other source; and it was error on the part of the circuit judge to let the verdict stand, as it was clearly contrary to the law as declared by him.

2. The presiding judge committed error in charging the jury as follows:

"Suppose that the sheriff's sale and the deed made in pursuance of that sheriff's sale was a nullity, yet the deed purports to designate by metes and bounds a tract of land and purports to convey that land to Epps. That becomes a description of the land, showing the extent of Epps' claim under the deed, so it becomes what we call color of title, and by way of writing that shows the extent of the party's claim under the deed, and if Epps took possession of that 200 acres of land under that deed or supposed deed, and held it continuously, either himself or by somebody that was holding it under him and in pursuance of some arrangement with him, if he held it continuously for twenty years from the date of that sheriff's deed, March 3, 1870, that would be sufficient to establish in Epps a title by adverse possession, as I told you a while ago. As the law now is, 10 years' adverse possession gives title, but in 1870 when this sale was alleged to have been made, it required 20 years.

"If it appears that Epps took possession of the land contained in that deed of Gamble, acting as sheriff, and held it continuously for 20 years, that would give title in him to all the land embraced in that deed now, by virtue of the sale, and by virtue of the bar of the statute of limitations; so if he had held the land for 20 years adversely and continuously, that forbids any other person to claim the land as against him. If he had title by conveyance from the sheriff and by the 20

years' adverse possession and died, and that title descended to his heirs, then the conveyance by those heirs to W. W. Kennedy in 1894 would confer upon W. W. Kennedy a good title to the land, and if that should be your conclusion, then the plaintiff must recover, unless there is something else to show that she has been ousted of her right to recover.

"You will observe then that the 20 years' possession from the date of the sheriff's deed in 1870, if it was adverse, whether Epps held it himself by hostile possession or permitted somebody else to hold it by some arrangement under him, would give him title. Only adverse holding would give him title by adverse possession. Under the statute, peaceable possession, whether he held it himself or by those living on the land who recognized his right superior to theirs, peaceable possession of the land 20 years would presume he held it because of a grant from the state, either to himself or to somebody else and the grant came to him, so if he held the land 20 years either peaceably or adversely, continuously, openly, and notoriously, and exclusively of everybody else's rights, even though he may have allowed other people to live there, if they lived there in recognition and in subordination of his rights, then that establishes in Epps the title which this plaintiff relies on, and that title passing to the plaintiff and her children by inheritance would inure to them now as a valid title, upon which they would be entitled to recover the land."

There was error in this charge, so given, in that there was no pretense, or claim on the part of the heirs of W. W. Kennedy or proof that David Epps or his heirs had ever been in possession of the land in question or any part of it for any time whatsoever, or that they ever claimed any part of it; on the contrary, the contention on the part of the heirs of W. W. Kennedy, now suing, was that W. W. Kennedy was in possession of the land in 1883, claiming it as his own, and the claimants based their claim before the jury upon such alleged possession.

There was error further in making reference to any party to this action holding land in subordination to the claim of David Epps or his heirs, in that there was no such claim put forward by the claimants or by H. A. Kennedy, and such charge so given as aforesaid, raised an issue before the jury which, it is respectfully submitted, had a tendency to confuse them and suggest that the land might have been so held, and to the prejudice of the defendant, H. A. Kennedy; and there being error further in this charge because it appeared affirmatively that W. W. Kennedy did not enter into possession of the premises in question, under claim of title, exclusive of any other right, founding such claim upon a written instrument, to wit: Of either the deeds of Gamble or Clark, acting sheriff and sheriff, respectively, or under a

deed made to him by the heirs of David Epps; but, on the contrary, he claims to have gone into possession in 1883 and to have held the land independently of any of them; and in that it was a faulty proposition of law to charge the jury that the Code of Civil Procedure contemplated that a person could enter into possession under an invalid deed and by occupying a part of the premises, draw to such part the possession of the whole, it being respectfully submitted that the law does not so contemplate, and the charge is contrary to a proper construction of the statute.

3. There was error on the part of the circuit judge in charging the jury that if they found a verdict against H. A. Kennedy, it should be for the land in dispute, and this was several times done; in that it included the idea that if the plaintiff and her children recovered at all, that they were entitled to the entire premises; whereas, while claiming the entire premises, and while claiming under a deed and also by alleged possession, if they did not find that the plaintiff was entitled to the whole by virtue of a deed or by possession of the whole, but were entitled to a part, based upon actual adverse possession which excluded the idea of holding under a deed, then they would have been entitled only to so much as had been actually occupied by W. W. Kennedy and no more, and there was error in not so instructing the jury.

4. There was error on the part of the circuit judge in refusing to charge the third request of H. A. Kennedy, which was as follows: "That in order to trace the title claimed by plaintiff, through the sheriff of Clarendon district, to the said W. W. Kennedy, the plaintiff is required to show by competent testimony that the defendant named in the alleged execution and deed of sheriff, one J. M. Kennedy, was at the time of the alleged sale the owner of the said tract of land, and having failed to make such proof, the plaintiff can take nothing by the sheriff's deed to David Epps"—in that it contained a correct proposition of law, and should have been so charged; and further in saying that it had not for the last expression it would have been charged, which was virtually charging the request to the effect that title had to be shown in J. M. Kennedy, and having practically so held by refusing the request in its entirety on account of the last expression, there was error for the reason that title in J. M. Kennedy had not been proven, either by possession for so long a time as to give him title, and by attempt to connect him with any grant by any conveyance whatsoever by prescription or by adverse possession.

4. There was error on the part of the circuit judge in refusing to charge the fourth request, which was as follows: "That if the plaintiffs have failed to prove that the said J. M. Kennedy was the owner of the land in dispute at the time of the alleged sale by the sheriff, then the title by said sheriff to the said David Epps conveyed no right of own-

ership or right of possession of the said tract of land to the said David Epps; and that under such circumstances the said David Epps transmitted to his heirs at law no right or title in or to the said tract of land, and if they thereafter undertook to convey the said tract of land to the said W. W. Kennedy, such conveyance, operated to convey to the said W. W. Kennedy no right, title, or estate in or to the land in dispute"—in that it was a correct proposition of law and should have been charged, and the reasons given by the presiding judge for not charging it because there was no evidence that J. M. Kennedy had any title to the land which David Epps could acquire by the sheriff's deed, nor was there any evidence that he was ever in possession of the land or any part of it at all, and no such claim was made by the plaintiff and her children, and it was error to so hold.

5. There was error on the part of the presiding judge in refusing to charge the defendant's sixth request, which was as follows: "That if the jury find that the said H. A. Kennedy for 10 years antecedent to the commencement of this action was, and had been holding the said premises as his own, adversely to the claim set up by the plaintiff and those under whom she claims, then as against them under the law said H. A. Kennedy has acquired title to the land in dispute and which plaintiff cannot now disturb"—in that it contained a correct proposition of law and should have been so charged, and the reasons given by the presiding judge in refusing to charge it and particularly in holding that he must show an ouster or turning out of everybody else's right, title, and interest in the land; he being in the undisputed possession if he had held it as his own adversely against W. W. Kennedy for the required period, that was sufficient, as no one else was making any claim for the land except the heirs of W. W. Kennedy, and they had to show a better title before they could disturb H. A. Kennedy in his possession.

6. Because there was error in the refusal of the presiding judge to charge the 9th request of this defendant, which was as follows: "As a circumstance in favor of the defendant H. A. Kennedy's claim, the jury may take into consideration the fact, if so proved, of the payment by the said H. A. Kennedy of taxes on the disputed premises, and also the further fact, if such be the case, that no proof has been made that during his lifetime any taxes were paid by the said W. W. Kennedy on said premises"—as it contained a correct proposition of law and should have been so charged, and there was error in holding that there was a charge on the facts.

7. There was error on the part of the presiding judge in not charging the defendant's tenth request, which was as follows: "If W. W. Kennedy's claim to the land was not founded upon a written instrument, judgment, or decree, the parties now claiming the land could recover only so much of the land as

was actually occupied, and no other; and in order to so recover, it must appear that W. W. Kennedy had been in the actual, continual occupation, under claim of title, exclusive of any other right, for a period of 10 years; and the jury would have to locate the land, if they so found"—in that it was a correct proposition of law and should have been charged as requested, and in referring thereto, his honor committed further error in holding that if W. W. Kennedy claimed all the land named in any one of the deeds, even though it might not have been a valid deed, yet showing the extent of his claim as color of title, and if he claimed all of the land and showed possession of any particular part of it, any foot of it, under the law was possession of all that was included in the boundaries named in the deed, in that there was no evidence that W. W. Kennedy made any such claim under any of the deeds put in evidence, or that he went into possession under any such deed or founded his claim to possession or claimed thereunder, and it was error to instruct the jury that possession of a part under a claim made under an invalid deed would give possession of the whole, as a person can take no rights whatsoever under an invalid deed.

8. There was error on the part of the presiding judge in not charging the request to charge, which is as follows: "There is no execution and no transcript of execution as a part of the record from Williamsburg county, and hence there is no evidence of a levy and a failure to show the levy, or the search for the execution and its laws, renders the sale under the sheriff's deed void"—as the same contained a correct proposition of law, and it should have been so charged, and was in accordance with the undisputed facts, and it was the duty of the court to have inspected the records and to have instructed the jury that there was an absence from the records of any execution or any reference to it which purported to be a copy or transcript of it; that there was an absence of any evidence of levy and there could not have been any proof lawfully made until there had been proven a search for the execution and inability to find it, and this was not done, and, as a matter of law, was the province and duty of the presiding judge to have construed the records of the judgment sent from Williamsburg, and not to have left anything to the jury to have found in reference thereto, save under his instructions.

9. Because the presiding judge erred further in charging as follows: "As a matter of course, if there was an agreement, if W. W. Kennedy had title to this land, either because he took possession in 1883, as plaintiff claims, and held it continuously from that time under some arrangement by which he was to redeem it from the Eppses, or because of his claiming it by adverse possession, or else because of his deed in 1894, from the Epps heirs if he had title to the land * * *

and H. A. Kennedy held the land in pursuance of such agreement, that would be holding it in subordination to W. W. Kennedy's title"—in that it was a charge upon the facts in reference to the possession of W. W. Kennedy in 1883, in the manner above set forth.

10. There was error on the part of the circuit judge in charging the jury as follows: Referring to the claim of H. A. Kennedy and stating that if he claimed the land as his by right of possession, he must show a definite time at which he began to hold the land exclusive of everybody else, and that he had held it continuously from that time until the commencement of the action, or until a sufficient time to ripen into a title in himself—in that if it appeared that he held the land exclusively and adversely as against W. W. Kennedy for the requisite period, that would give him title as against the present claimants.

The court in response to defendant's fourth request to charge stated that it was denied because the proposition excluded the idea that David Epps may have acquired title to the land either by the sheriff's deed, or, if that was a nullity, then by possession of the land for 20 years or more, and excluding that idea, was not a sound proposition.

Purdy & O'Bryan, for appellant. J. H. Lesesne, for respondent.

GARY, A. J. This action was commenced, on the — day of — 1908, for the purpose of having the lands described in the complaint sold, to aid in the support and education of the defendants, Mary L., Samuel M., Flora J., and Robert Clarence Kennedy, infant children of the plaintiff, and her late husband, W. W. Kennedy, who died on the 12th of June, 1905. The defendant H. A. Kennedy, a brother of W. W. Kennedy, filed an answer denying that the plaintiff and her children were the owners of the premises, and set up the defenses that he had been in possession of the land for 10 years, holding it adversely, and that he had been in the unobstructed possession thereof, before the commencement of the action, for 20 years, holding it as his own.

The jury rendered a verdict in favor of the plaintiff and her children for the land in dispute.

The defendant H. A. Kennedy made a motion for a new trial, which was refused, and he appealed upon exceptions, which will be reported. We proceed to consider them.

First exception:

The plaintiff introduced: (1) Deed from P. D. Epps, D. J. Epps, and M. E. Epps, heirs at law of David Epps, to W. W. Kennedy, dated the 19th of October, 1894, conveying the land in dispute; (2) deed from James M. Gamble, coroner of Clarendon county, acting sheriff, to David Epps, dated 7th of March, 1870, conveying the same land, in which deed the following recital appears: "Whereas, by virtue of a writ of fieri facias,

issued out of the court of common pleas for the county of Williamsburg, tested the 16th of November, 1867, and returnable according to law, to me directed and lodged in my office, on the 26th of January, 1870, commanding me, the goods, chattels, houses, lands, and other hereditaments and real estates of Jno. M. Kennedy, to levy the sum of —, which David Epps, by the judgment of the said court at Williamsburg courthouse, lately recovered against the said Jno. M. Kennedy—I have levied upon a certain tract of land, in the county of Clarendon aforesaid;" (3) deed from William J. Clark, sheriff of Clarendon county, confirming the deed of James M. Gamble, coroner (acting sheriff), to David Epps, dated 27th of March, 1871, conveying the same land, and containing the same recital; (4) certified copy of judgment roll, in the clerk's office of Williamsburg county, showing judgment recovered in 1867, by David Epps against Jno. M. Kennedy, to which reference was made in said deeds.

Before the plaintiff introduced in evidence the judgment roll from Williamsburg county, the clerk of the court and the sheriff of Clarendon county testified that there was no record of the execution under which the land was sold to be found in Clarendon, in their respective offices; that many of the books of record of the clerk's office, and the sheriff's office, were lost or destroyed about the time said property was sold under execution, in 1870 and 1871; the Republican Party being in power at that time. The sheriff testified that the execution book in his office, covering that period was missing, and that an execution coming from Williamsburg county to that office would properly be entered in the execution book; that there was no evidence of the sale by the sheriff in the salebook from May, 1870, to October, 1878. A. L. Barron, clerk of the court, testified as follows, upon cross-examination: "Q. You have an index to the abstracts? A. Yes, sir. Q. And the rolls? A. Yes, sir. Q. Those old indexes are there, are they not? A. Yes, sir. Q. Covering this period we are talking about? A. Yes, sir. Q. Going from that period, say 1865 and 1866, and coming to 1872, on those indexes, or directing the course of judgments, did you find any entry whatsoever of any judgment of Epps against Kennedy? A. No, sir. Q. I have reference to judgment which was referred to in the sheriff's deed? A. No, sir; I did not. Q. Did you find the evidence of entry of any such judgment on the abstract of judgments? A. No, sir."

There was testimony tending to prove that W. W. Kennedy (who was a son of said Jno. M. Kennedy) went into possession of the land in 1883, and held it continuously and adversely from that time until his death on the 12th of June, 1905. His honor, the presiding judge, charged that all proceedings must be presumed to be regular; and the appellant's attorneys in their argument say that there can be no fault found with this proposition.

It is especially applicable to this case, as W. W. Kennedy claimed the land for more than 20 years. *Corbett v. Fogle*, 72 S. C. 312, 51 S. E. 884; *Smith v. Libby*, MSS. Dec. 2 Rice's Dig. 328, cited in *Sheriff v. Welborn*, 14 S. C. 480.

The entering of the judgment in the book of "abstract of judgments" was not a prerequisite to a valid sale, as a failure in this respect is a mere irregularity, of which no one but the defendant in the action, in which the judgment was recovered, has the right to take advantage. *Mason v. Killough Music Co.*, 45 S. C. 11, 22 S. E. 755.

There was testimony tending to show that H. A. Kennedy was in privity with W. W. Kennedy, and those under whom he claimed; the plaintiff having testified that H. A. Kennedy cultivated a portion of the land, for the support of his father and mother, by permission of W. W. Kennedy. The general rule is that recitals in a sheriff's deed, to the effect that an execution was issued, and that a levy was made thereunder, are not evidence of the facts so recited. *Sheriff v. Welborn*, 14 S. C. 480. But where there is privity between the parties, the recitals are admissible for the purpose of proving such facts. *Brown v. Moore*, 26 S. C. 160, 2 S. E. 9. Therefore the recitals in the foregoing deeds were evidence of the facts therein stated.

Furthermore, the provisions of the Code which was adopted on the 1st of March, 1870, were inapplicable to this case, as one of the deeds shows that the execution was lodged in the sheriff's office on the 21st of January, 1870, and the other, that it was lodged on the 26th of January, 1870, which was a compliance with the requirements of the law at that time. Acts of 1791 (7 St. at Large, p. 262, § 5) and 1799 (7 St. at Large, p. 294, § 4); *Harrison v. Maxwell*, 2 Nott & McC. 347, 10 Am. Dec. 611; *Holloway v. Birtwhistle*, 2 Nott & McC. 350 (note); *Woodward v. Hill*, 3 McCord, 241; *Walton v. Dickerson*, 4 Rich. Law, 568; *Warren v. Jones*, 9 S. C. 288; *Harrison v. Mfg. Co.*, 10 S. C. 278.

It cannot be successfully contended that the jury disregarded the charge of his honor, the presiding judge, when, as in this case, the testimony was susceptible of more than one inference. This exception is overruled.

Second, third, and seventh exceptions:

The practical question presented by these exceptions is, whether there was error on the part of the presiding judge, "to instruct the jury that possession of a part under a claim, made under an invalid deed, would give possession of the whole." In ruling upon the request set out in the seventh exception, the presiding judge said: "That it is a correct statement of the law based upon a claim, where there is no writing showing the extent of the claim, but as I

have charged you, if W. W. Kennedy claimed all the land named in any one of those deeds, even though the deed may not have been a valid deed, yet showing the extent of his claim as color of title, and if he claims all of the land and showed possession of any particular part of it, any foot of it, that under the law was possession of all that was included in the boundaries named in the deed, and I so charge you."

Section 102 of the Code is as follows: "Whenever it shall appear that the occupant, or those under whom he claims, entered into possession of the premises, under claim of title, founding such claim upon a written instrument, as being a conveyance of the premises in question, and that there has been a continued occupation and possession of the premises, included in such instrument, or of some part of such premises, under such claim for ten years, the premises so included, shall be deemed to have been held adversely." The words "as being a conveyance of the premises," show that the extent of the occupant's claim, founded on an instrument of writing, is not dependent upon the validity of such instrument; otherwise there would have been no necessity for this section of the Code. There is a material difference between proving a deed, as a part of a chain of title, and introducing a paper to show the extent of a party's possession. *Allen v. Johnson*, 2 McMul. 495. The ruling of the presiding judge is fully sustained by Wood on Limitation of Actions, page 529 et seq. These exceptions are overruled.

Fourth, fourth (No. 2), fifth, sixth, and eighth exceptions:

There are two exceptions numbered "4"; we have therefore marked one of them "No. 2." The reasons assigned by the presiding judge, in ruling upon the requests mentioned in said exceptions, are satisfactory to this court, and show that they cannot be sustained.

There is another reason why the request mentioned in the sixth exception was objectionable: Rule 77 of the circuit court is as follows: "The point that there is no evidence to support an alleged cause of action shall be first made by a motion for nonsuit, or a motion to direct the verdict." The point that "no proof has been made that during his lifetime any taxes were paid by the said W. W. Kennedy on the premises," should have been made by motion for nonsuit, or the direction of a verdict.

Ninth exception:

As hereinbefore stated, Mrs. Kennedy, the plaintiff, testified that H. A. Kennedy cultivated the land by permission of W. W. Kennedy. If so, this testimony tended to show that H. A. Kennedy held in subordination to the title of W. W. Kennedy; and we fail to see wherein the charge was prejudicial to the rights of the appellant.

Eleventh exception:

The appellant's attorneys, in their argument, state that their remarks with reference to the fifth exception are applicable to the question presented by this exception. We do not deem it necessary to assign other reasons than those mentioned in disposing of the fifth exception. It is the judgment of this court that the judgment of the circuit court be affirmed.

(88 S. C. 500)

TUCKER v. GAINES.

(Supreme Court of South Carolina. Aug. 2, 1910.)

1. CONTRACTS (§ 346*)—ACTION—VARIANCE.

Where plaintiff sued on a writing received from defendant, and alleged a contract existing between him and defendant, he could not recover on the theory that the contract was one made by plaintiff with a third person for plaintiff's benefit.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1718-1753; Dec. Dig. § 346.*]

2. CONTRACTS (§ 187*)—CONSTRUCTION—RIGHT TO SUE.

Defendant wrote plaintiff, "I have agreed to take up" B.'s papers "due you when he moves or when he gathers his crop with you." Held, that such instrument imported an agreement with B., and did not confer on plaintiff a right of action against defendant, except on proof that it was made for plaintiff's benefit, in which event plaintiff would be bound by all the terms of the agreement between defendant and B.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 793-807; Dec. Dig. § 187.*]

Appeal from Common Pleas Circuit Court of Pickens County.

Action by J. B. Tucker against B. G. Gaines. Judgment for defendant, and plaintiff appeals. Affirmed.

Bonham, Watkins & Allen, for appellant.
J. P. Carey, for respondent.

HYDRICK, J. In 1906, L. H. Brownlee, while a tenant on plaintiff's plantation, became indebted to him in the sum of \$205 for a mule, for which plaintiff held his note and a mortgage on the mule. He was also in debt to plaintiff for advances made during the year, to secure which plaintiff held liens on his crop and a mortgage on his cow. On settlement, it was found he owed plaintiff \$366.48. Brownlee having agreed with defendant to move to his place, defendant wrote plaintiff, on Nov. 14, 1906, as follows: "Dear Sir: I have agreed to take up one L. H. Brownlee's papers due you when he moves or when he gathers his crop with you. You can come up and transfer me your papers. Trust this will be satisfactory." Brownlee moved to defendant's place, carrying with him the mule and cow and, perhaps, some of his crop. On December 22, 1906, plaintiff tendered to defendant Brownlee's papers, duly assigned to defendant, and

demanded payment of the amount due thereon. Defendant refused, stating that he had agreed with Brownlee to take up only the mule debt, and this he offered to do. Plaintiff then brought this action, alleging a contract between himself and defendant whereby defendant agreed to pay Brownlee's indebtedness to him. The judgment below was for defendant.

As the action was brought on an alleged contract between plaintiff and defendant, plaintiff cannot recover upon the theory that a contract was made by defendant with Brownlee for his benefit, because that is not the contract sued on. And, moreover, in that view of the case, it would be necessary for plaintiff to prove such a contract, and he would be bound by all its terms. There is no testimony, outside of defendant's letter, tending to show that he agreed with Brownlee to do more than take up the mule debt, and it is admitted that he offered to do that. Therefore it is necessary to consider only whether the letter evidences a contract between plaintiff and defendant.

We think the proper construction of the letter is that it merely informed plaintiff that defendant had agreed to take up Brownlee's papers. The words, "I have agreed," clearly refer to an agreement already made, but not with plaintiff, for it was admitted that there had been no prior agreement or negotiation between plaintiff and defendant; and the only agreement of which there was any testimony was the one with Brownlee. Clearly, therefore, that was the agreement to which the defendant's letter had reference. It was therefore not an agreement with plaintiff, and affords him no cause of action, unless, as we have said, he can show that it was made for his benefit; and, in that event, he would be bound by all the terms of the agreement between defendant and Brownlee.

Judgment affirmed.

(88 S. C. 410)

MURPHY v. ATLANTA & C. A. L. RY. CO.
(Supreme Court of South Carolina. July 21, 1910.)

1. MASTER AND SERVANT (§ 286*)—ACTION FOR INJURIES—QUESTION FOR JURY—NEGLECT OF MASTER.

In an action for injury to a railroad yard switchman, negligence as to an alleged defect in coupling apparatus on cars held for the jury under the evidence, which was circumstantial.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1020; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 288*)—ACTION FOR INJURIES—QUESTIONS FOR JURY—ASSUMPTION OF RISKS.

In an action for injury to a railroad yard switchman, his assumption of the risks that caused his injury held for the jury, under the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

3. TRIAL (§ 142*)—QUESTIONS FOR JURY.

Where testimony is susceptible of more than one inference as to a particular issue, it presents a question for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. § 142.*]

4. MASTER AND SERVANT (§ 287*)—ACTION FOR INJURIES — QUESTIONS FOR JURY — NEGLIGENCE OF FELLOW SERVANT.

In an action for injury to a railroad yard switchman, whether his injury resulted from the negligence of a fellow servant *held* for the jury, under the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1051-1067; Dec. Dig. § 287.*]

Appeal from Common Pleas Circuit Court of Greenville County; John S. Wilson, Judge.

Action by Moore Murphy against the Atlanta & Charlotte Air Line Railway Company for personal injury. Plaintiff was nonsuited, and he appeals. Reversed.

McCullough & Blythe, for appellant. Cothran, Dean & Cothran, for respondent.

GARY, A. J. This is an appeal from an order of nonsuit.

The allegations of the complaint, material to the questions raised by the exceptions, are as follows: "That on April 24, 1908, plaintiff was employed as yard switchman in defendant's yards at Greenville, S. C., and had been employed in such capacity for about three years. That on said date plaintiff was ordered by his superior officer to assist in shifting certain cars, consisting of five box cars in the yards of defendant at Greenville, S. C., for the purpose of placing two of said cars next to the engine upon the 'bad order' track for certain repairs. That in order to accomplish this, three of said cars had to be moved further up track No. 6, upon which track said engine and cars were then being operated. That in order to move the said cars, defendant, its agents and servants required on this occasion the said cars to be 'kicked'; that is, to be backed at a high rate of speed for the purpose of imparting to the three cars to be 'kicked' a sufficient momentum to carry them to the desired point, and at the proper time it was expected that they should be cut loose. That plaintiff was on the car farthest from the engine, ready to put on brakes at the proper time, to stop the cars when 'kicked,' as he was ordered and directed to do, when suddenly, without any notice of warning to him, and while the three cars were still attached to the engine and other cars, the said engine suddenly stopped, and plaintiff was violently thrown from said car to the ground between the rails, and said cars ran over his body. That plaintiff's injuries were due to the negligence of defendant, its servants and agents, in requiring said cars to be shifted in this manner; in stopping said engine in such a sudden manner, while the three cars to be shifted were still attached

thereto, and in not cutting them loose, so that they might continue south, of their own momentum; by furnishing a defective coupler on the car attached to the engine, and from which the three cars to be shifted were to be cut loose; in not properly inspecting said appliances, so as to see that they were sufficient and adequate for the purpose intended, and in not providing plaintiff a safe place to do the work required of him, and appliances sufficient to do said work; all of which contributed to his injury as the proximate cause thereof."

The defendant denied the allegations of negligence and set up the defense of assumption of risk.

At the close of the plaintiff's testimony, the defendant made a motion for a nonsuit, on the following grounds: "1. That the plaintiff's injuries were due to the risks of his employment, which he had assumed. 2. That plaintiff's injuries were due to the risks of the peculiar service in which he was engaged at the time, the danger of which he well knew. 3. That plaintiff's injuries were due to the negligence of a fellow servant. 4. That there is no testimony tending to show actionable negligence on the part of the defendant, in the matter of the alleged defect to coupling apparatus." The motion was sustained, and the nonsuit granted on said grounds; thereupon the plaintiff appealed.

The first question that will be considered is whether there was any testimony tending to show negligence on the part of the defendant.

The plaintiff testified as follows: "When you talk about 'kicking' cars, what do you mean? You give a kick signal to the engineer, and he does the rest. What does he do, stop his engine? No, sir; he runs his engine. He runs it slow, or how? He runs it fast. What did you mean when the signal is given to kick cars, what does the engine do? He comes ahead with a fast rate of speed, and when it goes far enough, they give a cut-down signal, and the engine stops then. Suddenly? As quick as he can. Then what is done after the engine stops? He backs back. What is done with the cars? The cars go on up, after they are cut off. What other way is there to get cars upon that track? Take and shove them up in there, and cut them off and put the brakes on, and back in and back out. You can shove them in how? Without kicking them. That is without going so fast? Yes, sir. On this occasion, what did the conductor do? He said he was going to kick three cars in on No. 6 track, and he told me to ride them in there, and not to let them hit the other cars. What rate of speed did the cars attain when he kicked them? Twelve or fifteen miles an hour. While the cars were going that way, what did the conductor do?

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

He gave the engineer a cut-down signal. Did you see him give the cut-down signal to the engineer? Yes, sir. What was the engineer supposed to do when he received that signal? He was supposed to stop his engine as quick as he could. And what did the engineer do? He stopped his engine as quick as he could, and they failed to cut the cars off, and I was jerked off of the car. Cross-examination: You were relying upon the brakeman—what was his name? Hayes. You were relying upon him, to cut the cars off, so that there would be no sudden stopping of the cars? I knew if he cut them off, there would be no sudden stopping. You were sitting there, or standing there, in the position that you have described to the jury, relying upon this brakeman to cut off the cars, so there would be no abrupt stopping of them? Yes, sir. And your opinion is that his failing to do that caused the car you were on to stop suddenly? No, sir; the engine did it. Well, the engine stopped it? Yes, sir. And if the cars had been cut off, you would not have fallen off? I would not have been jerked off. You say you have never known a car to fail to uncouple, and in your opinion it is not a frequent and daily occurrence, known to all of you, that in kicking those cars, they would fail to disconnect, by either not raising the lever high enough, or by raising it too high? No, sir. If they are in good order, they will cut loose. Redirect examination: You stated awhile ago, if something had been in good order, that it would not have done what it did. What do you mean by that? In cutting off the cars, if the lock pin in there had been in good order, it would not have happened. (Objected to by counsel for defendant. He alleges that the defect was in the coupler. Let him prove that. Objection overruled.) When you said if something had been in good order, that it would have uncoupled, did you refer to the brakes or the coupler? The coupler."

Rule 393 in reference to conductors, was introduced in evidence, and is as follows: "They must not allow running or flying switches to be made, where it can be avoided, and when unavoidable, such movements must be made with all the care necessary to absolutely prevent accident."

W. A. Hayes thus testified: "Just explain to the jury how this thing occurred, so far as your observation extended. Well, sir, we were kicking three cars in on No. 6 track. The conductor gave me orders to cut off three cars, and when they were backed in there, I raised the cut-off lever, and it failed to cut off. And then there is a pin here that goes through the couplers? Yes, sir. And then there is a little chain fastened to an iron rod here, and comes out this way, and the lever is here, at the side of the car? Yes, sir. And when you want to uncouple the cars, you lift up that lever, and that brings up the pin, and the couplers are supposed

to fly open, and the cars uncouple? Yes, sir. Where were you? On the side of the car. You say you were stationed at the side of the car, for the purpose of cutting it loose, when you got the signal? Yes, sir. Did you get the signal? Yes, sir. What did you do? I jerked the lever up. What were the cars supposed to do then? To come uncoupled. Did they come uncoupled? No, sir. What was the result? I raised the latch spring too high. What was done? Mr. Murphy was jerked from the top of the coal car. What is that (presenting coupling pin)? That is something like a latch pin. Is that a pin that moves up and down? Yes, sir; something like that. What kind of a coupler was it that you had? Climax, I think. What is this for? That works in a little notch back in there. I think that maybe it catches it and holds it. How? To lift it up higher. That is, to keep it from coming too high? Yes, sir; I suppose so. If it is in good condition, what will it do? I suppose it would have to cut loose, if it had been in good condition. Suppose that is wrong (indicating), what would take place? I don't know how bad it would have to be worn to lift it too high. It would have to be worn a good deal for this to come out through there. If it is worn, what will take place? If it is worn, it wouldn't work so well, if it is worn bad. What would it do when you lift it up, if it is worn? Well, I don't think the cars would come uncoupled, if it is worn bad. You don't think the cars would come uncoupled? No, sir; it would raise too high. Did you examine that coupler? No, sir; I did not examine it at all. Those couplers are what are called automatic couplers? Yes, sir."

C. J. Bull testified as follows: "By reason of your experience, are you familiar with this coupling pin (presenting same)? Yes, sir; pretty familiar with it. Explain to the jury there just how that coupler is constructed, and how they are presumed to work, when in good condition? If they are in good condition, when you lift the lever they should cut at once, and there should be no hanging in that at all, if it is in a proper condition, and when you lift the lever they will uncouple. What is that? That is a climax lock pin. Where does that work? In the bottom of the drawhead. What does it do? It is to hold the pin; to keep it from coming out too far, and this too. Now suppose that is in good condition, and that is in good condition (indicating) when you raise the lever, what would happen? It would come uncoupled. Suppose when you raise the lever it comes too high, so it won't uncouple, where is the defect? It is either in this, or in this, when it comes too high. Either one; it is defective (indicating on pin). The defect would be either in this or this (indicating)? Yes, sir; or this. When the defect is in this or this, it will raise too high, and this catches the knuckles, and keeps it from cutting loose. It comes up and slips

into the drawhead and catches the knuckles. Instead of coming up straight? Yes, sir; and stopping at the proper place; this comes into the drawhead and catches the knuckles. If that pin was in good condition, what would it do when you raised the lever? It would uncouple. When you jerked this by the knuckles, it is supposed to open here. Cross-examination: As I understand you, there are three places in one of those pins that might wear too much to lift sufficient; two of them there, and that little knot there? It might wear a little at this point? Yes, sir. And it might wear at the knot in the middle sufficiently to lift it too high? Yes, sir. And then it wouldn't uncouple? Yes, sir. And then what else? This here (indicating). At the toe there? Yes, sir. It might wear enough at the toe to make it come too high? Yes, sir. How about here at the back of the top? I don't suppose that could wear too much, if that didn't break off. If it didn't break off, it couldn't come too high. How about the heel? If that would break, it would come too high. There are three places, the knot in the middle, the toe and the back here? Yes, sir. Suppose the chain should break? It wouldn't uncouple then. How would you tell it had worn sufficiently to raise too high? That would be the only way; by lifting it. That would be by lifting at it to see? Yes, sir. The only safe test would be by lifting it? Yes, sir."

W. M. Logan thus testified: "What is that (presenting lock pin)? That is a lock pin. What is that used for? For holding the knuckles in the drawhead. It is used for holding the knuckles in the drawhead, and letting it loose in coupling and uncoupling. It is used for holding the knuckles and letting them loose, in coupling and uncoupling? Yes, sir. What is this here (indicating on coupler)? I call the whole thing the lock pin. Do you know what that is for, that lip? It is to keep it from coming out of the drawhead there. That foot on the lower part? Yes, sir. What is this for, and what is this for (indicating)? That works in a slot in there, and that works somewhere in there. I don't know just where; I never examined it. Do you know what it is intended for? It is intended to hold it in place, and make it couple and uncouple. Suppose that lock pin is in good condition, and it is coupled, and you turn that crank, what would it do? It would uncouple, in my opinion. Suppose these are worn thin, or that, or this (indicating), what is the result? It lets that come up too far, and catch the knuckles. In other words, I want you to give your opinion to that jury, whether or not this coupler in good condition, and with this lock pin in proper condition, when you raise that lever, would it uncouple? Yes, sir, that is my opinion. Can you raise it too

high, if it is in a proper condition? No, sir, I don't think so. If the couplers are in good condition, and you raise this crank, or lever, what will happen? It will cut loose. When you drop it, what will happen? They will come together. By simply raising that lever? Yes, sir."

We see no difference in principle between this case and that of *Gilliland v. Railway*, 86 S. C. 137, 68 S. E. 186. In that case, the coupler failed to connect the cars, while in the present case the coupler failed to disconnect them. In each case the question of negligence depended upon circumstantial evidence, which was similar in its nature. The exceptions raising this question, are therefore sustained.

The next question that will be considered is, whether the testimony showed that the plaintiff assumed the risks that caused his injury. The testimony was susceptible of more than one inference; there was error in refusing to submit this question to the jury.

The next question to be determined is whether the testimony showed that the injury resulted from the negligence of a fellow servant. The only reference which the appellant's attorneys, in their argument, have made to this question, is as follows: "Hayes said in his testimony that he had pulled the lever up too high, and that it was his fault in doing so." This portion of his testimony must be considered in connection with his entire testimony, which shows that this question should have been submitted to the jury.

It is the judgment of this court that the judgment of the circuit court be reversed.

WOODS and HYDRICK, JJ., concur in the result.

(86 S. C. 428)

NAPIER v. MATHESON.

(Supreme Court of South Carolina. July 26, 1910.)

1. TRIAL (§ 253*)—EVIDENCE—INSTRUCTIONS.

Where, in an action to recover a parcel of land in a tract, there was evidence that plaintiff's grantor had acquired title by adverse possession before he executed a deed to plaintiff, a charge that plaintiff had shown that he had title to not over four-sixths of the land embraced in the tract, and that he was in possession of more than that proportion and could not recover the balance, and the verdict must be for defendant, was properly refused, because ignoring the evidence of title of plaintiff's grantor by adverse possession.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

2. EJECTMENT (§ 110*)—EVIDENCE—INSTRUCTIONS.

Where, in an action to recover possession of one-eighth of an acre of a tract, plaintiff put in a paper title to four-sixths of a 4½-acre tract, under deeds from four of the six children of the deceased owner of the tract, and there was evidence that one of the children had acquired title by adverse possession before the execution of the deed to plaintiff conveying the land in dispute, a charge that plaintiff had shown title to four-sixths of the land claimed,

and that if the child alleged to have acquired title by adverse possession had not obtained the title of the two of the children who did not join in the conveyance to plaintiff, the jury could only find for plaintiff for four-sixths of the land in dispute, etc., was not erroneous, as leading the jury to believe that they could but find for plaintiff for at least four-sixths of the one-eighth acre.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 319-326; Dec. Dig. § 110.*]

3. APPEAL AND ERROR (§ 1068*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

Where, in an action for the possession of one-eighth of an acre of land, the jury found for plaintiff for the land in dispute, a charge was not open to the objection that it led the jury to believe that they could do nothing but find for plaintiff for four-sixths of the land.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228; Dec. Dig. § 1068.*]

4. EVIDENCE (§ 229*)—ADMISSIONS—ADMISSIBILITY.

Where, in an action to recover one-eighth of an acre of land embraced in a $4\frac{1}{2}$ -acre tract, plaintiff presented a deed from four of the six children of the deceased owner who had been in possession for over 30 years and there was evidence that one of the four children had been in possession for 11 years, the testimony of one of the two children who did not make any conveyance that the child in possession had acquired title by adverse possession was admissible, as against defendant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 822, 825; Dec. Dig. § 229.*]

5. TRIAL (§ 194*)—INSTRUCTIONS—CHARGE ON THE FACTS.

Where, in an action to recover land, defendant set up title by adverse possession dating from the time he had inclosed the land by a fence, a charge that it was for the jury to determine when the fence was built and that if it had been there for 10 years, and defendant had held the land for that time, his title was good, etc., was not a charge on the facts, in violation of the Constitution.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 439-466; Dec. Dig. § 194.*]

6. EVIDENCE (§ 353*)—DOCUMENTS—ADMISSIBILITY—PLATS.

In an action to recover possession of land, a plat of the land in dispute, made after the bringing of the action without notice to defendant, is admissible in evidence over the objection of defendant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1500-1508; Dec. Dig. § 353.*]

Appeal from Common Pleas Circuit Court of Marlboro County.

Action by C. D. Napier against A. J. Matheson for the recovery of the possession of one-eighth of an acre of land. From a judgment for plaintiff, defendant appeals. Affirmed.

The following are the exceptions of defendant:

1. His honor erred in not charging defendant's fourth request, to wit: "That the plaintiff has shown affirmatively that he has title to not over four-fifths of the land embraced in tract No. 4, and that he is in the exclusive possession of more than that proportion and cannot recover the balance, and the verdict must be for the defendant" when the propo-

sition requested correctly stated the law applicable to the case before the jury.

2. His honor erred in charging the jury that the plaintiff had shown paper title to four-sixths of the land and was entitled to recover at least that much, when the title shown was to a larger tract of which the part in question was less than the two-sixths not shown, as stated in the complaint, and defendant's holding it was not only entirely consistent with plaintiff's paper title shown, but plaintiff did not show paper title to any part of the two-sixths interest as charged.

3. His honor erred in charging the jury that if Mrs. McMillan had not gotten the title of A. A. and W. D. Rogers, they could only find for plaintiff four-sixths of the land in dispute; the error being that this was a charge practically that he had shown title to four-sixths of the land in dispute, when it appeared by the complaint and the undisputed testimony that the part claimed by the defendant was much less than the shares of either of A. A. and W. D. Rogers, and title to no part of that was shown.

4. His honor erred in charging the jury that they could decide whether W. D. Rogers had conceded the land to belong to Mrs. McMillan and made no claim to it; the error being that it was not a question between Mrs. McMillan and W. D. Rogers, and that any concession as to the ownership of the land by him was no evidence against, and was not admissible to disprove, the title of a third party in possession. (2) That it was the duty of plaintiff to show affirmatively a complete title in himself, good against the world, to the particular land in question, before he could recover the possession thereof from the defendant.

5. His honor erred in charging the jury: "The thing for the jury to say is, When was this fence put there? and you might say that is the pivotal point in this case. If it was there for 10 years before 1906, and Matheson held it for these 10 years, his title is good. If it was put there any time short of 10 years, it does not avail him. That is all there is in the case;" the error being that it was a charge on the facts of the case, and it was an intimation by the judge of his opinion that the question of the statute of limitation was the pivotal fact in the case an elimination of the other defenses of the defendant.

6. His honor erred in charging the jury that a verdict of four-sixths of the land described in the complaint might be brought in when there was no testimony on which such a verdict could have been based, and the charge was injurious to defendant and confusing to the jury.

7. His honor erred in not directing a verdict in plaintiff's favor, when plaintiff proved himself, and it was undisputed, that A. A. Rogers had had one-fifth interest in the $4\frac{1}{2}$ -acre tract, more than the defendant was in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the possession of, and there was no evidence whatever that plaintiff had ever acquired his title.

8. His honor erred in not setting aside the verdict and not granting a new trial when it was undisputed "that the plaintiff had shown affirmatively that he had title to not over four-fifths of the land embraced in tract No. 4, and that he was the exclusive possessor of more than that proportion, and the verdict should have been for the defendant.

9. His honor erred in admitting, over objection of defendant, a plat of the land in dispute, when it appeared that it was made after the beginning of the action, and without notice thereof to the defendant.

10. The court erred in charging the jury as follows: "When did Mrs. McMillan go into possession of the land? When did she go out of possession? Her deed to Napier is dated 1st of February, 1904. She was in possession of the land for over 11 years, and did she hold it for 11 years as her own, using it as her own against her brothers, A. A. and W. D. Rogers; did she hold it against them and use it for herself for 11 years? If she did and they were of age, and all the parties were of age, that would give him a good title against them." It being a charge on the facts in violation of the Constitution and error of law in that it charged that possession of one co-tenant for more than 10 years will bar a co-tenant who is out of possession, whereas it takes 20 years to oust a co-tenant.

Townsend & Rogers, for appellant. Stevenson, Matheson & Stevenson, for respondent.

GARY, A. J. This action was commenced on the — day of July, 1906, to recover the possession of a lot or parcel of land, containing about one-eighth of an acre. "At the conclusion of the testimony the defendant moved the court to direct a verdict in his favor on the ground that the plaintiff had shown title only to four-sixths of the large $4\frac{1}{4}$ -tract, and that no title whatever had been shown to the remaining one-third of the tract, which was more than the amount defendant was in possession of, which motion was refused." The jury rendered a verdict in favor of the plaintiff, and the defendant appealed upon exceptions, which will be reported.

First, seventh, and eighth exceptions: These exceptions must be overruled for the reason that if his honor, the presiding judge, had charged the request embodied in the first exception, he would have taken from the jury the consideration of the question whether Mrs. McMillan, plaintiff's grantor, had acquired title by adverse possession before she executed a deed, conveying the land to the plaintiff.

Second and third exceptions: In discussing these exceptions, the appellant's attorneys say: "The only land in dispute was the one-eighth acre described in the complaint; yet his honor charged throughout that the

plaintiff had shown title to four-sixths of the land claimed by the plaintiff, and therefore the jury, under his charge, could do nothing but find for the plaintiff at least four-sixths of the one-eighth acre." In the first place, when the charge is considered in its entirety, there is no reasonable ground for supposing that it would mislead the jury; and, in the second place, the verdict of the jury shows that they were not misled, as they found a verdict in favor of the plaintiff for the land in dispute, and not for four-sixths thereof.

Fourth exception: The charge of the presiding judge in this respect was as follows: "When did Mrs. McMillan go into possession of the land? Her deed, put in evidence, bears date 12th of April, 1892. When did she go out of possession? Her deed to Napier is dated 1st of February, 1904. She was in possession of the land for over 11 years, and did she hold it for 11 years as her own, using it as her own against her brothers, A. A. and W. D. Rogers; did she hold it against them, and use it for herself, for 11 years? If she did, and they were of age, and all the parties were of age, that would give him a good title against them. You read the testimony of W. D. Rogers on the stand, and I will leave it to you to say whether or not he makes any claim to the land. If, by his actions, he has conceded it to belong to Mrs. McMillan, I will leave it to the jury to determine whether or not he has any claim to it. There is enough testimony for me to leave it to the jury to say whether or not Mrs. McMillan ever got by deed of possession the title of A. A. and W. D. Rogers." The testimony of W. D. Rogers tended to show that Mrs. McMillan had acquired title by adverse possession, and was therefore admissible.

Fifth exception: The context shows that when the presiding judge charged that the time when the fence was built was the pivotal point in the case he meant that it was the pivotal point in establishing the defendant's claim of adverse possession, and not that said fact was the turning point in the entire case.

Sixth exception: What has already been said disposes of this exception.

Ninth exception: The cases of Patterson v. Crenshaw, 32 S. C. 534, 11 S. E. 390, and Duren v. Vee, 50 S. C. 444, 27 S. E. 875, show that this exception cannot be sustained.

The appellant's attorneys did not argue the tenth exception; therefore it will not be considered.

Judgment affirmed.

WOODS, J. I concur in the judgment of affirmance, but the reasons stated by Mr. Justice Gary for overruling the fifth and tenth exceptions seem to me unsound. The fifth exception assigns error in this instruction: "The thing for the jury to say is. When was this fence put there? and you

might say that is the pivotal point in this case. If it was there for 10 years before 1906, and Matheson held it for these 10 years, his title is good. If it was put there any time short of 10 years, it does not avail him. That is all there is in the case."

The defendant Matheson in his pleadings denied the title of the plaintiff and set up title by adverse possession in himself. By the instruction quoted the court clearly indicated to the jury that the plaintiff had made out his title, and that the only substantial question in the case was whether the defendant had acquired title by an adverse possession, dating from the time he had inclosed the disputed land by a fence. The Constitution forbids judges to charge juries with respect to matters of fact. The inhibition, of course, refers to matters of fact which have any bearing on the material issues involved in the trial. Careful examination of the record leaves not the least room to doubt that the plaintiff's grantor, Mrs. McMillan, had a good legal title to the land when she conveyed to him, unless the defendant had acquired his title by adverse possession. No reasonable jury could have found otherwise. In *Edgefield Mfg. Co. v. Maryland Casualty Co.*, 78 S. C. 73, 58 S. E. 960, the rule was laid down that "this court should not order a new trial when, from an examination of the record, it has no doubt the verdict of any fair jury would have been the same, even if no error had been committed." Applying this rule, as the record shows that the only issue made by the pleadings on which the evidence left any possible doubt was whether the defendant had acquired title by adverse possession, the court will not grant a new trial, even if it be assumed that it was a technical error for the circuit judge to refer to that issue as the pivotal point in the case.

The same reasoning applied to the tenth exception, for the evidence leaves no doubt that Mrs. McMillan did hold the land, claiming it adversely for 11 years before the defendant entered.

(88 S. C. 451)

STATE ex rel. DAVIS et al. v. STATE
BOARD OF CANVASSERS.

(Supreme Court of South Carolina. July 30, 1910.)

1. CERTIORARI (§ 68*)—QUESTIONS REVIEWABLE—FINDINGS OF FACT.

The court, on certiorari to review the action of an inferior tribunal, will correct errors of law, but will not review findings of fact, unless the findings are contrary to any reasonable conclusion or inference from the evidence, or unless they have no evidence to support them.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 180-182; Dec. Dig. § 68.*]

2. CERTIORARI (§ 66*)—REVIEW—PRESUMPTIONS.

Where, on certiorari to review the action of the State Board of Canvassers, the record

showed that all of the testimony heard by the county board of canvassers was not read to the State Board, but it did not show what parts were read and what were not, the court must assume that the findings of the State Board were based on a consideration of the testimony bearing on the facts found.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 178; Dec. Dig. § 66.*]

3. ELECTIONS (§ 83*)—QUALIFICATIONS OF ELECTORS—PAYMENT OF TAXES.

The statute requiring the production of a registration certificate and proof of the payment of all taxes assessed against an elector, collectible during the previous year, as conditions prerequisite to his right to vote, requires that the proof of payment of taxes shall be by legal and competent evidence furnished by affidavit, or in some other legal form, such as to satisfy a reasonable mind of the truth, and the managers of an election may not dispense therewith.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 77-81; Dec. Dig. § 83.*]

4. ELECTIONS (§ 83*)—REGULATIONS—MANDATORY STATUTES.

A statute requiring the production of a registration certificate and proof of payment of taxes assessed against an elector, as conditions prerequisite to his right to vote, is mandatory, and neither the courts nor the managers of an election may dispense with either of the requirements.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 77-81; Dec. Dig. § 83.*]

5. ELECTIONS (§ 229*)—ILLEGALITY—EFFECT.

Where fraud or illegality in an election is so general that a free and fair expression of the popular will has not been obtained, the whole election will be set aside, but when the polls can be purged of the illegal votes, the illegal votes should be rejected and the legal votes counted, and when that cannot be done the entire polls must be thrown out, where enough illegal votes have been cast to affect the result or to leave it in doubt.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 201; Dec. Dig. § 229.*]

6. ELECTIONS (§ 290*)—CONTESTS—REVIEW—"CANVASSING."

An order of the State Board of Canvassers committing to the county board of canvassers of a county the entire record, with instructions to the county board to recanvass the vote of the county and hear and consider the ground of protest filed by the attorney for a contestant, and to take such testimony as may be competent in support and rebuttal thereof, and to determine the result, etc., authorizes the county board to consider testimony in support of another contestant; the word "canvassing" implying investigation; examination.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 306, 307; Dec. Dig. § 299.*]

For other definitions, see Words and Phrases, vol. 1, pp. 951-952.]

7. ELECTIONS (§ 289*)—CONTESTS—NOTICE OF CONTEST—EFFECT.

The court in an election contest will not consider any other grounds of contest than those stated in the notice of contest filed, unless the notice is amended so as to include other grounds.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 285; Dec. Dig. § 289.*]

8. ELECTIONS (§ 259*)—CONTESTS—ORGANIZATION OF CANVASSING BOARD.

In the absence of any statute providing how or by whom meetings of the county board of

canvassers of a county shall be called, a majority of the board may call a meeting.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 234, 235; Dec. Dig. § 259.*]

9. OFFICERS (§ 108*)—ACT OF MAJORITY OF OFFICIAL BOARD—EFFECT.

Where a board of officers is constituted by law to perform a duty prescribed by law, the act of the majority is binding as the act of the body.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 184; Dec. Dig. § 108.*]

10. ELECTIONS (§ 305*)—CONTESTS—DISCRETION OF CANVASSING BOARD.

The time allowed for the production of witnesses before the county board of canvassers of a county, in proceedings to contest an election, must be left to the discretion of the board, and the court will not interfere therewith, except in case of manifest abuse of discretion to the prejudice of the party complaining.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 328; Dec. Dig. § 305.*]

11. ELECTIONS (§ 300*)—CONTESTS—DISCRETION OF CANVASSING BOARD.

A motion addressed to the county board of canvassers of a county for time to procure witnesses in proceedings to contest an election should be supported by affidavit naming the witnesses, and stating their places of residence, so that the board may decide how much time could be allowed within the limit allowed by the State Board of Canvassers.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 308; Dec. Dig. § 300.*]

12. ELECTIONS (§ 305*)—FINDINGS OF FACT—REVIEW.

A finding of the State Board of Canvassers that an election was fair, and that none of the things complained of affected the result, is not reviewable by the court on certiorari.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 318; Dec. Dig. § 305.*]

13. ELECTIONS (§ 227*)—STATUTES—MANDATORY PROVISIONS.

Civ. Code 1902, §§ 208, 212, requiring the administering to each person offering to vote at an election an oath that he is qualified to vote at the election, and providing that at each precinct a space shall be railed off with openings for the entrance and exit of voters, etc., are merely directory, and a violation thereof will not vitiate the election in the absence of fraud, unless the result was thereby affected.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 197-200; Dec. Dig. § 227.*]

Certiorari by the State on the relation of W. A. Davis and another against the State Board of Canvassers to review the action of the Board in an election contest. Petition dismissed.

D. W. Robinson, for petitioners. D. S. Henderson, for State Board of Canvassers.

HYDRICK, J. On the 17th August, 1909, an election was held in Aiken county on the question whether alcoholic liquors should be sold therein. When the county board of canvassers met, on August 24th, to canvass the vote and declare the result, the relators, Davis and Craig, filed notice and grounds of contest of certain precincts, at which the majority of the votes, as certified by the managers, was "for sale"; and two other citi-

zens, Johnson and Powell, filed notice and grounds of contest of certain precincts at which the majority was "against sale." The board adjourned to meet August 30th, to hear these contests. On that day, the attorneys for Johnson and Powell demurred to the grounds of contest filed by relators for insufficiency, in failing to allege that the irregularities and illegalities of which they complained affected the result of the election. The demurrer was sustained, and a motion to amend by making the allegation was refused, and the contest dismissed. The result declared was "for sale," by a majority of 167 votes. On appeal, heard on September 3d, the State Board recommitted the entire record with instructions to the county board "to recanvass the vote for Aiken county, * * * and hear and consider the ground of protest filed by C. E. Sawyer, attorney for protestants, and to take such testimony and evidence as may be competent, offered in support and rebuttal of the same, and to determine the result, and having done so, to transmit to this board the result of said canvass, together with its conclusions and findings upon the ground of protest, as well as all testimony and other records and papers connected with the same, required to be transmitted to this board by section 217 of Code 1902, the same to be returned to this board not later than Thursday, September 9, 1909."

On September 6th, two of the county board, which was composed of three members, issued a notice of a meeting of that board to be held on September 7th, at 11 o'clock, to proceed with the hearing. This notice was served on the attorneys for all parties and the chairman of the board between 10 and 11 o'clock on the 6th. Later, on the same day, the chairman issued a notice for a meeting of the board on the 8th, at 10 o'clock. Pursuant to their notice, two of the board met on the 7th. The regular chairman having sent word that he would not attend, they organized by electing one of their number chairman, and announced their determination to proceed with the hearing.

The attorneys for the relators demurred to the jurisdiction of the board, as thus organized, contending that the meeting was illegal, because it had not been called by the regular chairman. They also moved for a continuance until the next day, on the ground that they had not had time, since receipt of notice of the meeting, to summons their witnesses, some of whom they stated lived more than 20 miles from the courthouse. The demurrer and motion were overruled, and the board limited the time for the taking of testimony to three hours and a half to each side, and for argument to one hour to each side. Four witnesses were examined that day, and the record shows that at the conclusion of the testimony on the next day, re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

lators had consumed only 2 hours and 21 minutes of the time allowed them.

After hearing the evidence and arguments, the board dismissed both contests and certified the results as before. Both sides appealed. The State Board heard the appeal September 10th. As the time within which the board is allowed to perform its duties is limited by statute (Code 1902, vol. 1, § 229), the State Board, finding that it was necessary for them to dispose of the matter on the 10th; as, after that date, it would be *functus officio* (*Ex parte Mackey*, 15 S. C. 329; *Ex parte Elliott*, 33 S. C. 603, 12 S. E. 423), limited the time for the hearing to two hours and a half on each side. The testimony had been taken stenographically, and had not been transcribed, and hence had to be read to the board by the stenographer. The board reserved the right to have such parts of the testimony read by the stenographer as they, or either of them, desired. After hearing so much of the testimony as the respective sides caused to be read and the arguments, the board sustained the contest of both sides as to certain precincts and overruled them as to all others; but, finding that the result was not thereby changed, they dismissed both contests. Thereupon the relators sued out a writ of certiorari in the original jurisdiction of this court to review the action of said board.

In reviewing the action of an inferior tribunal, on writ of certiorari, this court will correct errors of law, but will not review the findings of fact. *Ex parte Riggs*, 52 S. C. 298, 29 S. E. 645; *Welsh v. Board*, 79 S. C. 246, 60 S. E. 699. The relators contended, however, that the findings of fact of the State Board relative to the grounds of their contest are not binding upon the court, because they are not judicial findings based upon consideration of the testimony, as the board heard only a part of it. The record shows that all of the testimony was not read to the board, but it does not show what parts were read and what were not. We must assume therefore that the findings of the board were based upon a consideration of the testimony bearing upon the facts found. But findings of fact which are contrary to any reasonable conclusion or inference from the evidence, or which have no evidence at all to support them, may be corrected as errors of law.

Construing the Constitution and statutes of this state, this court has held that the production of a registration certificate and proof of the payment of all taxes, including poll tax, assessed against an elector and collectible during the previous year, are conditions prerequisite to his right to vote; and, that every vote cast without compliance with these conditions is illegal; and that when it appears that enough illegal votes were cast in an election to change the result or make it doubtful, it will be declared void. *Wright*

v. Board, 76 S. C. 574, 57 S. E. 536; *Gunter v. Gayden*, 84 S. C. 48, 65 S. E. 948.

The only reasonable inference which can be drawn from the testimony is that one or the other of the above-mentioned conditions—and in some instances both—were not complied with at the following precincts: Banks Mill, Bloomingdale, Kitchings Mill, Otts, Wagener, and Windsor. At some of them, the managers agreed that they would not require the production of registration certificates or proof of the payment of taxes. At some, they required one but not the other. An attempt was made to show compliance with the law by proving that the managers knew the voters personally, and were satisfied that they had registration certificates; and that they had paid their taxes, by showing that the managers either knew or were informed that the sheriff had not been in the neighborhood to levy and collect tax executions, and the inference was that all the people had paid their taxes. Such a palpable attempt at evasion of the law will not be tolerated. Just what proof of payment of taxes, other than the certificate or receipt of the officers authorized to collect taxes, which is made conclusive proof thereof, will satisfy the statute, it is not now necessary to decide. But when the Legislature used the word "proof," it meant legal and competent evidence, furnished by affidavit or in some other legal form, and such as would satisfy a reasonable mind of the truth. The law-making power has declared that a registration certificate and proof of payment of taxes must be produced at the polls. Neither the courts nor the managers of election have any power to dispense with either of these mandatory requirements of the law.

In the elections reviewed in *Wright v. Board* and *Gunter v. Gayden*, it appeared that the illegal voting was so general that the whole election was thereby affected, and therefore vitiated. But when the illegal voting is confined to only a few of many precincts, the rejection of the vote of the precincts thereby affected will not necessarily vitiate the entire election. There may be cases, however, in which the number of precincts rejected on account of fraud or illegal voting is so large that the whole election will be declared void, even though the result at the other precincts would remain unchanged. Where fraud or illegality in an election is so general that it appears that a free and fair expression of the popular will has not been obtained, the whole election will be set aside. When the polls can be purged of the illegal votes, this should be done, and only the illegal votes should be rejected, and the legal votes should be counted. But when this cannot be done, the entire polls must be thrown out, if it appears that enough illegal votes have been cast to affect the result at such poll, or to leave it in doubt.

In this case it appears that enough illegal votes were cast at each of the above-named precincts to have changed the result at such precinct, or, at least, to have left it in doubt. As it was not shown by whom or on which side of the question the illegal votes were cast, and as the polls could not therefore have been purged of them, the entire vote at each of said precincts should have been thrown out. Upon the same grounds upon which we have found that the vote at the above-named precincts should have been rejected, the State Board did reject the polls at Creed's Store, a precinct contested by the relators, and also those at White Pond and Silverton, precincts which were contested by Johnson and Powell; and they should have rejected the poll at Montmorenci, another precinct contested by Johnson and Powell.

The next question is whether the county board erred in admitting testimony to support the contest of Johnson and Powell, and whether the State Board erred in sustaining their contest as to certain precincts. The relators contended that, as there was no appeal by Johnson and Powell from the first decision of the county board, they are concluded; also, that, by the terms of the order of the State Board, recommitting the matter, only the relator's contest was to be heard. It is apparent that the contest of Johnson and Powell was filed for no other purpose than to offset the possible effect upon the result of the election by the rejection of some or all of the precincts contested by the relators. Therefore, when the board decided to dismiss the contest of the relators, what would have been the use to consider the other? No matter what disposition had been made of it, in whole or in part, the result would not have been changed. Therefore it was not considered or decided.

But we think the terms of the order of the State Board broad enough to require the consideration of that contest by the county board. It will be noted that "the entire record" was recommitted with instructions to "recanvass the vote for Aiken county," and not merely the precincts contested by relators. In *State v. Nerland*, 7 S. C. 246, quoted with approval in *Ex parte Mackey*, 15 S. C. 332, Chief Justice Moses said: "The term (canvassers) employed to designate the duty to be performed by the commissioners would seem to impose an obligation beyond that of merely counting the ballots and comparing the statement of managers. 'Canvassing' implies 'search,' 'scrutiny,' 'investigation,' 'examination,' etc." The fact that the order of the State Board specifically required certain things to be done with regard to the contest of the relators does not exclude the consideration of the other contest, especially when the board were required by that order to recanvass the vote for the whole county, when the contest of relators covered only a few precincts.

With respect to some of the precincts con-

tested by the relators, the petition herein states other grounds than those stated in the notice of contest filed with the county board. The court will not consider any other grounds than those stated in the notice filed. While the statute does not specify any method of procedure in such contests, and while, perhaps, technical precision in pleading should not be required, still reason and justice require that the grounds relied upon should be stated so plainly and clearly that the contestee may prepare to meet them without unnecessary labor or expense; and, unless the notice is amended by order of the board, the contestant will be held to the grounds alleged, and the admission of evidence will be restricted accordingly. As well might the notice specify one precinct, and the contestant be allowed to introduce evidence as to another.

The next question is whether the demurrer of contestants to the jurisdiction of the board, as organized on September 7th, and the legality of that meeting, should have been sustained. The statute does not provide how or by whom meetings of the board shall be called. In the absence of such provision, it was competent for the majority to call the meeting. The rule is that "where a body or board of officers is constituted by law to perform a trust for the public, or to execute a power or perform a duty prescribed by law, it is not necessary that all should concur in the act done. The act of the majority is the act of the body." *Abbeville v. McMillan*, 52 S. C. 60, 29 S. E. 540.

The next question is whether there was error in not allowing more time for the production of witnesses before the county board, and more time for the hearing of the appeal by the State Board. The time allowed in such cases must necessarily be left to the discretion of such boards, and the court will not interfere, unless there was a manifest abuse of the discretion to the prejudice of the complainant. The time fixed by the statute within which the boards are required to discharge their duties shows that a speedy determination of such contests was contemplated and intended. And there are strong reasons resting in a sound public policy why such contests should be brought to a speedy determination. From the circumstances of the case, both boards were under the necessity to act promptly, and both have found as a fact that the time allowed was sufficient, and we think their finding was warranted under the circumstances. Moreover, the motion addressed to the county board for more time to procure witnesses was not supported by affidavit, as it should have been, naming the witnesses and stating their places of residence, so that the board could the more intelligently have decided how much time could be allowed within the limit allowed them by the State Board.

Section 208, vol. 1, Code 1902, provides that "the managers shall administer to each per-

son offering to vote an oath that he is qualified to vote at this election, according to the Constitution of this state, and that he has not voted during this election." And section 212 provides that "at each precinct, a space or enclosure, such as the managers of election shall deem fit and sufficient, shall be railed off or otherwise provided with an opening at one end or side for the entrance of the voter, and an opening at the other for his exit, as a voting place in which to hold the election. * * * And the ballot box shall be so located as to be in view of persons outside of the polling place, during the time of voting. * * * But one voter shall be allowed to enter any voting place at a time, and no one, except the managers, shall be allowed to speak to the voter while in the voting place casting his vote."

The violation of one or more of the foregoing provisions of the statute is alleged as the ground of contest of the following precincts: Aiken, Oak Grove, Bath, Kneecus Mill, Salleys, Seivern, and Shaws Fork. The state canvassers have found, as a fact, that the election was fair, and that none of the things above mentioned affected the result, and that some of the allegations were not sustained by the evidence. This finding cannot be reviewed.

Moreover, the provisions above quoted are merely directory, and not mandatory or imperative; and it is well settled that the violation of such provisions of a statute as merely regulate the conduct of elections is not, in the absence of fraud, vitiativ, unless it is made to appear that the result was thereby affected. *De Berry v. Nicholson*, 102 N. C. 465, 9 S. E. 545, 11 Am. St. Rep. 787; *Parvin v. Wimberg*, 130 Ind. 561, 30 N. E. 790, 15 L. R. A. 775, 30 Am. St. Rep. 254; *Patterson v. Watkins*, 131 Ala. 387, 31 South. 93, 90 Am. St. Rep. 43; 6 Cyc. 362. These provisions of the statute should, however, be observed by the election officers, whose sworn duty is to administer the law, as enacted by the Legislature. It has been well said that before an election all provisions of the statute should be deemed and held by the officers of the election to be mandatory. Any willful neglect of duty by such officers is made a misdemeanor by statute. Section 284, Cr. Code.

Notwithstanding the errors of the State Board which we have pointed out, we find, upon examination of the vote at the other precincts in the county, that they give a majority "for sale." Therefore the illegalities complained of have not affected the result of the election, as declared by the board. As there was no fraud, and the illegal voting was not so general as to warrant the conclusion that the election was not a free and fair expression of the popular will, it will be sustained.

Petition dismissed.

(36 S. C. 285)

LEWIS et al. v. POPE et al.

(Supreme Court of South Carolina. July 13, 1910.)

1. TRIAL (§ 194*)—INSTRUCTIONS—CHARGE AS TO MATTERS OF FACT.

An instruction that a person cannot live on or occupy one tract of land and establish adverse possession, under color of title, over an adjoining tract by proving that he has cut timber on the adjoining tract and hauled it off for use on the tract on which he lived was properly refused, as violating Const. art. 5, § 26, providing that judges shall not charge juries in respect to matters of fact.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.*]

2. ADVERSE POSSESSION (§ 18*)—ACTUAL OCCUPANCY—RESIDENCE.

Actual residence is not essential to the defense of adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 96-98; Dec. Dig. § 18.*]

3. ADVERSE POSSESSION (§ 13*)—ELEMENTS.

Adverse possession as applied to real estate is an actual, visible, and exclusive appropriation of land commenced and continued under a claim of right with the intent to assert the claim against the true owner, and accompanied by such an invasion of the rights of the opposite party as to give him a cause of action.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65-76; Dec. Dig. § 13.*]

For other definitions, see Words and Phrases, vol. 1, pp. 227-236; vol. 8, p. 7568.]

4. TRIAL (§ 260*)—REFUSAL OF INSTRUCTIONS.

A refusal to charge that a person cannot live on or occupy one tract of land and establish adverse possession, under color of title, over an adjoining tract by proving that he has cut wood or timber on the adjoining tract, for use on the tract on which he lived, is rendered harmless by charging that before one can succeed in holding lands under a claim of adverse possession, he must prove that he has been in possession for 10 consecutive years, claiming it openly, notoriously, and adversely, and he cannot succeed in his claim by living on another tract and cultivating for a few years a small patch on the tract he claims, or by going on such tract and sometimes cutting wood or timber for use on the tract on which he lives, but he must show that he has been doing that for 10 consecutive years.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

5. ADVERSE POSSESSION (§ 116*)—INSTRUCTIONS—PRESUMPTION.

In an action for the possession of land, where defendants show adverse possession by themselves and their ancestors for over 20 years, a request to charge that the mere going on the land while living on another tract and cultivating a part of it for a few years, or occasionally cutting wood on it, is not possession from which it can be presumed that there was a deed was properly refused.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 116.*]

6. ADVERSE POSSESSION (§ 43*)—CONTINUITY OF POSSESSION—TACKING SUCCESSIVE POSSESSIONS.

To sustain the defense of adverse possession under the statute, the defendant is not allowed to tack his possession to that of the party from whom he claims.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 213-225; Dec. Dig. § 43.*]

7. TRIAL (§ 187*)—INSTRUCTIONS—CHARGES AS TO MATTERS OF FACT.

A charge that, while the declarations of a person who has been in possession of land may be given in evidence to show under what right he held it, yet the loose declarations of a man in possession cannot prevail against the truth of the case as shown on the trial, was properly refused, as violating Const. art. 5, § 26, providing that judges shall not charge juries in respect to matters of fact.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 187.*]

8. TRIAL (§ 296*)—INSTRUCTIONS—CONSTRUCTION OF CHARGE AS A WHOLE.

An instruction that the law presumes possession unexplained to be adverse possession, that holding exclusively, and adversely, and openly are the highest acts in the power of the disseisor to indicate his intention, and that those who claim an interest in things must be charged with a knowledge of their status and condition was free from error, where the court also charged that if a plaintiff in an action to recover real property establishes legal title he is presumed to have been in possession within the time required by law, and the occupation of the land by any other person is deemed to have been in subordination to the legal title, and to defeat the legal title the person in possession must show that he has held and possessed the land adversely against such legal title for 10 consecutive years before the commencement of the action.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-718; Dec. Dig. § 296.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; J. W. De Vore, Judge.

Action by R. H. Lewis and others against N. B. Pope and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

The grounds of appeal were as follows: 1. Because his honor, as it is respectfully submitted, erred in refusing to charge the plaintiffs' sixth request, to wit: "A person cannot live on or occupy one tract of land and establish adverse possession, under color of title, over an adjoining tract of land by proving that he has cut wood or timber on such adjoining tract and hauled it off for use on the tract on which he lived." 2. Because his honor erred in refusing to charge plaintiffs' thirteenth request, to wit: "When a person claims that he has acquired title to land by being in possession for 20 years, he must prove such possession of such land for 20 consecutive years. The mere going on the land while living on another tract, and cultivating a part of such land for a few years, or occasionally cutting wood on it, is not such possession from which it can be presumed that he had a deed. In all cases the jury must find the truth from the evidence, and if, as a matter of fact, he had no deed, then they cannot presume that he had such deed." 3. Because his honor erred in refusing to charge all of the eighth request of the plaintiffs, to wit: "Where one establishes a legal title to land the law presumes that he has been in possession of the

same within the time fixed by the statute, and such title cannot be defeated by an occupant of such land, unless he proves adverse possession in one or the other of the ways which have been explained to you, and even though it does appear that the occupant has been in possession of the same for 20 years this will not presume a deed from the owner of such land, but before such occupant can defeat the legal title he must establish his adverse possession, either under color of title or by actual possession for 10 consecutive years." 4. Because his honor erred in refusing to charge plaintiffs' eleventh request, to wit: "While the declarations of a person who has been in possession of land may be given in evidence to show under what right he held it, yet I charge you that the loose declarations of a man in possession cannot prevail against the truth of the case, as may be ascertained and proved on the trial of such case." 5. Because his honor erred in charging the fourth request of the defendants, to wit: "The law presumes possession unexplained to be adverse possession. Holding exclusively, and adversely, and openly, are the highest acts in the power of the disseisor to indicate his intention. Those who claim an interest in things must be charged with a knowledge of their status and condition."

Sanders & De Pass, for appellants. Stan-
yarne Wilson and J. B. Atkinson, for respondents.

GARY, A. J. This is an action to recover possession of a tract of land containing about 100 acres. The defendants denied the plaintiffs' title, and set up the defenses of adverse possession, presumption of a grant, estoppel, and laches. The jury rendered a verdict in favor of the defendants, and the plaintiffs appealed upon exceptions which will be reported.

First exception. In order to understand clearly the question presented by this exception, it will be necessary to refer to the testimony of the defendants' witnesses, which is thus summarized by the respondents' attorneys: "In 1869 T. W. Pope, ancestor of defendants, was in possession. His son, N. K. Pope, says he continued in possession till he, N. K. Pope, went West in 1871. The fenced-in portion, some 11 acres, he cultivated and, in winter, pastured; the rest of the place, woodland, he used for firewood and cattle range. N. B. Pope says: He worked in this cultivated, fenced land for his father in 1871. The cattle were pastured there in winter. This continued till 1876, when the family scattered by deaths and marriages, leaving no one but himself with his father. They thereupon discontinued cultivating, and devoted the place to pasture, till three years after the fence law was enacted, about 1884,

and then hauled off the rails and built a fence for the cattle, and let that farm grow up. The tract was used in the only other ways possible; clearing land by cutting timber and selling it for wood, sawing and using it for firewood and sningles. This continued until his father's death in 1900. From the time his father went on the place till his death, he used it as his own, just like his other land, claiming it as his own, and no one interfered with his possession. After his death his children continued to use and occupy it, building houses upon it in 1901 and 1903. In 1904 it was divided amongst them by partition, and has since then been occupied and cultivated by those of the family to whom it was set off. During all the while, for 30 years, the plaintiff Lewis lived in that neighborhood. J. D. Cooley says: That his first recollection was T. W. Pope cultivating some eight or ten acres of the place, and getting wood and pine off of it for his own use. He made no difference in the use of this land and his other lands. In 1876 witness helped pile up fodder and put it in an old house there, along with T. W. Pope's children. Simeon Moore says: That in 1888 he cut down saw timber on the place for T. W. Pope, and sawed there for four or five months—about 200,000 feet. G. B. Morris says: That he was on the place in 1873, and T. W. Pope was then in possession, and he so continued till his death, using it just like he did his other lands, and claiming it as his own; and after his death his heirs took charge of it, but did not divide it up, under the surveyor's advice, because they could not find among his papers a deed to the place. From 1873 to this time the land has not been in possession of any one but T. W. Pope and his heirs. Mrs. Laura Nance says: That from her earliest recollection her father, T. W. Pope, was in possession of the land, cultivating it and pasturing it, and the men bringing in firewood. She left and went West in 1890, returning in 1896, finding him still in possession. Never heard of any one else claiming the land. T. E. Johnson, surveyor, says: That in 1900, after T. W. Pope's death, he surveyed his lands and platted them for his heirs, as shown by Exhibit 1. In doing so he made use of a plat made by J. B. Davis, surveyor, in 1879 for T. W. Pope of his lands, introduced as Exhibit J. This plat J includes the land in dispute. In T. W. Pope's lifetime, Wm. Ramsay got him to survey a tract which lies just east of the tract in dispute, and he (witness) had to locate the line dividing them. In doing so he got T. W. Pope to help him. Pope told him that was his line and Ramsay's. This was the eastern line of the land in dispute. N. B. Pope says: That when Davis made the survey and plat (Exhibit J) for his father, he and his father went along and his father showed Davis the lines by which the survey was made."

There are two reasons why this exception

cannot be sustained. In the first place, the request was in violation of art. 5, § 26, of the Constitution, which provides that "judges shall not charge juries in respect to matters of fact," in that it undertakes to say, as matter of law, that certain facts do not constitute adverse possession, whereas the inference from such testimony presents a question of fact to be determined by the jury. 16 Enc. of Law (1st Ed.) 465 et seq.; *Whaley v. Stevens*, 27 S. C. 549, 4 S. E. 145; *State v. Aughtry*, 49 S. C. 305, 26 S. E. 619, 27 S. E. 199; *Pickens v. Ry.*, 54 S. C. 498, 32 S. E. 597; *Rinake v. Mfg. Co.*, 58 S. C. 360, 36 S. E. 700; *Wood v. Mfg. Co.*, 66 S. C. 482, 45 S. E. 81; *Weaver v. Ry.*, 76 S. C. 49, 56 S. E. 657, 121 Am. St. Rep. 934; *Turbyfill v. Ry.*, 83 S. C. 325, 65 S. E. 278. The case of *Pickens v. Railway*, supra, shows that this principle is specially applicable to the case under consideration, as there was testimony, other than that mentioned in the exception, touching the question of adverse possession.

In the second place, actual residence is not essential to the defense of adverse possession. "Adverse possession, as applied to real estate, is an actual, visible, and exclusive appropriation of land commenced and continued under a claim of right, with the intent to assert such claim against the true owner, and accompanied by such an invasion of the rights of the opposite party, as to give him a cause of action." 1 Enc. of Law, 789; 2 Enc. L. & P. 362. "The usual test of entry and possession is actual occupation and residence, cultivation, and improvement of the land. The evidence necessary to establish actual adverse possession, varies in each particular case, depending upon the situation of the property, and the use to which it may be applied. The same rule will not apply equally to cultivated lands, town property, and wild lands. Although there must be actual entry, neither actual occupation, cultivation, nor residence is necessary, where the property is so situated as not to admit of any permanent improvement or cultivation; but where acts of ownership have been done upon lands, which from their nature indicate a continuous claim of property, and are continued long enough, such acts are evidence of an adverse possession for the consideration of the jury." 1 Enc. of Law, 822, 823. "The actual fencing and inclosing of the land are not, unless expressly required by statute, essential to constitute adverse possession, but such acts are very decisive, in determining possession and claim of ownership. Where the property has been properly inclosed, there may be sufficient evidence of claim and ownership without actual residence." 1 Enc. of Law, 828, 829; 2 Enc. L. P. 369-371. "Although possessio pedis does not require actual occupancy, it implies inclosure and use of the ground inclosed. I will not undertake to indicate in what way it should be used. In general it should be cultivated, or perhaps it might be sufficient that it should be

used for pasture." Per Butler, J., in delivering the opinion of the court in *Porter v. Kennedy*, 1 McM. 354. But even if there was error it was rendered harmless by charging the following request: "Before one can succeed in holding lands under a claim of adverse possession, he must prove that he has been in possession for 10 consecutive years, claiming it openly, notoriously, and adversely. He cannot succeed in such claim by living on another tract and cultivating for a few years a small patch on the tract he claims, or by going on such tract and sometimes cutting wood or timber, and hauling it off for use on the tract on which he lives, but he must show that he has been doing that for 10 consecutive years."

Second exception. The proposition contained in the first sentence of the request is disposed of by what was said in considering the first exception. The proposition embodied in the second sentence of the request is antagonistic to the doctrine upon which presumptions rest, to wit, that even when there is no proof of a fact, nevertheless, after 20 years, it will be presumed to exist. *Riddlehoover v. Kinard*, 1 Hill Eq. 376; *McLeod v. Rogers*, 2 Rich. Law, 19; *Corbett v. Fogle*, 72 S. C. 312, 51 S. E. 834; *Powers v. Smith*, 80 S. C. 110, 61 S. E. 222.

"Presumptions may supply the place of positive proof. There are two kinds of presumptions. The one may be called a legal presumption; the other a presumption of fact. The first is wholly unconnected with the idea of belief, in fact, it is opposed to it. It is a mere rule of law to supply those defects of our nature and the nature of things, which cannot otherwise be guarded against. Under this rule the party must rely on a long-continued and uninterrupted possession. The rule invests such possession with the title. I am never led to the consideration of this subject, but my mind involuntarily recurs to the peculiarly happy and lucid exposition of the rule by Lord Chancellor Erskine in the case of 12 Vesey, 266, 267. He observes that it has been said you cannot presume unless you believe. 'But it is because there are no means of creating belief or disbelief that such general presumptions are raised upon subjects of which there is no record or written muniment. Therefore, upon the weakness and infirmity of all human tribunals, judging of matters of antiquity, instead of belief (which must be the formation of the judgment upon a recent transaction), where the circumstances are incapable of forming anything like belief, the legal presumption holds the place of particular and individual belief. Mankind, from the infirmity and necessity of their situation, must, for the preservation of their property and rights, have recourse to some general principle to take the place of individual and specific belief; which can hold only as to matters within our own time, upon which a conclusion can be formed from particular and

individual knowledge.' The second is the rule in relation to the presumption of facts. Where the party undertakes to show that, in point of fact, a deed did exist, there he must first prove such circumstances as will evidence the belief of its existence; next, the loss or destruction; and lastly, the contents." Per Colcock, J., in delivering the opinion of the court, in *Stockdale v. Young*, 3 Strob. 501, note. The second kind of presumption is not involved in this case.

Third exception. The circuit judge charged the request down to the words "which have been explained to you." The second portion of the request would, however, deprive the defendants of the right to rely upon the presumption of a grant, unless they first showed that they had acquired title to the land by adverse possession for the statutory period of 10 years. In order to sustain the defense of adverse possession under the statute, the defendant is not allowed to tack his possession to that of the party from whom he claims. *Pegues v. Warley*, 14 S. C. 180; *Ellen v. Ellen*, 16 S. C. 132; *Garrett v. Weinberg*, 48 S. C. 28, 26 S. E. 3. It was, however, held in the case of *McLeod v. Rogers*, 2 Rich. Law, 19, that a continuous adverse possession of land for 20 years, by different persons and at different times, is sufficient to raise the presumption of a grant. It will thus be seen that it would have been prejudicial to the rights of the defendants to charge the request.

Fourth exception. When the request was presented the presiding judge said: "I refuse that eleventh request as it stands, but I will cover it in my general charge, before I get through, in a different way." The appellants have not shown wherein the general charge in this respect was prejudicial to their rights, but waiving such objection, the exception cannot be sustained, as the request was in violation of article 5, § 26, of the Constitution, which provides that "judges shall not charge juries in respect to matters of fact."

Fifth exception. In disposing of the request set out in this exception, the presiding judge said: "I will have to charge that request. Holding exclusively, and adversely, and openly are such matters as you may take into consideration, in ascertaining and passing upon the question, as to whether the holding was adverse." When the question presented by this exception is considered in connection with other portions of the charge, especially what was said in charging the plaintiff's first request, it will be seen that it is free from error. The first request and the remarks of the presiding judge are as follows: "If a plaintiff, in an action to recover real property, or the possession thereof, establishes a legal title to the land in dispute, then he is presumed to have been in possession thereof, within the time required by law, and when such is the case, the occupation of the land by any other person is deemed to have been under and in subordina-

tion to the legal title, and before such legal title can be defeated the person in possession must show that he has held and possessed the land adversely against such legal title for 10 consecutive years, before the commencement of the action.

"I charge you, as I have already done in sum and substance, whenever a person comes into court, and shows that he has the legal title, or has had it, the law presumes that he is in possession, or that if any one else is in possession, the law presumes that he is there by permission of the owner, the person who owns the legal title to the land. The person in possession claims as a subordinate, but that presumption may be rebutted by evidence. That is the case here, and it is for you to say whether that presumption has been rebutted by the evidence."

It is the judgment of this court that the judgment of the circuit court be affirmed.

WOODS, J., concurs in the result. HYDRICK, J., did not sit in this case.

(86 S. C. 370)

STATE v. DUNCAN.

(Supreme Court of South Carolina. July 18, 1910.)

1. CRIMINAL LAW (§ 1171*)—APPEAL—HARMLESS ERROR—ARGUMENT OF COUNSEL.

Great latitude is allowed in the argument of counsel, provided it is confined to the evidence; but the court on its own motion must check any departure therefrom, and an abuse of the privilege, over objection, so far as to probably affect the verdict, is error requiring a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

2. CRIMINAL LAW (§ 1171*)—APPEAL—HARMLESS ERROR—ARGUMENT OF COUNSEL.

Where the record shows that no other verdict could have been found on any reasonable view of the evidence than was found, improper argument of counsel in departing from the evidence was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

3. CRIMINAL LAW (§ 726*)—APPEAL—HARMLESS ERROR—ARGUMENT OF COUNSEL.

Where counsel for accused in his argument improperly alluded to the fact that newspapers were urging convictions for homicide, the argument of the state's attorney that there were four indictments for that crime on the docket, but they had nothing to do with the case, and that every case must stand on its own merits, was not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1681; Dec. Dig. § 726.*]

4. HOMICIDE (§ 300*)—SELF-DEFENSE—INSTRUCTION.

A charge on self-defense that if accused used such language to decedent as might reasonably be expected to bring on a physical encounter, and actually helped to bring it on, resulting in the death of decedent, accused could not plead self-defense, and the jury must determine whether accused used to decedent language that was reasonably calculated to bring on a difficulty, etc., properly submitted to the

jury the question whether accused acted as a reasonable man, and whether a reasonable man would expect to bring on a difficulty by the use of similar language.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

5. CRIMINAL LAW (§§ 763, 764*)—INSTRUCTIONS—STATEMENT OF FACTS.

A hypothetical statement of the facts in an instruction, with a statement of the legal result following therefrom, is not a charge on the facts.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. §§ 763, 764.*]

6. CRIMINAL LAW (§ 823*)—INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTION.

Where the court charged that unless the state proved beyond a reasonable doubt that accused killed decedent, they must acquit, and that the issue whether accused killed decedent must be determined from the testimony, a statement in a charge explaining the difference between manslaughter and homicide, as to what spirit of heart accused killed decedent out of, was not prejudicial, as conveying to the jury the impression that in the opinion of the court accused had killed decedent.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 823.*]

7. WITNESSES (§ 287*)—REDIRECT EXAMINATION—EXPLANATION OF TESTIMONY.

Where a witness for accused, on cross-examination admitted that his wife supported herself, and that he had supported her until recently, and stated that he and his wife did not live together, but were on good terms, it was not error to refuse to allow him to explain why he was separated from his wife.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 930, 1000-1002; Dec. Dig. § 287.*]

8. CRIMINAL LAW (§ 656*)—TRIAL—REMARKS OF TRIAL JUDGE.

The remarks of the trial judge in sustaining an objection to a question asked a witness who lived separate from his wife, as to the cause of the separation, that it was bad enough to know that the wife had quit the witness, were not objectionable as reflecting on the character of the witness for veracity or otherwise.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1524-1533; Dec. Dig. § 656.*]

Appeal from General Sessions Circuit Court of Alken County; Geo. W. Gage, Judge.

Mark Duncan was convicted of manslaughter, and he appeals. Affirmed.

Hendersons, for appellant. Solicitor Jas. F. Byrnes, for the State.

HYDRICK, J. Appellant was convicted of manslaughter for the killing of William Brooks. He and Brooks had a fight on Wednesday night, about 8 o'clock, in which appellant admitted that he used his knife and tried to cut Brooks, but did not know whether he had done so or not. After they fought some time, Brooks ran away, and appellant pursued him some distance, but he gave up the pursuit, and returned to the house in front of which the fight occurred, and asked for a gun, saying that Brooks had cut him. He then reported the matter to the town constable, who with a crowd, accompanied also

by appellant, went in search of Brooks, but he was not found until the following Friday, when his dead body was found in a field near the place where the fight occurred. His jugular vein was cut, and he died of hemorrhage. There was testimony that Brooks had been drinking during the afternoon of Wednesday with two other men, and that one of them had been heard to threaten, after they had separated, to find him and whip him, because he had carried off their liquor. But there was no testimony that they, or either of them, or any other person, had any difficulty with Brooks after the fight with appellant, or even that any one saw him, until his dead body was found.

The following statement is taken from the record: During the course of his argument before the jury, Mr. D. S. Henderson, of counsel for the defense, referred to the policy of newspapers crying for conviction of persons charged with homicide, stating he was tired of it. The solicitor, in opening his argument to the jury, referred to the remarks of Mr. Henderson, and stated no such charge could be made against Mr. Henderson, because he was always asking for acquittals; that at a former term, he (Mr. Henderson) had stated before a jury the number of acquittals he had secured in homicide cases. At this point, Mr. Henderson objected, stating: "The solicitor, in his argument to this jury, has no right to say anything about my acquitting people, and I object to it, and want my objection put on the record. I call him to order. The Solicitor: I withdraw that then. The Court: You have no right to argue that, Mr. Solicitor. Proceeding, the solicitor stated: But, if everybody is not guilty it is remarkable that it should be necessary for four homicides to have been committed within a radius of four miles of Bath. Mr. Henderson: I want to call the solicitor to order again. He has no right to say to the jury that, within a radius of four miles of Bath, four homicides have been committed. The Court: Is that a fact? The Solicitor: Yes; there are four indictments in this court so alleging and counsel will admit it. Mr. Henderson: There is no such testimony in this case. The Court: I understand, if it is a matter of public record, I think the solicitor has a right to refer to it. Mr. Henderson: I object. The Court: Yes, sir." The solicitor stated that everybody knew that there were four indictments for such homicides, and counsel for the defense couldn't deny it, but that all this has nothing to do with the facts of this case. As said by Mr. Henderson, every case, like every tub, must stand on its own bottom.

Error is assigned because the court allowed the solicitor, over the objection of appellant's counsel, to state to the jury that four homicides had been committed within four miles of Bath, the place of the homicide in question. There can be no doubt that the

ruling was erroneous. The fact that other homicides had been committed had no relevancy whatever to the issues before the court in this case. The only question which has given this court serious concern is whether the reference to other homicides, made, as it was, under the sanction of the court, was so prejudicial to appellant as to call for a reversal of the judgment. Counsel on both sides in every case, but most especially in criminal cases, should be careful not to inject into the case prejudicial matter by way of statement or argument, which does not properly arise out of the evidence before the court, or inference which may reasonably and legitimately be drawn from it. Within the four corners of the evidence, great latitude in argument is allowed. But it is the duty of the court, of its own motion, to check any departure from the record. And when abuse of privilege of argument is allowed, against objection, to such an extent that it appears probable that the verdict was thereby affected, a new trial will be granted. The law guarantees every litigant a fair and impartial trial, and this has not been secured, where the verdict has been influenced by consideration outside of the evidence.

But, as said in *State v. Robertson*, 26 S. C. 118, 1 S. E. 444: "It is often a matter of difficulty to draw the line sharply between argument and unauthorized statement, between what is and what is not allowable, and as this pertains to the conduct of the cause, it must, to a large extent, be left to a wise discretion of the circuit judge." In *State v. Williamson*, 65 S. C. 248, 43 S. E. 673, the court said: "It is undoubtedly the duty of the circuit court, when appealed to, to repress any flagrant breach by counsel of the rules governing fair and legitimate argument, and for manifest abuse of discretion in this regard, from which it is probable that defendant was prejudiced, this court would set aside the verdict." It is argued that it is impossible to say when and to what extent the case of a litigant is prejudiced by the unauthorized statements of counsel. But it certainly will not do to say that for every departure from the record, the verdict of the jury will be set aside. If the record shows that no other verdict could have been found upon any reasonable view of the evidence, we are safe in concluding that no harm was done. If, however, an examination of the record and consideration of all the circumstances, imputing fair and average intelligence and honesty of purpose to the jury, leads to the conclusion that the result was probably affected, then, we think, a fair and impartial administration of the law demands a new trial.

In deciding the question, it is not improper to consider the circumstances under which the alleged abuse of the privilege of argument arose. When one attorney injects extraneous matter into the case, he arouses a

strong temptation in his opponent to reply to it, even though it may be necessary to travel outside the record to do so. And where one so provokes his adversary, he greatly weakens his claim upon the court to relieve him from the evil consequences thereby brought upon himself. He is the author of his own injury. Now, in this case, it appears that appellant's attorney was the first to breach the rule of legitimate argument. No doubt his allusion to the crying of newspapers for conviction in homicide cases, and his inveighing against such a course, caused the solicitor to feel that it was incumbent upon him to justify such a course on the part of the press by mentioning the fact that so many homicides had been committed within so small a radius. No doubt, too, defendant's counsel, realizing the powerful influence exercised by the press in enlightening and moulding public sentiment, and in arousing it to civic righteousness, felt called upon to warn the jury lest that sentiment had been so aroused as to demand a victim. But that does not justify or excuse his traveling outside of the record, for his purpose could better have been accomplished by proper requests for instructions to the jury as to their duty under such circumstances, which, coming from the court, would have had much greater influence with the jury.

The record does not show that the solicitor made any other or further comment than the mere mention of the fact that there were four indictments for homicide on the docket, and concluded by saying: "All this has nothing to do with the facts of this case. As said by Mr. Henderson, every case, like every tub, must stand on its own bottom." We think this went very far to correct his error; for he thereby admitted that the other indictments had nothing to do with this case, and that it should be tried on its own merits. After a careful consideration of all the circumstances and the testimony in the case, we do not think appellant is entitled to a new trial on this ground. In *Ball v. Commonwealth* (Ky.) 85 S. W. 226, the prosecuting attorney said, in his closing argument, that more than a score of men, perhaps, had been killed in the city of the homicide, and nothing had been said about it because the people there were afraid to talk about it; and in *Sturgeon v. Commonwealth* (Ky.) 102 S. W. 812, the prosecuting attorney said to the jury: "I have tried to do my duty fairly. It remains, gentlemen, for you to do yours; and the records of this court show that there are now confined in the county jail some 23 murderers." In both cases, the court held the remarks were not prejudicial.

In declaring the law of self-defense, the judge charged: "If one man uses bad language, if Duncan used such language to Brooks as might reasonably be expected to bring on a physical encounter, and actually helped to bring on a physical encounter,

which resulted in the death of Brooks, then the law closes Duncan's mouth to plead self-defense. That is a matter for the jury to determine. Did Duncan use to Brooks language that was reasonably calculated to bring on a fight, and actually helped to bring it on, and as a result of that fight, was Brooks killed? If so, Duncan is wrong about bringing on the fuss, and cannot plead self-defense."

The errors assigned are: (1) That the jury should have been charged that the defendant would not be deprived of his right of self-defense, "unless the language used by him and his manner of using it were such as to give him personally just reason to suppose that his language to the deceased would probably result in a personal difficulty, and that he actually so believed, or reasonably should have so believed, and that the jury believed he so believed"; and (2), that the charge that if the jury found certain facts to exist, then Duncan was wrong about bringing on the fuss, and could not plead self-defense, was a charge on the facts.

We think both assignments are untenable. It certainly would not do to let the defendant be the sole judge of whether the language used by him might reasonably be expected to bring on a difficulty. The jury were the judges of that fact, just as they were of the fact whether the defendant acted in all other respects as a man of ordinary reason, prudence, and firmness. When the judge said "such language as might reasonably be expected," etc., it certainly conveyed the idea that it must be such as a reasonable man would expect would bring on the difficulty, whether that man was the person using the language, or the person to whom it was used, or any other. The defendant must be required to measure up to the standard of a reasonable man. *State v. McKellar*, 85 S. C. 236, 67 S. E. 314.

It has been decided too often to require citation of cases that a hypothetical statement of the facts with a statement of the legal result following thereupon, is not a charge upon the facts. During the course of his charge, while explaining the difference between murder and manslaughter, the judge said: "Now, what spirit of the heart did Duncan kill Brooks out of?" It is alleged that this was a charge on the facts, because the judge thereby conveyed to the jury the impression that, in his opinion, Duncan had killed Brooks, which was denied by the defendant, and contested in evidence and argument.

Standing alone, the sentence quoted appears to be obnoxious to the objection urged. But, when it is considered in the connection in which it was used, and in connection with the whole charge, we are satisfied that the jury did not take it as an expression or even an intimation of his honor's opinion. For, in response to defendant's first request,

the judge instructed the jury "that should they find that the state has not proved beyond a reasonable doubt that the deceased, William Brooks, came to his death by violence at the hands of the prisoner, Duncan, then they should acquit the prisoner forthwith." Again, after he had charged the requests, and was proceeding to deliver his general charge, he instructed the jury as follows: "Now, the first issue for you is, did Duncan kill Brooks? That lies at the threshold of the case. If Brooks is dead, did Duncan kill him? and that is a matter that you will have to determine from the testimony in the case. You have heard the testimony, and you know the place; you have got your common wits about you, and taking all the testimony into consideration, are you certain beyond a reasonable doubt that Duncan killed Brooks; or, have you a reasonable doubt? If you have a reasonable doubt, stop there and that ends the case."

After submitting that issue to the jury, he then instructed them that, if they were satisfied, beyond a reasonable doubt, that Duncan did kill Brooks, they should then proceed to inquire of the circumstances of the killing, and whether it was done in self-defense, or whether it was murder or manslaughter; and, in explaining the difference between murder and manslaughter, the question complained of was asked. The explanation of the law of self-defense and the difference between murder and manslaughter was necessarily based upon the supposition that Duncan killed Brooks. And the judge expressed what had been assumed merely for the purpose of explaining and declaring the law in that view of the case. Under these circumstances, we are satisfied the defendant suffered no prejudice.

On cross-examination of one of defendant's witnesses, the solicitor asked him: "Who supports your wife?" He answered: "She supports herself at the present time. I supported her until a short time ago." On the examination in reply, in response to a question by defendant's counsel, the witness stated that he and his wife did not live together, but were on good terms. Defendant's counsel then asked him the cause of their separation, which, upon objection by the solicitor, was excluded, the judge saying: "It is bad enough to know that she quit him." Error is assigned in refusing to allow the witness to explain why he was separated from his wife, and in making the remark above quoted, which, it is claimed, tended to discredit the witness before the jury. The cause of the separation of the witness and his wife was wholly irrelevant and properly excluded. The remark of the court complained of was not intended and could not have been construed as any reflection upon the character of the witness for veracity or otherwise. Judgment affirmed.

(36 S. C. 379)

TURBYFILL v. ATLANTA & C. AIR LINE RY. CO.

(Supreme Court of South Carolina. July 18, 1910.)

1. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR.

Railroad crossings are inherently dangerous and were so regarded by the law before the statute requiring signboards with the words "railroad crossing" printed thereon, and the blowing of the whistle and ringing of the bell when approaching the crossing, which was enacted not for the purpose of declaring the crossing dangerous, but merely to minimize the danger; hence any error in allowing witnesses, in an action for death at a crossing, to give their opinion as to whether the crossing was dangerous was harmless, both under the statute and common law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

2. TRIAL (§ 296*)—INSTRUCTIONS.

In an action for death at a railroad crossing, a charge that if deceased was killed because of neglect to give the statutory signals, and such neglect "contributed to her death" defendant is responsible and must answer in damages, unless deceased was guilty of gross or willful negligence, or was violating the law, and that such negligence was the proximate cause of her death, was not erroneous where from time to time throughout the charge the court charged in effect that when the word "contributed" was used, whether applied to the alleged negligence of the defendant or the contributory negligence of plaintiff, it was necessary that it should be a proximate cause of the injury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

3. TRIAL (§ 191*)—INSTRUCTIONS.

In an action for death at a crossing, where the court charged that the Supreme Court has said one of the purposes of requiring the signals to be continued is to give notice of the location of the train and the rapidity of its approach, especially when, "as it is alleged in the case," it cannot be seen on account of a curve or other obstruction, the quoted words were used merely by way of illustration in calling attention to cases where the statute is especially applicable, and did not render the instruction a charge on the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

4. NEGLIGENCE (§ 136*)—ISSUE OF—FOR JURY—WHEN.

The issue of negligence should go to the jury, when the facts which, if true, would constitute evidence of negligence are controverted; when such facts are not disputed, but there may be a fair difference of opinion as to whether the inference of negligence should be drawn; and when the facts are in dispute, and the inferences to be drawn therefrom are doubtful.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 333-346; Dec. Dig. § 136.*]

5. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS COVERED BY CHARGE GIVEN.

Requested charges substantially covered by a charge given are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

6. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMING FACTS.

In an action for death at a crossing, a charge that in this case the evidence shows that deceased was of age and was living apart from the parent, and as it fails to show that she contributed anything for the support or aid of the parent, no damages can be allowed on this account, was properly refused as being a charge upon the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

7. APPEAL AND ERROR (§ 1067*)—PREJUDICIAL ERROR.

Where the court had already charged on the question of damages substantially as requested, any error in refusing a further charge thereon was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.*]

8. DEATH (§ 86*)—ACTION FOR WRONGFUL DEATH—DAMAGES.

In an action for death at a crossing, it is not essential that the person for whose benefit it is brought should have been dependent on the deceased, or that he should have suffered pecuniary loss, and the amount of the recovery being his absolute property, his life expectancy is not an element of damages to be considered.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 112-114, 119; Dec. Dig. § 86.*]

9. APPEAL AND ERROR (§ 1078*)—EXCEPTIONS—FAILURE TO ARGUE—REVIEW.

Exceptions not argued on appeal will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; J. W. Devore, Judge.

Action by I. M. Turbyfill as administrator of the estate of Belinda R. Hand, deceased, against the Atlanta & Charlotte Air Line Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 83 S. C. 325, 65 S. E. 278.

The exceptions referred to in the opinion are as follows:

Exceptions.

It is respectfully submitted, that his honor erred:

1. In allowing the witness, I. M. Turbyfill, to be asked the following questions: "Q. Was that a dangerous crossing or not? Q. Did you consider it so?" And in permitting him, against the objection of the defendant, to answer the same. And also in permitting the following questions to be asked the witness Parker Grier: "Q. Was that a dangerous crossing? Q. Did you consider that a dangerous crossing?" And in permitting the witness to answer the same against the objection of the defendant. And also in permitting the following question to be asked the witness O. N. Moore: "Q. State whether or not that is a dangerous crossing?" And in allowing the witness to answer the question, against the objection of the defendant. The error being, as it is respectfully submitted, that this was permitting these witnesses to

give their opinion on one of the material issues in the case.

2. In charging the plaintiff's fifth request, to wit: "If the jury find that the deceased was killed at the time and place alleged because of neglect to give the statutory signals, and such neglect contributed to her death, then the defendant is responsible for her death and must answer in damages therefor, unless they further find that the deceased was guilty of gross or willful negligence, or was violating law, and that such gross or willful negligence or violation of the law was the proximate cause of her death." The error being, as it is respectfully submitted: (a) That by this charge his honor instructed the jury substantially that if the deceased was killed at the place alleged because of the neglect of the defendant to give statutory signals, and that such neglect contributed to her death, that the defendant would be liable therefor, thereby leaving the jury to believe that if such neglect contributed in any manner to her death the defendant would be liable; whereas, it is respectfully submitted that his honor should have charged that before the defendant would be liable it must be shown that the neglect to give the statutory signals contributed as a proximate cause to her death. (b) Because his honor further erred in charging this request, because it is respectfully submitted that when his honor charged the jury that the defendant would be liable if the failure to give the statutory signals contributed to the death of the intestate, unless the jury should further find that the deceased was guilty of gross or willful negligence, or was violating the law, and that such gross or willful negligence or violation of the law was the proximate cause of her death, he, in substance, charged and instructed them that gross or willful negligence or violation of law on the part of the plaintiff before it would exonerate the defendant must be "the proximate cause of her death;" thus substantially charging them that this gross or willful negligence or violation of law on the part of the deceased must be the sole cause of her death; whereas, it is respectfully submitted, that even if the defendant was guilty of violating the statute, and even if such violation did contribute as "a proximate cause" to her death, yet that the defendant would not be liable if the deceased was guilty of gross or willful negligence which contributed as "a proximate" cause to her death.

3. Because, as it is respectfully submitted, his honor erred in charging the plaintiff's twelfth request, to wit: "I charge you further that the Supreme Court of our state has said, 'One of the purposes of requiring the signals to be continued is to give notice of the location of the train and the rapidity of its approach, especially when, as it is alleged in this case it cannot be seen on ac-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

count of a curve or other obstructions.'” The error being, as it is respectfully submitted, that by this charge his honor charged upon the facts, contrary to the provisions of the Constitution of 1895, and intimated to the jury that the train could not be seen by the deceased on account of a curve or other obstruction. Whereas, it is respectfully submitted, this was one of the material facts in the case to be determined by the jury from the evidence introduced, and his honor erred in so charging.

4. Because, it is respectfully submitted, his honor erred in refusing to charge the defendant's third request, to wit: “(3) The object of the law in requiring a railroad company to ring the bell or sound the whistle of an engine for 500 yards continuously before reaching a crossing is to give notice of the approach of the engine, its location, and the rapidity of its approach, to persons expecting to cross the track at the crossing, but if a person who is expecting to cross the track at such crossing knows that the train is approaching, knows its location and the rapidity of its approach, by any other means, then the object of the statute has been accomplished; and if a person, with the knowledge that a train is approaching within 500 yards, and knows its location, and the rapidity of its approach, does enter on the track without exercising ordinary care and caution and is injured by collision with the train, and if it appears that the failure to exercise ordinary care and caution contributed to the injury, it cannot be said that the failure to ring the bell or sound the whistle caused the injury.” The errors being, as it is respectfully submitted: (a) That this was a sound proposition of law applicable to the facts in the case, and his honor erred in not submitting the question to the jury and in allowing them to determine whether if a party, intending to cross a railway track, knew of the approach of the train, its location and the rapidity of its approach by means other than the giving of the signals required by the statute, was required to exercise ordinary care and caution before entering on the track; and, further, that his honor by refusing to charge this request took from the jury and prevented them from determining whether a person intending to cross the track, and who knew of the approach of its engine, its location, and the rapidity of its approach, by means other than by the giving of the signals required by the statute, would be guilty of such contributory negligence as would defeat a recovery. It being respectfully submitted that when a person does know of the approach of an engine, its location, and the rapidity of its approach, either by sight or hearing, or by any other means other than the giving of the signals required by the statute, and that notwithstanding such knowledge the person does enter upon the track and is injured, it then becomes a question for the

jury to determine whether or not such person failed to exercise ordinary care and caution, and whether such person was guilty of such contributory negligence as would exonerate the railroad company. (b) That his honor overlooked the distinction existing between the common law and the statute in actions of this kind, and limited the jury to the consideration of the defense under the statute.

5. Because his honor erred in failing to charge defendant's fourth request, to wit: “(4) If a person who expects to cross a railway track at a crossing knows of the approach of the train, that it is within 500 yards of such crossing, knows its locality, and the rapidity of its approach, and such knowledge is derived either from the ringing of the bell or the sounding of the whistle continuously for 500 yards before the train reaches such crossing, or because the person saw and heard the train for this distance, then it is the duty of such person to exercise ordinary care and caution to avoid coming into collision with the train, and if he fails to exercise ordinary care and caution, and such failure contributes or aids or helps in producing the injury—that is, if it combines and concurs with the negligence of the railroad company in causing an injury—there can be no recovery.” The error being, as it is respectfully submitted, that by refusing this request his honor took from the jury the question of the contributory negligence of the deceased and her failure to exercise ordinary care and caution, provided the jury found from the facts that the deceased had knowledge of the approach of the engine within 500 yards, its location, and the rapidity of its approach; whereas, it is respectfully submitted, that this request was a sound proposition of law, applicable to the facts of the case, and should have been submitted to the jury; and, further, as it is respectfully submitted, it is the duty of a person who expects to cross a railway track, and who sees or knows that a train is approaching within 500 yards, and who knows the location of the engine and the rapidity of its approach, to exercise ordinary care and caution to avoid coming into collision with the train, and that the failure of a person so situated and under such circumstances to exercise ordinary care and caution is contributory negligence, and if such person does fail under such circumstances to exercise ordinary care and caution, and such failure does combine and concur with the negligence of the railroad company as a proximate cause in bringing about the injury there should be no recovery, and his honor erred in not so instructing the jury.

6. Because his honor erred, as it is respectfully submitted, in refusing to charge defendant's sixth request, to wit: “(6) If a person carelessly leaves a safe place and carelessly goes into a place of danger when, by the

exercise of slight care, such person could and would know that it was dangerous, then such person may be said to have been guilty of gross negligence, because the failure to exercise slight care is gross negligence." It being respectfully submitted that this request embodied a sound proposition of law applicable to the facts in this case, and his honor erred in not so charging the jury. It being respectfully submitted that this request embodied a correct definition of what is gross negligence, and this being one of the material defenses of the defendant, his honor, we respectfully submit, erred in not so defining gross negligence and in refusing to charge this request.

7. Because his honor erred, as it is respectfully submitted, in refusing to charge defendant's fourteenth request, to wit: "(14) The failure to stop, look and listen before entering upon a highway crossing, where it contributes as a proximate cause to an injury, is contributory negligence." The error being, as it is respectfully submitted, that under the decisions of this court, where the failure to stop, look and listen before entering on a railroad track contributes as a proximate cause to the injury, such failure is contributory negligence, and his honor erred in not so instructing and charging the jury, and that by so refusing his honor took from the jury the question whether there was a failure to stop, look and listen on the part of the deceased, and whether such failure—if it existed—contributed as a proximate cause to her injury, thereby leaving the jury to believe that even though the deceased did fail to stop, look, and listen before entering upon the highway crossing, and even though such failure contributed as a proximate cause to her injury, that still she would not be guilty of contributory negligence.

8. Because his honor erred in refusing to charge defendant's fifteenth request: "(15) If a person is injured by collision with a train at a highway crossing, and if the evidence shows that such person failed to stop, look, and listen before going on the track, and that if he had stopped, looked, and listened he would have known that he could not cross without great danger of being injured, then the failure to stop, look, and listen—if they existed—may be said to have contributed as a proximate cause to the injury." It being respectfully submitted that this request embodied a sound proposition of law applicable to the facts of this case and should have been charged; and, further, that by such refusal his honor, as it is respectfully submitted, erred, in that by refusing this request he took from the jury the question whether the failure on the part of the deceased to stop, look and listen—if such existed—before going on the track was contributory negligence on her part, such as would defeat a recovery, even though she might have known or did know that she could not

cross without great danger of being injured. Whereas, it is respectfully submitted that, in any case brought to recover damages by collision with an engine at a highway crossing, if the evidence shows that there was a failure to stop, look, and listen before going on the track, and that if such person had stopped, looked, and listened he would know that he could not cross without great danger of being injured, then the failure to stop, look, and listen—if they existed—is contributory negligence, and the jury should have been so instructed.

9. Because, as it is respectfully submitted, his honor erred in refusing to charge defendant's sixteenth request, to wit: "(16) If the evidence shows that a person intending to cross a railway track could, by the exercise of slight care, have seen and known that it was very dangerous to attempt to cross such track, then if the evidence shows that such person failed to exercise slight care, and that this failure contributed as a proximate cause to an injury by collision with a train, there can be no recovery, even though the signals were not given as the statute required." The error being, as it is respectfully submitted, that this was a sound proposition of law applicable to this case and should have been charged. It being respectfully submitted that it is the duty of a person intending to cross a railway track to at least exercise slight care to know whether it is very dangerous to attempt to cross such track, and if in any case the evidence does show that the person injured did fail to exercise slight care, and that such failure did contribute as a proximate cause to an injury by collision with a train, then there can be no recovery, even though the company did fail to give the signals as the statute required, and his honor, as it is respectfully submitted, erred in not so instructing the jury.

10. Because, as it is respectfully submitted, his honor erred in refusing to charge defendant's third request on the measure of damages, to wit: "(3) In this case the evidence shows that the deceased was of age and that she was living apart from the parent, and as the evidence fails to show that the deceased contributed anything, either in money or services, for the support or aid of the parent, no damages can be allowed on this account." The error being, as it is respectfully submitted, that as there was no evidence in this case showing, or tending to show, that the mother, for whose benefit this action is brought, received anything from the deceased, either in money or by way of service for her support or aid, and the evidence further showing, beyond contradiction, that the mother was living apart from the deceased, his honor erred in refusing this request, thereby permitting the jury in their estimate of damages to include the loss of money and the services of the deceased.

11. Because his honor, as it is respectfully

submitted, refused to charge the defendant's sixth request, on the question of damages, to wit: "(6) The action in this case is brought for the benefit of the parent, and in considering what amount of damages should be allowed—if the jury determine that any should be allowed at all—the jury should take into consideration the age of the parent, and as the parent could not receive any aid, or support, or assistance, or comfort beyond her life the jury should not render a verdict for an amount which would extend beyond the life of such parent; that is to say, they should not allow damages for a length of time beyond which they think the parent might reasonably be expected to live." The error being, as it is respectfully submitted, that this action being brought for the benefit of a parent over 60 years of age, and the statute providing that the jury can only give such damages as are proportionate to the injury sustained by the party for whose benefit the action is brought, his honor should have instructed the jury that in estimating the damages done the beneficiary—the mother in this case—they should not allow any damages for a time beyond which such beneficiary might reasonably be expected to live, and that by refusing this request his honor permitted the jury to give damages for an unlimited time; whereas, it is respectfully submitted that the injury or damages done the beneficiary by the wrongful death of the deceased must of necessity cease at the death of the beneficiary, and the jury should have been instructed as the defendant requested.

12. Because, it is respectfully submitted, his honor erred in not charging the defendant's first request as to the contributory negligence of the deceased, without modification, to wit: "(1) It is the duty of a person who is approaching a railroad crossing, known to be dangerous, to be on the alert and to be vigilant to avoid being injured;" and in modifying the same by inserting the words, "if he knows it." The error being, as it is respectfully submitted: (a) That by this modification his honor led the jury to believe that it was not the duty of a person attempting to cross a railroad track at a highway crossing to be on the alert and to be vigilant to avoid being injured, unless such person had actual knowledge that such crossing was dangerous. It being respectfully submitted that it is the duty of a person who is attempting to cross a railroad track, at any time or place, to be on the alert and to be vigilant to avoid being injured, and his honor erred in not charging this request as it was written. (b) That by this modification his honor overlooked the distinction as to the rights and liabilities of the parties, under the statute and under the common law.

13. Because, as it is respectfully submitted, his honor erred in modifying the defendant's second request as to the contributory

negligence of the deceased, to wit: "(2) A person who is approaching a railroad crossing known to be dangerous—if the exercise of due care and caution demands it—should be on the alert and should stop, look, and listen before entering on the track, and if such person does enter on the track without exercising such care as ordinary caution, under the circumstances, would demand, and his failure to exercise such care combines and concurs with the negligence of the railroad company as a proximate cause in producing the injury, then the jury would have a right to find that such person was guilty of contributory negligence." And in modifying the same by inserting the words "and knows it." The error being, as it is respectfully submitted, that his honor by this modification led the jury to believe that a person attempting to cross a railroad track at a highway crossing was not required to stop, look, and listen, if due care and caution demanded it, unless such person had actual knowledge that such crossing was dangerous; whereas, it is respectfully submitted, it is the duty of a person at all times, in attempting to cross a railroad track, if the exercise of due care and caution demands it, to be on the alert and to stop, look, and listen before entering on the track, even though such person may not have actual knowledge of the fact that such crossing is dangerous, and his honor should have charged the request as submitted without modification.

14. Because his honor erred in charging the plaintiff's eleventh request to charge, to wit: "(11) I charge you that if you should find that the deceased saw and heard the train, or should, by the exercise of care, have seen and heard it, nevertheless this would not deprive the plaintiff of the right to recover and would not relieve the defendant from the obligations and penalties of the law, if he failed to give the signals as required by the statute, unless you further find that the deceased was guilty of gross or willful negligence, or was at the time violating the law." The error being, as it is respectfully submitted: (a) That by this charge his honor instructed the jury that if the defendant failed to give the signals, and notwithstanding this, yet if the deceased saw and heard the train, the plaintiff in this action could recover, unless the deceased was guilty of gross or willful negligence, or was at the time violating the law; whereas, it is respectfully submitted, that if the deceased saw and heard the train it was not necessary for the defendant to show that she was guilty of gross or willful negligence or was violating the law in order to prevent a recovery. (b) That by this charge his honor overlooked the distinction between the right of the plaintiff to recover under the statute and under the common law, thereby limiting the scope of the defense to the evidence required under the statute, and preventing the

jury from considering the evidence as to the contributory negligence of the deceased under the common law.

Sanders & De Pass, for appellant. Wilson & Osborne, for respondent.

GARY, A. J. This is an action for damages, alleged to have been sustained through the wrongful acts of the defendant, in causing the death of plaintiff's intestate.

The complaint alleges: That at Duncans, S. C., the railroad crosses the public highway. That on the 9th day of November, 1906, Miss Belinda Rutledge Hand, was traveling along said highway, when she was struck and killed at said crossing, by the engine of a train, operated by the Southern Railway Company, under and by virtue of its lease or other contract, with the defendant company. That her death was caused by the negligence, recklessness, and wantonness of the defendant, through said Southern Railway Company, in the following respects: (a) The train was off schedule time by several hours, and was running within a few minutes of the schedule time of train No. 11, for which latter train Duncans Station was a regular stopping station, the place of stopping being east of said highway. (b) The train approached said crossing at a very great and excessive rate of speed, some 60 miles an hour, notwithstanding the fact that by reason of the curves of the track east of the crossing and obstructing buildings along the line or side of the track, that crossing was such as to demand of approaching trains a slow rate of speed, of which fact said operating company had been repeatedly notified, warned, and cautioned by municipal authorities of said town for the protection of its residents, which notifications and warnings were willfully and wantonly disregarded. (c) The bell was not rung, nor whistle sounded by the engineer or fireman of said train, at a distance of 500 yards from said crossing, nor kept ringing or whistling, until the engineer had crossed said highway; such omission being in violation of the statute law of the state. (d) In having no one at said crossing to warn or inform her of the approach of said train, as ordinary prudence required for a train approaching such a crossing at such an excessive speed. (e) Neither the engineer nor fireman were looking ahead down the track, as was their duty, which neglect contributed as a direct cause to said injury.

The defendant denied the allegations of the complaint and set up the defenses of contributory negligence and assumption of risk. The jury rendered a verdict in favor of the plaintiff for \$4,700, and the defendant appealed upon exceptions, which will be reported.

First exception. In their argument the appellant's attorneys say: "If this action was brought under the statute alone, on

account of the failure to ring the bell or blow the whistle, the admission of this evidence, might have been harmless, but the complaint contains allegations of common law, as well as of statutory negligence." Railroad crossings are inherently dangerous, and were so regarded by the law, before the statute was enacted. The statutory provisions were not enacted for the purpose of declaring the crossing to be dangerous, but to minimize the danger, by requiring signboards with the words "railroad crossing" printed thereon, and the blowing of the whistle and the ringing of the bell, when approaching the crossing. Therefore, even if the ruling was erroneous, it was harmless, both as to the statutory and common-law causes of action.

Second exception. This part of the charge is free from error when considered in connection with other portions thereof. Time and again throughout the charge his honor, the presiding judge, instructed the jury, in effect, that when the word "contributed," whether applied to the alleged negligence of the defendant or the contributory negligence on the part of the plaintiff, it was necessary that it should be a proximate cause of the injury. We deem it only necessary to cite two instances: "A railway company may fail to ring the bell or sound the whistle, as the statute required, and such failure might contribute to an injury, but unless such failure does more than merely contribute to the injury, there can be no recovery, because our Supreme Court has said that such failure must contribute as a proximate cause to the injury complained of; otherwise there can be no recovery." "If it appears that a person was injured by collision with a railway train at a highway crossing, and that such person failed to exercise slight care, and that such failure on the part of the injured person, to exercise slight care combined and concurred in any degree whatsoever with the failure of the railway company to ring the bell or sound the whistle, as required by the statute, as a proximate cause in producing the injury, then there can be no recovery against the railway company, on account of the failure to ring the bell or sound the whistle, as the statute requires."

These were requests which were charged by the presiding judge. The case of Lee v. Ry., 84 S. C. 125, 65 S. E. 1031, shows that even if there was error in the use of the word "contributed," it was rendered harmless by the charge embodied in said request. In that case the court said: "His honor struck out the word 'caused,' and substituted for it, the words 'contributed to.' This charge made the language of the request conform to the language of the statute. It would have been error if his honor had not already charged the jury the plaintiff's seventh request, to wit: 'When the law

speaks of an act of negligence as contributing to the injury, it means as a direct and proximate cause thereof, without which the injury would not have occurred.' This court has held that 'when the law speaks of an act of negligence as contributing to an injury, it means as a direct and proximate cause thereof'—citing *Bowen v. Ry.*, 58 S. C. 222, 36 S. E. 590, *Burns v. Ry.*, 65 S. C. 234, 43 S. E. 679, *Duncan v. Greenville County*, 73 S. C. 254, 53 S. E. 367, *Turbyfill v. Ry.*, 83 S. C. 325, 65 S. E. 278."

Third exception. The words, "as it is alleged in this case," were used merely by way of illustration, in calling attention to cases, where the statute is specially applicable.

Fourth, fifth, seventh, and eighth exceptions. "The issue of negligence should go to the jury: (1) When the facts which, if true, would constitute evidence of negligence are controverted. (2) When such facts are not disputed, but there may be a fair difference of opinion, as to whether the inference of negligence should be drawn. (3) When the facts are in dispute, and the inferences to be drawn therefrom are doubtful." 16 Enc. of Law, 465 et seq. (1st Ed.); *Whaley v. Stevens*, 27 S. C. 549, 4 S. E. 145; *State v. Aughtry*, 49 S. C. 305, 26 S. E. 619, 27 S. E. 199; *Lampley v. Ry.*, 71 S. C. 156, 50 S. E. 773; *Pickens v. Ry.*, 54 S. C. 498, 32 S. E. 567; *Rinake v. Victor Mfg. Co.*, 55 S. C. 179, 32 S. E. 983; *Wood v. Mfg. Co.*, 66 S. C. 482, 45 S. E. 81; *Weaver v. Ry.*, 76 S. C. 49, 56 S. E. 657, 121 Am. St. Rep. 934; *Turbyfill v. Ry.*, 83 S. C. 325, 65 S. E. 278.

On the former hearing in this case (83 S. C. 325, 65 S. E. 278), the court had under consideration exceptions raising similar questions, and overruled them, on the ground that they were concluded by the case of *Weaver v. Ry.*, 76 S. C. 49, 56 S. E. 657, 121 Am. St. Rep. 934, in which the court said: "The presiding judge could not have charged the request, without intimating to the jury the inference to be drawn from the facts, therein so carefully set out in detail. The instructions would have been in violation of article 5, § 26, of the Constitution, and were therefore properly refused."

Sixth and ninth exceptions. These exceptions are overruled on the ground that the refusal to charge the requests therein mentioned was not error, because they had already been substantially charged in the first request of the defendant, which was submitted to the jury.

Tenth exception. In the first place, this request would have been a charge upon the facts, and in the second place, the presiding judge charged the defendant's first, second, fourth, and fifth requests relative to the measure of damages, which show that even if there was error in refusing the third

request, it was not prejudicial to the rights of the appellant.

Eleventh exception. The ruling of the presiding judge is sustained by the case of *Trimmer v. Ry.*, 81 S. C. 213, 62 S. E. 209. Upon request, the appellant's attorneys were granted permission to review that case, as to this question. The court, however, adheres to the doctrine therein announced.

Twelfth, thirteenth, and fourteenth exceptions. The appellant's attorneys have not argued these exceptions; therefore they will not be considered.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(86 S. C. 248)

WILLIAMS v. NEWTON et al.

(Supreme Court of South Carolina. July 5, 1910.)

1. APPEAL AND ERROR (§ 1026*)—QUESTIONS REVIEWABLE—HARMLESS ERROR.

Rulings complained of must not only be erroneous, but they must materially affect the rights of the party complaining.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4029; Dec. Dig. § 1026.*]

2. APPEAL AND ERROR (§ 1046*)—QUESTIONS REVIEWABLE—HARMLESS ERROR.

Where the result would have been the same whether the language of the circuit judge in his opinion complained of was stricken out or allowed to remain, the language of the judge was not prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4134; Dec. Dig. § 1046.*]

3. WILLS (§ 17*)—DEVISE TO ILLEGITIMATE CHILD—RIGHT OF SURVIVING WIFE.

A husband living in a sister state, deserted his wife and daughter there, and purchased land in South Carolina and had the same conveyed to a trustee for his benefit and to those he might direct by will. He subsequently executed a will whereby he gave all his property to a bastard child. His legitimate daughter died during his lifetime. Held that, under Civ. Code 1902, § 2487, limiting the amount of property devisable to illegitimate children to one-fourth of testator's estate, the surviving wife was entitled to a half of three-fourths of his entire estate; so that only the remainder would pass under the will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 40-42; Dec. Dig. § 17.*]

4. APPEAL AND ERROR (§ 1078*)—QUESTIONS REVIEWABLE—QUESTIONS NOT ARGUED.

An exception not argued will not be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

5. APPEAL AND ERROR (§ 931*)—RULINGS ON EVIDENCE—REVIEW.

Where the referee sustained objections to testimony and there was nothing in the record to show that the circuit judge reversed the rulings, a party could not urge that such testimony was received; for, in the absence of any showing, it must be presumed that the circuit judge discarded incompetent testimony.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3766; Dec. Dig. § 931.*]

6. APPEAL AND ERROR (§ 731*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment that the circuit judge erred in forestalling the referee in the judgment of facts yet to be proved is too general to be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3020; Dec. Dig. § 731.*]

Appeal from Common Pleas Circuit Court of Marlboro County; J. C. Klugh, Judge.

Action by Mary B. Williams against R. C. Newton and others. From a judgment for plaintiff, defendants appeal. Affirmed.

See, also, 84 S. C. 98, 65 S. E. 959.

The following is the decree of the circuit judge and the exceptions thereto:

Frank Williams and Mary Blaine Gillespie were married in West Virginia about the year 1868, and lived together for many years. One child was born to them, who died many years ago after reaching maturity. About the year 1887 Frank Williams left his wife and daughter and engaged in railroad construction in several states, and finally about 1890 or 1891 he came to South Carolina and built the bridge of the C. S. & N. R. R. over the Great Pee Dee river. While engaged in this work he formed a little illicit connection with a woman named Mary Jane Quick, which resulted in the birth of an illegitimate son, Frank Quick, the principal defendant herein. Williams lived a depraved life thereafter and seems to have absolutely deserted his wife and children. They were reduced to straits for a livelihood in their distant home and kept a boarding house where the daughter, deprived of a father's protection and restraining care, fell into evil ways. The wife, according to the testimony of Frank Williams' nephew, J. S. Williams, who lived near her in West Virginia, as well as other witnesses, her neighbors, bore a good reputation and lived a correct life. Yet Frank Williams, in his voluntary absence from them, denounced both his wife and daughter to strangers with foulest accusations and in vilest language. He repeatedly expressed his determination that they should have nothing of his property, and he appears to have cherished this as a fixed purpose and set about a concerted plan to carry it out. He purchased two tracts of land in Marlboro county, where he made his home, and had them conveyed to C. S. McCall as trustee, to hold "for the sole" use and benefit of the said Frank Williams, allowing him the absolute "use and control thereof, and make title to same to whomsoever the said" Williams may at any time direct, either by written indorsement thereon "during his life or by his last will duly made." This deed bears date July 27, 1900. The said Frank Williams executed his last will on January 8, 1902, and having died shortly thereafter, said will was duly admitted to probate. By his last will he appointed C. S. McCall his executor and directed him

to "take charge of any property of which I may die seised" and possessed, "or of which I may have the power of disposition, to be disposed of as hereinafter provided for." Then referring to the deed above set out, the testator declared his intention that the will be construed in connection with and as supplementary to the deed, and in case of conflict between the two documents that the manifest intention of the deed shall prevail. By said will he, in effect, gives in trust for the use and benefit of Frank Quick aforesaid and his heirs all his property of every kind, including the real estate mentioned in the said deed, with contingent remainder over to William Williams, the testator's brother.

This action was commenced in September, 1904, against C. S. McCall, as trustee and executor, Frank Quick, and William Williams. C. S. McCall died shortly afterwards and R. C. Newton was appointed trustee by the court and substituted as a defendant. The complaint sets forth two causes of action, first, for dower; second, to annul said will in so far as it attempts to give to the bastard son of the testator more than one-fourth part of the real, clear value of the estate of Frank Williams. On demurrer that these two causes of action are improperly united the court sustained the demurrer and ordered that the cause be divided into two separate and distinct actions. On appeal by defendants this order was affirmed. 82 S. C. 227, 64 S. E. 219.

The case was tried before me on the second of said actions. The trustee alone seems to have answered to the merits. His answer puts in issue practically all the allegations of the complaint, and as special defense alleges that the plaintiff has assigned and transferred all the interest claimed by her in this case to another, and that she has no legal status in this action. With reference to this last-mentioned defense it may be said here that no competent evidence was offered in support of it. The only testimony offered upon it was that R. C. Newton, the defendant, who was permitted to testify over repeated objections of plaintiff's counsel, to certain statements made to him by his own attorney of declarations made to said attorney by the plaintiff. This was bold hearsay and the objections to it should have been and are now sustained. This defense is overruled.

The case was referred to a referee to take and report the testimony and "to make a statement of the account in accordance with the contention of each party and report the same." From this order the defendants appealed, and on motion, the appeal was dismissed. 84 S. C. 98, 65 S. E. 959.

The opinion and judgment of the Supreme Court dismissing the said appeal was filed October 29, 1906. Promptly thereafter the referee proceeded to hold reference for the pur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pose of executing the said order of reference. After devoting two days to the case and taking such testimony as was offered by plaintiff, the defendants offering no testimony, the plaintiff moved the referee to adjourn the reference and report the testimony in time for a hearing at the then approaching term of court. This motion the referee refused, and thereafter the plaintiff moved the court, on due notice, to vacate the order of reference and to proceed with the trial of the case upon the testimony already taken in the case *de bene esse* and that taken by the referee, together with much as might be offered at the trial by either side. This motion was heard by me. The history of the litigation in the case impressed me that the defendants were delaying the trial of the cause by every practicable device. Frank Williams died in January, 1902, nearly eight years ago. This action was commenced in September, 1904, and has been pending more than five years with no other progress than the determination of two dilatory appeals by the defendants, both of which have been decided against them, and the partial taking of the testimony. The unreadiness of the defendants or their unwillingness to proceed prevented the referee from completing his duties under the order of reference in the two days which he devoted to the case. The plaintiff is a woman advanced in years and said to be in needy circumstances. The peculiar nature of the case and the provisions of the statutes make it highly probable that her rights, if she has any, will be entirely lost unless determined in her lifetime—certainly any benefit to her will be. She has been thwarted by the dilatory tactics of the defendants for five years since she began to assert her rights. The delay which has already supervened is a reproach to the administration of justice. Further unnecessary delay would be a denial of justice. These considerations constrained me to order a final reference and report by the referee and the trial of the case before me, under the provisions of the order which appears in the record.

The testimony fully establishes the material allegations of the complaint and brings the case clearly within the provisions of the statute of 1795 (5 St. at Large, p. 271, § 4; sections 2368 and 2487 of Civ. Code, 1902). The fact that the testator resorted to the device of a trust and the intervention of a trustee can make no difference in the result. *Gore v. Clarke*, 37 S. C. 537, 16 S. E. 614, 20 L. R. A. 465, and cases therein cited. This seems to have been a part of his plan to evade the statutes and cut his wife and children out of any part of his estate. The daughter seems to have died before her father, so that the wife alone now invokes the statute which will interfere with the disposition of his property by the testator.

It was long ago determined by the court, and the decision has been reaffirmed in many

subsequent cases, that the statute insures to the protection of his only wife and legitimate children, and that next of kin, even grandchildren, cannot invoke the benefit of its provisions. *Breithaupt v. Bauskett*, 1 Rich. Eq. 485. The act of 1795 was copied verbatim in the modification of 1872, in the chapter on conveyances at page 425, and again at page 444 in the chapter on wills, with modification to suit the subjects. The same arrangement was followed in the General Statutes of 1882, §§ 1785 and 1866, but in the former section the words "only in favor of wife and legitimate children" were interpreted as an amendment, thus formally enacting the construction given to the act by the court. His arrangement with the amendment appears in the revisions of 1893, §§ 1887, 1999, and in the Civil Code of 1902, §§ 2368 and 2487. So that in the present case it is clear that the testamentary provisions are to be treated as void only to the extent of the interest of the wife, and are good against all the world besides.

The statute recognizes as valid the legacy and devise to the extent of one-fourth of the estate even as against the wife. So that her interest is the remaining three-fourths, and as to that it is the same as if her husband had died intestate. *Breithaupt v. Bauskett*, supra. That is to say, under the statute of distributions the plaintiff, as the widow of Frank Williams, would be entitled to one-half of three-fourths of his entire estate if he had made no attempt to dispose of so much of it by his will; and such is the extent of her interest as against the will. The remaining five-eighths of the estate must go according to the dispositions made of it by the testator.

It is so adjudged and decreed.

The following are the grounds of appeal on the part of the defendants R. C. Newton, trustee, and Frank Quick:

1. Because his honor erred in finding that the defendants unduly obstructed the progress of the case.

2. Because he erred in taking the case away from the referee and ordering it on for trial on the ground that all the delays had been caused by the defendants, and the appellants allege that this was an abuse of his discretionary powers as chancellor.

3. Because he erred in holding that the history of the litigation in the case showed that the defendants were delaying the trial by every practicable device.

4. Because his honor erred in holding that the unreadiness of defendants or their unwillingness to proceed prevented the referee from completing his duties under the order of reference.

5. Because his honor erred in holding that the plaintiff had been thwarted by the dilatory tactics of the defendant for over five years since she began to assert her rights, and that the delay which has already super-

vened is a reproach to the administration of justice.

6. Because his honor erred in finding that the plaintiff was in needy circumstances; there being no proof on this point.

7. Because his honor erred in holding that the case came within the provisions of the statute of 1795 (sections 2368 and 2487 of Civil Code of 1902), when he could have held that the testator, Frank Williams, never did have any title to the property in question and only had the power of appointment.

8. Because his honor erred in not holding that the contingent remainders created by the will of Frank Williams defeated any claim that the plaintiff might have under the statute.

9. Because his honor erred in holding that the title was vested in Frank Williams, and that the widow was entitled to dower; it being respectfully submitted that the question of dower was not before him.

10. Because his honor erred in animadverting upon the conduct of the defense, as it is respectfully submitted that his animadversions were without foundation in fact, and that the record shows that the defense has been conducted upon a plane of professional honor and duty, and the appellants respectfully ask that this court order the same expunged from the record, both as regards the trustee and the attorneys in the case.

11. Because the presiding judge erred in sustaining the referee who admitted the depositions over objection of attorneys for defendants, and for allowing the depositions to be opened; it being respectfully submitted that the envelope enclosing the depositions taken in North Carolina showed that it had not been taken before Charles Strayhouse, Esq., clerk of the court of Orange county, in the state of North Carolina, according to the notice given for the taking of the depositions; but that they were taken, as shown by the indorsement by a commissioner, and further that there was no indication of seal on the envelope, and further did not show that the testimony as taken by him and kept in his hands until the depositions were deposited in the postoffice, as required by law.

12. Because the presiding judge sustained the ruling of the referee in allowing the parentage of the defendant to be proven by hearsay and reputation, it being submitted that under the allegations of the complaint it was error to admit general reputation and hearsay on this point; it being error to hold that bastardy is provable by reputation.

13. Because his honor erred in forestalling the referee in his judgment of facts yet to be proven.

Newton & Owens, for appellants. Livingston & Muller, for respondent.

GARY, A. J. The complaint alleges two causes of action, one for dower, and the other, to have the bill of the testator declared a nullity, in so far as it attempts to give to his illegitimate son more than one-fourth of his real estate.

The facts are fully stated in the decree of his honor, the circuit judge, which will be incorporated in the report of the case. The defendant appealed upon exceptions which will also be reported.

The first, second, third, fourth, fifth, sixth, and tenth exceptions cannot be sustained, for the reason that it is not only incumbent upon the appellant to show that the rulings were erroneous but also that they materially affected his rights. Whether the language of which the appellant complains is struck out or allowed to remain, the result would not be changed. It cannot therefore be successfully contended, that the remarks of the circuit judge were prejudicial to the rights of the appellant.

The seventh and eighth exceptions are overruled, for the reasons stated in the decree.

The ninth exception was not argued; therefore it will not be considered.

The eleventh exception cannot be sustained, as there is nothing in the record showing that the envelope containing the depositions was not sealed and properly indorsed. It is true the appellant's attorneys made the objection to the admissibility of the depositions on said grounds, but the respondent's attorneys contended that they were properly sealed and indorsed; the referee and circuit judge so ruled, and the appellant has failed to show that the ruling was erroneous.

The twelfth exception must be overruled on the ground it appears from the record that the referee sustained all objections to testimony, tending to prove the illegitimacy of the son by general reputation; also that he ruled out all declarations of the mother, tending to show that Frank Quick was a bastard. There is nothing in the record showing that the circuit judge reversed the rulings of the referee in this request. In the absence of any showing to the contrary, it is to be presumed that the circuit judge, in reaching his conclusions, discarded all incompetent testimony. Williams v. Halford, 73 S. C. 119, 53 S. E. 88. Furthermore, not only were there circumstances tending to prove that Frank Quick was illegitimate, but there was likewise positive testimony to that effect, which was introduced without objection.

The thirteenth exception is too general to be considered; but waiving such objection, it has not been made to appear that the ruling was prejudicial to the rights of the appellant.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(134 Ga. 865)

CORDRAY v. SAVANNAH UNION STATION CO.

(Supreme Court of Georgia. Aug. 9, 1910.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§§ 629, 657, 659*)—EXCEPTIONS, BILL OF (§ 56*)—CERTIFICATION—SUPPLEMENTARY CERTIFICATE—REMITTING TO LOWER COURT FOR ADDITIONAL CERTIFICATION.**

Where the judge of the superior court signed a bill of exceptions as of a certain date, after the rendition of the judgment to which exception was taken, there is no provision of law for counsel to suggest that such certificate did not speak the truth in this respect, and for this court to require the judge to make an additional certificate as to the time when and the circumstances under which he signed the original certificate, with a view to determining whether it was signed within due time after the judgment was rendered, or was filed within the time prescribed by the statute after it was signed.

(a) This court has held that, when the judge of the superior court has signed a certificate to a bill of exceptions, he has exhausted his power in that regard, and cannot add a supplementary certificate explanatory of the first. *Woolf v. State*, 104 Ga. 536, 30 S. E. 796. See, also, *Dyson v. Southern Ry. Co.*, 113 Ga. 327 (3), 38 S. E. 749.

(b) This case does not fall within the exception to this rule provided by the act of August 22, 1905 (Acts 1905, p. 84). In this connection, see *Jones v. State*, 127 Ga. 281, 56 S. E. 453.

(c) If it were permissible, generally, to return a bill of exceptions to the presiding judge for further certification, it would not be done in a case where the motion for that purpose states that the judge, "at the suggestion of counsel, antedated said bill as of May 4th, the date upon which the same had been tendered to the judge originally."

(d) Section 5557 of the Civil Code has reference to defects which can be removed during the term. If supplemental certificates were allowed to be made by a judge to a bill of exceptions, the limitations prescribed by the statute upon the time within which he should certify thereto would be practically destroyed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2828-2843; Dec. Dig. §§ 629, 657, 659; **Exceptions, Bill of*, Cent. Dig. §§ 94-96; Dec. Dig. § 56.*]

2. APPEAL AND ERROR (§§ 660, 663*)—BILLS OF EXCEPTION—REMITTING FOR CLERK'S ADDITIONAL CERTIFICATION.

The act of a clerk in filing or transmitting a paper does not stand on the same basis as the act of the judge in signing the certificate to the bill of exceptions, which, with the bill of exceptions, constitutes the writ of error. Generally, upon proper suggestion, made in due time, that the date of filing entered by the clerk upon the bill of exceptions was erroneous, the clerk will be ordered to certify to this court the correct date of filing. But his certificate cannot be traversed, or extrinsic evidence be introduced to combat it. *McDaniel v. Columbus Fertilizer Co.*, 109 Ga. 284 (1), 34 S. E. 598.

(a) Where counsel stated in his place that there was an error in the date of the entry of filing entered by the clerk on the bill of exceptions, and moved that this court order the clerk to certify as to what was the correct date of such filing, and thereupon adverse counsel produced a certificate, under seal, of the deputy clerk who made the entry, stating that it was correctly made, and on the date when the paper was handed to him for filing, and that there

was no error in the entry, this court will decline to grant the motion to require a further certificate from the deputy clerk covering the same ground.

(b) No such application was made in this case, as in the case of *Cooper v. Nisbet*, 118 Ga. 872, 45 S. E. 692.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2844-2847, 2853, 2855; Dec. Dig. §§ 680, 683.*]

3. APPEAL AND ERROR (§ 627*)—BILL OF EXCEPTIONS—TIME FOR FILING.

The certificate to the bill of exceptions being dated May 4, 1909, and the filing having taken place on May 24th, it was not filed within the time prescribed by law, and the writ of error must be dismissed. *Civ. Code*, § 5554; *Jones v. State*, 127 Ga. 281, 56 S. E. 453.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2744-2749; Dec. Dig. § 627.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action between E. F. Cordray and the Savannah Union Station Company. From the judgment, Cordray brings error. Dismissed.

Oliver & Oliver, for plaintiff in error. Anderson & Cann, for defendant in error.

FISH, O. J. Writ of error dismissed. All the Justices concurring, except BECK, J., absent on account of sickness.

(125 Ga. 5)

WORKINGMEN'S UNION ASS'N et al. v. REYNOLDS et al.

(Supreme Court of Georgia. Aug. 10, 1910.)

*(Syllabus by the Court.)***CORPORATIONS (§ 189*)—ATTORNEY AND CLIENT (§ 70*)—ACTIONS—AUTHORITY TO BRING—PLEADING—DEMURRER.**

The court committed error in dismissing the petition upon general demurrer.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 706-722; Dec. Dig. § 189; **Attorney and Client*, Cent. Dig. § 95; Dec. Dig. § 70.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by the Workingmen's Union Association and others against J. S. Reynolds and others. From a judgment dismissing the petition on demurrer, plaintiffs bring error. Reversed.

A complaint was brought in the name of a corporation and certain individuals as members thereof, making substantially the following allegations: The corporation is an order "charitable and social in its nature and purposes, and was not organized for individual pecuniary profit and gain." Eighteen named members of the corporation falsely and fraudulently conspired for the purpose of excluding all other members thereof, consisting of about 800 in number, from having any voice in the control of the corporation, and for the further purpose of selling its property and distributing among themselves the proceeds

of the sale, "and thereby to injure and defraud said corporation and your petitioners as members thereof." As a part of the fraudulent scheme the defendant members of the order sent to a large number of its members a notice that they were due the corporation a specified sum, and, unless it was paid at the time and place of a called meeting in the city of Savannah, such members would be expelled from the order. About 800 members of the order appeared in response to the notice, but were prevented from attending such meeting by the police of Savannah at the instance of the defendant members, who notified the police that those appearing in response to the notice would come for the purpose of creating disorder and violating the law, and they were thereby prevented from an opportunity of protesting against said notices and from participating in the proceedings for which the meeting was called, and from protesting against the claim that they owed the society anything. The defendant members were the only ones present at the called meeting, and they decided to sell a certain piece of real estate belonging to the association. In pursuance of a resolution passed by the defendant members at a subsequent meeting, the property was sold for \$2,300 to John F. Jones, who participated in the design of the defendant members to defraud the association. Certain of the defendant members, fraudulently claiming to be officers of the association, but not lawful officers thereof, executed to Jones a deed to the property in the name of the corporation. The defendant members, after paying "the recorded indebtedness of the association against the property" out of the purchase money, distributed the balance thereof among themselves. The defendant members were not the true and lawful representatives of the corporation, and had no right to bind it in the deed, and the "transaction was ultra vires the rights and powers of the corporation." It was prayed that the deed be declared false and fraudulent and a cloud upon the title of the corporation, and that Jones be required to tender it into court for cancellation and account for the rent, income, and profits he had received from the property; that a receiver be appointed to take charge of the property and account to the court for the rents, income, and profits pending a reorganization of the order, and, when it was duly reorganized, that the funds be turned over to it to be used for its legitimate objects and purposes. It was further prayed that the defendant members of the order be required to account to it for the purchase money received by them from Jones, and that the same be decreed to be the assets of the corporation "free from any claim whatever on the part of the said John F. Jones or of the said other defendants." Jones was never served with a copy of the petition or process, and did not appear and plead. General and special demurrers were filed in the name of the other parties

who were named as defendants, and the court passed an order that "the demurrer is sustained to the petition, with the individual members as parties, with the right to amend on or before June 8, 1907," on which date another order was passed providing that the privilege to amend was extended to June 15, 1907, on which date an amendment was filed by the plaintiffs striking the names of the individual members of the order as plaintiffs, after which general and special demurrers were filed; and to the order of the court sustaining the general demurrer and dismissing the petition the plaintiff excepted.

Oliver & Oliver, for plaintiffs in error.
Cann, Barrow & McIntire, for defendants in error.

HOLDEN, J. (after stating the facts as above). The petition does not show on its face that the suit in the name of the corporation was unauthorized by those duly empowered by the corporation to institute suit in its behalf. The presumption is that the attorney at law who signed the petition as counsel for the corporation had the authority of the proper officers of the corporation to appear and bring such suit; and this presumption can only be overcome in the manner provided for in Civ. Code, § 4423. *Peoples' Mutual Fire Ins. Co. v. De Loach*, 113 Ga. 802, 39 S. E. 466; *Lester v. McIntosh*, 101 Ga. 675, 29 S. E. 7; *Dobbins v. Dupree*, 36 Ga. 108.

The suit was instituted by the corporation against certain of its members and an alleged purchaser of its property from the latter, charging that for the reasons stated the sale was fraudulent and made without authority, and praying that the deed be canceled and a receiver appointed to take charge of the property and hold its income and profits for the benefit of the corporation, and that the purchaser account to the corporation for the income and profits he had received therefrom, and also praying that the defendant members of the corporation be required to account to it for the purchase money received by them for the property, and that the same be decreed to be assets of the corporation free from any claim of the purchaser or of the other defendants who had appropriated the same to their own use. The corporation could not have the deed canceled, the property placed in the hands of a receiver, and the income and rents thereof paid to the corporation, and also recover from the defendant members of the corporation the purchase money paid to them. A suit to cancel a deed and recover the rents, income, and profits of the property would be a repudiation of the alleged illegal sale; while a suit to recover the proceeds of such sale from the defendants to whom they were paid would be a ratification of the alleged illegal sale, and the remedies sought in the two instances are inconsistent. This, however, does not make the petition subject

to general demurrer. The fact that the purchaser was not served with the petition and process, and did not appear and plead, might be sufficient to prevent a cancellation of the deed and the granting of other relief based on a repudiation of the sale, to the granting of which the purchaser would be a necessary party to the case; but such fact would not afford a ground to dismiss the petition on general demurrer, as the allegations of the petition authorized a recovery by the corporation of the purchase money received by the defendant members thereof, on the theory of a ratification by the corporation of the alleged illegal sale. If the sale made in behalf of the corporation was illegal, and the corporation ratified it, or if it was legal, the defendant members of the corporation receiving and appropriating to their own use the purchase money arising therefrom would be liable in an action by the corporation to account therefor. The court erred in dismissing the petition upon general demurrer.

Judgment reversed.

BECK, J., absent. The other Justices concur.

(135 Ga. 22)

SEWELL et al. v. DAVENPORT.

(Supreme Court of Georgia. Aug. 10, 1910.)

(Syllabus by the Court.)

NEW TRIAL (§ 70*)—GROUNDS—INSUFFICIENCY OF EVIDENCE.

The only grounds contained in the motion for a new trial being the general ones that the verdict was contrary to law and the evidence and without evidence to support it, and the evidence authorizing the finding, there was no error in overruling the motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 142; Dec. Dig. § 70.*]

Error from Superior Court, Coweta County; R. W. Freeman, Judge.

Action between Aaron Sewell and others and John Davenport. From the judgment, Sewell and others bring error. Affirmed.

H. A. Hall, for plaintiffs in error. W. C. Wright, for defendant in error.

LUMPKIN, J. Judgment affirmed. The other Justices concur, except BECK, J., absent.

(134 Ga. 361)

PARK v. FOGARTY et al.

(Supreme Court of Georgia. Aug. 9, 1910.)

(Syllabus by the Court.)

1. WILLS (§ 733*)—CONSTRUCTION.

From an examination of the entire will under construction (which is set out at length in the statement of facts), it is apparent that the word "estate," appearing in the last clause of the fifth item of the will, was used by the testator as denoting all the residue of his property, both real and personal, after the execu-

tor had "wound up the business" of the testator in accordance with the directions contained in the will (which would include the payment of debts and the special legacies named in the seventh item of the will), and that the testamentary scheme was that the executor was to hold intact the entire corpus of such property until the youngest child attained the age of 21 years.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1825; Dec. Dig. § 733.*]

2. WILLS (§ 733*)—CONSTRUCTION—ESTATES CREATED.

The eighth item of the will did not make a specific devise of "the residence No. 815 Telfair," mentioned therein to the legatee named in said item by the testator as "my daughter Lizzie," but was a direction that when the time for division provided for in the will arrived, namely, at the majority of the youngest child, such legatee should then receive this residence, at a valuation of \$2,500, as a part of her share of the property devised to her. Such legatee was not entitled to the use or possession of, or the income from, the residence until the youngest child arrived at the age of 21 years. *Jordan v. Miller*, 47 Ga. 346.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1825; Dec. Dig. § 733.*]

3. WILLS (§ 733*)—CONSTRUCTION—ESTATES CREATED.

Until the time for distribution arrived, the residence referred to in the preceding headnote would be a part of the general property of the estate of the testator, and the income therefrom belongs to the estate, subject to administration by the executor in accordance with the terms of the will in the same manner as the income from other property of the estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1825; Dec. Dig. § 733.*]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by D. G. Fogarty, executor of Patrick D. Horkan, and others, against E. H. Park. Judgment for plaintiffs, and defendant brings error. Affirmed.

This case arises on a petition filed by the executor for direction as to the construction to be placed upon the will of his testator. In an agreed statement of facts, used upon the hearing before the judge to whom the case was submitted, the following facts are set forth: "(1) The testator's will was drawn by himself. (2) That testator died August 19, 1906, leaving as his sole heirs at law the following children: Elizabeth (styled Lizzie in his will), then aged 21 years, William, then aged 19 years, George, then aged 12 years, and Tom, his youngest child, then aged about 10 years. (3) That none of these children was then married, and that they all lived with their father at 813 Telfair street, Augusta, Ga.; their aunt, Miss Marie Molony, residing with the family and assisting testator's daughter in managing their domestic affairs. (4) That at the time said will was made Miss Elizabeth Horkan was a young lady, just of age, that William Horkan was then a minor, and that Tom and George Horkan were young school boys." It was further agreed "that at the time of the

death of P. D. Horkan he conducted, in the city of Augusta, Ga., a large wholesale and retail dry goods store," and "that at the present time, all debts and legacies having been paid, other than legacies to children, the estate is worth approximately \$120,000."

The will in question was as follows:

"Know all men by these presents that I, Patrick D. Horkan, in the name of God, and of sound mind and capable of with disposing of my earthly goods, do make this my last will and testament and wish and desire my estate to be disposed of according to the laws of Georgia. It is my wish and desire that all my debts and the debts of P. D. Horkan be paid in full.

"First. It is my wish and desire that all local or city bills be paid at once, and paid out of the receipts of the current business of the store.

"Second. As I owe large amounts to the banks of the city for borrowed money, for the keeping up and enlarging the business of P. D. Horkan & Co., and as the said different banks of the city hold as security for the loans the various stocks and collaterals that I own, it is my desire that they be paid, and the collaterals be taken up and returned to the administrator of my estate; and to enable said administrator to promptly discharge those debts and have said securities returned, I authorize the use of fifty thousand dollars of the life insurance to be issued to cancel those debts. The merchandise debts that the firm of P. D. Horkan & Co. owes to be paid out of the current receipts of the store.

"Third. It is my will and desire that the business run on and be continued not longer than the present leasehold of the store now occupied by P. D. Horkan & Co., and the stock of goods on hand be not sacrificed in bulk, but sold to the best and most favorable advantage. The business to be wound up before October 1st, year 1907. I desire that Sam P. Thomas be continued as head clerk in charge, as he is most familiar with the trade and customers, and whose integrity I regard highly. The administrator can buy for cash such goods and domestics, thread and any other that is necessary to do; keeping intact and in healthy condition the general assortment, but no other merchandise is to be bought.

"Fourth. I appoint and designate D. G. Fogarty administrator of my estate, and the said D. G. Fogarty and Miss Maria Mollony, my beloved sister in law, guardians for my children.

"Fifth. When my business is wound up, the amount of money on hand to be placed at interest, or invested in real estate until Thomas my youngest child is of legal age, and then the estate to be equally divided between the survivors of my children, share and share alike.

"Sixth. The amount of my life insurance I desire collected, and as far as can be pos-

sible in the judgment of the administrator to be kept together intact for investment. The amount is one hundred thousand dollars, carried in the following societies: Catholic Knights, Equitable Life, Mutual of New York, Mutual of N. J., New York Life, Northwestern of Milwaukee. The administrator can use one-half of this to pay off the banks my debts and take up the collaterals that they hold. The last two policies in the Equitable Life I desire to be reserved and not used. The stock of merchandise and accounts are large, and I desire all the debts to be paid out of the business.

"Seventh. I desire that my administrator be required to give no bond for his carrying my desires and the articles of this will and testament. I desire that Miss Mollony receive one thousand dollars of my estate for her kind services to my children. I desire the pastor of St. Patrick's Church to receive one hundred dollars for masses for my soul, and my remains be placed right beside those of my beloved departed wife.

"Eighth. It is my desire that the residence No. 815 Telfair be given to my daughter Lizzie, as part of her portion of my estate and same to be taken at \$2500.00. The present residence 813 Telfair which was owned by my departed wife, I desire to be used jointly and in common by my family until Thomas is of age, and then to be disposed of as my children regard best for them.

"Ninth. I will and desire that my sister-in-law, Miss Mollony be made guardian jointly with D. G. Fogarty, both to see that George and Tom are well educated out of their share of the income from estate. That all of them shall be allowed the income to live on that is received or derived from net income.

"Tenth. I desire all my debts paid as soon as possible out of sales from the merchandise and accounts now on hand.

"Eleventh. It is my desire that my son William assist D. G. Fogarty all he can to make a successful sale of the stock of merchandise now on hand.

"Twelfth. It is my desire, when the debts are all paid off, that the administrator take back from banks the collaterals and in his judgment hold or sell, any of the stocks for reinvestment that he regards best. I desire that all investments or money invested shall be put in real estate as far as possible, and that my estate shall be managed according to the laws of the state of Georgia. Signed this the sixth day of March, nineteen hundred and six. 6th March, 1906.

"Patrick D. Horkan."

It was the contention of the plaintiff in error that, under the fifth item of the will, only the cash money which the executor had on hand after winding up the business of the testator as directed by the will was to constitute "the estate" which was to be divided among the survivors of the testator's children when the youngest child became of le-

gal age, and that she was entitled to receive from the executor her share of the remaining property of the estate. She also contended that, under the eighth item of the will, the residence therein mentioned was a specific legacy to her and became her property in fee simple, that she was entitled to its immediate use and enjoyment and to the income therefrom from the death of the testator, and that such income was not subject to distribution by the executor as general income of the estate. The court below rendered a decree holding adversely to each of these contentions, the effect of the decree being to adjudge that a proper construction of the will was that the plaintiff in error was to receive none of the corpus of the estate until the youngest child became of age; that until then the residence property remained a part of the corpus of the estate; and that the income therefrom was subject to equal distribution to all the children of the testator along with other income of the estate. To this decree the plaintiff in error excepted, making assignments of error thereon which raised the contentions above stated.

Park & Park, for plaintiff in error. D. G. Fogarty, for defendants in error.

HOLDEN, J. Judgment affirmed. All the Justices concurring, except BECK, J., absent on account of sickness.

(125 Ga. 23)

WADDELL et al. v. LEDFORD.

(Supreme Court of Georgia. Aug. 10, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1005*)—REVIEW—RE-FUSAL OF NEW TRIAL.

The grounds of the motion for a new trial did not complain of any charge of the court or ruling in regard to the admission or rejection of evidence, but only attacked the verdict on the grounds that it was contrary to law and evidence, without evidence to support it, and contrary to certain charges of the court. The evidence was sufficient to support the finding of the jury, and, the verdict having been approved by the presiding judge, this court will not interfere therewith.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3864, 3948; Dec. Dig. § 1005.*]

Error from Superior Court, Meriwether County; R. W. Freeman, Judge.

Action between George Waddell and others against E. A. Leford. From the judgment, Waddell and others bring error. Affirmed.

McLaughlin, Jones & Jones, for plaintiffs in error. Howell & Hatchett, for defendant in error.

LUMPKIN, J. Judgment affirmed. The other Justices concur, except BECK, J., absent.

(135 Ga. 1)

RONEY v. CRAWFORD.

(Supreme Court of Georgia. Aug. 10, 1910.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 228*)—ACTION BY TRUSTEE ON SUBSCRIPTION TO STOCK.

In a suit by a trustee in bankruptcy of a corporation to recover of a subscriber to the capital stock the balance due on his subscription contract, the subscriber is not entitled to a credit of dividends unless such dividends had been earned by the corporation when declared. The instructions of the court on this subject were in accord with the principles enunciated in this case when before this court on a former occasion.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 228.*]

2. LOTTERIES (§ 15*)—SUBSCRIPTION TO STOCK—RIGHT OF RECOVERY.

The bankrupt corporation was a debenture company, and its creditors were those who had purchased its certificates. The defendant pleaded, in bar of the suit to recover an unpaid stock subscription, that the business of the debenture company was a lottery forbidden by law, and that its debenture holders were in pari delicto, and the suit could not be maintained for their benefit by the trustee in bankruptcy. Held, the lottery statutes (Pen. Code 1895, §§ 406, 408) make penal the selling of lottery tickets, and not their purchase. Assuming the business of the debenture company to come within the operation of the lottery statutes, yet under the allegations of the plea and the evidence the investors in the certificates, who did not participate in the management and operation of the company, would not be in pari delicto with the company so as to defeat a recovery of money invested in the enterprise.

[Ed. Note.—For other cases, see Lotteries, Dec. Dig. § 15.*]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by T. C. Crawford, trustee in bankruptcy of the Augusta Debenture Company, Limited, against H. C. Roney. Judgment for plaintiff, and defendant brings error; plaintiff filing cross-exceptions. Affirmed.

Jos. B. Cumming and C. H. & Rodney Cohen, for plaintiff in error. Wm. H. Barrett, for defendant in error.

EVANS, P. J. The action is by T. C. Crawford, trustee in bankruptcy of the Augusta Debenture Company, Limited, against H. C. Roney, to recover a balance due on a stock subscription. The case has been twice before considered by this court. 126 Ga. 763, 55 S. E. 499; 130 Ga. 515, 61 S. E. 117. In the former trials the defendant contended that the company had earned and declared dividends on his stock sufficient to discharge all liability on his subscription contract, except the sum of \$56.32, which he offered to pay. At the last trial the defendant amended his plea by alleging that the business engaged in by the debenture company was a lottery scheme, calculated to defraud, contrary to public policy, and prohibited under

the laws of the state; that the company issued certain debenture certificates of the forms attached to the plea, and when the company failed there were no creditors other than holders of debentures; and that the suit is proceeding solely in the interest of such debenture holders. The court refused to strike this amendment on demurrer, and submitted this phase of the case on the theory that if the business of the debenture company was that of a lottery the debenture holders were in *pari delicto*. Exceptions are taken to his instructions and refusals to charge on this subject. The jury returned a verdict for the plaintiff, and the defendant moved for a new trial, which being refused he brings error.

1. The court instructed the jury that the defendant would not be entitled to the stock-dividend credit unless the dividend had been actually earned at the time it was declared, and that dividends on corporate stock can only be declared and paid out of net profits, and refused to instruct them that, if the dividend was declared by the directors in good faith and received by the stockholders in the belief that the same had been paid out of the profits, the defendant would be entitled to a credit for such dividend upon his stock subscription; even though such dividend was paid out of the capital stock. The charge of the court was in accord with the principles enunciated in the case in 130 Ga. 515, 61 S. E. 117. In that report the evidence submitted by the plaintiff to show that the dividend claimed by the subscriber had not been actually earned was examined and held sufficient to carry the case to the jury on that issue. The same evidence was produced upon the second trial, and is sufficient to sustain the finding of the jury, which was adverse to the defendant.

2. According to the averments of the amended plea, it is contended that the present suit is an effort to collect assets of a bankrupt corporation, who was engaged in the business of a lottery for the purpose of reimbursing the debenture or lottery-ticket holders. The plea is projected upon the theory that the debenture holders and the debenture company are in *pari delicto*. It is a general rule of universal application that courts of justice will not allow one in *pari delicto* to enforce an executory contract, or recover back amounts paid upon an illegal contract. For the purpose of determining the merits of the defense set up in the amended plea, we will assume that the corporation was engaged in a lottery scheme as alleged in the plea. Let it be observed, however, that the action by the trustee in bankruptcy is not to recover money to pay any prize, but to collect the unpaid stock subscriptions as assets of the bankrupt corporation for the purpose of paying such claims as are legally chargeable against the bankrupt's estate. Lotteries have ever been deem-

ed as contrary to public policy, but the keepers of lotteries were not denounced as criminals by the common law. The rule of *pari delictum*, which finds expression in the maxims, "ex turpi causa non oritur actio," and "in *pari delicto* melior est conditio defendentis," forbids a suit upon an illegal contract where both parties knowingly and intentionally engage in the illegal act. But there are exceptions to the general rule, which have been recognized by the courts from the earliest times. One of these exceptions or limitations grows out of the nature of the particular transaction, and is thus expressed by Sir George Jessel, Master of the Rolls, in a comparatively recent English case, "You cannot ask the aid of a court of justice to carry out an illegal contract; but in cases where the contract is actually at an end, or is put an end to, the court will interfere to prevent those who have, under the illegal contract, obtained money belonging to other persons on the representation that the contract was legal, from keeping that money." *Sykes v. Beadon*, L. R. 11 Ch. Div. 170, 193. The reason for this rule is thus stated in 2 Pomeroy's Eq. Jur. § 842: "When the contract is illegal, so that both parties are to some extent involved in the illegality, but are not in *pari delicto*—that is, both have not, with the same knowledge, willingness, and wrongful intent, engaged in the transaction, or the undertakings of each are not equally blameworthy—a court of equity may, in furtherance of justice and of a sound public policy, aid the one who is comparatively the more innocent, and may grant him full affirmative relief, by canceling an executory contract, by setting aside an executed contract, conveyance, or transfer, by recovering back money paid or property delivered, as the circumstances of the case shall require."

In the charter of the debenture company there was no suggestion that a lottery business was intended. The various certificates issued by it contained very alluring inducements to the investor, and were calculated to appeal very strongly to the cupidity of those uninitiated in the intricacies of modern finance. Our Penal Code denounces as criminal the sale of anything representing a chance in a lottery, gift enterprise, or other similar scheme or device; but no penalty is imposed upon the purchaser of a chance in any lottery scheme. Pen. Code 1895, §§ 406-408. If the debenture company was really engaged in a lottery scheme, then it would be guilty of a misdemeanor in the conduct of such business; but those who did nothing more than purchase debenture certificates would not be affected with the corporation's criminality. The lottery acts of 14 George III, c. 76, forbade the insurance of lottery tickets. It was held in *Jaques v. Golightly*, 2 Wm. Bl. 1073, that money paid as a premium for insuring lottery tickets may be

recovered back, though the winnings, if any, cannot be recovered, the contract being void by the statute; and the Chief Justice is reported to have said: "The statute is made to protect the ignorant and deluded multitude who, in hopes of gain and prize, and not conversant in calculations, are drawn in by the office keepers." In *Mount v. Waite*, 7 Johns. (N. Y.) 434, which was an action to recover money which the plaintiff had paid to the defendant for insuring lottery tickets, Chancellor Kent said: "The plaintiffs here committed no crime in making the contract. They violated no statute, nor was the contract malum in se. I think, therefore, the maxim as to parties in pari delicto does not apply, for the plaintiffs were not in delicto." And this rule has been very generally followed by the American courts. *Becker v. Wilcox*, 81 Neb. 476, 116 N. W. 160, 16 L. R. A. (N. S.) 571, 129 Am. St. Rep. 690, and cases cited in the notes; also, authorities cited in the opinion of Lumpkin, J., when on the trial bench, which will be found in the case of *Equitable Loan & Security Co. v. Waring*, 117 Ga., at page 632, 44 S. E., at page 320, 62 L. R. A. 98, 97 Am. St. Rep. 177. There is nothing in the pleading or the evidence which charges that the debenture holders actively participated in the furtherance of the business of the defendant. They were simply purchasers of certificates from the debenture company, and did not participate in the management of the corporation's affairs. So that it becomes immaterial to decide whether the particular business in which the debenture company was engaged was that of a lottery, inasmuch as, under the allegations in the pleadings and under the proof submitted, the debenture holders were not in pari delicto with the debenture company, even if it be conceded that the debenture company conducted a lottery, which is not decided. The court gave the defendant the benefit of a defense to which he was not entitled; and he has no cause of complaint as to the accuracy of instructions in the submission of that defense, when such instructions were not calculated to injuriously affect his other defense. The charge on the burden of proof was not erroneous.

The case was fairly tried on the real issue, under appropriate instructions, and the judgment refusing a new trial is affirmed.

BECK, J., absent. The other Justices concur.

(135 Ga. 10)

C. P. LIVELY & SON v. INMAN, AKERS & INMAN.

(Supreme Court of Georgia. Aug. 10, 1910.)

(Syllabus by the Court.)

1. REFERENCE (§ 100*)—AUDITOR'S REPORT—EXCEPTIONS.

"An exception to an auditor's report, which requires for its determination a consideration

of some part or parts of the brief of evidence, is incomplete, when the evidence necessary to be considered in passing thereon is neither incorporated therein, nor attached thereto as an exhibit, nor specifically pointed out in the brief of the evidence." *Brock v. Wildey*, 132 Ga. 19, 63 S. E. 794.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 160; Dec. Dig. § 100.*]

2. REFERENCE (§ 100*)—AUDITOR'S REPORT—EXCEPTIONS—FINDINGS OF FACT.

In the trial of exceptions of fact to an auditor's report, where exceptions of law thereto are overruled, the auditor's report is prima facie correct as to the facts which it finds, and the onus is on the part excepting to show that it is erroneous.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 164, 165; Dec. Dig. § 100.*]

3. REFERENCE (§ 100*)—AUDITOR'S REPORT—EXCEPTIONS OF FACT—SUBMISSION TO JURY.

Where exceptions of fact to an auditor's report are approved and submitted to a jury, the issues thus submitted comprehend only those made by the exceptions; and the court is not called on to state the full contentions of the parties as made by the pleadings, unless it is necessary to elucidate the issues made by the exceptions.

[Ed. Note.—For other cases, see Reference, Dec. Dig. § 100.*]

4. TRIAL (§ 238*)—INSTRUCTIONS.

A charge embracing a correct principle of law is not rendered erroneous by a failure to charge on some other legal principle applicable to the case.

[Ed. Note.—For other cases, see Trial. Dec. Dig. § 238.*]

5. INSTRUCTIONS.

The charge as a whole fairly submitted the issues, and the evidence authorized the verdict.

Error from Superior Court, Gwinnett County; D. W. Meadow, Judge.

Action between C. P. Lively & Son and Inman, Akers & Inman. From the judgment, C. P. Lively & Son bring error. Affirmed.

N. L. Hutchins, Jr., for plaintiffs in error.
I. L. Oakes, for defendants in error.

EVANS, P. J. Judgment affirmed. The other Justices concur, except BECK, J., absent.

(134 Ga. 371)

GEORGIA R. & BANKING CO. v. CITY OF ATLANTA.

(Supreme Court of Georgia. Aug. 10, 1910.)

(Syllabus by the Court.)

1. DEDICATION (§ 43*)—STREETS—ESTABLISHMENT—DEDICATION OR PRESCRIPTION—EVIDENCE.

In a controversy between a city and a landowner as to the existence of a street across the landowner's property by dedication or prescriptive use, evidence illustrating recognition of the strip of land as a street by the city is admissible. The evidence allowed, and of which complaint is made in the second, third, fourth, and fifth grounds of the amended motion, is admissible.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 83, 84; Dec. Dig. § 43.*]

2. EVIDENCE (§ 358*)—MAPS—EXISTENCE OF STREET.

Upon proof of a civil engineer that a certain map is a correct delineation of the streets of a city in the vicinity of the disputed street, the map is admissible for the purpose of illustrating the evidence relative to the existence or nonexistence of the street.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 358.*]

3. TRIAL (§ 169*)—DIRECTION OF VERDICT.

Where a petition by a railroad company is brought against a city to enjoin prosecutions of its employes under an ordinance prohibiting the obstruction of a street, wherein it is alleged that the property claimed to be a street is not a street, but is the private property of the plaintiff, and the prayer is not only for injunction against the prosecutions of the plaintiff's servants, but also against the city's interference with the plaintiff's property rights, and it is further prayed that the title to the land be decreed to be in the plaintiff, and where, after both sides have submitted evidence, the presiding judge announces that he is of the opinion that the plaintiff has not made out such a case as authorizes a court of equity to interfere with the enforcement of a criminal law, it is error to direct a verdict for the defendant, where the evidence does not demand a finding that there was a street over the locus in dispute. See *Georgia Railroad Company v. City of Atlanta*, 118 Ga. 486, 45 S. E. 256; *McCoy v. Central Ry. Co.*, 131 Ga. 378, 62 S. E. 297.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 169.*]

Error from Superior Court, Fulton County; J. I. Pendleton, Judge.

Action by the Georgia Railroad & Banking Company against the City of Atlanta. There was a directed verdict for defendant, and plaintiff brings error. Reversed.

Jos. B. & Bryan Cumming and McDaniel, Alston & Black, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., for defendant in error.

EVANS, P. J. Judgment reversed. All the Justices concur, except BECK, J., absent, and HOLDEN, J., disqualified.

(134 Ga. 849)

ALEXANDER et al. v. CITY COUNCIL OF AUGUSTA et al.

(Supreme Court of Georgia. July 27, 1910.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§ 23*)—CANALS—"FURTHER CONSTRUCTION."

The words "further construction," as employed in section 6 of the act incorporating the Augusta Canal Company (Acts 1845, p. 141), when considered in connection with the subject-matter to which they refer, should be construed as referring to repair work on the canal which was authorized to be constructed by the act, as well as to work of original construction of the canal.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 23.*]

2. EMINENT DOMAIN (§ 71*)—CANALS—PROCEDURE—PAYMENT OF DAMAGES.

The act approved December 27, 1845 (Acts 1845, p. 138), incorporating the Augusta Canal Company, as amended by the act approved

December 19, 1849 (Acts 1849-50, p. 85), in so far as it authorized the taking of private property under the power of eminent domain without first paying to the landowner damages, and in so far as it provided a different method of procedure for taking property under the power of eminent domain from that specified in the act approved December 18, 1894 (Acts 1894, p. 95), as now embodied in Civ. Code 1895, §§ 4657-4686, was superseded by the adoption of article 1, § 3, par. 1, of the Constitution of 1877 (Civ. Code 1895, § 5729), and the act of 1894, supra.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 71.*]

3. REVIEW ON APPEAL.

In view of the ruling announced in the second headnote, it is unnecessary to deal with other questions presented in the bill of exceptions.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by Irvin Alexander and Hugh Alexander against the City Council of Augusta and others. Judgment for defendants, and plaintiffs bring error. Reversed.

Irvin Alexander and Hugh Alexander instituted suit to enjoin the city council of Augusta and its agents, J. J. Twiggs and J. D. McGee, from the commission of alleged acts of trespass in taking and removing certain trees and earth from the land of plaintiffs, and prayed for other relief. The defendants, in answer, alleged a right in the city to take the property under the power of eminent domain, as conferred by and in conformity with the provisions of the act approved December 27, 1845 (Acts 1845, p. 138), incorporating the Augusta Canal Company, as amended by the act approved December 19, 1849 (Acts 1849-50 p. 85). The object of the Augusta Canal Company, as declared in the act of incorporation, was to "provide for the construction of a canal for manufacturing purposes and for the better securing an abundant supply of water for the city" of Augusta. The provisions of the act which related to the manner of obtaining a location for the construction of the canal were contained in sections 5 and 6, as follows:

"Sec. 5. And be it further enacted by the authority aforesaid, that in case the line of said canal, or the raceways, wasteways, or towpath therewith connected, shall pass through the lands of any person or persons with whom the present commissioners, or their successors, or the future managers of said canal, hereafter to be elected, as provided in the second section of this act, have not made or cannot make a satisfactory agreement as to the terms upon which the same may be extended over or through such lands, the said commissioners, or their successors, or the said managers, as the case may be, shall nevertheless have the right to establish, open and construct the said canal, raceways, waterways, (wasteways) and towpaths through and over the same, and that the

damages, if any, sustained by the proprietor or proprietors of such lands shall be ascertained and assessed by five appraisers, of whom two shall be nominated by said commissioners or managers, two by such proprietor or proprietors and the fifth by the four so nominated, whose award, or that of a majority of them, certified in writing under their hands and seals, in duplicate, one part for each of the parties in interest, shall be recorded in the office of the clerk of the superior court of the county in which such lands are situated; and if not appealed from, as hereinafter provided, shall operate as, and have the force and effect of, a judgment vesting in said company the right of way over and through such lands; upon which award, so recorded, and not appealed from, if any sum is thereby awarded as damages to said proprietor or proprietors, the said clerk shall, after the expiration of thirty days from the time of the record thereof, issue execution for the same, under the usual form of executions founded upon judgment of the court, returnable to the next superior court of said county, which after execution may be levied on any property of the company, either real or personal. But in case either of the parties should be dissatisfied with the decision or award of the said appraisers, such dissatisfied party or parties may, within ten days after the recording of the same, exercise his, her, or their right of appeal, by making known his, her or their intention, by a written notice served upon the adverse party, and upon the said clerk, whose duty it shall be thereupon to suspend the issue of execution, and enter a memorandum of such appeal on the appeal docket of his court, to be tried by a special jury at the next term, which trial shall be final, vesting in the company the said right of way, and, in case of damages, entitling the person for whom they are found to a judgment and execution therefor. Provided, that the appraisers hereinbefore mentioned, before entering upon the discharge of their duties as such (shall) severally take and subscribe an oath before some judicial officer of the State, well and truly and impartially to determine and award in the premises.

"Sec. 6. And be it further enacted by the authority aforesaid, that in case it should be necessary, in the further construction or further extension, deepening, or widening of said canal, or its raceways, wasteways, or other improvements or works therewith connected, to use any earth, clay, stone, gravel, or other materials, on or near the line of said canal or other works, and the said commissioners or managers and the proprietor or proprietors of the land from which such earth, clay, stone, gravel, or other materials are to be taken, cannot agree upon the terms on which the same may be procured for the purposes aforesaid, it shall nevertheless be lawful for said commission-

ers or managers to take and use the same, and the damages, if any, shall be assessed, the right of appeal, if desired, exercised, and the ultimate award or judgment shall be enforced as provided in the preceding section of this act, in relation to the right of way, and assessment and collection of damages awarded by the appraisers, or found by a special jury on appeal. Provided, that no difference or disagreement between the said company and any landholders shall be a ground for injunction against said commissioners, managers, or company, or otherwise suspend or impede any of the works contemplated in this or the preceding section of this act, which shall proceed without delay or interruption, upon the said commissioners, managers, or company tendered to such landholders sufficient security for the payment of such damages as may be assessed or found for him as aforesaid; upon the sufficiency of which said security the judge to whom application may be made shall decide, and who, if he deems the same insufficient, shall require other or additional security to be offered within three days; on the failure or refusal to give which, an injunction may issue; but any injunction granted against said commissioners, managers, or company shall be dissolved so soon as such security as the judge of the superior court of the Middle district of this State may deem sufficient shall have been given by said commissioners, managers or company."

The act of 1849 was an act to amend several acts in relation to the city of Augusta, and to amend the act passed on December 27, 1845, to incorporate the Augusta Canal Company. It provided that, upon being authorized by a vote of the stockholders in said company, the corporation should "be authorized to sell, transfer, and convey to the city council of Augusta the canal, its appurtenances, and all other property and effects belonging to said company, upon such terms and stipulations as may be agreed upon," and that "upon such purchase and conveyance the city council of Augusta shall be vested with all the power, authority and privileges conferred on said company by the act incorporating it, and shall be subject to all the liabilities therein prescribed." The act further provided: "That, in case of such purchase and conveyance, the corporate power and authority of the city council of Augusta shall be extended over, upon, and for one hundred feet on each side of the said canal, through its whole extent, and to Stalling's island above Bull sluice in Savannah river, so far as to allow the said city council to pass all ordinances and perform all acts necessary to the use of said canal, and the protection of it and its appurtenances from injury. And be it further enacted, that if the city council of Augusta shall at any time hereafter deem it advisable to sell and transfer the said canal and its appurtenances to any individual or individuals, the

shall be authorized to do so by ordinance passed by them for that purpose; and thereupon the purchaser or purchasers from them shall be vested with all the powers and privileges and subject to all the liabilities specified in the act incorporating the Augusta Canal Company." The judge refused the injunction, and the plaintiffs excepted.

Lamar & Callaway, for plaintiffs in error.
C. Henry Cohen and Austin Branch, for defendants in error.

ATKINSON, J. 1. The record discloses that the material taken from the land was intended to be used in making repairs to the Augusta Canal. It was urged that the power of eminent domain conferred by the act of 1845, as amended by the act of 1849, properly construed, did not extend to the right to take material for repair work, but was restricted to taking it for work of original construction. In making this contention counsel referred to certain language contained in section 6 of the act of 1845, which declared that the power of eminent domain might be exercised for the purpose of obtaining certain material necessary to be used in "the further construction, future extension, deepening, or widening of said canal, or whatever raceways, wasteways, or other improvements, or works connected therewith," and asserted that the repairs to the banks of the canal more than 50 years after the construction thereof was not contemplated. This construction of the act is too narrow. One of the declared objects intended to be accomplished by the construction of the canal was the better securing of an abundant supply of water for the city. The matter of creating and maintaining the canal was a thing to be accomplished by artificial means. The nature of the artificial waterway was not such as that when once constructed it would remain so permanently. On the contrary, it was such that natural agencies would tend to its destruction, and the object to be accomplished would fail unless the work of maintenance were kept in progress. As to such an enterprise, the work of construction would never be at an end. Considered in the light of the subject-matter which the Legislature had under consideration, the words "further construction," as contained in the act of 1845, should be construed as referring to repair work as well as work of original construction.

2. It was contended that in so far as the act of 1845, set forth in the statement of facts, incorporating the Augusta Canal Company, as amended by the act of 1849, authorized the exercise of the power of eminent domain, it was repealed and superseded by article 1, § 3, par. 1, of the Constitution of 1877 (Civ. Code 1895, § 5729), which declared that "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid";

also, that it was superseded by the act approved December 18, 1894 (Acts 1894, p. 35), "to provide a uniform method of exercising the right of condemning or taking private property," as now contained in Civ. Code 1895, §§ 4657-4686, inclusive. The act of 1845, above mentioned, properly construed, authorized the taking of property before actual payment of damages to the landowner. The Constitution of 1877, supra, forbade it. By article 12, § 1, pars. 3 and 4, of the Constitution of 1877 (Civ. Code 1895, §§ 5934, 5935), existing laws not in conflict with the Constitution of the state, or with the supreme law of the land, were preserved; but there was no provision for saving existing laws which were repugnant to the Constitution. The Legislature provided in the act of 1845 that property might be taken before actual payment of damages to the landowner, and the provision in the Constitution of 1877, which declared that private property should not be taken without compensation being first paid, were inconsistent, and the latter repealed so much of the former as authorized the taking of property without first making payment of the damages incurred. The act of 1894, supra, was a general law, and provided different procedure from that prescribed by the act of 1845 for taking property under the exercise of the power of eminent domain. This general law did not specifically name the act of 1845, but it was so comprehensive as to make it apparent that the general law was intended to repeal all existing legislation, local as well as general, in regard to the method of exercising the power of eminent domain. Where such intention exists, a general law will repeal a local law, though it is not specially named. *Crovatt v. Mason*, 101 Ga. 252, 28 S. E. 891. The general law did not purport to confer upon any corporation the right to exercise the right of eminent domain, but only to provide in what manner corporations having the right to exercise the power might exercise it. *Georgia Railroad Co. v. Union Point*, 119 Ga. 809, 47 S. E. 183; *Georgia Railroad Co. v. Decatur*, 129 Ga. 502, 59 S. E. 217.

In so far as the act of 1845 provided a different method of exercising the right of eminent domain from that prescribed in the act of 1894, it was superseded by the latter act. Hence, by giving effect to the Constitution of 1877, in the manner above indicated, and to the act of 1894, the act of 1845, as amended by the act of 1849, was superseded in so far as it authorized the taking of private property under the power of eminent domain without first paying the damages, and in so far as it authorized the taking of such property under condemnation proceedings different from those specified in the act of 1894. In support of the contrary view, it was argued that under the doctrine of the *Dartmouth College Case*, as recognized and applied in the case of *Gardner v. Georgia Railroad & Banking Co.*, 117 Ga. 522, 43

S. E. 863, the city acquired, under the act of 1845, rights which could not be taken away. Article 1, § 3, par. 1, of the Constitution of 1877 (Civ. Code 1895, § 5729), requiring the payment of damages before the taking of property under the power of eminent domain, and the act of 1894, which prescribes the procedure under which property may be taken for private purposes, should not be so applied as to work an impairment of any contract or destroy any vested right acquired under the act of 1845. The Constitution expressly prohibits such application. Article 4, § 1, par. 6 (Civ. Code 1895, § 5902); article 12, § 1, par. 5 (Civ. Code 1895, § 5936). But neither the Constitution nor the act referred to had such effect. The former allowed the power of eminent domain to be exercised, but only provided that damages should be paid before the property could be taken. The latter merely provided a different method of taking property under the power of eminent domain by persons having the right to exercise it. These changes in the law were remedial in character, and did not impair any contract or impair any vested right under the doctrine of the Dartmouth College Case. The case differs from Gardner v. Georgia Railroad & Banking Co., 117 Ga. 522, 43 S. E. 863. That case involved the act approved December 14, 1835, amending the charter of a railroad corporation, wherein it was expressly declared that under the power of eminent domain the decision rendered in the condemnation proceedings provided for "shall vest in the company the fee simple of the land in question." Laws Ga. 1835, p. 228, § 15. In the case cited it was said in the opinion that under the act of 1894, providing a method of taking property, etc., only an easement in the property could be acquired, and that there was a substantial difference between such an estate and the fee simple which could be acquired under the act of 1835, supra; and thereupon it was declared that, in so far as the act of 1894 was inconsistent with the exercise of the charter rights specified in the act of 1835, it had no application to the defendant company. The act of 1894 does not declare that the only interest in the property appropriated under its provisions which would pass to the person exercising the power of eminent domain would be an easement; but its language relative to that matter is: "Such an interest in the property taken as may be necessary to enable the corporation or person taking to exercise their franchise or conduct their business; and whenever the person or corporation shall cease using the property taken for conducting their business, the said property shall revert to the person from whom taken, his heirs or assigns." Under this language any interest might be taken which would be necessary to a proper exercise of the franchise or conducting of the business. The necessities of the franchise might require an absolute con-

version of the property, such as earth taken for the construction of railroad beds, etc. The act of 1845, as amended by the act of 1849, being the act involved in the present case, did not declare in express language that the judgment in the condemnation proceedings provided for therein should vest the fee to the property in the person exercising the power of eminent domain. It merely declared that the trial should be final, "vesting in the company the said right of way." It did no more than authorize the taking of property for specified purposes, which, in effect, limited the use of the property to the purposes specified, so that the person taking acquired such interest therein, but no greater or less interest than was necessary for the enjoyment of the franchise. This was in keeping with the general rule that in condemnation proceedings corporations acquire only such interest in the property taken as may be necessary for the enjoyment of the franchise. Whatever might have been the difference in the character of the estate acquired when the property was taken under the act of 1835 from that when acquired under the general law of 1894, the same difference did not exist where the property was taken under the provisions of the charter of the Augusta Canal Company, as granted by the act of 1845 and amended by the act of 1849. In the latter case the interest acquired would be substantially the same as that which could be acquired if the property were taken under the general law of 1894. It thus appears that the Constitution did not deprive the corporation of its right to exercise the power of eminent domain, and that the act of 1894 did not restrict the character of the estate which, under the provisions of the act of 1845, the corporation could have acquired in the property taken under the power of eminent domain. The substantial rights were unaffected. The provisions of the former act relative to proceedings by which property might be taken were not subject-matter of substantial right in the party undertaking to condemn.

3. In several grounds of the bill of exceptions complaint was made that the act of 1845, as amended by the act of 1849, was unconstitutional; but the record does not disclose that these complaints were made in the pleadings or otherwise, so as to show that the question as to the constitutionality of the act was made before the trial court and decided. Other assignments of error relate to a construction of provisions of the act of 1845 in regard to the method of procedure in taking private property under the exercise of the power of eminent domain, and the application of such provisions of the act of 1845 to the present case. Under the statement above made, no constitutional question is presented for decision; and, as the act of 1845 has been superseded, in so far as it refers to the method of procedure in the matter of taking private property,

under the power of eminent domain, it is unnecessary to deal with the questions relative to such procedure.

Judgment reversed. All the Justices concur.

(134 Ga. 739)

DE LOACH et al. v. NEWTON et al.
(Supreme Court of Georgia. July 13, 1910.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 38*)—
ESTABLISHMENT—SUFFICIENCY OF PETITION.

When considered as a whole, the petition on which the ordinary of Tattnall county ordered an election in the school district of that county known as the Claxton-Hagan district was in substantial compliance with the law, and the election so ordered and held was not void on the ground that such petition furnished no basis for the order, so as to authorize an injunction to be granted against the levy of the local tax in such school district by virtue of the election.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 66; Dec. Dig. § 38.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 53*)—
DE FACTO OFFICERS—EFFECT OF ACTS.

The act of August 23, 1905 (Acts 1905, p. 425), as amended by the act of August 21, 1906 (Acts 1906, p. 61), provides for the laying out of counties into school districts by the county boards of education, and that such boards shall order an election for trustees in the respective districts so laid out. Whenever the citizens of any school district, in a county not levying a local tax for educational purposes, wish to supplement the funds received from the state school fund by levying a tax for educational purposes, they shall present to the ordinary a petition from one-fourth of the qualified voters of the district, and thereupon the ordinary shall order an election to determine the question of local taxation. There is no provision in either of said acts for the ordinary to order an election to determine whether a school district shall be laid out, or for the purpose of electing trustees in such a district.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 130; Dec. Dig. § 53.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 53*)—
DE FACTO OFFICERS—EFFECT OF ACTS—SUC-
CESSORS—NATURE OF TENURE.

If a school district has been duly laid out, and upon a petition of one-fourth of the qualified voters thereof the ordinary ordered an election to determine the question of local taxation, but also included in his order that trustees for the school district should be elected, which was done, and the county board of education, although it did not order the election of such trustees, recognized and approved the persons elected as such and caused them to be commissioned, and they acted as trustees under such commissions, they were de facto officers, and their actions as such, which de jure officers would be authorized to perform under the law, could not be collaterally attacked as void on account of the manner of their election.

(a) After the trustees of a school district were thus elected and commissioned, upon the expiration of the terms of two of them the board of education of the county ordered an election to be held to select successors for them. Semble, that the persons so selected for the new terms, whether the same as those originally

elected or not, after such election and being commissioned thereunder, were de jure trustees.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 130; Dec. Dig. § 53.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 103*)—
LOCAL TAX—PETITION FOR ELECTION—
SIGNERS.

The petition to the ordinary for the purpose of calling an election to determine the question of levying a local school tax in a district should be signed by the petitioning voters themselves. There is no provision for an attorney at law to present a petition, signed only by him, as the representative of a number of voters. The signature of one acting as an attorney cannot take the place of the signatures of the voters.

(a) In the present case a petition was signed by persons purporting to constitute one-fourth of the qualified voters of the district. A copy of this was attached to an additional petition to the ordinary, signed by certain persons as attorneys for the petitioners. The latter petition was not a substitute for, or in lieu of, a petition by the voters, and the persons named in it also signed the other petition. This mere duplication of petitions did not operate to invalidate the original petition signed by the requisite number of voters.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 103.*]

5. STATUTES (§ 18*)—ENACTMENT—LEGISLA-
TIVE JOURNALS.

If an enrolled act of the Legislature was duly signed by the President of the Senate and the Speaker of the House and approved by the Governor and deposited in the office of the Secretary of State, it was not competent to attack its validity on the ground that the legislative journals showed that the bill originated in the House, was there passed by a constitutional majority, and transmitted to the Senate, where it was amended and passed by a constitutional majority, and then transmitted to the House, where the Senate amendment was concurred in, but failed to show that this was done by a constitutional majority.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 26, 27; Dec. Dig. § 18.*]

Error from Superior Court, Tattnall County; B. T. Rawlings, Judge.

Action by J. A. De Loach and others against D. C. Newton and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Hines & Jordan, for plaintiffs in error.
J. P. Moore and Gordon Saussy, for defendants in error.

FISH, C. J. Certain persons, as citizens and taxpayers, sought to enjoin the collection of a tax in a school district in Tattnall county. On the hearing of the application for an interlocutory injunction it was refused, and they excepted. It was contended that the election, which was held under the act of August 23, 1905 (Acts 1905, p. 425), as amended by the act of August 21, 1906 (Acts 1906, p. 61), was invalid, because the petition on which the ordinary based his order for an election was insufficient, and the election held was therefore void. The petition to the ordinary stated that "the un-

dersigned qualified voters of said county respectfully show the following facts." It was contended that this showed a petition by the voters of the county, and not those of the district. But later in the petition it was stated "that the undersigned petitioners represent more than one-fourth of the qualified voters in said proposed district," thus showing that the signers purported to be qualified voters both of the county and the district, and the petition showed plainly that they were acting as such and with reference to a district election. There was no contention that the district had not already been laid out by the county board of education as provided by law, and, while the petition referred to establishing a school district, there is nothing to show that the district was not already established; and the real thing sought was to provide for local taxation within it. It was said that the petitioners did not seek to have local taxation, or show under what act they were proceeding; but they stated "that they desire to establish a school district to be maintained by local taxation pursuant to the amended act of August, 1906, of the acts of the General Assembly of said state," and they prayed "that your honor order an election for said proposed district, pursuant to the act above referred to." This sufficiently indicates that the petitioners were proceeding under the act of August 21, 1906, which was the only act passed in that year, touching the subject of such elections. While the language used may not have been exact, it was sufficient to show that the thing desired was an election in regard to the maintenance of the school by local taxation, pursuant to the act mentioned, and not merely to establish a school district. *Coleman v. Board of Education*, 131 Ga. 643 (7), 63 S. E. 41. In stating the number of qualified voters who signed the petition, it was said: "The undersigned petitioners represent more than one-fourth of the qualified voters in said proposed district." It is evident that this meant that "the undersigned" were more than one-fourth of such voters. It would be a strained construction to hold that the petitioners meant that they were acting as agents or representatives of such voters, and to upset the election on that ground. *Town of Solon v. Williamsburg Savings Bank*, 35 Hun (N. Y.) 1, 7. The petition, thus amended, was not presented alone; but another petition, covering substantially the same ground, though differently expressed, and having attached to it a copy of the original petition signed by the voters, was also presented. This was signed by a firm of attorneys. The law provides for such a petition to the ordinary to be made by one-fourth or more of the qualified voters of the district. There is no provision of law for having a petition of this character signed by attorneys, nor will the signature of attorneys take the place of the signatures of the qualified voters. Still, as it appears there

was an original petition, signed by the voters, which was presented to the ordinary, the duplication will not affect the validity of his action on the proper petition. The plaintiffs alleged that the original petitions could not be found in the ordinary's office, but the answers set up that they had been found there, and they were tendered in evidence.

There was no law authorizing the ordinary to call an election for the selection of trustees for the school district, nor was there any prayer for this in the petition presented to him. Nevertheless, in addition to ordering an election to determine the question of local taxation, he ordered that three school trustees should be elected for the district. It appears that this was done, and that the county board of education recognized and approved the three trustees thus elected and commissioned them; and it appears also that the persons so elected proceeded to discharge the duties of such trustees until the terms of two of them had expired, when successors were elected by order of the county board of education. The three first elected were, at least, *de facto* officers, and the two last elected were probably *de jure* officers. At any rate, the official acts of such trustees were not subject to collateral attack. *Brown v. Flake*, 102 Ga. 528, 29 S. E. 267.

Objection was also made to the sufficiency of the allegations of the petition to the ordinary, on other grounds; but the petition, taken as a whole, was substantially sufficient. It was not so lacking in jurisdictional averments as to render the election void.

It is contended that the act of 1906 is unconstitutional, on the ground that the journals of the House of Representatives and the Senate do not show that it was enacted in the manner prescribed by the Constitution; the contention being based upon the following facts derived from these journals: The act originated in the House of Representatives and was there passed by a constitutional majority. It was then transmitted to the Senate, where certain amendments were made, and, as amended, was passed by that body by a constitutional majority. It was then returned to the House, where the Senate amendments were concurred in; but the journal of the House does not show by what vote this was done. It is not contended that the enrolled act was not duly signed by the President of the Senate and the Speaker of the House and approved by the Governor and deposited in the office of the Secretary of State. The question is whether the omission from the journal of the House of a statement showing that the Senate amendments to the House bill were concurred in by a majority of all the members elected to the House invalidates the act. The decision in regard to whether the journals of legislative bodies will be looked to for the purpose of invalidating an act of the Legislature apparently regular on its face, and, if so, to what extent such journals may

be considered, is one which has been productive of many decisions and much conflict. Some of the courts, it must be conceded, have not only rendered decisions conflicting with those of other courts, but also with those previously rendered by themselves. The decisions may be generally classified under four heads: First, those holding that the enrolled act, duly signed by the presiding officers of the two branches of the Legislature and approved by the Governor and lodged with the Secretary of State, is conclusive, and cannot be shown to be invalid by reference to the journals. Second, those which hold that the enrolled act, thus signed, approved, and deposited, is not conclusive, but that the legislative journals can be examined to see whether the act has been constitutionally passed. This class of decisions consider the journals as in the nature of minutes or the ultimate documentary evidence of what was done by the Legislature, and hold, not only that an affirmative entry upon a journal showing a violation of the constitutional method of enacting laws will invalidate an act, but also that, the journal being the complete evidence of legislative action, silence is equivalent to negation, and the failure of the journal to show that a constitutional provision was complied with is equivalent to a statement that it was not complied with, and hence is as equally fatal to the act as a direct statement of noncompliance. Third, those which hold that such enrolled act is not conclusive, and that the journals may be examined for certain purposes, but that a failure of the journals to show a full compliance with the constitutional provisions in regard to the modes of passage of acts will not cause the act to be held unconstitutional, and that this will only be done when the entries on the journals affirmatively show that the act has not been constitutionally passed. Fourth, decisions which do not rest upon general rules or principles, but set up as a basis the peculiar or special language of the Constitution under consideration.

For the present, we will lay aside the class of cases last mentioned and consider those based upon reason and principle rather than upon special words. The third class of decisions mentioned, which go behind the enrolled act duly signed, approved, and deposited, and consider the journals for the purpose of invalidating the act, but which hold that an affirmative entry on the journal showing noncompliance with constitutional provisions will accomplish that result, but an absence of such an entry or an entry which does not show that constitutional provisions were complied with, will not so operate, seem to us to be illogical. If the act is to be held to be invalid because of an inspection of the journals, it must be because the journals are the highest and best evidence of what the Legislature did, by virtue of their customary keeping, or because of some constitutional provision re-

quiring them to be kept. If they are in fact the constitutional evidence of what was done and what was not done, and are final and conclusive in their nature, it would seem that silence in regard to a step required to be taken by the Constitution would be equivalent to negation. It is improbable that a journal ever contains such an entry as that an act was passed, but was not read as constitutional provisions required, or was not published, or read three times, or the like. So that if the journal must show what the Legislature did and is the conclusive evidence of it, it is difficult to see why an absence of showing a required step is not equivalent to a denial that such step was taken. Silence of the ultimate witness as to requisites which must be shown is apparently equivalent to negative assertion. Cases of the class referred to condone omission in the journals to show compliance with requirements and cure them by the aid of presumptions that something happened which the journals do not show, but upset the act and declare it invalid when the journals do speak. In other words, they are final as to what happened, but practically of no weight as to what did not happen.

Taking up the two great divisions of adjudication, one of which goes behind the enrolled act, duly signed, approved, and deposited, and invalidates it by inspecting the journals, and the other of which holds the enrolled act, thus signed, approved, and deposited, to be conclusive, at least unless some constitutional provision distinctly declares otherwise, we will mention a few of the many adjudications. At the outset, however, let it be borne in mind that there is a wide distinction between taking up an act which has been passed by the Legislature, comparing it with the Constitution, and declaring whether its provisions are in accord with that instrument or not, and looking into the details of the method of procedure by the legislative bodies in passing the act and the regularity of the steps which they took in so doing. The court declares the law. If there are two statutes in apparent conflict, the court must determine which is the controlling one, or the existing law. If a statute and a provision of the Constitution are set up as being in conflict with each other, the court must compare the two and determine if such a conflict in fact exists, and, if so, that the Constitution must prevail. But this is not the same thing as going into the details of legislative procedure, critically examining the methods of a co-ordinate department of the government, and declaring that its members have failed or refused to obey constitutional directions or commands as to the manner in which they should perform their duties, because of an entry, or the absence of an entry, on the journal kept by some clerk or subordinate employé. The latter proceeding is at best a matter of delicacy, and not to be indulged in by the courts un-

less plainly required by the Constitution. The Legislature is one of the three departments of the government. Its members and officers are sworn to support the Constitution, and in the discharge of their duties they are acting under oath. Where the Constitution directs or commands them to take certain steps in a certain way, or not to enact a law without some prescribed antecedent procedure, their oath includes the obligation to enact the measure in the constitutional manner, or not to enact it without the happening of the Constitutional event thus provided. In the imperfection of all human institutions, Legislatures may sometimes, through inadvertence or even through design, violate the Constitution; but the courts will not lightly conclude that they have intentionally or unintentionally violated rules of conduct laid down for them by the Constitution in the transaction of their business. The clerical officials who keep the legislative journals must necessarily do so in the haste and pressure of business; and memoranda, often hurriedly made, must be relied on by them. Assistants and subordinates are employed to aid them. As between the question of whether the President of the Senate and the Speaker of the House, aided by the enrollment committees, all of whom are charged with the duty of seeing that the constitutional rules are enforced, have through incompetence or corruption, violated that duty and signed and sent to the Governor an act which had not in fact been passed in the constitutional manner, and the Governor, who is also sworn to obey the Constitution, has likewise inadvertently or unintentionally approved an act which had not been lawfully passed, or, on the other hand, that some journalizing clerk or assistant has made a mistake in the preparation of the journal, courts will be more ready to adopt the latter theory than the former. Const. art. 3, § 7, pars. 13, 23. We do not mean that correct entries should not be made. It is the duty of the secretary of the Senate and the clerk of the House of Representatives to have correct entries made, so that the journals shall truly show the history of the transactions of the Legislature and of each bill introduced; and there are journalizing committees charged with a similar duty. The journals are deposited, after completion, with the Secretary of State. There is no law by which mistakes in them can be corrected. It would be unfortunate, indeed, if an accidental error by the clerk, beyond correction, must be seized on by the courts to destroy the act, unless it is clearly so required.

In England the signed and enrolled act has uniformly been held to be conclusive. *Rex v. Arundel*, Hobart, 110; *The Case of Herey*, 12 Coke's Rep. 57, 58; *College of Physicians' Case*, 3 Keb. 587; *Edinburg Ry. Co. v. Wauchope*, 8 Cl. & F. Rep. 710, 724.

While the English Constitution is unwritten. It is not without existence, and in the conservatism of that country long-continued custom has sometimes been adhered to as closely as written declarations in enactments in other countries.

In America the United States and each of the individual states has a written Constitution, most, if not all, of which contemplate the keeping of journals by the respective legislative bodies. One of the leading cases discussing the relative weight to be given to the enrolled act and the entries on the journals, for the purpose of invalidating it, is that of *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294. It was there held: "The signing by the Speaker of the House of Representatives and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two Houses of such bill as one that has passed Congress; and when the bill thus attested receives the approval of the President, and is deposited in the Department of State according to law, its authentication as a bill that has passed Congress is complete and unimpeachable. It is not competent to show from the journals of either House of Congress that an act so authenticated, approved, and deposited, did not pass in the precise form in which it was signed by the presiding officers of the two Houses and approved by the President." The Constitution of the United States is not identical with that of the state of Georgia on the subject of the method of passing acts; but it does declare that "each House shall keep a journal of its proceeding and from time to time publish the same, except such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal." Article 1, § 5. It does not require the President of the Senate and the Speaker of the House to attest the bill in the presence of the respective Houses. In the case cited, it was contended that a tariff act, which had been signed by the presiding officer of each House and approved by the President and deposited with the Secretary of State, was invalid because it had omitted entirely a section which was contained in the act as passed by the two Houses, and this could be shown by reference to the journals of those bodies, reports of committees of conference, and other papers printed by authority of Congress, and having reference to the bill in question. While the court said that as to matters which the Constitution expressly required to be entered on the journals it was unnecessary to enter into a discussion, as that question was not involved, yet the reasoning of the court is cogent. Mr. Justice Harlan, among other things, said: "It was assumed in argument that the object of this clause was to make the journal the best, if not conclusive, evidence upon the is-

sue as to whether a bill was in fact passed by the two Houses of Congress. But the words used do not require such interpretation. On the contrary, as Mr. Justice Story has well said: "The object of the whole clause is to insure publicity to the proceedings of the Legislature, and a correspondent responsibility of the members to their respective constituents. And it is founded in sound policy and deep political foresight. Intrigue and cabal are thus deprived of some of their main resources, by plotting and devising measures in secrecy. The public mind is enlightened by an attentive examination of the public measures; patriotism and integrity and wisdom obtain their due reward; and votes are ascertained, not by vague conjecture, but by positive facts. * * * So long as known and open responsibility is valuable as a check or an incentive among the representatives of a free people, so long a journal of their proceedings and their votes, published in the face of the world, will continue to enjoy public favor and be demanded by public opinion." 1 Story, Constitution, §§ 840, 841. * * * It is admitted that an enrolled act, thus authenticated, is sufficient evidence of itself—nothing to the contrary appearing upon its face—that it passed Congress. But the contention is that it cannot be regarded as a law of the United States if the journal of either House fails to show that it passed in the precise form in which it was signed by the presiding officers of the two houses, and approved by the President. It is said that, under any other view, it becomes possible for the Speaker of the House of Representatives and the President of the Senate to impose upon the people as a law a bill that was never passed by Congress. But this possibility is too remote to be seriously considered in the present inquiry. It suggests a deliberate conspiracy to which the presiding officers, the committee on enrolled bills, and the clerks of the two Houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the Constitution. Judicial action based upon such a suggestion is forbidden by the respect due to a co-ordinate branch of the government. The evils that may result from the recognition of the principle that an enrolled act, in the custody of the Secretary of State, attested by the signatures of the presiding officers of the two Houses of Congress, and the approval of the President, is conclusive evidence that it was passed by Congress, according to the forms of the Constitution, would be far less than those that would certainly result from a rule making the validity of congressional enactments depend upon the manner in which the journals of the respective Houses are kept by the subordinate officers charged with the duty of keeping them."

Attached to the brief of the attorneys for

the government in that case, and printed on page 661 et seq. of 143 U. S. (12 Sup. Ct. 495, 36 L. Ed. 294), is a list of authorities up to that time (1891), by states, upon the question whether the legislative journals could be used to impeach the enrolled act duly recorded and authenticated; and some of the leading decisions were discussed in the opinion of Mr. Justice Harlan. Since the decision of that case, several of the courts have changed their position on the subject, and have abandoned the practice of holding duly signed and enrolled acts invalid because of entries and omissions in the journals. Thus, in the Bond Debt Cases, 12 S. C. 200, the journals were considered; but in *State v. Chester*, 39 S. C. 307, 17 S. E. 752, it was held: "Where an original bill and an act duly ratified and approved show on their face that the bill originated in the House of Representatives, received three readings in both Houses, and the act was duly signed by the President of the Senate and the Speaker of the House of Representatives, and approved and signed by the Governor, and deposited with the Secretary of State, the court cannot look to the journals of the two Houses to show that the bill did not originate in the lower House, did not receive three readings in both Houses and was not duly ratified, the true rule being that such an act is sufficient evidence that it passed the General Assembly, and it is not competent to impeach such an act by the journals of the Houses, or any other evidence, other than evidence of such prerequisites as the organization of the Houses, the presence of a quorum, and the record of votes upon the journal when so required by the Constitution." Some previous rulings on the subject were formally overruled.

In Indiana some of the earlier decisions followed the doctrine of holding acts invalid by references to the journals; but in *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710, the court reversed its position and followed the rule later announced in *Field v. Clark*. *Frazer, J.*, said that it was believed that the anomalous and essentially mischievous doctrine of thus upsetting acts had its origin in New York, and had passed into other states and been adopted without much examination though afterwards largely exploded in the state of its origin.

In Kentucky it was first apparently thought that the enrolled bill might be attacked by considering the journals. The Constitution of that state (section 46) declares that: "No bill shall become a law unless, on its final passage, it receives the votes of at least two fifths of the members elected to each House, and a majority of the members voting, the vote to be taken by yeas and nays and entered on the journal." In *Lafferty v. Huffman*, 99 Ky. 80, 35 S. W. 123, 32 L. R. A. 208, upon full consideration, that position was repudiated. It was said the argument

in a former decision was not decisive of the point, and it was held: "An enrolled bill, when attested by the presiding officers of the two Houses of the General Assembly, as required by law, cannot be impeached by the journals of those Houses, and must be accepted by the courts as the bill adopted by the Legislature and as conclusive of the regularity of the steps taken in its passage." Hazelrigg, J., referring to the decisions which hold that the journals are competent to impeach the enrolled bill, but which declare that where those records are merely silent the presumption is absolute that the required steps were in fact taken, said: "This seems to be hardly logical. If the validity of a law is to rest at all on the entries in the journals, it seems to us, when there is a total absence of evidence that a necessary step has been taken, the superstructure—the law—thus built up without a foundation must fall. Those courts assume that the failure of the clerk to make the entry and in this violate the Constitution requiring the entry to be made was an oversight or mistake, and treat the entry as made, supplying the omission, and yet are not willing to assume it to be a mistake or mere misapprehension of the inferior officer, if an entry is made, showing steps taken not in conformity with the constitutional requirements." Again, he said: "But it is said, since the Constitution requires the journals to be kept, it must be because they are to be used as evidence of legislative compliance or noncompliance with the constitutional requirements. We can see, however, much use for these journals other than the one suggested. Besides being necessary for the conduct of the business, it is to be remembered that our government is a representative one, and the journals show the respective parts borne by each representative in the enactment of the laws and the conduct of the public business. Responsibility cannot be shifted or made to rest on the body as a whole. We know that the enrollment of bills receives careful attention at the hands of special committees for that purpose. It is the final act of the body, the climax of the work before the finishing hand of the presiding officer sets his approval thereto. It receives and merits attention for that reason, and there is small room for imposition or fraud. The enrolled act is well-nigh necessarily the very act passed by the body; but the chances of mistake are very great in the make-up of the journals, as they are ordinarily kept; and, if it be understood that the enrolled bill may be impeached by them, the chances of fraud are likewise great."

The Constitution of Washington of 1891 (article 2, § 22) contains this provision: "No bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the members voting for or against the same be entered on the journal of each House, and the majority of the mem-

bers elected to each House be recorded thereon as voting in its favor." Nevertheless, in *State v. Jones*, 6 Wash. 452, 84 Pac. 201, 23 L. R. A. 340, it was held: "The enrolled bill on file in the office of Secretary of State of an act of the Legislature, which is duly signed by the presiding officers of both Houses, and otherwise appears fair upon its face, is conclusive evidence of the regularity of all proceedings necessary for its proper enactment in conformity with the constitutional provisions." In the opinion it was said: "Unless the method of keeping journals should at once be revolutionized, and so much attention be paid to them that they will be made to absolutely represent all the doings of the body to such an extent as to very much prolong the sessions of the Legislature, the sanctity of legislative enactments will be entirely dependent upon the carefulness and good faith of some copyist employed by the Legislature at a few dollars per day." The authorities on the subject were elaborately discussed.

In California a full discussion of the subject was had in *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93, where it was held that the enrolled act could not be impeached by the journals. In 1879 a new Constitution was adopted in that state, which provided (article 4, § 15) that on the final passage of all bills they should be read at length and the vote should be by yeas and nays on each bill separately, and should be entered on the journals, and no bill should become a law without the concurrence of a majority of the members elected to each house. Nevertheless, in *Yolo County v. Colgan*, 132 Cal. 265, 64 Pac. 403, 84 Am. St. Rep. 41, the court held that the validity of a statute, which had been duly certified, enrolled, approved, and deposited in the office of the Secretary of State, could not be impeached by a resort to the journals of the Legislature; and this has been followed in later cases.

One of the earlier and leading cases on the subject is that of *Pangborn v. Young*, 32 N. J. Law, 29, in which Chief Justice Beasley filed a forcible opinion, considering the question and holding that the enrolled act, duly signed and filed in the office of the Secretary of State, or an exemplification of it under the great seal, was conclusive evidence of its existence and contents, and that the minutes of the two houses, although kept under the requirements of the Constitution, could not be received as evidence for the purpose of showing that the law as actually voted on and passed, and approved by the Governor, was variant from that filed in the office of the Secretary of State. He declared that this view was in conformity with the decided weight of American authority. It was stated that the Constitution provided that "each House shall keep a journal of its proceedings, and from time to time publish the same; and the yeas and nays of the members of either House on any ques-

tion shall, at the desire of one fifth of those present, be entered on the journal." And that another clause directed, with regard to the form of enacting bills, "that the yeas and nays of the members voting on such final passage shall be entered on the journal." In the opinion it was said: "Can any one deny that, if the laws of the state are to be tested by a comparison with these journals, so imperfect, so unauthenticated, that the stability of all written law will be shaken to its very foundation? Certainly no person can venture to say that many of our statutes, perhaps some of the oldest and most important, those which affect large classes of persons, or on which great interests depend, will be found defective, even in constitutional particulars, if judged by this criterion." Referring to the argument that, unless the courts were permitted to examine the journals to see if the Legislature was following the constitutional provisions in regard to the manner of enacting laws, the Legislature might, at will, set at defiance the restraints of the organic law, the Chief Justice said: "If we may be permitted, for the purpose of illustration, to suppose the Legislature to design the enactment of a law in violation of the principles of the Constitution, a judicial authority to inspect the journals of that body would interpose not the slightest barrier against such transgression, for it is obvious that there could not be the least difficulty in withholding from such journals every fact evincive of such transgression. A journal can be no check on the actions of those who keep it, when a violation of a duty is intentional. It cannot, therefore, fail to be observed how inadequate to the correction of the supposed evil is the proposed remedy." Again, he said: "If an enrolled statute of this state does not carry within itself conclusive evidence of its own authenticity, it would seem that the same principle must be extended to the statutes, however authenticated, of other states. An act, therefore, of Virginia or California, with regard to the mode of enactment, would be open to trial as a matter in pais. And, indeed, the doctrine, if carried to its legitimate conclusion, would seem to abolish altogether the conclusiveness even of international authentications; for if the great seal of this state, attesting the existence of a statute, is not final, it is not perceived how great efficacy is to be given to the seal of a foreign government."

In *Ex parte Wren*, 63 Miss. 512, 532 (56 Am. Rep. 825), Mr. Justice Campbell said: "If the validity of every act published as law is to be tested by examining its history, as shown by the journals of the two Houses of the Legislature, there will be an amount of litigation, difficulty, and painful uncertainty appalling in its contemplation and multiplying a hundredfold the alleged uncertainty of the law. Every suit before every court where the validity of a statute may be call-

ed in question as affecting the right of a litigant will be in the nature of an appeal or writ of error or bill of review for errors apparent on the face of the legislative records, and the journals must be explored to determine if some contradiction does not exist between the journals and the bill signed by the presiding officers of the two Houses. What is the law is to be declared by the court. It must inform itself as best it can what is the law. If it may go beyond the enrolled and signed bill and try its validity by the record contained in the journals, it must perform this task as often as called on, and every court must do it. A justice of the peace must do it, for he has as much right and is as much bound to preserve the Constitution and declare and apply the law as any other court, and we will have the spectacle of examination of journals by justices of the peace and statutes declared to be not law as the result of their journalistic history; and the circuit and chancery courts will be constantly engaged in like manner, and this court will, on appeal, have often to try the correctness of the determination of the court below as to the conclusion to be drawn from the legislative journals on the inquiry as to the validity of statutes thus tested."

In a note by Mr. A. C. Freeman to the case of *Carr v. Coke*, 47 Am. St. Rep. 801, 815, it is stated that: "The current of the later and better reasoned authorities is unhesitatingly in favor of the doctrine that a duly enrolled and authenticated statute regular on its face is conclusive of the fact that it was regularly passed, and that the courts cannot go behind it and entertain evidence by which it may be impeached. Wherever the question is one of first impression, this rule is generally adopted, while in some other states the courts continue to follow earlier precedent, and adhere to the contrary view."

It would unduly prolong this opinion to take up the constitutional provisions of each state and the rulings made under them. Most of the decisions will be found classified in a note to *Palatine Insurance Co. v. Northern Pacific Railway Co.*, 9 Am. & Eng. Ann. Cas. 532. See, also, 26 Am. & Eng. Enc. Law, 556 et seq., and cases cited. In a number of the states it has been held that the legislative journals can be considered. The decisions rendered by the Supreme Court of Illinois, beginning with that in *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571, are typical of this class. In some of the states particular words in a Constitution have been construed one way, as bearing on the subject now in hand, while substantially the same words have been construed in a different way in other jurisdictions. Thus, the words, "to be entered on the journal of each House," are construed as mandatory in Florida (*State v. Green*, 36 Fla. 154, 18 South. 334) while the words, "to be noted on the jour-

nal," are construed in Tennessee as directory merely (*Home Telegraph Co. v. Mayor, etc., of Nashville*, 118 Tenn. 1, 101 S. W. 770). In North Carolina the Constitution provides (article 2, § 14): "No law shall be passed to raise money on the credit of the state, unless the bill for the purpose shall have been read three several times in each House of the General Assembly, and passed three several readings, which readings shall be on three different days, and agreed to by each House respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal." It was held, in *Bank v. Commissioners*, 119 N. C. 214, 25 S. E. 966, that the validity of an act could be impeached by reference to the journals. But compare what was said in *Carr v. Coke*, 116 N. C. 223, 22 S. E. 16, 28 L. R. A. 737, 47 Am. St. Rep. 801, and what was said in *State v. Jones*, 6 Wash. 452, 34 Pac. 201, 23 L. R. A. 340, under the provisions of the Constitution of that state. It would be fruitless to enter into an elaborate discussion of the peculiar language employed in some of the state Constitutions and the rulings made in regard to it. It may be stated, generally, that unless the Constitution, in effect, establishes a standard by which the courts are to measure the validity of the legislative procedure, they will not go behind the enrolled act, duly signed and filed in the proper depository. Some of the courts treat the direction or mandate of the Constitution as to the methods of procedure as directed to the Legislature; some, under the special language of a particular provision, as furnishing a guide for the courts. We need not determine what would be the ruling under a stringent provision similar to that contained in the North Carolina Constitution, as, for example, the constitutional statement contained in section 5775 of our Civil Code of 1895 that no bill or resolution appropriating money shall become a law unless upon its passage the yeas and nays, in each House, are recorded.

In the present case it is contended that the act in question is invalid, because the journal of the House of Representatives does not show that the constitutional provision embodied in Civ. Code, § 5777, was complied with. That section is as follows: "No bill shall become a law unless it shall receive a majority of the votes of all the members elected to each House of the General Assembly, and it shall, in every instance, so appear on the journal." The language here employed is different from that contained in section 5775. The section now involved declares that no bill shall become a law unless it receives a majority of the votes of all the members elected to each House, but does not add and also unless it shall so appear on the journal, but, after the first provision, it adds the command or direction that it shall so appear. Therefore, whatever might be held in regard to an appropriation act, the present

law clearly comes within the reasoning and authority of the weight of judicial decisions above discussed. Neither are we dealing with what may be the requirements as to amendments proposed to the Constitution, which, strictly speaking, are not acts of the Legislature in the ordinary acceptance of those words, but proposals of amendments.

There has been no ruling in this state directly upon the question of declaring an act invalid by reference to the journals, in regard to the steps to be taken in its passage. There are some expressions employed in different opinions which might imply that the journals could be looked to for that purpose; but they were not direct rulings. Thus, in *Speer v. Mayor, etc., of Athens*, 85 Ga. 49, 11 S. E. 802, 9 L. R. A. 402, the validity of a local act was involved; it being contended that no notice of its intended introduction had been given as required by the Constitution. Extrinsic evidence was offered to show that the necessary publication had not been made. This court held that the act could not be so impeached, and that whether proper notice had been given for the introduction of a local or special bill was for the decision of the Legislature. It was said that evidence in regard thereto "outside of the journals" could not be received, but the case did not involve the question whether the act could be shown to be invalid by reference to the journals. In later rulings the language in regard to evidence "outside of the journals" has been omitted. *White v. Atlanta*, 134 Ga. —, 68 S. E. 103. In *Lee v. Tucker*, 130 Ga. 43, 49, 60 S. E. 164, 166, the question arose on a proceeding to remove a county site, where there was an election followed by an act of the Legislature. It was said: "If, in Georgia, the courts have any such power to pass upon such a question of fact, it is at least clear from the rulings heretofore cited that they can consider no evidence outside of the journals of the two Houses of the General Assembly"—thus expressing a doubt as to the power of the courts to pass upon the question of fact at all. In *Carswell v. Wright*, 133 Ga. 714, 66 S. E. 905, no point was made as to the right to consider the journals, but only as to the construction of certain entries thereon. In *Georgia Penitentiary Co. v. Nelms*, 65 Ga. 490, 38 Am. Rep. 793, an attack was made on an act or resolution on the ground that it gave a donation or gratuity, and that the journals did not show that it passed by a two-thirds vote, and that the yeas and nays were recorded. The actual ruling was that the act or resolution in question did not give a donation or gratuity; and that, whatever were the requirements of the Constitution on that subject, they had no application to the case in hand. Without citing all of the cases in this state on the subject, it may be said that in none of them has it been directly held that an act of the Legislature, duly enrolled and signed, approved by the Gov-

error, and deposited in the office of the Secretary of State, could be shown to be invalid by reason of entries or lack of entries on the journals touching the details of its passage, such as whether it was duly published, if a local act, or was read on three separate days in each House, or what was the vote on its passage.

It is said that the Constitution provides for keeping of journals, which shall be deposited with the Secretary of State and published, and that the Legislature has provided, in Civ. Code, § 5210, that the journals of each branch of the General Assembly, as published, shall be recognized judicially without proof; and the inquiry is made: For what purpose can they be used, if not to show noncompliance by the Legislature with the constitutional provisions in regard to reading and passing bills? Certain useful functions of the journals and their publication have already been noted as suggested by Judge Story and the Supreme Court of Kentucky. In addition to these, other uses might be suggested. For instance, it might be desirable to consult them to ascertain who were the presiding officers of the respective Houses; or, if it should be shown that a certain event happened during the session of the Legislature in a particular year, the journals might show when the Legislature was in session that year. A possible use for them might arise on the construction of an act. In *Solomon v. Commissioners of Cartersville*, 41 Ga. 157, the journals of the General Assembly were consulted to ascertain when the Legislature adjourned. In *Gormley v. Taylor*, 44 Ga. 76, a query was put on this subject. Apparently, however, the journals were consulted as to certain sessions held by the General Assembly. The court said: "When important and almost revolutionary results must flow from declaring a session of the Legislature illegal, the courts are bound to require a most palpable and direct violation of the Constitution before they interfere." See, also, *McDaniel v. Strohecker*, 19 Ga. 432, 435; *Bibb County Loan Association v. Richards*, 21 Ga. 592, 613-616; *Cutcher v. Crawford*, 105 Ga. 180, 31 S. E. 139. While the mere consequence of declaring a plainly unconstitutional act to be so cannot affect the adjudication, yet, if the far-reaching consequences of scrutinizing the conduct of the Legislature in respect of passing acts may legitimately be considered by the courts in determining the constitutional purpose on that subject, it may be mentioned that there are now pending before this court four cases in which attacks have been made upon the validity of acts of the Legislature on the ground of irregularity, or failure to strictly pursue the constitutional provisions in regard to their passage. The case now under consideration involves the entire system of county and district schools and local tax-

ation for educational purposes. Another act thus attacked is what is commonly known as the "prohibition law," prohibiting the manufacture or sale of intoxicating liquors in this state, etc. With the fall of this act would probably go the taxation on substitutes for spirituous or malt liquors. Still another of the cases involves the method of passing an act increasing the salaries of certain judges of superior courts and city courts. Still another involves the legislative proceedings in passing an act requiring headlights of a certain character on locomotives. These cases alone involve most important consequences. If the rule sought to be established should be laid down, by which the courts would scrutinize the legislative journals for years past and declare invalid all acts in regard to which such journals do not show compliance with the methods prescribed by the Constitution, it is difficult to see how far-reaching the results might be.

There were some other points mentioned in the petition, but not referred to in the briefs. Upon a careful consideration, we are of opinion that the act now in question should not be declared invalid for the reason urged against it.

For the reasons stated, we are of opinion that the judgment complained of should be affirmed.

Judgment affirmed. All the Justices concur.

(134 Ga. 758)

WHITLEY v. STATE. †

(Supreme Court of Georgia. July 13, 1910.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 17*)—PROHIBITION—CONSTITUTIONALITY.

The act approved August 6, 1907 (Acts 1907, p. 81), entitled "An act to prohibit the manufacture, sale, barter, giving away to induce trade, or keeping or furnishing at public places, or keeping on hand at places of business, of any alcoholic, spirituous, malt or intoxicating liquors, or intoxicating bitters or other drinks which, if drunk to excess, will produce intoxication; to except sales of alcohol in certain cases, upon certain conditions; to provide certain rules of evidence in connection with the enforcement thereof; to prescribe penalties, and for other purposes"—is not unconstitutional on the ground that it is in conflict with article 8, § 1, par. 1, of the Constitution, which declares that "there shall be a thorough system of common schools for the education of children in the elementary branches of an English education only, as nearly uniform as practicable, the expenses of which shall be provided for by taxation, or otherwise," or that it is in conflict with article 8, § 3, par. 1, of the Constitution, which reads as follows: "The poll tax, any educational fund now belonging to the state (except the endowment of, and debt due, to the University of Georgia), a special tax on shows and exhibitions, and on the sale of spirituous and malt liquors, which the General Assembly is hereby authorized to assess, and the proceeds of any commutation tax for military service, and all taxes that may be assessed on such

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

†For opinion of Court of Appeals, see 68 S. E. 863.

domestic animals as, from their nature and habits, are destructive to other property, are hereby set apart and devoted for the support of common schools."

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 21; Dec. Dig. § 17.*]

2. INTOXICATING LIQUORS (§ 17*)—CONSTITUTIONALITY OF ACTS—INHERENT RIGHTS.

The act of 1907 (Acts 1907, p. 81) is not unconstitutional on the ground that it conflicts with article 1, § 5, par. 2, of the Constitution, which provides that "the enumeration of rights herein contained as a part of this Constitution shall not be construed to deny to the people any inherent rights which they may have hitherto enjoyed."

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 21; Dec. Dig. § 17.*]

3. STATUTES (§ 107*)—SUBJECTS AND TITLES.

Said act is not unconstitutional on the ground that it conflicts with article 3, § 7, par. 8, of the Constitution, which provides that "no law or ordinance shall pass which refers to more than one subject-matter."

[Ed. Note.—For other cases, see *Statutes*, Dec. Dig. § 107.*]

4. STATUTES (§ 18*)—ENACTMENT.

A plea in abatement to an accusation set up that said act was unconstitutional as being in violation of article 3, § 7, par. 14, of the Constitution, which provides that "no bill shall become a law unless it shall receive a majority of the votes of all the members elected to each House of the General Assembly, and it shall, in every instance, so appear on the journal," and of article 3, § 7, par. 4, which provides that "each House shall keep a journal of its proceedings, and publish it immediately after its adjournment," and alleged that the legislative journals showed that the bill was introduced in the Senate and passed by a vote of a majority of the members thereof; that it was transmitted to the House, where several material amendments were made to it, and as amended it was passed by a vote of a majority of the members (the number of votes cast in each of these instances being stated); that it was then returned to the Senate, where several amendments were proposed and rejected; and that the entry on the Senate journal in regard to the final action of that body concurring in the House amendments did not show that the bill as altered by the House or the alterations therein received the votes of a majority of all the members elected to the Senate. *Held*, that such plea was insufficient in law, and was properly stricken.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 17; Dec. Dig. § 18.*]

(Additional Syllabus by Editorial Staff.)

5. INTOXICATING LIQUORS (§ 6*)—POLICE POWER—PROHIBITION OF SALE OF INTOXICANTS.

Const. art. 4, § 2, par. 2 (Civ. Code 1895, § 5798), provides that the exercise of the state's police power shall never be abridged. Const. art. 3, § 7, par. 22 (Civ. Code 1895, § 5784), provides that the General Assembly shall have power to make all laws consistent with its Constitution and not repugnant to the United States Constitution, which they shall deem necessary and proper for the welfare of the state. *Held*, that the Legislature had the right thereunder to enact Act Aug. 6, 1907 (Acts 1907, p. 81), prohibiting the manufacture, sale, giving away to induce trade, keeping or furnishing at public places, or keeping on hand at places of business, any alcoholic, spirituous, malt, or intoxicating liquors.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 4; Dec. Dig. § 6.*]

6. STATUTES (§ 227*)—CONSTRUCTION—"MAY"—"AUTHORIZE."

The words "authorize" or "may," as used in a statute, are sometimes construed as mandatory in effect, though permissive in form, as where a statute provides for the doing of some act required by justice or public duty; but, where they confer or recognize a discretionary power, a mandatory construction will not be given to them.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 308, 309; Dec. Dig. § 227.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4418-4447; vol. 8, p. 7719; vol. 1, pp. 648-648.]

F. P. Whitley was convicted of keeping intoxicants at his place of business, and he brought error. On certified questions from the Court of Appeals. Questions answered.

The Court of Appeals certified to the Supreme Court the following questions:

(1) The defendant was tried in the criminal court of Atlanta on an accusation charging that he, in the county of Fulton, on the 26th day of February, 1909, did keep on hand at his place of business intoxicating liquors. Was the accusation good as against a demurrer on the following grounds:

"That the Legislature of the state of Georgia was without authority to enact the prohibition law under which this defendant is indicted (to wit, the act approved August 6, 1907, entitled, 'An act to prohibit the manufacture, sale, barter, giving away to induce trade, or keeping or furnishing at public places, or keeping on hand at places of business, of any alcoholic, spirituous, malt or intoxicating liquors, or intoxicating bitters or other drinks which, if drunk to excess, will produce intoxication; to except sales of alcohol in certain cases, upon certain conditions; to provide certain rules of evidence in connection with the enforcement thereof; to prescribe penalties, and for other purposes'). [Acts 1907, p. 81.] That by article 8, § 1, par. 1, of the Constitution of said state, it is provided that 'there shall be a thorough system of common schools for the education of children,' and by article 8, § 3, par. 1, of said Constitution, it is provided that 'the poll tax, any educational fund now belonging to the state (except the endowment of, and debt to, the University of Georgia), a special tax on shows and exhibitions, and on the sale of spirituous and malt liquors, which the General Assembly is hereby authorized to assess, and the proceeds of any commutation tax for military service, and all taxes that may be assessed on such domestic animals, as from their nature and habits are destructive to other property, are hereby set apart and devoted for the support of common schools,' and that it is therefore mandatory upon the General Assembly of said state to assess a specific tax on the sale of spirituous and malt liquors as one means of supporting such schools; and said prohibition act being an act to prohibit the sale of said liquors in

said state, and by consequence an act to destroy the subject-matter on which said mandatory constitutional tax is ordained to operate, is, so far as the same assumes to prohibit the sale of such liquors in said state, no law, but null and void by reason of a lack of constitutional authority in said General Assembly to enact the same.

"That said prohibition act, so far as the same assumes to prohibit the manufacture, sale, barter, giving away, keeping and furnishing of any of the liquors therein specified, in said state, is inconsistent with and repugnant to article 1, § 5, par. 2, of the Constitution of said state, which provides as follows, to wit, 'the enumeration of rights herein contained as a part of this Constitution shall not be construed to deny to the people any inherent rights which they may have hitherto enjoyed,' because at the time said Constitution was adopted in 1877 the people of said state had ever theretofore enjoyed, as an inherent right, the right to make, sell, barter, give away, keep, and furnish any such liquors, subject only to sundry statutory regulations as to the sale of such liquors in tippling-houses, and the intent and effect of said just-cited clause of said Constitution was and is to inhibit the General Assembly of said state from denying the same; the defendant conceding that said assembly has the right to regulate said rights by any regulation not destructive thereof or otherwise illegal.

"That the act referred to and heretofore described is in direct contravention of paragraph 8, § 7, art. 3, of the Constitution of the state of Georgia, which said paragraph is to be found in section 5771 of the Code of the state of Georgia, and which paragraph provides, amongst other things, as follows: 'No law or ordinance shall pass which refers to more than one subject-matter'—because said act is repugnant to the constitutional provision aforementioned, for the reason that the same in terms prohibits both the sale and manufacture of the various liquors in said act mentioned. That sale and manufacture are in the very nature of things two separate and distinct subject-matters. That, because of the limitation imposed upon the power of the General Assembly by the terms of the paragraph aforementioned, the prohibition against both the sale and manufacture of such liquors could not lawfully be included within the terms of said act. That the two provisions of the acts aforementioned are so blended one with the other as that they constitute one general expression of the legislative scheme, and neither can be disregarded without destroying the evident purpose intended to be accomplished by the passage of the legislation in question. And therefore that, because the said two subject-matters are thus sought to be included within the terms of said act, the said act is rendered thereby unconstitutional, null, and void as a whole."

(2) To the accusation referred to in the preceding question, the defendant filed a timely plea in abatement on the following ground, namely: "That the act of the Legislature under which this prosecution is being conducted is void and is no law for the following reasons, to wit: Because by article 3, § 7, par. 14, of the Constitution of said state, it is provided that 'no bill shall become a law unless it shall receive a majority of the votes of all the members elected to each House of the General Assembly, and it shall, in every instance, so appear on the journal,' and article 3, § 7, par. 4, of said Constitution, provides that 'each House shall keep a journal of its proceedings, and publish it immediately after its adjournment,' and it does not appear on the journal, so kept and published, of either House of said General Assembly, that a bill identical with said prohibition act received a majority of the votes of all the members elected to each House of said General Assembly. On June 28, 1907, there was introduced in the Senate of said state a certain bill to prohibit the sale in said state of any drink, which, if drunk to excess, will produce intoxication, which bill, after being altered in a number of material particulars, was passed by said Senate on July 13, 1907, by a vote of 34 to 7; the total number of members elected to said Senate being 44. That this bill was altered by the House of Representatives of said state in a number of material particulars, and as so altered was passed by said House on July 30, 1907, by a vote of 139 to 39; the total number of members elected to said House being 183. And that it does not appear on the journal of said Senate that said bill so altered by said House, or the alterations therein made by said House, received the votes of a majority of all the members elected to said Senate. While it appears on the journal that said Senate passed one bill on July 13, 1907, by a vote of 34 to 7, and that said House passed a different bill on July 30, 1907, by a vote of 139 to 39, it does not appear on the journals that one and the same bill, identical with said prohibition act, received the votes of a majority of all the members elected to each House of said General Assembly, as required by said Constitution as aforesaid, and therefore said prohibition act is no law, but null, nonexistent, and void. This defendant attaches hereto, as a part hereof, marked 'Exhibit A,' the text of the bill originally introduced in the Senate, and of all the alterations made therein, the text of the bill passed by the Senate, the text of the alterations made in the bill by the House, and the text of the bill passed by the House, with appropriate reference to the pages of the journals, and a summary of the points of divergence between the bills by the Senate and by the House."

The Exhibit A, referred to, is as follows:

"On June 26, 1907, a bill was introduced in the Senate which read thus: 'A bill to be entitled an act to prohibit the sale, barter, or giving away to induce trade, or furnishing at public places, of any alcoholic, spirituous, malt or intoxicating liquors, or intoxicating bitters, or other drinks, which if drunk to excess will produce intoxication, and for other purposes. Be it enacted by the General Assembly of the state of Georgia, and it is hereby enacted by authority of the same: Section 1. That, from and after the first day of January next after the passage of this act, it shall not be lawful for any person, within the limits of this state, to sell or barter for valuable consideration, either directly or indirectly, or give away to induce trade at any place of business, or furnish at any other public places, or manufacture for the purpose of sale, any alcoholic, spirituous, malt, or intoxicating liquors, or intoxicating bitters, and any person so offending shall be guilty of a misdemeanor, and shall be punished as prescribed in section 1039 of the Penal Code of Georgia Sec. 2. Be it further enacted that nothing in this act shall be so construed as to prevent the manufacture, sale, and use of domestic wines, or cider, or the sale of wines for sacramental purposes: Provided, such wine or cider shall not be sold in barrooms by retail, or in places to be drunk on the premises; nor shall any thing herein contained prevent licensed druggists from selling or furnishing pure alcohol for medical, art, scientific, and mechanical purposes. Sec. 3. Be it further enacted, that all laws and parts of laws in conflict with this act be, and the same are hereby repealed.' This bill was read first on June 26, 1907. Sen. Journ. 14. Second time on July 3, 1907. S. J. 104. And third time on July 13, 1907. S. J. 148. But on each of these three readings it was read precisely as originally introduced; no changes whatever being made therein. After the third reading, it was altered in the following particulars: (1) The words 'or keep on hand at their place of business' were inserted in the caption between the word 'place' and the word 'of.' S. J. 150. (2) The words 'or keep on hand at their place of business' were inserted in section 1, between the word 'sale' and the word 'any.' S. J. 15. (3) The words, 'nor shall it be lawful in the limits of said state for intoxicating liquors to be sold in dispensaries, and the sale of intoxicating liquors in said state shall be prohibited to private persons and to the state; its officers and agents,' were added to section 1 at the end thereof. S. J. 149. (4) Section 2 was stricken from the bill, and in lieu thereof a new section 2 was inserted, as follows: 'Sec. 2. Be it further enacted, that nothing in this act shall be so construed as to prevent licensed druggists from selling or furnishing pure alcohol for medicinal purposes only, provided the same is sold or

furnished for such purpose, upon the presentation of a written prescription from a reputable physician actually in charge of the patient for whom such prescription is given. Before giving out any prescription as contemplated in this act, it shall be the duty of such physician to have actually examined any and all persons applying for same and to have determined from such examination that the same is necessary, and that said written prescription shall certify that said examination has been made, and that any person violating this section shall be punished as prescribed in section 1039 of the Penal Code of 1895.' S. J. 150. (5) Section 3 was stricken from the bill, and a new section 3 inserted in lieu thereof, as follows: 'Sec. 3. Be it further enacted, that nothing in this act shall prohibit the sale, by licensed druggists, of wood or denatured alcohol for art, scientific and mechanical purposes, or grain alcohol for bacteriologists, who are actually engaged in that class of work, for scientific purposes only.' S. J. 150, 149. (6) A section 4 was added as follows: 'Sec. 4. Be it further enacted by the authority aforesaid, that all laws and parts of laws (in conflict with this act) be, and the same are hereby repealed.' S. J. 151.

"As thus altered the bill read: 'A bill to be entitled an act to prohibit the sale, barter, or giving away to induce trade, or furnishing at public places, or keep (ing) on hand at their places of business, of any alcoholic, spirituous, malt, or intoxicating liquors, or intoxicating liquors or intoxicating bitters, or other drinks, which, if drunk to excess, will produce intoxication, and for other purposes. Be it enacted by the General Assembly of the state of Georgia, and it is hereby enacted by authority of the same: Section 1. That, from and after the first day of January next after the passage of this act, it shall not be lawful for any person within the limits of this state to sell or barter for valuable consideration, either directly or indirectly, or give away to induce trade at any place of business, or furnish at any other public places, or manufacture for the purpose of sale, or keep on hand at their places of business, any alcoholic, spirituous, malt, or intoxicating liquors, or intoxicating bitters, or other drinks which if drunk to excess will produce intoxication, and any person so offending shall be guilty of a misdemeanor and shall be punished as prescribed in section 1039 of the Penal Code of Georgia. Nor shall it be lawful in the limits of said state for intoxicating liquors to be sold in dispensaries, and the sale of intoxicating liquors in said state shall be prohibited to private persons and to the state, its officers and agents. Sec. 2. Be it further enacted, that nothing in this act shall be so construed as to prevent licensed druggists from selling or furnishing pure alcohol for medicinal purposes only, provided the same is sold or furnished for such pur-

pose, upon the presentation of a written prescription from a reputable physician actually in charge of the patient for whom such prescription is given. Before giving out any prescription as contemplated in this act, it shall be the duty of such physician to have actually examined any and all persons applying for same and to have determined from such examination that the same is necessary, and that said written prescription shall certify that said examination has been made, and that any person violating this section shall be punished as prescribed in section 1039 of the Penal Code of 1895. Sec. 3. Be it further enacted, that nothing in this act shall prohibit the sale, by licensed druggists, of wood alcohol, of denatured alcohol for art, scientific, and mechanical purposes, or grain alcohol for bacteriologists, who are actually engaged in that class of work, for scientific purposes only. Sec. 4. Be it further enacted by the authority aforesaid, that all laws and parts of laws (in conflict with this act), be, and the same are hereby repealed.'

"As above altered, the bill was passed by the Senate on July 13, 1907, by a vote of 34 to 7, which vote appears on the journal. S. J. 148. The bill was then read in the House first time on July 17, 1907. H. J. 362. Second time on July 19, 1907. H. J. 415. And third time on July 30, 1907. H. J. 563. And on each of these three readings was read precisely as it came from the Senate; no changes whatever being made therein. After its third reading it was altered in the following particulars: (1) The caption was stricken out, and the following inserted in lieu thereof: 'An act to prohibit the manufacture, sale, barter, giving away to induce trade, or keeping or furnishing at public places, or keeping on hand at places of business, of any alcoholic, spirituous, malt, or intoxicating bitters, or other drinks, which if drunk to excess, will produce intoxication; to except sales of alcohol in certain cases upon certain conditions, and to provide certain rules of evidence in connection with the enforcement hereof; to prescribe penalties, and for other purposes.' H. J. 567, 568. (2) The words 'keep or' were inserted in section 1, between the word 'or' and the word 'furnish.' H. J. 568. (3) The words 'for the purpose of sale,' after the word 'manufacture,' in section 1, were stricken out. H. J. 568, 569. (4) The words, 'provided, that licensed druggists may sell and furnish pure alcohol, for medical purposes only, upon written prescription of a regular practicing physician of this state, in the manner herein prescribed, to wit: Before any physician shall issue any such prescription, he shall make an actual examination of the person for whom the prescription is granted. The prescription shall be substantially in the following form: Georgia, county. I,, a regular practicing physician under the laws of said state, do hereby prescribe for the use of, a patient in my charge, whom I

have personally examined, of pure alcohol, and do certify in my opinion that the same is necessary in the alleviation or cure of illness from which said patient is suffering. This (date). (Signed by the physician.) No prescription shall be filed [filled] hereunder except under the date upon which it is dated and issued, or upon the following day. Within ten days after the same is filled by the druggist he shall file said prescription for record with the ordinary of the county in which filed, who shall cause the same to be recorded in his office, and a certified copy of the same, or the original prescription, showing it has been recorded, shall be primary evidence in any court in this state. The record containing such prescription, showing it has been recorded, shall be open to public inspection. A recording fee of five cents for each prescription so recorded shall be paid by such druggists to the ordinary. Upon any prosecution under this act the burden of proving the defense that the sale was pure alcohol under prescription as herein provided for, shall be upon the defendant. Provided, further, no druggist who is also a practicing physician shall fill his own prescriptions hereunder, nor shall they be filled at any drug store in which said physician is financially interested, and no prescription shall be re-filled; nor shall more than one pint be furnished on any one prescription. The delivery of the alcohol under such prescription shall be made only directly to the person for whom such prescription is issued, or to the physician, or in case of a minor, to his parent or guardian for him, or, in case of a married woman, to her husband for her. Provided, that nothing in this act shall be so construed as to prevent wholesale druggists from selling or furnishing alcohol in wholesale quantities to regular licensed retail druggists or public charity hospitals or to medical pharmaceutical colleges. Be it further provided, that all wholesale druggists shall be required to keep a complete record of all their sales of alcohol, which record shall at all times be open for inspection to the regular authorities of such counties or cities in which such wholesale stores are located"—were added to section 1 at the end thereof. H. J. 566, 567. (5) Section 2 was stricken out, and a new section 2 was inserted in lieu thereof, as follows: 'Sec. 2. Be it further enacted by the same authority, that any person, firm or corporation who shall violate this act in any respect shall be guilty of a misdemeanor; any physician who shall issue a prescription hereunder containing any false statements, shall be guilty of a misdemeanor; any druggist who shall fill any prescription for alcohol in anywise other than herein allowed, or shall fail to file a prescription filled by him hereunder with the ordinary within the time prescribed, shall be guilty of a misdemeanor; any person who shall obtain alcohol for another in accordance with the terms hereof, and who shall convert the same

to any other use, shall be guilty of a misdemeanor.' H. J. 568. (6) In addition to the foregoing alterations, it appears by the journals that the House further altered the bill passed by the Senate by what is known on the journals as 'House Amendment No. 18.' The text of this particular alteration does not appear on the journals; but it does appear that it was at least four lines in length and contained the word 'five' in the second line and also the word 'five' in the fourth line. S. J. 323.

"As altered by the House (otherwise than by House Amendment No. 18), the bill then read thus (the alterations made by the House being indicated by underscoring): 'A bill to be entitled an act to prohibit the manufacture sale, barter, giving away to induce trade, or keeping or furnishing at public places, or keeping on hand at places of business, of any alcoholic, spirituous, malt, or intoxicating liquors, or intoxicating bitters, or other drinks, which, if drunk to excess, will produce intoxication; to except sales of alcohol in certain cases, upon certain conditions; to provide certain rules of evidence in connection with the enforcement hereof; to prescribe penalties, and for other purposes. Section 1. Be it enacted by the General Assembly of the state of Georgia, and it is hereby enacted by authority of the same, that, from and after the first day of January next after the passage of this act, it shall not be lawful for any person, within the limits of this state, to sell or barter for valuable consideration, either directly or indirectly or keep or furnish at any other public places, or manufacture, or keep on hand at their place of business any alcoholic, spirituous, malt, or intoxicating liquors or intoxicating bitters, or other drinks, which, if drunk to excess, will produce intoxication, and any person so offending shall be guilty of a misdemeanor, and shall be punished as prescribed in section 1039 of the Penal Code of Georgia. Nor shall it be lawful in the limits of said state for intoxicating liquors to be sold in dispensaries, and the sale of intoxicating liquors in said state shall be prohibited to private persons and to the state, its officers and agents. *Provided, that licensed druggists may sell and furnish pure alcohol for medical purposes only, upon written prescription of a regular practicing physician of this state, in the manner herein prescribed, to wit: Before any physician shall issue any such prescription he shall make an actual examination of the person for whom the prescription is granted. The prescription shall be substantially in the following form: Georgia, county. I,, a regular practicing physician under the laws of said state, do hereby prescribe for the use of, a patient in my charge whom I have personally examined, of pure alcohol, and do certify in my opinion that the same is necessary in the alleviation or cure of illness from which said patient is suffering. This*

(date). (Signed by the physician.) No prescription shall be filled hereunder except upon the day upon which it is dated and issued, or upon the following day. Within ten days after the same is filled by the druggist he shall file said prescription for record with the ordinary of the county in which filled, who shall cause the same to be recorded in his office, and a certified copy of the same or the original prescription showing it has been recorded shall be primary evidence in any court in this state. The record containing such prescription shall be open to public inspection. A recording fee of five cents for each prescription so recorded shall be paid by such druggist to the ordinary. Upon any prosecution under this act the burden of proving the defense that the sale was of pure alcohol, under prescription as herein provided for, shall be upon the defendant. *Provided further, no druggist who is a practicing physician shall fill his own prescription hereunder, nor shall they be filled by any drug store in which said physician is financially interested, and no prescription shall be refilled; nor shall more than one pint be furnished on any one prescription. The delivery of the alcohol under such prescription shall be made only directly to the person for whom such prescription is issued, or to the physician, or, in case of a minor, to his parent or guardian for him, or, in case of a married woman, to her husband for her. Provided further, that nothing in this act shall be so construed as to prevent wholesale druggists from selling or furnishing alcohol in wholesale quantities to regular licensed retail druggists, or to public or charity hospitals, or to medical or pharmaceutical colleges. Be it further provided, that all wholesale druggists shall be required to keep a complete record of all their sales of alcohol, which record shall at all times be open for inspection to the regular authorities of such counties or cities in which such wholesale stores are located. Sec. 2. Be it further enacted by the same authority, that any person, firm or corporation who shall violate this act in any respect shall be guilty of a misdemeanor; any physician who shall issue a prescription hereunder containing any false statement shall be guilty of a misdemeanor; any druggist who shall fill any prescription for alcohol in anywise other than herein allowed, or who shall fail to file a prescription filled by him hereunder with the ordinary within the time prescribed, shall be guilty of a misdemeanor; any person who shall obtain alcohol for another in accordance with the terms hereof and who shall convert the same to any other use shall be guilty of a misdemeanor. Sec. 3. Be it further enacted by the authority aforesaid, that nothing in this act shall prohibit the sale by licensed druggists of wood or denatured alcohol for art, scientific, or mechanical purposes, or grain alcohol for bacteriologists, who are actually engaged in that class of work, for scientific*

purposes only. Sec. 4. Be it further enacted by the authority aforesaid, that all laws and parts of laws in conflict with this act be and the same are hereby repealed.'

"On July 30, 1907, the bill, as altered as above stated by the House, was passed by the House, by a vote of 139 to 39, which vote appears on the journal. H. J. 592. The differences between the two bills are: (1) The Senate bill made penal 'manufacture for the purpose of sale,' leaving innocent and lawful the manufacture of any form of intoxicant for medical, social, domestic, or any other use not involving the element of gain. The House bill made it penal to 'manufacture' for any purpose whatever. (2) The Senate bill left it open to manufacture for export out of the state, so that fruit and grain could have been sold to our brewers and distillers who could have operated their plants for export purposes. This House bill annihilated this. (3) The Senate bill, while making it penal to 'furnish at any public place,' did not make it penal to 'keep' at such place. The House bill made it a substantive offense to 'keep' at any 'public place.' Under the former it would have been lawful to store liquor on hand in any public warehouse; under the latter such retention was made a crime. (4) The Senate bill allowed the sale of pure alcohol for medical use, annexing but one condition, namely, on written prescription by a reputable physician after examination of the patient. This done, any quantity necessary, in the judgment of the physician, could be furnished, any licensed druggist could fill the prescription, any person whomsoever could convey the medicament to the sufferer, and it was not required that the name of the sick person, the name of his or her physician, the name of his or her apothecary, and all the details of his or her prescription should be spread upon the public records. The House bill made the law do the prescribing, and not the attending physician. Not more than one pint could be furnished on any one prescription. If the vicinage had but one drug store, and the attending physician was owner of it, or financially interested in that, then the prescription could not be filled at home but must be sent abroad. When the prescription was filled, the medicament could not be delivered to any one indifferently for transmission to the sufferer. A husband might receive it for his wife, or a parent or guardian for a minor, but in all other cases 'the delivery of the alcohol under such prescription shall be made only directly to the person for whom such prescription is issued, or to the physician.' A son could not receive it for his father, or a wife for her husband, or a parent for his adult child. In short, save as to married women and minors the druggist or the doctor must convey it to the sick person, or else the sick person himself or herself must go for it or do without. When the prescription had been filled, all

the details thereof were to be entered on the public record 'open to public inspection.' (5) The House bill created 14 new offenses not known to the Senate bill; the same being as follows: To manufacture for any purpose other than for sale; to keep at any public place; to fill any prescription except upon the day of its issue [issuance] or the following day; to fail to file the prescription with the ordinary; for the ordinary to fail to record the same; for the druggist to fail to pay the ordinary his recording fee; for the physician, if also a druggist, to fill his own prescription; to fill the prescription at any drug store in which the prescribing physician is financially interested; to refill any prescription; to furnish more than one pint on any one prescription; to deliver the medicament to any one but the sick person or the physician, the case of married women and minors only excepted; for wholesale druggists to sell alcohol to any hospital or private sanitariums; or to fail to keep a complete record of their sales; or to fail to keep such record open at all times to the inspection of the local authorities. (6) The Senate bill made an alleged illegal sale of alcohol triable as in other criminal cases; the House bill made it incumbent upon defendant to prove his innocence. As thus altered, the bill was taken up in the Senate on August 1, 1907, for a consideration of the same, and on pages 317-323 of the journal will be found all the proceedings had in the Senate thereon; and it does not appear that the bill, as altered by the House, or the alterations therein made by the House, received the votes of a majority of all the members elected to the Senate."

Was the plea in abatement properly stricken on the ground that it was insufficient in law?

Salem Dutcher, W. K. Miller, Spencer R. Atkinson, and Anderson, Felder, Rountree & Wilson, for plaintiff in error. C. D. Hill, Sol. Gen., D. K. Johnston, and Lowry Arnold, for the State.

LUMPKIN, J. 1. Article 8, § 1, par. 1, of the Constitution (Civ. Code, § 5908), declares: "There shall be a thorough system of common schools for the education of children in the elementary branches of an English education only, as nearly uniform as practicable, the expenses of which shall be provided for by taxation, or otherwise." Section 3, par. 1, of the same article (Civ. Code, § 5908), reads as follows: "The poll tax, any educational fund now belonging to the state (except the endowment of, and debt due to, the University of Georgia), a special tax on shows and exhibitions, and on sales of spirituous and malt liquors, which the General Assembly is hereby authorized to assess, and the proceeds of any commutation tax for military service, and all taxes that may be assessed on such domestic animals as, from their nature and habits, are destructive to other

property, are hereby set apart and devoted for the support of the common schools." It was contended that it was mandatory upon the Legislature to assess a specific tax on the sale of spirituous and malt liquors as one means of supporting such schools, and that this excluded the power of the Legislature to prohibit the sale of such liquors. If the two paragraphs of the Constitution quoted be fairly considered, they do not sustain the position. While that first cited declares that there shall be a thorough system of common schools for the education of children in the elementary branches of an English education, it states that the expenses shall be provided for "by taxation, or otherwise." The second of the sections declares, in effect, that any revenue derived from certain sources shall be set apart and devoted to the support of the common schools. It does not say that the Legislature shall impose a tax on the sale of spirituous and malt liquors, but that it is authorized to do so. Several other items besides this tax are mentioned in the section. But it may well be doubted whether it was the intention of the Constitution to make a mandatory provision as to them, so that the Legislature must provide a commutation tax in lieu of military service, or must assess a tax on certain animals, for instance. In article 7, § 13, par. 1 (Civ. Code, § 5900), the proceeds of the sale of the Western & Atlantic Railroad, "whenever the General Assembly may authorize the sale," are devoted to the payment of the bonded indebtedness of the state. But nobody would contend for a moment that the Constitution intended to require the Western & Atlantic Railroad to be sold. Undoubtedly permissive words, such as "authorize," or "may," are sometimes construed as mandatory in effect, though permissive in form, as for instance where a statute provides for the doing of some act which is required by justice, or public duty. But where the language employed, together with its context, shows that the constitutional or statutory provision under consideration conferred or recognized a discretionary power, a mandatory construction will not be given to it. In the present case, if a tax were assessed on the sale of spirituous and malt liquors, there would be no discretion on the part of the Legislature as to what should be done with the proceeds. They would be devoted to the support of the common schools. But construing this provision in the light of its context, and of other provisions of the same instrument, it does not command the Legislature to tax the sale of spirituous and malt liquors, and impliedly deny to them the power to prohibit such sale. In paragraph 22, § 7, art. 3, of the Constitution (Civ. Code, § 5784), it is declared that "the General Assembly shall have power to make all laws and ordinances consistent with its Constitution, and not repugnant to the Constitution of the United States, which they shall

deem necessary and proper for the welfare of the state." The police power is recognized in this and in other sections of the Constitution, notably in paragraph 2, § 2, art. 4 (Civ. Code, § 5798), where, among other things, it is declared that "the exercise of the police power of the state shall never be abridged, nor so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals, or the general well-being of the state." The sale of spirituous and malt liquors has from early times been considered as falling peculiarly within the cognizance of the police power of the state.

In *Perdue v. Ellis*, 18 Ga. 586, it was said that "the General Assembly have the right, should the general public good require it, and public opinion demand it, to pass a law to restrict or even suppress the internal traffic in spirits." In *Howell v. State*, 71 Ga. 224, 228, 51 Am. Rep. 259, Hall, J., said: "Undoubtedly the Legislature had the power to make this inhibition general, and, having this power, it would seem that they might confine it to certain special localities." In *Menken v. City of Atlanta*, 78 Ga. 688, 672, 2 S. E. 559, 562, the local option legislation then in force, by which the sale of liquors could be prohibited in counties by popular vote, was held to be constitutional as a valid exercise of the police power. Chief Justice Bleckley said: "If it has not been heretofore sufficiently decided, we decide now that the local option legislation of this state is constitutional as a valid exercise of the police power. Historically considered, there is no subject more completely amenable to this power than the sale of intoxicating liquors." This decision was rendered after the adoption of the present Constitution. In *Ison v. Mayor and Council of Griffin*, 98 Ga. 623, 25 S. E. 611, it was said that a license to sell spirituous liquors was neither a contract nor a property right in the licensee, but a mere permit to do what would otherwise be an offense against the general law, and when granted by a municipal corporation it was subject at all times to the police power of that corporation; and that, in the absence of any restriction upon its authority, the municipality could revoke such license. In *Plumb v. Christie*, 103 Ga. 686, 694, 30 S. E. 759, 762 (42 L. R. A. 181), Mr. Justice Lewis said: "No principle is more universally recognized by the courts than the right of a state, under general police powers reserved and granted to its Legislature, to control the traffic in any commodity the use of which may endanger either the public health or morals. It is equally well established that the sale of intoxicating liquors is peculiarly, on account of the evil effects resulting from their use, subject to legislative control and regulation. To such an extent can this power be exercised that an absolute prohibition of the sale of this commodity throughout the state can be accomplished

by an act of its Legislature, and, among the number of cases reviewing such legislation, our attention has never been called to a single case in a court of last resort where the validity and constitutionality of such an act has not been upheld." In *Henderson v. Heyward*, 109 Ga. 373, 376, 34 S. E. 590, 591 (47 L. R. A. 366, 77 Am. St. Rep. 384), Mr. Justice Cobb said: "That the state has a right to prohibit absolutely the sale of whisky is no longer an open question, either in this court or in the Supreme Court of the United States."

It is true that in none of these cases were the paragraphs of the Constitution now invoked directly considered; but most of them were rendered after the adoption of the present Constitution, and they all considered the Legislature as having the authority to prohibit the sale of spirituous or malt liquors, under the general police power of the state. We hold that the constitutional provisions in regard to the maintenance of a common school system, and the appropriation of any amounts which might arise from certain sources to its support, did not prevent the Legislature from exercising its police power in regard to spirituous or malt liquors, or render the prohibition law of 1907 unconstitutional on that ground.

It was sought to differentiate the local option law and the local prohibition laws from the general prohibition law, in respect of the matter now under consideration. But we think the differentiation sought to be made is unsound. Article 3, § 7, par. 16 (Civ. Code, § 5778), was cited as indicating a difference. That paragraph requires publication of notice of intention to apply for a local or special law prior to the introduction of a bill in the General Assembly. It has no relevancy to the question now before us.

2. By article 1, § 5, par. 2, of the Constitution, it is declared: "The enumeration of rights herein contained as a part of this Constitution shall not be construed to deny to the people any inherent rights which they may have hitherto enjoyed." It was contended that prior to the time when the Constitution of 1877 was adopted the people of the state had enjoyed, as an inherent right, the right to make, sell, barter, give away, keep, and furnish any of such liquors, subject only to sundry statutory regulations, and that the intent and effect of the section just quoted was to inhibit the General Assembly from denying such alleged right. The point is without merit. What has been said in the previous division of this opinion answers it. We need only to add that in *Loeb v. Jennings*, 133 Ga. 796, 67 S. E. 101, it was claimed that the prohibition law violated the provision of the Constitution of the United States which declares that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States. In dealing with that contention it was said: "There is no consti-

tutional privilege or immunity in any citizen of this state or of any other state to come within its borders and violate its laws in regard to prohibiting the sale of intoxicating liquors."

3. Article 3, § 7, par. 8, of the Constitution (Civ. Code, § 5771), provides: "No law or ordinance shall pass which refers to more than one subject-matter," etc. It was urged that the act of 1907 was violative of this provision, because it prohibited both the sale and manufacture of various liquors mentioned in it, and that sale and manufacture are two separate and distinct subject-matters. The question of what constitutes duality of subject-matters has been so frequently discussed by this court that it would serve no good purpose to repeat what has been said. Of course selling an article is not identical with its manufacture. Neither is malt liquor identical with distilled liquor. Nor yet is giving away liquor to induce trade the same thing as furnishing it at public places. But all of these things were germane to and formed a part of the general purpose of the act. They were not so entirely distinct and different as to constitute different subject-matters within the meaning of the paragraph of the Constitution last quoted. In 28 Am. & Eng. Enc. Law, 575, occurs this statement: "The word 'subject', as used in the Constitution, is not to be taken as synonymous with 'provision.' An act may properly include any number of provisions so long as they are not inconsistent with or foreign to its general object. This requirement of singleness of subject is not intended to embarrass honest legislation, but only to prevent the vicious practice of joining in one act incongruous and unrelated matters; and if all the parts of a statute have a natural connection and reasonably relate, directly or indirectly, to one general and legitimate subject of legislation, the act is not open to the objection of plurality, no matter how extensively or minutely it deals with the details looking to the accomplishment of the main legislative purpose."

4. By article 3, § 7, par. 14, of the Constitution, it is provided that "no bill shall become a law unless it shall have received a majority of the votes of all the members elected to each house of the General Assembly, and it shall, in every instance, so appear on the journal." It was urged that the legislative journals showed that a bill to prohibit the sale of liquors, etc., was introduced into the Senate and was passed by a majority of that body; that this bill was amended by the House of Representatives in a number of material particulars, and as so altered was passed by the House by a vote of a majority of the members of that body; that it appeared from the journal of the Senate that, after the bill was returned to that House several amendments were offered and rejected; and that the Senate journal, showing the concurrence in the amendments originating in the

House of Representatives and the final action on the bill, did not show that it received the votes of a majority of all the members elected to the Senate. The question thus raised is controlled by the decision in *De Loach v. Newton* (decided to-day) 68 S. E. 708. The plea in abatement filed by the defendant, in which he set up this contention, was properly stricken.

The accusation was not subject to the objections set out in the questions certified to this court. All the Justices concur.

(134 Ga. 321)

HARDWOOD LUMBER CO. v. ADAM & STEINBRUGGE.

(Supreme Court of Georgia. July 15, 1910.)

(*Syllabus by the Court.*)

1. SALES (§ 418*)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

The general rule is that in a suit for breach of contract for failure to deliver goods of a certain quality sold at a specified price, the measure of damages is the difference between the contract price and the market price at the time and place of delivery.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1175; Dec. Dig. § 418.*]

2. SALES (§ 418*)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

This is not an inflexible rule in all cases, so as to exclude a recovery of actual damages sustained in cases to which such rule in its very nature is inapplicable; as, where there is no market at the time and place of delivery by which damages can be measured, and resort must be had to the nearest available market, with the cost of shipment to the place of delivery added.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1188; Dec. Dig. § 418.*]

3. SALES (§ 418*)—BREACH OF CONTRACT—MEASURE OF DAMAGES—GOODS BOUGHT FOR RESALE.

If goods are bought for the purpose of resale, and so known to both parties, and upon failure of the seller to deliver there is no market in which the buyer can readily obtain them, he may go into the market and purchase the best substitute obtainable, using reasonable care and diligence, and charging the seller with the difference between the contract price of the goods and the price of the goods substituted.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1188; Dec. Dig. § 418.*]

4. SALES (§ 418*)—BREACH OF CONTRACT—MEASURE OF DAMAGES—GOODS BOUGHT FOR RESALE.

In order to entitle the purchaser to recover full damages in such a case he must have acted within a reasonable time, and have used due diligence to mitigate the loss.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1188; Dec. Dig. § 418.*]

5. REVIEW ON APPEAL.

The evidence was sufficient to authorize the charge of the judge, and to sustain the finding of the jury, approved by the presiding judge.

6. SALES (§ 418*)—BREACH OF CONTRACT—DAMAGES.

If the seller of goods fails to deliver them according to the contract, and thereafter the

purchaser urges delivery, and the seller promises to make it, but fails to do so, this alone does not work such an extension of the contract as will prevent the purchaser from recovering damages on the basis of the original breach.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1176; Dec. Dig. § 418.*]

7. SALES (§ 418*)—BREACH OF CONTRACT—DAMAGES.

In such a case, if there is no market in which the articles sold can be readily bought, and within the knowledge of both parties they were bought for resale, and the purchaser buys the best substitute obtainable in order to fulfill his subcontract of sale, in determining the reasonableness of his conduct and of the time when he makes the purchase, the conduct of the defendant in asking delay after the failure to deliver, and promising to make delivery, may be considered.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1176; Dec. Dig. § 418.*]

8. REVIEW ON APPEAL.

When taken in connection with the entire charge, none of the excerpts of which complaint was made are such as to require a new trial.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by Adam & Steinbrugge against the Hardwood Lumber Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

In May, 1905, the Hardwood Lumber Company, of this state, contracted to sell to Adam & Steinbrugge, of New Orleans, La., 75,000 feet of red gum lumber for July and August shipment. The correspondence between the parties showed that the lumber was bought for the purpose of resale, references being made in the letters of the purchasers to their customers. The first letter written by them, which was introduced in evidence, said: "If you would care to make us a price C. I. F. Rotterdam, and guarantee that our customers will get exactly what the B/L calls for, we believe that we could do some business with you." The lumber was not shipped at the time agreed upon. In October thereafter the plaintiffs began writing a series of letters to the defendants, urging the latter to deliver the lumber. The sellers replied by making various excuses, such as that the logs had to be gotten out of the swamp, that it had been raining so as to make it impossible to do so, and that the railroad did not furnish enough cars; and promising delivery at an early time. This correspondence of urgency on one side and excuses on the other continued for a number of months. On October 11, 1906, the purchasers wrote: "We sold this stock according to your contract with us; and if you don't deliver it, the customer that we sold it to will certainly hold us up for indemnity so much per M. feet, in which event we will put the matter up to you. Please let us know if you know of some place where we could buy this stock?" In its reply the seller said: "We know of no place where you can place this order. If we

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

could find some one to take it, we do not think they could get it out any quicker than we will. We will make delivery just as soon as possible." On December 10, the purchasers wrote: "If you cannot give us any definite information in regard to delivery of this stock, we must go out and buy it somewhere else; and if there is any difference in price, we would expect you to help us out." On January 30, 1907, they again wrote: "We really do not know how we can make our customers wait any longer; they simply must have this stock, and they will not accept the excuse you give us, and threaten to buy the stock on the open market, charging us up with the difference." On February 21, 1907, the purchasers wrote: "We wish to advise you that inasmuch as you have made no efforts, apparently, to get this stock for us, this letter will serve to advise you that, if you will not have delivered this stock by the first of May, we will buy what is due on the open market, or allow you the privilege of doing it." The sellers replied: "We have yours of the 21st, with reference to extending the time of delivery of the red gum sold you to the first of May. We will use our best endeavors to get the lumber ready for shipment by that time. We are anxious to fill your order, and regret that conditions have been such that we have been unable to do it. We intend to do it, and if you just have patience you will get the lumber all right." The purchasers continued to write letters urging the delivery of the lumber until November, 1907. On October 24th they informed the seller that, if the latter did not deliver the lumber immediately, the purchasers would at once bring suit for the breach of contract. They added: "We have secured at different times gum lumber at considerably higher prices than we paid you to deliver our contracts that we made based on getting the stock from you." The seller finally wrote on November 9, 1907, saying: "It is useless for us to promise to make delivery of this stock within the next thirty days. We have always intended to deliver this stock, as we told you before; but if you think that you can get your money quicker by bringing suit against us, it is a matter for you to decide. We have told you before we regretted this delay, but it is impossible to prevent it."

The purchasers brought suit, alleging that they had been compelled to buy red gum lumber to fill their contracts at a higher price than that at which they purchased, and had incurred the expense of transportation, which the seller agreed to pay, making an aggregate difference of \$441.78. They recovered a verdict for the full amount. A motion for a new trial was overruled, and the defendant accepted.

Wm. H. Fleming, for plaintiff in error. S. H. Myers and Geo. T. Jackson, for defendants in error.

LUMPKIN, J. (after stating the facts as above). The defendant did not deny that it broke the contract, and never delivered the red gum lumber sold. The only question was as to the measure of damages. The plaintiffs contended that they were entitled to recover the difference between certain lumber which they had purchased in this country and had shipped to Europe, in order to meet the contracts which they had made on the faith of the contract with the defendant and the price at which the lumber was sold to them, with cost of delivery at Rotterdam, in accordance with the contract with the defendant. The latter claimed that there was no sufficient evidence to show that there was not a market at Rotterdam in which the lumber could have been procured; that the date of the breach was either in July and August, 1906, or in November, 1907; and that the purchases made by the plaintiffs were between those dates; that the proper measure of damages was the difference between the contract price and the market price at the time and place fixed for delivery; and that, in the absence of sufficient evidence to show this difference, only nominal damages could be recovered. Various exceptions were made to charges and refusals to charge, but they all referred to the measure of damages, and need not be stated in detail.

Damages are given as compensation for the injury done. "Damages recoverable for a breach of contract are such as arise naturally and according to the usual course of things from such breach, and such as the parties contemplated when the contract was made, as the probable result of its breach." Civ. Code 1895, § 3799. "Any necessary expenses which one of two contracting parties incurs in complying with the contract may be recovered as damages." Section 3806. One injured by a breach of contract is bound to lessen the damages as far as practicable by the use of ordinary care and diligence. Section 3802. In a suit for breach of contract for failure to deliver goods of a stated quality sold at a specified price, the general rule is that the measure of damages is the difference between the contract price and the market price at the time and place fixed for delivery. If there is no market at the place of delivery at the time fixed therefor, resort may be had to the nearest available market, with cost of transportation to the place of delivery usually added. *Ford v. Lawson*, 133 Ga. 237 (6a), 65 S. E. 444. It is evident that the general rule cannot be taken as a Procrustean one, subject to no exception or modification. If so, it would exclude the possibility of recovering profits, where in contemplation of the parties at the time of the contract. If there should be no market at the time and place fixed for delivery, the seller breaking his contract could not escape liability for actual damages, on that account. The article sold may be such

as requires to be manufactured, and such as is not ordinarily carried in the market for sale. *Sizer v. Melton*, 129 Ga. 143 (7), (8), 58 S. E. 1055.

In 2 Benjamin on Sales (8th Am. Ed.) § 1327, after reviewing a number of cases, the author states as follows: "It is submitted that these decisions establish the following rules in cases where goods have been bought for the purpose of resale, and there is no market in which the buyer can readily obtain them: I. If at the time of the sale the existence of a subcontract is made known to the seller, the buyer, on the seller's default in delivering the goods, has two courses open to him: (1) He may elect to fulfill his subcontract, and for that purpose go into the market and purchase the best substitute obtainable, charging the seller with the difference between the contract price of the goods and the price of the goods substituted. (2) He may elect to abandon his subcontract, and in that case he may recover as damages against the seller (a) his loss of profits on the resale, and (b) any penalties he may be liable to pay for breach of his subcontract; but if the amount of the penalties has not been made known to the seller, the buyer is not entitled to recover their amount as a matter of right, but the jury may, if the penalties are reasonable, assess the damages at that amount. It is further submitted that, in order to entitle the buyer to claim exceptional profits arising from a subsale, express notice of the amount of such profits must have been given to seller at the time when the contract was made, under circumstances implying that he accepted the contract with the special condition attached to it. II. If at the time of the sale the existence of a subcontract is not made known to the seller, a knowledge on his part that the buyer is purchasing with the general intention to resell, or notice of the subcontract given to him subsequent to the date of the contract, will not render him liable for the buyer's loss of profits on such subcontract; the buyer may either procure the best substitute for the goods as before, and fulfill his subcontract, charging the seller with the difference in price, or abandon the subcontract and bring his action for damages, when the ordinary rule, it would seem, will apply, and the jury must estimate, as well as they can, the difference between the contract price and the market value of the goods, although there is no market price in the sense that there is no place where the buyer can readily procure the goods contracted for. III. In every case the buyer, to entitle him to recover the full amount of damages, must have acted throughout as a reasonable man of business, and done all in his power to mitigate the loss."

According to the seller's letters in this case the timber from which it was to be sawed had to be gotten out of the swamps,

where it grew. After the failure to deliver in accordance with the contract, the purchasers made this request of the seller: "Please let us know if you know of some place where you could buy this stock?" To this the seller replied: "We know of no place where we can place this order." The agent of the purchasers testified that "their default had forced us to enter the open market for the purchase of lumber wherever we could get it, and to meet obligations we had assumed when we supposed that the Hardwood Lumber Company was going to fulfill their contract." It is true that the agent testified that the lumber bought to fill the contracts of the purchasers, as indicated in an exhibit to their petition, was bought after November 9, 1907. He, however, testified to the items of the account. The bills of lading introduced in evidence indicated that the purchases were in fact made after the time provided in the contract for delivery, but before the date mentioned by him. After the breach occurred, the plaintiffs again and again urged the defendant to ship the lumber, and informed the latter that it had been sold to customers who insisted on having their contracts filled; and the plaintiffs threatened to hold the defendant liable if its contract of sale was not complied with promptly. The seller made excuses and various indefinite promises to make the shipment at an early date until November, 1907, when the patience of the plaintiffs was exhausted, and they brought suit.

After a contract of sale of goods is broken by failure to deliver, the mere fact that the purchaser is willing, by way of voluntary forbearance, to waive the delay and receive the property sold, and urges delivery, does not operate as a waiver of the legal damages incurred by him, if there is no extension for a consideration and no compliance or tender of compliance on the part of the person in default. He cannot repudiate his contract, and be relieved from damages for its breach because he was urged to comply with it. This case presents no question of request for delay in performance and grant thereof before breach or pending delivery in installments.

After a complete breach of contract on the part of the seller to deliver the goods sold, if they are of a kind not readily obtainable in the market, and if the seller undertakes to procure the best substitute he can to fill his contract of resale, for which purpose both parties knew that the goods were bought, the purchaser must act within a reasonable time and with reasonable diligence. In determining whether he does so or not, the conduct of the seller tending to cause some delay in action may be considered. The presiding judge charged, on this subject, as follows: "I charge you

that the plaintiff is only bound to exercise good business judgment and reasonable diligence in the matter of repurchasing the lumber, and would not be bound to purchase all in one lot, if he exercised good faith and reasonable business ability as a reasonably good business man would exercise under the circumstances." While generally the measure of damages is to be fixed at the time of the breach of the contract, it cannot be said as matter of law, under the conduct of the seller and its repeated assurances of early shipments and requests for delay, that the purchasers were bound to purchase the entire lumber immediately. Indeed, it might be inferred from the evidence that they could not do so, but that they did the best they could to remedy the default of the seller and save themselves from damages as far as possible on account of their resales. There are some decisions which go further than this charge, and hold that if the purchaser waits until a certain time, at the request of the seller, and then purchases goods to meet his subcontract of sale, the seller cannot complain. On the subject of delay induced by the party in default see *Mendel v. Miller*, 126 Ga. 834, 56 S. E. 88, 7 L. R. A. (N. S.) 1184.

Upon a careful consideration of the entire record, we do not think this a case for nominal damages. While there is some conflict in the testimony introduced by the plaintiffs as to the dates of the purchases made by them after the defendant's default, and as to whether the specific purchases made were rendered necessary by such default, there was sufficient evidence to authorize the finding of the jury in favor of the plaintiffs. Nor do any of the grounds of the motion for a new trial, when considered in the light of the entire evidence and the charge of the court, require a reversal. As showing the general rule and certain modifications of it both in England and America, see *Ogle v. Vane*, L. R. 2 Q. B. 272 (dealing both with the question of the statute of frauds and delay, not as a new contract, but as a voluntary forbearance); *Barrow v. Arnaud*, 8 Q. B. 595, 601; *Loder v. Ke-Kule*, 3 C. B. N. S. (91 E. C. L.) 126; *Hinde v. Liddell*, 10 L. R. Q. B. 265; *Borries v. Hutchinson*, 18 C. B. (114 E. C. L.) 445; *Hickman v. Haynes*, 10 L. R. C. P. 595; 2 *Joyce on Damages*, §§ 1625, 1626; 3 *Sutherland on Damages*, 652; *Vickery v. McCormick*, 117 Ind. 594, 20 N. E. 495; *Haskell v. Hunter*, 23 Mich. 305; *Watson v. Kirby*, 112 Ala. 436, 20 South. 624 (6); *Paine v. Sherwood*, 21 Minn. 225; *Thomas Iron Co. v. Jackson Iron Co.*, 131 Mich. 130, 91 N. W. 137; *Den Bleyker v. Gaston*, 97 Mich. 354, 56 N. W. 763.

Judgment affirmed. All the Justices concur.

(134 Ga. 812)

DICKINSON et al. v. HOLDEN et al.

(Supreme Court of Georgia. July 14, 1910.)

(Syllabus by the Court.)

WILLS (§ 634*) — CONSTRUCTION — ESTATES CREATED.

A will contained the following items, which were before this court for construction: "Item 3. I give to my daughter, Catherine T. Thornton, five hundred acres of land, with all the improvements, including the house and lot on which I now live, * * * to have and to hold the same for the maintenance, use, and benefit of said Catherine T. Thornton, during her life, and then to revert back to my grandchildren, John T. Dickinson, W. Q. Dickinson, and the heirs of Richard A. Dickinson, deceased. Said property not to be subject to the debts or liabilities of said Catherine T. Thornton in any manner whatsoever. * * * Item 7. Should either of my grandchildren, John T. Dickinson or W. Q., or my great grandchildren, A. Q. and Z. B. Dickinson, die without heirs, then the property above given, thus left, shall be given to the estate of the survivors." The devise contained in the items of the will above set forth gave to W. Q. Dickinson, who survived the testator and the life tenant, a remainder interest in the property, which became indefeasibly vested upon the death of the testator, whether item 3 of the will be construed alone or in connection with item 7. The court below properly so held, and in doing so determined adversely to the plaintiff in error, the only issue in the case. Civ. Code 1895, § 3104; *Sumpter v. Carter*, 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274; *Holcombe v. Tufts*, 7 Ga. 538.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.*]

Error from Superior Court, Tallapoosa County; D. W. Meadow, Judge.

Action between A. O. Dickinson and others and W. O. Holden and others. From the judgment, Dickinson and others bring error. Affirmed.

W. O. Mitchell and Anderson, Felder, Rountree & Wilson, for plaintiffs in error. Jno. C. Hart, Samuel H. Sibley, and Hawes Cloud, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur, except HOLDEN, J., disqualified.

(124 Ga. 843)

ROYAL FRATERNAL UNION v. HALL et al.

(Supreme Court of Georgia. July 27, 1910.)

(Syllabus by the Court.)

1. PLEADING (§ 238*)—AMENDMENT OF ANSWER AFTER TIME ALLOWED—AFFIDAVIT BY ATTORNEY.

Under section 5057 of the Civil Code of 1895, as amended by the act of December 21, 1897 (Acts 1897, p. 35), the affidavit which a defendant is required to make in order to set up, after the time allowed for answer has expired, "any new facts or defense of which notice was not given by the original plea or answer," cannot be made by an attorney at law for his client, even though such client be a nonresident of this state.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 622; Dec. Dig. § 238.*]

2. PLEADING (§ 238*)—AMENDMENT OF ANSWER AFTER TIME ALLOWED—AFFIDAVIT BY ATTORNEY.

The proposed amendment to the answer, setting forth the substantial allegations which were sought to be added to the original answer, was sworn to, in another state, by an agent of the nonresident defendant corporation, on January 8, 1909, but no affidavit in regard to the delay was made as required by law; and upon the hearing of the cause on February 4th, such amendment to the answer was offered, and, upon objection to its being allowed, a brief additional amendment was also offered, the substance of which was practically covered by the amendment already tendered, which, in effect, only alleged that the plaintiffs had received all to which they were entitled, and the attorney at law of the nonresident defendant made an affidavit to such second proposed amendment in respect to the delay, and sought to make the affidavit cover also the delay in reference to the amendment first tendered. *Held*, that there was no error in rejecting said amendments, and that the presiding judge did not abuse his discretion in declining to allow such amendments to be filed without the affidavit required by the statute.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 622; Dec. Dig. § 238.*]

3. REVIEW ON APPEAL.

Under the decision of this court in this same case (130 Ga. 820, 61 S. E. 977), and the evidence submitted on the trial under review, the presiding judge, to whom the case was submitted without the intervention of a jury, did not err in finding in favor of the plaintiffs the amount of the certificate, less the amount which they had previously received from the defendant.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by M. F. Hall, administratrix, and others, against the Royal Fraternal Union. Judgment for plaintiffs, and defendant brings error. Affirmed.

Osborne & Lawrence, for plaintiff in error. Saussy & Saussy, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(124 Ga. 357)

JONES v. McELROY.

(Supreme Court of Georgia. July 27, 1910.)

(Syllabus by the Court.)

1. DEEDS (§ 70*)—RIGHT OF VENDOR—FRAUD OF PURCHASER.

Where land is jointly owned by two persons, and one obtains a deed from the other of his interest by means of an intentionally false and fraudulent promise to sell the land at its true value and pay off an incumbrance and account for the balance, or, failing to find a purchaser, he will procure a new loan to discharge the present incumbrance, and, having thus obtained the title, he retains, uses, and claims the property as absolutely his own, the whole transaction by which ownership is obtained is such a fraud as will entitle the grantor to have the deed canceled.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 165-182; Dec. Dig. § 70.*]

2. DEEDS (§ 70*)—RIGHT OF VENDOR—FRAUD OF PURCHASER.

In such a case equity affords relief, not because of the mere breach of the verbal promise,

but because of the fraud of the grantee in procuring an absolute deed to be made to him upon his false and fraudulent representation and promise that he will use the title for the grantor's benefit.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 165-182; Dec. Dig. § 70.*]

3. TRIAL (§ 233*)—DUTY TO GIVE INSTRUCTIONS.

While it is the duty of a judge to state the contentions of the litigants, an instruction that the jury will find the contentions of the parties in the petition and answer, which are so clearly set out and so frequently referred to by counsel that the court does not deem it necessary to again state them, sufficiently meets the requirement, unless the special facts of the case demand a more formal summary to prevent possible misapprehensions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 529; Dec. Dig. § 233.*]

4. TRIAL (§ 296*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

In view of its context and the general charge, an instruction "that the evidence should be stronger to show the plaintiff is correct in her contentions than it is to go to show that the defendant's contentions are correct, but it be but slightly so, that would be sufficient," though inaccurate, is not so misleading as to require a new trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713; Dec. Dig. § 296.*]

5. TRIAL (§ 296*)—MISLEADING INSTRUCTIONS.

In a case where documentary evidence is submitted, an instruction that "you take the law from the court and the facts from the witnesses, and apply the one to the other, and make your verdict," is technically inaccurate. But from the general structure of the charge and the scope of the evidence it is apparent in this case that the jury could not have been misled by the inaccurate expression, as excluding the documentary evidence from their consideration.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 296.*]

6. REVIEW ON APPEAL.

There was sufficient evidence to support the verdict, which is approved by the trial judge. No substantial error of law was committed requiring a new trial.

Error from Superior Court, Bartow County.

Action by Mrs. S. F. McElroy against J. M. Jones. Judgment for plaintiff, and defendant brings error. Affirmed.

John T. Norris and Neel & Peebles, for plaintiff in error. D. K. Johnston, G. H. Aubrey, and Thos. W. Milner & Son, for defendant in error.

EVANS, P. J. The action is by Mrs. S. F. McElroy against her brother J. M. Jones, and his mother-in-law, Mrs. K. P. Larey, for cancellation and other relief. The case made in the amended petition may be thus briefly stated: C. M. Jones, the father of the plaintiff and J. M. Jones, was the owner of a tract of land, incumbered by a deed to secure a debt of \$1,000. On January 7, 1895, he transferred the bond to reconvey, executed by the lender, to the plaintiff and her brother J. M. Jones, upon an expressed consideration of \$3,000. After maturity of the loan the broth-

er represented to the sister that he could sell the land for its real worth, and orally promised, if she would make a deed to him of her half interest, that he would sell the land and account to her for one-half of the net purchase price, and, in the event he could not sell the land for its full value, he would procure a new loan on the land, and from the proceeds pay off the present incumbrance. On the faith of this promise the plaintiff, on March 18, 1899, made to her brother a quitclaim deed to her half interest in the property, stating in the deed that the consideration was \$1 and love and affection. It is alleged that the brother obtained this conveyance with the intentional design to defraud the plaintiff, his sister. Thereafter, on May 22, 1900, J. M. Jones conveyed the land by quitclaim deed to his mother-in-law, Mrs. Larey, upon a consideration of \$100, and Mrs. Larey, on the same day, paid the incumbrance and took a conveyance from the holder of the security deed, in which the amount paid by her was stated to be \$1,218.15. At the time Mrs. Larey received the deed from J. M. Jones and paid the incumbrance she knew the purposes for which the plaintiff executed the deed to J. M. Jones, and that the conveyance from J. M. Jones to Mrs. Larey was in pursuance of a conspiracy to defraud the plaintiff of her land. The value of the land was alleged to be \$3,000, and the net income therefrom, while in the defendant's possession, during the interval between the making of the deed and the bringing of the suit, was \$115, which amount, with \$550, was sufficient to pay the plaintiff's half of the loan debt, which latter amount was tendered to the defendants and refused by them. The plaintiff prayed for the cancellation of the deeds, and for general relief. The defendants severally demurred and answered. The demurrers were overruled, and the trial of the case resulted in a verdict for the plaintiff. The defendants each moved for a new trial, which motions were overruled. J. M. Jones sued out a bill of exceptions, assigning error on the refusal of his motion for new trial and on the pendente exceptions to the overruling of his demurrer. No error is assigned on the rulings against Mrs. Larey.

1, 2. Cancellation of the deed was prayed on the ground that the grantee obtained it by means of an intentionally false and fraudulent verbal promise to hold and use the land for certain specific purposes, and, having thus obtained the title, he conveyed the land to another who had notice of his fraudulent purpose, and in pursuance of his scheme to defraud. Equity affords relief in such a case, not because of any express trust declared in the verbal promise, but because of the fraud of the grantee. This relief may be granted either by declaring the holder of the legal title a trustee *ex maleficio* (*Brown v. Doane*, 86 Ga. 82, 12 S. E. 179, 11 L. R. A. 381) or by a cancellation of the deed fraudulently procured. The plaintiff's relief

is not based on a mere breach of an oral promise, but upon the fraud of the grantee in procuring an absolute deed to be made to himself upon his fraudulent representation and promise that he would use the title for the grantor's benefit. There is no law which requires a fraudulent undertaking to be manifested in writing; and parol evidence is admissible, not for the purpose of contradicting the deed, but for the purpose of establishing the fraud by means of which the grantee became vested with the absolute title.

3. The court instructed the jury that they would find the contentions of the parties set out in the pleadings. Error is assigned that the court should have restated the contentions. While it is the right and duty of the court to state the contentions of the parties, his reference to the pleadings as containing such contentions will suffice, unless the special facts of the case may require a formal statement of the actual issues in order to prevent possible misapprehension. *Central Ry. Co. v. McKinney*, 118 Ga. 538, 45 S. E. 430.

4. The court charged: "The burden of proof is upon the plaintiff in the case to show that her contentions are correct. What is meant by the burden of proof is the weight of evidence; it should be stronger going to show the plaintiff is correct in her contentions than it is going to show the defendant's contentions are correct; but if it be but slightly so, that would be sufficient, but it must preponderate in her favor in order for her to recover in the case. Then I charge you, if you find from the evidence that the contentions of the plaintiff are correct, you would find in her favor; otherwise, you would find for the defendant." The error assigned is that, before the plaintiff is entitled to relief by cancellation on the ground of fraud, the evidence must be clear and unequivocal as to the fraud, and that the court should have so instructed the jury; that the expression that if the evidence of the plaintiff be but slightly stronger than that of the defendant, that would be sufficient, in effect abrogates the rule as to the strength of evidence sufficient to justify cancellation. Our Code declares that in all civil cases the preponderance of evidence is sufficient to produce mental conviction; and that by a preponderance of evidence is meant that superior weight of evidence which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than the other. Civil Code, §§ 5144, 5145. Further on in his charge the court said: "When you come to make your verdict in this case, don't view the evidence in detached portions, but take the whole of it, all the facts and circumstances proven in the case, to determine for yourselves what the truth is as best you can, and let your verdict speak the truth, trying to do justice between the parties." While the particular expression to

which exception is taken may be inapt, yet, when taken in connection with its context and the general charge, we do not think that it misled the jury as to the degree of proof required in order to authorize a recovery by the plaintiff.

5. In his instruction the court said to the jury, "You take the law from the court, and the facts from the witnesses, and apply the one to the other and make your verdict." Certain documentary evidence was used, and it is contended that this charge excluded such evidence from the consideration of the jury. We do not think so. The court was charging upon the issues made in the case by the parol evidence which was offered relating to such documentary evidence. While it would have been better for the court to have instructed the jury that they should consider all the evidence, oral and written, in applying the law to the case, we do not think that the jury was in any way misled by the particular expression of the court of which complaint is made. Especially so, where it appears that the court, in discussing the weight of evidence, instructed the jury: "Now, there is some record evidence introduced here, and the same rules will apply to that, except that it is not delivered from the stand, and not delivered in the same way as witnesses on the stand."

6. There was sufficient evidence to authorize the verdict, which has the approval of the trial judge. We do not think any substantial error was committed in the trial; and the judgment is affirmed. All the Justices concur.

(134 Ga. 800)

JOHNSON v. AMERICAN NAT. LIFE INS. CO.

(Supreme Court of Georgia. July 14, 1910.)

(Syllabus by the Court.)

1. INSURANCE (§ 134*)—ACTION ON POLICY—FRAUDULENT STATEMENTS OF INSURED—ADMISSIBILITY IN EVIDENCE.

A statute declares that all life or fire insurance policies issued upon the lives or property of persons within the state, which contain any reference to the application for insurance, or the constitution, by-laws, or other rules of the company, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain or have attached to said policy a correct copy of said application, signed by the applicant, and of the by-laws referred to, and, unless so attached and accompanying the policy, no such constitution or by-laws shall be received in evidence, either as part of the policy or as an independent contract, in any controversy between the parties to or interested in the said policy, "nor shall such application or by-laws be considered a part of the policy or contract between the parties." *Held*, that a failure to attach an application for life insurance to the policy, which referred to it, prevented such application from being treated as a part of the contract or introduced in evidence as such, or to show that certain statements were contracted or warranted to be true; but it did not pre-

vent the defendant from pleading and proving that the insured had made false and fraudulent statements as to his age and health, and had thus fraudulently induced the insurer to issue the policy, and that it was therefore void, not as matter of contract, but because of fraudulent procurement.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 214-217; Dec. Dig. § 184.*]

2. INSURANCE (§§ 255, 655*)—ACTION ON POLICY—EVIDENCE—RATE BOOK.

Suit was brought on a policy of life insurance containing the following provision: "If the age of the insured is incorrectly stated, the amount payable under this policy shall be the insurance which the actual premiums would have purchased at the true age of the insured." The age stated in the policy was 55 years. The defendant pleaded fraud in the procurement of the policy, alleging that in fact the insured was more than 70 years of age, and uninsurable. *Held*, that the rate book of the company was admissible for the purpose of showing that there was no rate on a person 70 years of age, and that the misrepresentation was material.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 548; Dec. Dig. §§ 255, 655.*]

3. INSURANCE (§ 655*)—ACTION ON POLICY—EVIDENCE.

Under the issue of fraud in the procurement of the policy, it was competent to show false representations by the insured as to his age and health, and what they were in fact; and admissions made by him were relevant in that connection.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1677-1685; Dec. Dig. § 655.*]

4. EVIDENCE (§ 333*) — DOCUMENTARY EVIDENCE.

The tax digest of the county of the residence of the insured was admissible in evidence to show that, while his name appeared thereon, he returned no poll tax, as bearing on his age.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 333.*]

5. EVIDENCE (§ 333*)—RECORDS.

So, also, was the book of registered voters, containing the name of the insured and the statement of his age.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1247-1257, 1259-1265; Dec. Dig. § 333.*]

6. PLEADING (§ 307*) — APPEAL AND ERROR (§ 1089*)—REVIEW—HARMLESS ERROR.

It is not correct practice to attach to a plea as exhibits original documents which will be relied on as evidence. Copies, not original papers, should be used as exhibits to pleadings. Where originals are so attached, on proper motion made in due time, the court should require the originals to be detached and copies substituted. But where no motion was made, and just before the jury retired the court was asked to have the exhibits detached from the answer of the defendant, and not to allow them to be taken out by the jury, and not to allow the jury to see them, a refusal of such motion will not necessitate a new trial, where the court had, in the presence of the jury, rejected such papers from evidence, and ruled them inadmissible as such.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 930-934; Dec. Dig. § 807; Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039.*]

7. REVIEW ON APPEAL.

When considered in the light of the evidence and the entire charge, the charges complained of do not require a new trial. The evidence was sufficient to authorize the verdict.

Error from Superior Court, Johnson County; B. T. Rawlings, Judge.

Action by E. A. W. Johnson against the American National Life Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

J. L. Kent, E. L. Stephens, and Hines & Jordan, for plaintiff in error. Wm. Faircloth, B. B. Blount, Fred Harper, Brown & Randolph, and Robt. S. Parker, for defendant in error.

LUMPKIN, J. A policy of insurance was procured on the life of an aged negro, who was about 70 years old and in feeble health, as shown by the weight of the testimony. He represented himself to be 55 years of age and in good health, and the policy stated his age to be 55 years. There was evidence tending to show that he did not pay the premium himself, but it was paid by a white man, on whose place he lived. The person who paid the premium also appeared to have taken considerable interest in effectuating the insurance. The policy was dated January 22, 1908, and was assigned to the person who paid the premium, the assignment being dated January 30th. The evidence showed that the assignment was prepared in advance, and was taken to the insured, along with the policy, and that then it was signed and both together were delivered to the assignee. On February 3d the insured died, 12 days after the date of the policy. Suit was brought by the assignee against the insurance company. The defendant set up fraud in the procurement of the policy, and that it was a wagering contract, but offered to return the premium paid. The jury found for the defendant. The presiding judge overruled the motion for a new trial, and the plaintiff excepted.

The principal question involved is as to the effect of the act of August 17, 1906 (Acts 1906, p. 107). It declares that, "from and after the passage of this act, all life and fire insurance policies issued upon the life or property of persons within this state, whether issued by companies organized under the laws of this state or by foreign companies doing business in this state, which contain any reference to the application for insurance, or the constitution, by-laws, or other rules of the company, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain or have attached to said policy a correct copy of said application signed by the applicant, and of the by-laws referred to; and unless so attached and accompanying the policy, no such constitution or by-laws shall be received in evidence either as part of the policy or as an independent contract in any controversy between the parties to or interested in the said policy; nor shall such application or by-laws be considered a part of the policy or contract between such par-

ties." This act provides that, where a reference is made in the policy of insurance to the application, a correct copy of the latter must be attached to the policy, and unless this is done such application shall not "be considered a part of the policy or contract between such parties." But this does not exclude an insurance company from showing that the policy was procured by fraud and misrepresentation.

To consider the application as a part of the contract of insurance, and as forming a warranty or covenant, treats the policy as a valid contract and sets up one of its terms. To seek to set aside or repudiate the policy as having been obtained by fraud is to set up that there was no valid and binding contract of insurance. The two things are entirely different. The legislative enactment, which declares that, under certain circumstances, an application for insurance mentioned in the policy shall not be considered a part of the policy or contract between the parties, does not prohibit one of such parties from showing that, whatever the contract was, it was procured by the fraud of the other. 1 May on Insurance (4th Ed.) § 29, C. Section 2097 of the Code of 1895, in so far as it provides that the representations contained in an application for insurance are considered as covenanted to be true, is modified by the act of 1906. But section 2098 provides: "Any verbal or written representations of fact by the assured to induce the acceptance of the risk, if material, must be true, or the policy is void. If, however, the party has no knowledge, but states on the representation of others, bona fide, and so informs the insurer, the falsity of the information does not void the policy." And section 2099 declares that "a failure to state a material fact, if not done fraudulently, does not void; but the willful concealment of such a fact, which would enhance the risk, will void the policy." The court excluded the application; but evidence was admissible to show false representations and concealment.

The tax digest was admissible. *Griffin v. Wise*, 115 Ga. 610, 41 S. E. 1003; *Western & Atlantic R. Co. v. Tate*, 129 Ga. 526, 59 S. E. 266. The registration book of voters was also admissible, to throw light on the age of the insured.

The charge of the court was not entirely accurate, in view of the sections of the Code above cited, and of the provision in the policy that, "if the age of the insured is incorrectly stated, the amount payable under this policy shall be the insurance which the actual premium would have purchased at the true age of the insured." But when the entire charge is considered together, and it is remembered that, if the insured was 70 years of age, instead of 55, he was not an insurable risk in this company, and that the premium would not have purchased any insurance at his true age, we do not think that any of the

charges to which objection was taken should cause a new trial.

The jury found for the defendant. The presiding judge approved their finding, and we cannot say that he erred in so doing.

Judgment affirmed. All the Justices concur

(134 Ga. 330)

**FORD v. MAYOR AND COUNCIL OF
BRUNSWICK.†**

(Supreme Court of Georgia. July 14, 1910.)

(Syllabus by the Court.)

**CONSTITUTIONAL LAW (§ 80*)—DISTRIBUTION
OF GOVERNMENTAL POWERS—CONSTRUCTION
OF CONSTITUTION.**

The Court of Appeals certified the following question: "Is section 4 of the act approved December 23, 1892 (Acts 1892, p. 213), amending the charter of Brunswick, unconstitutional and void in so far as it authorizes the mayor of the city of Brunswick to preside as judge in the police court of said city, he being a member of the legislative body of the city, because said section above referred to is in violation of article 1, § 1, par. 23, of the Constitution of the state of Georgia (Civ. Code 1895, § 5720), which provides that 'the legislative, judicial, and executive powers shall forever remain separate and distinct, and no person discharging the duties of one shall at the same time exercise the functions of either of the others, except as herein provided,' in that said section allows the mayor, who is charged with legislative functions, to exercise judicial functions also by presiding in the mayor's court?" *Held*, that the provision of the Constitution referred to relates to state legislative, judicial, and executive powers, and has no relation to municipal offices, created by the Legislature, in the discharge of strictly municipal functions. *Shafer v. Mumma*, 17 Md. 331, 77 Am. Dec. 658; *Waldo v. Wallace*, 12 Ind. 569. On general subject, see 10 Century Digest, 1316 et seq., 458 et seq.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 140-147; Dec. Dig. § 80.*]

Certified Question from Court of Appeals.

Action between Lee Ford and the Mayor and Council of Brunswick. From the judgment, Ford brought error to the Court of Appeals, from which a question was certified to the Supreme Court. Question answered.

F. H. Harris, for plaintiff in error. Bolling Whitfield, for defendant in error.

ATKINSON, J. Question answered as set forth in headnote. All the Justices concur.

(134 Ga. 840)

MILLEDGEVILLE OIL MILLS v. WILKINSON.

(Supreme Court of Georgia. July 15, 1910.)

(Syllabus by the Court.)

**1. MASTER AND SERVANT (§ 258*)—INJURIES TO
SERVANT—ACTIONS—SUFFICIENCY OF PETI-
TION.**

The plaintiff's petition as amended was sufficient to withstand the demurrers filed by the

defendant, and the court below did not err in overruling them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 834; Dec. Dig. § 258*.]

2. REVIEW ON APPEAL.

While there were some slight inaccuracies in the court's charge upon the subject of the mortality and annuity tables introduced in evidence, they were not of such a nature as to require the grant of a new trial.

3. REVIEW ON APPEAL.

The charge of the court as a whole was full, fair, and complete, and no material error appears in the excerpts of the charge which are attacked as erroneous in the motion for a new trial.

4. REVIEW ON APPEAL.

No error appears in the other rulings of court complained of, and there was sufficient evidence to support the verdict.

Error from Superior Court, Baldwin County; H. G. Lewis, Judge.

Action by J. D. Wilkinson against the Milledgeville Oil Mills. Judgment for plaintiff, and defendant brings error. Affirmed.

It was alleged in the petition that the plaintiff was employed in the mill of the defendant as a mill hand, and was subject to orders of the superintendent; that he was directed by the latter to sharpen certain knives upon an emery wheel operated by steam power, in connection with which there were mechanical devices of a nature unknown to petitioner; that while engaged in performing this work a piece of steel from one of the knives was broken off by the wheel and thrown into petitioner's right eye, thereby destroying the sight of the same; that petitioner was without experience in operating machinery of the character of that described in the petition, and this was known to the defendant; that plaintiff was directed by the superintendent to hold the knives against the wheel with his hand, and that to do so necessitated his standing in front of the wheel; that the frame carrying the emery wheel was defective, in that it had no proper feed or guide to regulate the pressure of the knife on the wheel, and that the guide did not properly place the knife, which defects were known to the defendant and unknown to petitioner; that the defendant was negligent in furnishing plaintiff with a defective and dangerous machine upon which to sharpen the knives, and in placing petitioner in a position of danger, and in failing to warn petitioner of the dangerous position and of the dangerous and defective character of the machine, and in failing to instruct petitioner as to the safe and proper use and operation of the machine; that the position occupied by petitioner in front of the wheel was the place indicated to him by the defendant's machinist and superintendent as the proper position; that the position thus indicated was a dangerous one, because it was where the wheel would likely cast fragments broken from the wheel or instrument being ground;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† For opinion of Court of Appeals, see 68 S. E. 847.

that the danger of this position was not so obvious and plain that a person of petitioner's inexperience in the use of such a wheel or of machinery generally could have discovered it by the exercise of ordinary care, and petitioner had not discovered such danger prior to the injury complained of, but the danger was discernible to a person skilled in the use of machinery, and was known to defendant's superintendent and machinist; that because of the defects described, and the high speed with which the wheel was operated, the same was rendered dangerous, especially to an inexperienced operator; that petitioner was an ordinary mill hand, entirely without experience in the operation of machinery like that referred to; that the defendant was negligent, in that its superintendent and machinist directed plaintiff to adjust the knife to the stone by the use of a hand attachment, and did not notify and direct him to use the automatic adjuster then adjusted to the carriage of said machine.

The defendant demurred generally; also specially, upon the ground that it did not appear from the petition that it was the duty of the defendant to warn the plaintiff that the place was dangerous, nor why it was dangerous, nor in what the danger consisted, nor why such danger was not within the knowledge of the plaintiff, nor why the plaintiff did not have as full an opportunity to know of the danger as the defendant had; that the plaintiff did not state in what consisted the defect or danger of the machine furnished, nor whether the defect was latent or apparent, whether obvious or concealed, nor in what the same consisted; and that it did not appear from the petition what or why instructions were necessary as to the use of the machine, or why any warning of danger was required of the master to an adult servant.

Allen & Pottle and N. E. & W. A. Harris, for plaintiff in error. Hines & Vinson, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(124 Ga. 896)

ROSS v. LETTICE, County Treasurer.

(Supreme Court of Georgia. Aug. 9, 1910.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§ 190*)—RETROACTIVE LAWS.

An act of the General Assembly which creates a new obligation and imposes a new duty in respect to transactions or considerations already past is retroactive in character, and in violation of article 1, § 3, par. 2, of the Constitution (Civ. Code, § 5730), which forbids the General Assembly to pass a retroactive law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 531-533; Dec. Dig. § 190.*]

(Additional Syllabus by Editorial Staff.)

2. CONSTITUTIONAL LAW (§ 188*)—"RETROACTIVE STATUTES."

A statute is "retroactive," in its legal sense, which creates a new obligation on transactions or considerations already past, or destroys or impairs vested rights.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 530; Dec. Dig. § 183.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6199-6201.]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Application of John P. Ross for writ of mandamus to M. Lettice, County Treasurer. Judgment for defendant, and plaintiff brings error. Affirmed.

J. E. Hall and John P. Ross, for plaintiff in error. Jos. H. Hall, Du Pont Guerry, and Warren Roberts, for defendant in error.

EVANS, P. J. In 1871 the General Assembly created the road board of Bibb county, conferring upon that body ministerial authority over clearing and working the legally established public roads. The fiscal affairs of Bibb county are looked after by the county board of commissioners, and that board has also jurisdiction to lay out and establish a public road. The county board of commissioners established a public road, directing it to be entered upon the register of public roads, to be worked by the county road forces. The road board refused to obey this order, and certain citizens of Bibb county filed an application for mandamus against them to compel obedience to such order. The road board employed Mr. Ross, an attorney at law, to defend the application for mandamus. His defense was successful. *Green v. Road Board of Bibb County*, 126 Ga. 693, 56 S. E. 59. Mr. Ross presented a bill for his fees to the proper authorities of Bibb county, who refused to audit and pay the demand; and suit was instituted, which resulted in favor of the county. Thereupon the General Assembly passed an act authorizing and directing Bibb county to pay Mr. Ross' fee and certain expenses incurred by him in the litigation. The county commissioners, after the passage of this act, approved the demand and issued a warrant to the treasurer for its payment. The treasurer refused to pay the warrant, and Mr. Ross applied for a mandamus to compel him. The court refused to grant a mandamus absolute, and exception is taken thereto.

At the time of the enactment of the act of 1909 it had been adjudicated that Mr. Ross was not entitled to receive from the county's revenues compensation for defending the road board in certain litigation. This adjudication was based on the lack of power in the road board to employ counsel at the county's expense to defend the board in a mandamus proceeding instituted by citizens of the county to compel it to open and

work a road purporting to have been established by order of the county board of commissioners. *Ross v. Bibb County*, 130 Ga. 585, 61 S. E. 465. Whatever right Mr. Ross may now have against the county to collect his fee and certain expenses must spring from the act of 1909. By the terms of the act Bibb county "is authorized and directed to pay to John P. Ross, of said county, the sum of seven hundred and fifty (\$750) dollars for attorney's fees incurred by the road board of Bibb county in the case of John C. Green and T. B. West v. The Road Board of Bibb county, petition for mandamus, in the superior court of Bibb county, and fourteen dollars and seventy-five cents (\$14.75) for costs incurred by said road board and advanced by him on a cross-bill of exceptions in said case." Acts 1909, p. 377. This act is assailed as being void, because violative of article 1, § 3, par. 2, of the Constitution (Civ. Code, § 5730), which declares that "no bill of attainder, ex post facto law, retroactive law, or law impairing the obligations of contracts, or making irrevocable grants of special privileges or immunities, shall be passed." Manifestly the act is retrospective, and intended, not only to confer power upon the county to pay the fee, but to create a liability against the county which theretofore did not exist. In construing a similar provision in the Texas Constitution, the Supreme Court of that state said that "retrospection, within the meaning of the Constitution, would be to give a right where none before existed, and, by relation back, to the party the benefit of it." *Sutherland v. De Leon*, 1 Tex. 250, 46 Am. Dec. 101. A statute is retroactive, in its legal sense, which creates a new obligation on transactions or considerations already past, or destroys or impairs vested rights. A statute does not operate retrospectively because it relates to antecedent facts, but if it is intended to affect transactions which occurred or rights which accrued before it became operative as such, and which ascribe to them essentially different effects, in view of the law at the time of their occurrence, it is retroactive in character. *Hasbrouck v. Milwaukee*, 13 Wis. 39, 80 Am. Dec. 718; *Evans v. Denver*, 28 Colo. 193, 57 Pac. 696; *Chicago, B. & Q. Railroad Co. v. State*, 47 Neb. 549, 66 N. W. 624, 41 L. R. A. 481, 53 Am. St. Rep. 557; *State v. Whittlesey*, 17 Wash. 447, 50 Pac. 119; *Maxwell v. Goetschius*, 40 N. J. Law, 383, 29 Am. Rep. 242. Mr. Justice Story, in the case of *Society for Propagating the Gospel v. Wheeler*, 2 Gall. 189, Fed. Cas. No. 13,156, thus defines a retroactive law: "Upon principle every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new liability in respect to transactions or considerations already past, must be deemed retrospective."

This definition has been adopted in *Rairden v. Holden*, 15 Ohio St. 207, and *Sturges v. Carter*, 114 U. S. 511, 5 Sup. Ct. 1014, 29 L. Ed. 240. The design of the act is to create a new obligation and to impose a new duty in respect to a transaction or consideration already past, and, under the overwhelming weight of authority, such a statute is retroactive. The Constitution forbids the General Assembly to pass retroactive laws, and the act of 1909 comes within the prohibition.

The statute was attacked as offending other provisions of the Constitution, and special facts were pleaded in bar of the plaintiff's remedy; but, in view of our holding that the act of 1909 is unconstitutional because it is retroactive, it becomes unnecessary to discuss the other features of the case.

Judgment affirmed. The other Justices concur, except BECK, J., absent.

(134 Ga. 869)

TURNER v. CITY ELECTRIC RY. CO.
(Supreme Court of Georgia. Aug. 9, 1910.)

(Syllabus by the Court.)

1. CARRIERS (§ 303*)—STREET RAILROADS—LANDINGS FOR PASSENGERS.

Generally the duty which the law imposes upon an ordinary railroad company to provide and maintain a safe place for landing its passengers is not applicable to a street car company, operating its line along a public street of a city and not stopping at regular places selected by it, or providing places for passengers to get on and off its cars, but stopping such cars at street crossings or various intermediate places upon signal from a passenger. *Macon Ry. & Light Co. v. Vining*, 120 Ga. 513, 48 S. E. 232. [Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1231; Dec. Dig. § 303.*]

2. CARRIERS (§ 303*)—STREET RAILROADS—DUTY TO PASSENGERS.

Under such circumstances it is the duty of the company, and its agents or employees representing it, to use due diligence to select a reasonably safe place for landing its passengers, and to make such selection with reference to getting off the car while it is at rest.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1231; Dec. Dig. § 303.*]

3. CARRIERS (§ 280*)—DUTY TO PASSENGERS—EXTRAORDINARY DILIGENCE.

The diligence due from a carrier of passengers for hire for the protection of its passengers is extraordinary diligence. Civ. Code, § 2266.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1085-1092, 1098-1106, 1109-1117; Dec. Dig. § 280.*]

4. CARRIERS (§ 321*)—STREET RAILROADS—LANDING FOR PASSENGERS.

While the charge of the court, that "in that connection I charge you it is the duty of the defendant in this case to provide for passengers on their railway a reasonably safe place to alight from the car; that is, to get off of the cars"—was not accurately adjusted to the evidence in the case, standing alone, it might not require a new trial; but the judge nowhere in his charge instructed the jury as to the duty of the defendant company in regard to selecting a reasonably safe place for the landing of passengers.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 321.*]

5. CARRIERS (§ 348*)—INJURY TO PASSENGERS — CARE REQUIRED IN ALIGHTING FROM STREET CAR.

The judge should not inform the jury that ordinary care on the part of a passenger requires him to do some particular thing, such as looking out for danger.

(a) Charges that "if the plaintiff could have avoided the consequences of its negligence by ordinary care in looking out for danger and avoiding it," and that "if there was a safe place on one side of the car, and she chose to alight on the other side, which was not safe, and that unsafe condition would have been apparent to her, had she used ordinary care in looking out for danger, and by ordinary care she could have avoided injury, she could not recover," were not accurately expressed. The expressions "by ordinary care in looking out for danger and avoiding it," and "had she used ordinary care in looking out for danger," may have led the jury to understand that the court instructed them, as matter of law, that under the evidence ordinary care required the plaintiff to look out for danger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1403-1407; Dec. Dig. § 348.*]

6. INSTRUCTIONS.

The giving of a certain request in charge, after the conclusion of the general charge, with the addition thereto, is not likely to occur on another trial, and need not be dealt with.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by Mattie Turner against the City Electric Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

McHenry & Porter and W. M. Henry, for plaintiff in error. Dean & Dean, for defendant in error.

LUMPKIN, J. Judgment reversed. The other Justices concur, except BECK, J., absent.

(134 Ga. 344)

ELLIOTT et al. v. HIPP et al.

(Supreme Court of Georgia. July 27, 1910.)

(Syllabus by the Court.)

1. MANDAMUS (§ 70*)—POWER TO ISSUE—COMPELLING PERFORMANCE OF OFFICIAL DUTIES.

When duties are imposed on a judge of a superior court as an officer, another judge of the superior court has no power to issue a mandamus to compel the performance of such duties.

(a) The duty devolving upon the judge of a superior court under Pol. Code, §§ 50, 51, providing for the appointment of a board of county registrars, is an official act.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 132; Dec. Dig. § 70.*]

2. MANDAMUS (§ 141*)—JUDGES (§ 49*)—DISQUALIFICATION—REVOCATION OF MANDAMUS.

Where the judge of another circuit to whom such application was presented refused a mandamus nisi against the judge named in the petition, and granted a restraining order and mandamus nisi against the registrars, it was proper for the judge granting the order and mandamus nisi to subsequently revoke the same and refuse to take further action on such application, for the reason that the same should be presented to the judge referred to in the ap-

plication, who had jurisdiction to act thereon and who was not disqualified from so doing.

(a) The allegation that a judge is active in aiding one faction of a political party in a county to gain control of the party and the politics of the county, in order to further his political purposes and interests and those of a faction with which he is in sympathy, does not disqualify him from passing on an application to enjoin the registrars from filing a registration list alleged to have been prepared by them with the names of certain persons opposing such faction illegally left off for the purpose of gaining such control, and to compel them by mandamus to place such names on the registration list.

(b) While the petition and the amendment thereto aver political interest and activity on the part of the judge in whose jurisdiction the case falls, and an attempt and conspiracy on his part with others to dominate and control the politics of the county in his own interest and that of others, the allegations made do not show that he has any pecuniary interest in the result of the litigation, nor do they state any other facts sufficient to render him disqualified from presiding in the case.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 141; Judges, Cent. Dig. §§ 187, 188; Dec. Dig. § 49.*]

Error from Superior Court, Gilmer County; Geo. L. Bell, Judge.

Mandamus by E. S. Elliott and others against J. O. Hipp and others. From the judgment, plaintiffs bring error. Affirmed.

A. H. Burtz and Gober & Griffin, for plaintiffs in error. D. W. Blair and L. Z. Rosser, for defendants in error.

HOLDEN, J. The plaintiffs in error addressed a petition to the superior court of Gilmer county, alleging that they were citizens and taxpayers of that county; that the judge of the circuit in which the county is situated had appointed a board of county registrars, all of whom belonged to one faction of a named political party. The petition prayed that a writ of mandamus issue against the judge of the circuit, requiring him to appoint a bipartisan board of registrars, composed of citizens belonging to both factions; and an injunction against the registrars, restraining them from filing with the clerk of the superior court a list of registration with the names left off which they had illegally omitted therefrom; and a writ of mandamus, requiring them to complete the list of registration as they were required to do by law, and to place thereon the names of petitioners and others whom they had illegally left off. The judge of the Atlanta circuit, to whom the petition was presented, refused to issue a mandamus nisi against the judge, but issued a restraining order against the registrars and an order that the registrars show cause before him at a named time why the mandamus absolute and injunction as prayed should not be granted. Upon the hearing the judge of the Atlanta circuit rejected an amendment offered by the plaintiffs, and revoked the restraining order and mandamus nisi theretofore grant-

ed against the registrars, and refused to take further action in the matter, on a motion made by the registrars on the ground that Judge Morris of the Blue Ridge circuit was not disqualified to act upon the application, and the judge of the Atlanta circuit had no jurisdiction to pass upon the same. The plaintiffs filed exceptions pendente lite to the refusal to issue a mandamus nisi against Judge Morris. They excepted to the order revoking the restraining order and mandamus nisi against the registrars, and to the refusal of the judge of the Atlanta circuit to entertain jurisdiction in the matter.

1. The provisions in reference to the appointment of county registrars are contained in Pol. Code, §§ 50, 51. Section 50 requires that the judge of the superior court of each county shall biennially appoint three upright and intelligent citizens of the county as county registrars, and that he shall have the power, with or without cause, to remove any registrar and appoint a successor. Section 51 makes it the duty of the judge not to appoint all the registrars from any one political interest or party, but to so regulate his appointments and removals as to maintain a bipartisan board. Clearly the duties defined in these sections relate to acts to be performed by the judge of the superior court in his capacity as such judge, and therefore are official functions pertaining to that office. The writ of mandamus implies that the authority issuing it is possessed of power to enforce obedience to its mandate. One superior court judge in this state has no more power than another, and no one of them has power to compel another to perform an official act. *Shreve v. Pendleton*, 129 Ga. 374, 58 S. E. 880.

2. The only relief sought against Judge Morris was that the court issue a writ of mandamus requiring him to appoint a bipartisan board of registrars. The prayer for process was that the defendants be required to appear "at a time fixed by the court." The petition was addressed to the superior court of Gilmer county, of which Morris is the judge, but was presented to a judge of the Atlanta circuit, who indorsed thereon that he took jurisdiction "by reason of the fact that Judge N. A. Morris is named as a party." The judge to whom the petition was presented refused to issue a mandamus nisi, or other process, against Morris, and therefore the latter never became a party defendant in the case; and it cannot be said that as judge of the superior court to which the petition was addressed he was disqualified from hearing the case because of being a party thereto. The action of the judge of the Atlanta circuit, refusing process against Judge Morris, left the case as one standing against the registrars named in the petition, in which the relief sought against them was an injunction to prevent them from filing with the clerk of the superior court the list

of registration from which it was alleged they had illegally left off certain names, and a writ of mandamus requiring them to complete the list of registration as required by law and to place thereon the names of petitioners and others illegally omitted therefrom. Was the judge of the Blue Ridge circuit disqualified to pass on the application because of any of the matters alleged in the petition? Briefly stated, the gravamen of the case alleged against the registrars in the petition was a failure to discharge their duties as registrars, and the performance by them of illegal acts in connection with their duties as such in passing upon the qualification of citizens whose right to vote had been challenged and in preparing the registration lists; and on information and belief it was alleged that their illegal conduct was done at the instance and under the direction of Morris, the judge of the circuit. An amendment was offered alleging that since 1904 Morris had been in a conspiracy with one Cox to dominate and control the politics of the county, and stating various acts done by them in furtherance of this design. The allegations, that one who holds the office of judge of the superior court is an active partisan of one political faction in a county; that it is his desire and to his interest that such faction should dominate and control the politics of the county; that he is engaged in a conspiracy to that end; that he attempts to influence and control the acts of other officials with this purpose in view; and that such officials, at his instance and direction, are acting illegally in order to accomplish such purpose—are not such as to disqualify such judge from hearing and acting on a petition making such allegations, and seeking to restrain such officials from committing the illegal acts charged, and to compel them to perform the duties enjoined upon them by law. The above is especially true where, as in this case, the allegations regarding the conduct of the judge were made on information and belief, and were not positively verified. It is to be presumed that, in hearing and acting upon an application of the character outlined above, the judge will not disregard his solemn oath as an official charged with the just administration of the law, but will accord a fair and impartial hearing to the petitioners and grant them whatever legal relief they may show themselves entitled to receive. In 17 Am. & Eng. Enc. Law, 738, and in 23 Cyc. 582, it is stated that, in the absence of statutory provisions, bias or prejudice on the part of a judge does not disqualify him. The only provision of our law on the subject of the disqualification of a judge is set forth in Civ. Code, § 4045, which provides "that no judge * * * can sit in any cause or proceeding in which he is peculiarly interested, or related to either party within the fourth degree of consanguinity or affinity,

nor of which he has been of counsel, nor in which he has presided in any inferior judiciary when his ruling or decision is the subject of review, without the consent of all the parties in interest." In 17 Am. & Eng. Enc. Law, pp. 738, 740, it is stated that it is the general rule that statutory grounds of disqualification are exclusive. Under the provisions of the code section above referred to, Morris was not disqualified to act upon the petition, as the allegations thereof do not show that he was peculiarly interested in the cause, or that he came within any of the other provisions relating to disqualification.

After the judge of the Atlanta circuit to whom the petition was presented refused a mandamus nisi against Morris, judge of the Blue Ridge circuit, as the allegations in the petition did not show that Judge Morris was disqualified from acting thereon, it would have been proper for the judge of the Atlanta circuit to have refused to grant a restraining order and a mandamus nisi against the registrars; but after having granted such order and mandamus nisi against them, it was proper to sustain the motion made by the defendant registrars and to revoke the restraining order and mandamus nisi against them, and to refuse to entertain jurisdiction in the matter. No error was committed in refusing to allow the amendment offered by the plaintiffs, and in sustaining the motion of the registrars.

Judgment affirmed. All the Justices concur.

(134 Ga. 870)

MAYS v. REDMAN BROS.

(Supreme Court of Georgia. Aug. 9, 1910.)

(Syllabus by the Court.)

1. EJECTMENT (§ 9*)—TITLE TO SUPPORT ACTION.

Persons claiming to have bought land, fully paid the purchase money, gone into possession, and erected valuable improvements, brought suit to recover it, and damages on account of destruction of the improvements, against an alleged disseisor, averring that the persons from whom they bought had conveyed to another, who had conveyed to the defendant, and that both of these grantees took with notice of plaintiffs' rights. *Held*, that the plaintiffs showed a sufficient title to authorize the maintenance of such an action against the defendant, who thus obtained a conveyance. *Grace v. Means*, 129 Ga. 638, 59 S. E. 811.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.*]

2. VENDOR AND PURCHASER (§§ 238, 239*)—BONA FIDE PURCHASER.

In such a case, if the defendant was a bona fide purchaser for value and without notice, he would be protected from the equitable owner, even if his grantor had notice of the equitable rights of the plaintiff; or, if his grantor was a bona fide purchaser for value and without notice, the defendant would be protect-

ed, even if he himself bought with notice. *Civ. Code*, § 3938.

(a) Under the evidence, and in view of the general charge, an omission to charge distinctly that, if the first grantee purchased without notice, the grantee under him would be protected, whether he had notice or not, would not alone require a new trial.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 580-600; Dec. Dig. §§ 238, 239.*]

3. WITNESSES (§ 393*)—IMPEACHMENT—ADMISSIBILITY OF EVIDENCE ON FORMER TRIAL.

After laying the proper foundation, a brief of evidence, approved by the presiding judge as a correct brief of the evidence introduced on a former trial of the same case, and filed under his order as a part of the record in connection with a motion for a new trial then made, was admissible for the purpose of impeaching a witness who testified on the last trial, by showing that he testified differently on the former trial. *City of Columbus v. Ogletree*, 102 Ga. 293 (5), 29 S. E. 749; *Owen v. Palmour*, 111 Ga. 885 (2), 36 S. E. 969.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1252-1257; Dec. Dig. § 393.*]

4. EJECTMENT (§ 90*)—ADMISSIBILITY OF EVIDENCE.

It appeared that the persons under whom both the plaintiff and the defendant claimed became bankrupt; that the land, together with certain machinery thereon, was included in the appraisal of the bankrupt's property; that the referee issued a notice that, unless sufficient cause should be shown to the contrary, he would pass an order of sale; that one of the present plaintiffs interposed a claim to the machinery, and at the same time the person now alleged to have purchased with notice of the plaintiff's equitable rights interposed a claim to the land. *Held*, that there was no error in admitting the claim interposed by one of the plaintiffs, in order to show that it did not include the land, but rejecting the claim interposed by the other party.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 254-277; Dec. Dig. § 90.*]

5. EJECTMENT (§ 90*)—ADMISSIBILITY OF EVIDENCE.

Where the trustee in bankruptcy of the persons under whom both parties to the present case claim brought suit to recover the land and machinery against the present plaintiffs and the persons under whom the present defendant holds as a grantee, and the defendants in that action filed a joint plea, duly verified, in which it was alleged that the land belonged to such other person and that the machinery belonged to the present plaintiffs, a certified copy of such plea was admissible as tending to show that the plaintiffs admitted that they were not then the owners of the land.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 254-277; Dec. Dig. § 90.*]

6. EJECTMENT (§ 86*)—BURDEN OF PROOF.

In an action of the character described in the first headnote above, the burden of showing both a perfect equitable title to the land and also notice to the subsequent purchasers rested on the plaintiffs.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 238-245; Dec. Dig. § 86.*]

7. PROPERTY (§ 10*)—ACTUAL POSSESSION—NOTICE.

Actual possession of land is notice of whatever right or title the occupant has.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 10.*]

8. REVIEW ON APPEAL.

The other grounds of the motion for a new trial, when considered in connection with the evidence and the entire charge, are not such as to require a reversal. As there is a reversal on rulings of law, and a new trial will be had, the sufficiency of the evidence is not discussed.

Error from Superior Court, Butts County; E. J. Reagan, Judge.

Action by Redman Bros. against R. W. Mays. Judgment for plaintiffs, and defendant brings error. Reversed.

Jno. R. L. Smith and H. M. Fletcher, for plaintiff in error. C. L. Redman and O. M. Duke, for defendants in error.

LUMPKIN, J. Judgment reversed. The other Justices concur. BECK, J., absent.

(135 Ga. 9)

CASWELL v. MOTEN.

(Supreme Court of Georgia. Aug. 10, 1910.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS (§ 340*)—
SALE OF PERSONALTY — INTERPOSITION OF
CLAIM—EVIDENCE.

The verdict was not authorized by the evidence, and the court, therefore, erred in overruling the motion for a new trial, wherein this ground was alleged.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 340.*]

Error from Superior Court, Liberty County; P. E. Seabrooke, Judge.

Application by J. M. Caswell, administrator, for leave to sell personal property. Mary Moten interposed a claim. Verdict for claimant, and the administrator brings error. Reversed.

J. M. Caswell, as administrator of the estate of Isaac Futch, deceased, obtained an order to sell personal property of the estate and thereupon undertook to sell certain cattle as the property of such estate to which cattle Mary Moten interposed a claim alleging that the cattle belonged to her. The verdict was in favor of the claimant, whereupon the administrator made a motion for a new trial, upon the ground that the verdict was contrary to law and contrary to the evidence. This motion was overruled, and the administrator excepted.

Upon the trial the claimant testified: "Isaac Futch was my stepfather. * * * These cattle belonged to my mother. She got them from her father's estate. Isaac Futch was in possession of them when he died. My mother left him in possession when she died, and I let him remain in such possession. She has been dead about 18 or 20 years. I have one sister, Nicey Williams. Isaac Futch was in possession from before my mother's death till he died, about 2 years ago. He returned them and marked them as his own, and when he sold beeves would buy others in place of them. I am married, and have not

lived with Futch since my mother died. I am about 42 years old."

Frank Sheppard, introduced by claimant, testified: "I know that Isaac Futch sold a red cow that his first wife got from her father's estate, and bought another one in its place. He told me that he raised 11 head from that cow." A few weeks before he died he "told me that there was 11 head of cattle at his place descended from the white-faced black cow. Mary Moten's mother gave her the red cow, which was traded and replaced by the black cow with white face."

Stephen Martin testified, in behalf of claimant: "I bought a red cow from Isaac Futch in the lifetime of his first wife, * * * and he bought one in the place of it from Frank Sheppard—a white-faced black cow from which these cattle in dispute descended. I don't know anything about paying for the cows."

Jesse Futch, introduced by plaintiff, testified: "I know the cattle in question. They belonged to Isaac Futch in his lifetime. * * * He bought one of the original cows from which these were raised with money that I loaned him. He had been in possession about 18 or 20 years, and marked them in his own mark, and when he sold beeves he used the money for himself, and I never knew of any one claiming them except him. Mary Moten came to me soon after he died, and asked me if these cattle didn't come from that [which] belonged to her mother, and I told her they did not, and she said, 'That lets me out of it.' I know the cattle that his first wife got from her father's estate. I know that the red cow did not raise a single calf. He sold the red cow to Stephen Martin, and told me repeatedly that he had never been paid for her. This was the only cow that she got from her father's estate."

Ophella Futch testified, in behalf of plaintiff: "I was Isaac Futch's second wife, and lived with him 4 years before he died. He was in possession of these cattle, marked them in his own mark, and used them for himself; and no one ever claimed them but him."

Ben A. Way, for plaintiff in error. Donald Fraser and S. B. Brewton, for defendant in error.

FISH, O. J. Judgment reversed. The other Justices concur, except BECK, J., absent.

(3 Ga. App. 119)

FOSTER v. STATE. (No. 2,751.)

(Court of Appeals of Georgia. July 25, 1910.)

(Syllabus by the Court.)

1. FALSE PRETENSES (§§ 4, 7*) — "CHEATING AND SWINDLING"—ELEMENTS OF OFFENSE.

The offense of cheating and swindling consists of some false pretense, device, trick, or contrivance fraudulently made or enacted by

the defendant with the intent to deceive the prosecutor or the public, so successfully accomplished that the prosecutor or some member of the public is in fact deceived thereby, and suffers loss or damage. If the false pretense consists in a representation, it must relate in part at least, and materially, to a present or past fact or state of facts, and not consist merely in a false promise or statement as to something to happen in the future.

[Ed. Note.—For other cases, see *False Pretenses*, Cent. Dig. §§ 13-18, 25; Dec. Dig. §§ 4, 7.*]

2. FALSE PRETENSES (§ 7*)—CHEATING AND SWINDLING—VALUE OF THING OBTAINED.

A person may be guilty of cheating and swindling in a transaction in which both parties know that they are violating or about to violate the law, provided that the one therein cheats and swindles the other out of something of value. But neither counterfeit money itself nor the possession thereof is a thing of value; and therefore one person cannot cheat and swindle the other by representing to him that if he will go to certain expense he can procure at a certain time and place a designated amount of counterfeit money, though the latter fails to get the expected spurious currency.

(a) There may be an exception to this rule in a case where a person of superior or sharpened intellect or cunning imposes upon the credulity of a very ignorant or weak-minded person, and secures the latter's money or property; but the present case does not fall within any such exception.

[Ed. Note.—For other cases, see *False Pretenses*, Dec. Dig. § 7.*]

(Additional Syllabus by Editorial Staff.)

3. WORDS AND PHRASES—"STELLIONATE." In Scots and civil law the word "stellionate" denotes all such crimes in which fraud is an ingredient, as have no special names to distinguish them, and are not defined by any written law, and hence Pen. Code 1895, § 670, providing that one using any deceitful means or artful practice other than those mentioned in the Code by which an individual or the public is defrauded and cheated shall be punished as for a misdemeanor may be said to be the statute against stellionates.

Error from City Court of Hall County; Geo. K. Looper, Judge.

Harry Foster was convicted of cheating and swindling, and he brings error. Reversed.

B. P. Gaillard, Jr., for plaintiff in error.
Fletcher M. Johnson, Sol., for the State.

POWELL, J. The defendant was prosecuted and convicted of cheating and swindling. It seems from this record that there was in Gainesville a grass widow named Mrs. Robertson, and that she had as an intimate acquaintance the defendant, Foster, who was a young married man, connected with some kind of a show. According to Mrs. Robertson's version of the transaction here involved, Foster told her that he represented a Cincinnati company which organized lodges and furnished counterfeit money to its members; that he could cause her to be initiated by her paying the sum of \$100, and that she would receive \$500 in counterfeit money; but that she would have to go to

Jacksonville, Fla. (where the company's agent would be on January 12-14), to be initiated and get the money. It was understood between them that they were to leave Gainesville secretly, so, on the night of January 12th, she privately met him at the railroad station. Here she gave him \$10 to purchase her ticket to Atlanta. He purchased it for \$3.15 and offered her back the change, but she told him to keep it for her. In Atlanta she gave him \$20 with which to buy her a mileage book, and he bought that for her, putting the book in his pocket after securing her transportation to Jacksonville from it. Arriving in Jacksonville next day, she gave him the \$100 with which he was to get her the \$500 in spurious currency. He did not come back. She was left penniless, but borrowed enough money from a policeman to get back home. She returned from Jacksonville on the same day she arrived there.

The defendant's statement was that the affair was purely a meretricious escapade; that he and the woman left secretly and went to Jacksonville merely on a pleasure trip of a libidinous nature; that she gave him her money to keep for her, because she had no safe means of keeping it herself; that on the day of their arrival in Jacksonville, after they had spent awhile in the room they were jointly occupying, he went down to the bar where he met a number of old acquaintances; that he there became involved in a fight in which he was severely cut and slashed with a knife, and he was sent to the hospital where he was confined for some time; that Mrs. Robertson, taking fright at what had happened, left him and returned to Gainesville. No other witness testified.

What the truth of this affair is, we, of course, do not know. Our personal views on that subject are not material. The jury's finding has given credence to the woman's version, and we must accept that as conclusive of the facts. But do the facts make a case of cheating and swindling in Hall County in which Gainesville is located? The accusation was apparently based on section 670 of the Penal Code of 1895, which provides: "Any person using any deceitful means or artful practice, other than those which are mentioned in this Code, by which an individual, or the public, is defrauded and cheated, shall be punished as for a misdemeanor." In Scots and civil law, the word "stellionate" is used to denote all such crimes in which fraud is an ingredient, as have no special names to distinguish them, and are not defined by any written law. This section may, therefore, be said to be the statute against stellionates. However, the elements essential to the maintenance of a prosecution under it are tolerably well defined by the decisions of the court. There must be a false pretense, device, trick, or contrivance fraudulently made or enacted by the defend-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ant with intent to deceive the prosecutor or person injured, so successfully accomplished that the prosecutor or person injured is in fact deceived and thereby suffers loss or damage. If the false pretense consists in a representation, it must relate (in part at least, and materially so) to a present or past fact or state of facts, and not consist merely in a false promise as to something to happen in the future. If the representation relied on by the state in this case be that there was a Cincinnati company forming lodges and selling counterfeit money to its initiates, the state did not prove that the representation was false. If the representation relied on be the statement that a representative of that company would be in Jacksonville on a named day and would deliver the money, the prosecution cannot be maintained, for that related to a future matter.

But beyond all this, the prosecution should not lie for the offense of cheating and swindling under the facts of this case. How was Mrs. Robertson swindled? We must eliminate all transactions occurring out of Hall county, except in so far as they illustrate and give legal point to what occurred there. Was Mrs. Robertson deceived in Hall county? Yes; she was deceived into believing that if she would go to Jacksonville, Fla., she could get \$500 in spurious currency in return for \$100. She makes no complaint of not getting all she expected to get out of the trip and in return for the money she expended in connection therewith, except that she did not get the counterfeit money. The transaction in Jacksonville whereby she was induced to turn the \$100 over to him must be eliminated; for that occurred in Florida. So the question resolves itself into this: Can the defendant be convicted of cheating and swindling because he falsely represented to the prosecutrix that the existing conditions were such that, if she would go to certain expense, she could buy a certain amount of counterfeit money, and she, believing him, incurred that expense and did not get the counterfeit money? The question must be answered in the negative. If the representation had proved true, she would have been in a worse fix than she was when they proved untrue. The very possession of the counterfeit money would have made her a felon. As it was, when she did not get it, she was simply left as a foolish woman with less money and more experience; and, in legal contemplation at least, even this is better than being a felon.

We are not to be understood as holding that cheating and swindling cannot be predicated of an unlawful transaction. There are many transactions for which the state can prosecute where the parties by reason of the uncleanness of their hands, would not be allowed to maintain a civil action. Thus, although the sale of liquor is a crime in this

state, yet if the keeper of a blind tiger should represent to a prospective purchaser that the contents of a bottle was corn whisky, and should sell it as such, receiving therefor the purchaser's money, when in fact the bottle contained water only, he could be held for cheating and swindling. Or, if in a similar case the prospective purchaser should palm off on the keeper of a blind tiger in the nighttime a worthless slip of paper as a dollar bill, and receive in exchange therefor a quart of whisky, the person so deceiving the seller of the liquor could be convicted of cheating and swindling. However, it must be noticed in each of these illustrations that the person deceived parts with something of value. It is true that in this state liquor cannot be said to have any market value in the full sense of the words, yet it is a thing of value. But in no sense is counterfeit money a thing of value. The very possession of it is criminal. It is a violation of law to make it, to own it, or use it. It is utterly without value. Suppose that the defendant had said to the prosecutrix: "Your sworn enemy is in Jacksonville, if you will go there with me and pay me \$100, I will show that enemy to you that you may poison him." Suppose the defendant's statement were a lie, could the transaction be treated as cheating and swindling? The privilege of poisoning one's enemy is not a thing of value.

This case is also to be distinguished from those cases in which the defendant, by imposing on the credulity or weak-mindedness of the prosecutor has caused him to pay money for something which could not be of value, but which the prosecutor was led to believe was in fact so. In such cases a prosecution for cheating and swindling may lie. But in this case, the prosecutrix acted with her eyes open; she admitted that she knew that the money she was to get would not be good money.

Plainly, the conviction cannot rest on the failure of the defendant to return the change out of the \$10 bill which he received from the prosecutrix at Gainesville to buy her railroad ticket to Atlanta. She asked him to keep that for her. If he failed to return it on demand, the criminality of the transaction might be investigated under an indictment for larceny after trust, but not under this accusation for cheating and swindling. However consummate the defendant's knavery may appear, however pitiable is the plight of the prosecutrix, we are constrained to hold that the defendant's conviction must be set aside. And after all—

"When lovely woman stoops to folly,
And finds too late that men betray,
What charm can soothe her melancholy?
What art can wash her guilt away?"

Judgment reversed.

(8 Ga. App. 107)

GIBBS v. STATE. (No. 2,398.)

(Court of Appeals of Georgia. July 26, 1910.)

*(Syllabus by the Court.)***1. BURGLARY (§ 4*)—CHARACTER OF BUILDING—"DWELLING HOUSE"—RAILROAD CAR.**

A railroad car may be treated as a "dwelling house," and may be the subject of burglary, when it is used exclusively for the purposes of habitation.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. §§ 14-18; Dec. Dig. § 4.*

For other definitions, see *Words and Phrases*, vol. 3, pp. 2285-2295; vol. 8, p. 7646.]

2. BURGLARY (§ 41*)—SUFFICIENCY OF EVIDENCE.

The defendant's guilt of the crime of burglary being wholly dependent upon the inference arising from the possession of goods stolen at the time of the burglary, and this possession being shown by the uncontradicted and unimpeached evidence to be lawful and consistent with the defendant's innocence of burglary, the verdict was contrary to the evidence, and a new trial should have been granted. *Hampton v. State*, 6 Ga. App. 778, 65 S. E. 816.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. §§ 94-109; Dec. Dig. § 41.*]

Error from Superior Court, Floyd County; Moses Wright, Judge.

Henry Gibbs was convicted of burglary, and he brings error. Reversed.

M. B. Eubanks and W. B. Mebane, for plaintiff in error. John W. Bale, Sol. Gen., for the State.

RUSSELL, J. The defendant in the court below was convicted of the offense of burglary. He moved for a new trial upon general grounds, and now excepts to the overruling of his motion.

Evidence on the part of the state showed that the prosecutor occupied a railroad car, which had been placed at a point called Atlanta Junction, as a dwelling house. "He lived, ate, and slept in this car." The car was placed there for the prosecutor and other section hands to live in. The car was entered on May 21st through one of the windows, and a certain suit case, some shoes, a coat, and pants were taken therefrom while the prosecutor was absent at his work. The pants were speckled or spotted color, the coat was black with stripes in it, and the shoes were low-quartered men's shoes, No. 9. About two weeks after these goods were taken, the defendant came up to the car at Atlanta Junction, in the presence of the prosecutor and several other men, wearing the pants and shoes which had been stolen, and talked "to the boys." The prosecutor "fool-ed him down to Mr. Christopher's house," and he was arrested. This is substantially the state's case as shown by the testimony. A witness, who was not sought to be impeached by proof of general bad character or by contradictory statements, and whose testimony was not contradicted by any evidence in the case, testified that on the 7th

day of June (following the burglary) she saw one Peter Baker sell the defendant a pair of shoes and pants similar to those that were lost for 60 cents. The other persons mentioned by this witness as being present at the time of the transaction were not introduced by the defendant; but there was no conflict between this testimony of the defendant's witness, which accounts for the defendant's possession of the goods, and the testimony of the prosecutor. On the contrary, the prosecutor himself testified that he knew Peter Baker; that Peter lived in the quarters, and perhaps knew that he had those things in the car.

1. A railroad car, which is withdrawn from service as such, and is used exclusively for the purposes of habitation, as the car in this case was shown to be, may be so included within the term "dwelling house" as to be the subject of burglary, and one who breaks in or enters it for the purpose of committing a felony or a larceny therein may properly be convicted of burglary, instead of the lesser offense of breaking and entering a railroad car.

2. Upon the evidence submitted, the conviction of the defendant was not authorized. The corpus delicti was proved, it is true; but the only circumstance connecting the defendant with the perpetration of the offense was the possession of part of the stolen property, and this possession was so explained by uncontradicted testimony as necessarily to rebut the inference arising from possession of the stolen property. The decision must be controlled by the ruling in *Hampton v. State*, 6 Ga. App. 778, 65 S. E. 816, and similar cases. If the witness who corroborated the defendant's statement had been impeached or discredited in any way, we should not feel authorized to disturb the verdict. If there were any circumstance which would supply a reason why the jury did not believe this witness, we would not interfere. If there had been any testimony that the witness was unworthy of belief on account of general bad character, or in a conflict between different portions of the witness' own testimony, if the witness had made contradictory statements either previously or upon the trial, or if there had been any evidence directly or circumstantially in conflict with her testimony, the verdict of the jury would be authorized; but a jury cannot arbitrarily disregard testimony which is wholly unimpeached and not contradicted, unless it is in relation to a matter which is unreasonable or impossible.

If, upon another trial, the witness is shown by testimony to be unworthy of credit for any legal reason, or by any method provided by law, the testimony delivered upon this trial might be discredited, and the jury authorized to disregard it; but in the

absence of some testimony to this effect upon the trial now under review it appears to us that the jury merely arbitrarily disregarded uncontradicted and unimpeached evidence, and it is beyond their power to do this in any case.

Judgment reversed.

(3 Ga. App. 44)

ATLANTIC COAST LINE R. CO. v. BLALOCK. (No. 2,644.)

(Court of Appeals of Georgia. July 5, 1910. Rehearing Denied July 19, 1910.)

(Syllabus by the Court.)

1. PLEADING (§§ 11, 252*)—MASTER AND SERVANT (§ 80*)—ACTION FOR WAGES—SUFFICIENCY OF PETITION.

The court did not err in overruling the general demurrer; and, the objection made by the only special demurrer which was well taken having been cured by amendment, there was likewise no error in overruling the special demurrers and in refusing to dismiss the petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 31, 742; Dec. Dig. §§ 11, 252;* Master and Servant, Cent. Dig. § 113; Dec. Dig. § 80.*]

2. APPEAL AND ERROR (§ 1061*)—REVIEW—NONSUIT.

An exception based upon the refusal of the court to award a nonsuit will not be considered, where, subsequently thereto, the case is submitted to the jury, and, a verdict being rendered against the defendant, a motion for a new trial is made which presents the complaint that the verdict is contrary to the evidence and without evidence to support it. Where a motion for a new trial is based upon this ground, the court will review the sufficiency of the evidence as a whole, in the light of the verdict, and will not merely consider the sufficiency of the plaintiff's case to withstand the nonsuit at the particular stage at which the motion for nonsuit was made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4210; Dec. Dig. § 1061.*]

3. WORK AND LABOR (§§ 18, 28*)—EFFECT OF EXPRESS CONTRACT—EXTRA WORK.

Even though a trainhand was employed under a schedule of wages to serve as a flagman between two designated points, this fact would not prevent his recovering on a quantum meruit for additional services not provided for in the schedule of rates, if he was directed to perform such additional services and did perform them satisfactorily. Evidence that an employer pays a stipulated amount for certain services may afford a basis for the conclusion that the rendition of one-half of the given service would be worth one-half of the amount at which the whole service was valued.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 28, 55; Dec. Dig. §§ 18, 28.*]

4. PAYMENT (§ 74*)—EVIDENCE—RECEIPT.

A receipt, being only prima facie evidence of payment, is subject to be denied or explained by parol evidence; and, if the explanation given is satisfactory, the receipt may be disregarded by the jury.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 226-231; Dec. Dig. § 74.*]

Error from City Court of Tifton; R. Eve, Judge.

Action by William Blalock against the Atlantic Coast Line Railroad Company. Judg-

ment for plaintiff, and defendant brings error. Affirmed.

Geo. E. Simpson and Bennet & Branch, for plaintiff in error. C. C. Thomas, for defendant in error.

RUSSELL, J. 1. Blalock brought suit upon account against the Atlantic Coast Line Railroad Company, attaching to his petition an itemized statement of the services rendered by him as flagman, and allowing credit for certain payments made him by the defendant, and showing a balance in his favor of \$184.95. He alleged that he went into the employ of the defendant company under their schedule of wages for trainmen and yardmen which was effective March 1, 1907, and under which, as he alleged, all flagmen of the company worked and received their pay. He alleged: That the schedule of wages for flagmen on local freight trains between Tifton and Waycross for one continuous trip a day was \$45 per month. The schedule of wages between Waycross and Brunswick for a round trip each day was \$45 each month. That he was required and directed by the defendant to make the run between Tifton and Waycross each day, for which he was entitled under the schedule to be paid at the rate of \$45 per month, and also, in addition to this, as he was required to make one-half of the round trip between Waycross and Brunswick each day in addition to the regular daily run between Tifton and Waycross, he was entitled for this half round trip to one-half of the amount set forth in the schedule of wages for a round trip, to wit, at the rate of \$22.50 per month. He alleged that during the term of his service he earned \$525.00, but had only been paid \$340.05, leaving a balance of \$184.95 due him, as appeared by his statement of account attached. Plaintiff further alleged a demand for payment, and averred that when he placed his claim in the hands of an attorney, and demand was made by his attorney, he was immediately discharged because said demand was made.

The defendant demurred to the petition generally, upon the ground that it failed to set forth a cause of action and also demurred specially, upon several grounds, which it is not necessary to state in extenso. As to that portion of the petition which alleged that the petitioner was immediately discharged because of his demand, the court sustained a demurrer based upon the ground that this impertinent and irrelevant statement was calculated to prejudice the rights of the defendant. In response to this ruling, that portion of the petition was stricken by the plaintiff. When this had been done, we are of the opinion that the trial judge properly refused to dismiss the petition. It is certainly not subject to a general demurrer. Nor do we think that the plaintiff was required to attach a schedule of wages adopted. The con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tents of this schedule was not a matter of pleading but of evidence. So far as the petition was concerned, the definite and detailed reference to the schedule gave the defendant ample opportunity to object to it or defend against it in case it was introduced.

The second special demurrer, based upon the ground that the petition does not allege that the schedule did not provide for wages for a one-way run, as run by the plaintiff between Tifton and Brunswick, was, for a similar reason, not well taken; and furthermore the demurrer was without merit because it was naturally inferable that the schedule did not provide for a one-way run; from the fact that the plaintiff stated that the provision of the schedule upon that subject was for a double-run return trip, or a run each way. It was likewise immaterial, as held by the court below, in what manner the schedule was promulgated, and the statement that all of the flagmen of the company worked and received pay under the schedule might well be held irrelevant; but it is not objectionable as being a conclusion of the pleader. It is plainly a statement of fact. The statement that the plaintiff was entitled to one-half the amount set forth in the schedule of wages for the round trip, viz., the rate of \$22.50 per month for making one-half of the round trip, is not a conclusion of the pleader in one sense, while it may be in another. It is more properly a statement of the pleader of the amount of the plaintiff's demand as the net result of his figures shown by the statement of the account and the facts previously detailed in the petition. Such a summary of the plaintiff's case is always allowable, although it may be opinionative. The plaintiff who sues for \$5,000 damages merely states that in his opinion the injury has damaged him \$5,000, basing this opinion upon the antecedent facts which he alleges to exist. The court did not err in overruling the general demurrer, and, the objection to the only special demurrer which was well taken having been cured by amendment, there was likewise no error in overruling the special demurrers and in refusing to dismiss the petition.

2. At the conclusion of the evidence for the plaintiff the defendant made a motion for nonsuit, which was overruled, and the case proceeded to trial, resulting in a verdict in favor of the plaintiff. This court has several times held that an exception based upon a refusal to allow a nonsuit is nugatory if the case proceeds to trial and the complaint is thereafter made by the defendant that the finding of the jury was without evidence to support it. In such a case, even if the court erred in not awarding a nonsuit at the time the motion was made, yet if, considering the evidence as a whole, the verdict is right, the error becomes immaterial. In such event it cannot be said that the court abused its discretion in opening the case to further testimony; and, even though

some of the testimony in support of the verdict may have come from the defendant himself, it would be immaterial if the evidence, taken as a whole, supported the verdict of the jury. An exception based upon the refusal of the court to award a nonsuit will not be considered where, subsequently thereto, the case is submitted to the jury, and, a verdict being rendered against the defendant, a motion for a new trial is made which presents the complaint that the verdict is contrary to the evidence and without evidence to support it. Where a motion for a new trial is based upon this ground, the court will review the sufficiency of the evidence as a whole, in the light of the verdict, and will not merely consider the sufficiency of the plaintiff's case to withstand the motion for a nonsuit at the particular stage at which the motion for nonsuit was made. In *Ellenberg v. Southern Ry. Co.*, 5 Ga. App. 390, 63 S. E. 240, we held that the discretion of the judge should be liberally exercised in behalf of allowing the whole case to be presented, and that, "except in rare cases, as where the defendant would be subjected to unfairness or undue prejudice, or where the plaintiff has given evidence of intention deliberately to trifle with the court, or to delay the progress of the trial, it is an abuse of discretion for the trial judge to refuse to allow the plaintiff to produce additional evidence sufficient to avoid a nonsuit." As, in the broader light of our advancing intelligence, we more plainly see that the object of a trial is to reach the truth, the less is a progressive profession inclined to tolerate the observance of any technical rule which will tend only to test the skill and vigilance of the counsel, when it is at the expense of the real justice of the case.

3. Upon the trial the plaintiff testified that he was employed as a flagman, and that at the time of his employment the schedule of rates (which was later introduced in evidence) prescribed a salary of \$45 per month for a daily run between Tifton and Waycross and \$45 per month for a run each way (that is, going daily and returning the same day) between Waycross and Brunswick. There was no express contract (according to the plaintiff's testimony) between himself and the company, and the amount of his wages was only inferable from the amount fixed by the schedule. He testified that two crews were doing the work which, according to the schedule, should be performed by three crews of trainmen. In this latter statement he was corroborated by other testimony in the case. On the 8th of each month during the period of his service he was paid certain amounts which, upon examination, we find to be correct, if his wages were calculated as being \$45 per month, but which would not be payment for the time served by him in any of the months if, as testified by him, he performed additional services to those which (as prescribed by the schedule)

would entitle him to \$45 per month. The whole point in the case is whether the plaintiff was entitled to recover anything on a quantum meruit for a half run per day between Waycross and Brunswick, because the schedule is silent as to any such service as this. The schedule of wages allows trainmen \$45 per month for a daily trip between Waycross and Brunswick and return. It says nothing as to the compensation of a trainman who, in addition to making the daily trip between Tifton and Waycross, is required to go on to Brunswick, and the next day return from Brunswick to Waycross, serving the company as a trainman before proceeding on his regular run from Waycross to Tifton. It is undisputed that the plaintiff performed this service. In other words, he made a flagman and a half. He received pay for one flagman. The company refused to pay him for the additional service performed between Waycross and Brunswick, although his service, in the way the trains were arranged, and performance of like service on the part of another flagman, enabled the company to dispense with the third flagman, who was ordinarily required, and who, according to the testimony, was "cut out."

Counsel for the railroad company takes the position that the adoption of the schedule of rates, and the entrance of the plaintiff into the employment of the company under the schedule of rates, created a contract which precludes the plaintiff from recovering anything upon a quantum meruit. The trial judge seems to have entertained a contrary view, and we concur in the opinion, evidently entertained by him, that the mere fact that the contract (if one may be said to have been made by the schedule of rates) fixed the value of the plaintiff's service as a flagman between Tifton and Waycross, would not prevent him from receiving a proper compensation without regard to the contract, for any extra services he might perform, not included in the contract. As the plaintiff testified that he was directed to perform the service of a flagman between Waycross and Brunswick, it is undisputed that the defendant knew he was performing it, and received the benefit of his services. If the schedule of rates contained no provision for this service, is it just and right that the defendant, for that reason, should receive services in addition to those prescribed by the schedule of rates without compensation? We think not. It is true that there is evidence to the effect that the plaintiff agreed to perform the entire service rendered by him between Tifton and Brunswick for \$45 per month; and, if this was the truth, the plaintiff was not entitled to recover anything for services performed by him in addition to those provided for by the schedule of rates. But the plaintiff positively denied the testimony to that effect, and the credibility of the witnesses, and the as-

certainment of the truth as to this point, was a matter exclusively for determination by the jury.

Granting that the jury were authorized to find that the plaintiff performed services in addition to the services prescribed for the run between Tifton and Waycross, and the value of which was fixed by the schedule of rates, and that he was entitled to some compensation therefor, we do not see that there could be any fairer means of ascertaining the true value of such extra services than that adopted by the jury. The schedule of rates was introduced before the jury without objection; and, in fact, the defendant had demurred to the petition because it was not attached thereto. This schedule of rates showed that the valuation fixed by the company upon a run between Waycross and Brunswick, going both ways in one day, was \$45 per month. The plaintiff testified that he was required to go one way each day. Were not the jury authorized, from these facts, to infer, as well as if it had been a matter of expressed testimony, that if two trips between Waycross and Brunswick daily, for a month, were worth \$45 a month, one daily trip over the same points would be worth one-half as much? It seems so to us, and therefore, agreeing with the contention of the counsel for the plaintiff in error that the plaintiff in the court below was required to establish the value of his extra services by quantum meruit, we think the trial judge properly overruled the motion for a new trial, over the objections that the evidence was improperly admitted on the trial, and that the verdict was not sufficiently supported by the testimony.

4. Considerable stress is laid upon the fact that Blalock signed the payroll of the defendant company, acknowledging receipt in full of all the amounts claimed by him, except \$15.10 which was tendered him by the company. Blalock did not deny signing these receipts; and they might have afforded a conclusive circumstance to rebut every contention he maintained with regard to what he should receive for his services. The receipts might also have served to satisfy the jury that there had been complete accord and satisfaction. However, Blalock explained these receipts, as he had a right to do; and, in view of the finding of the jury, it must be held that his explanation was satisfactory. Under section 5208 of our Civil Code of 1895, "receipts for money are always only prima facie evidence of payment, and may be denied or explained by parol." According to Blalock's testimony, he never knew that the receipts purported to be in full, and he was constantly asking for payment for his extra services and expecting to receive it. According to his testimony, the payments were mutually understood to be only partial payments. According to the verdict of the jury, this was the truth of the case. The

trial judge was satisfied with the finding of the jury, and it is not within our power to say that the verdict did not speak the truth. Judgment affirmed.

(8 Ga. App. 10)

HILTON v. SYLVANIA & G. R. CO.

(No. 2,131.)

(Court of Appeals of Georgia. July 5, 1910.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 133*)—RIGHTS OF STOCK-HOLDERS—TRANSFER OF STOCK.

The owner and holder of a certificate of stock has the right to have the stock transferred into his name on the books of the corporation, and the illegal refusal of the president of the corporation to permit the transfer makes the corporation liable for any damages resulting from the refusal.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 513-520; Dec. Dig. § 133.*]

2. TRIAL (§ 242*)—MISLEADING INSTRUCTIONS.

Where the material issues in a case depend upon the consideration of documentary evidence, the court should not charge the jury that they "should receive the evidence from the witnesses on the witness stand." In such case an instruction of this restrictive character tends to mislead and confuse.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 569-576; Dec. Dig. § 242.*]

3. CORPORATIONS (§ 133*)—REFUSAL TO TRANSFER STOCK—ACTION FOR DAMAGES—SUFFICIENCY OF PETITION.

A petition to recover damages from a corporation for the refusal of the president of the corporation to allow a proper transfer of stock upon the books of the corporation must contain allegations of facts showing damage from the refusal.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 133.*]

(Additional Syllabus by Editorial Staff.)

4. CORPORATIONS (§ 133*)—REFUSAL OF CORPORATION TO TRANSFER STOCK.

The illegal refusal of a corporation to transfer stock to the name of the owner constitutes a conversion of the stock by the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 513; Dec. Dig. § 133.*]

5. CORPORATIONS (§ 133*)—REFUSAL OF CORPORATION TO TRANSFER STOCK—MEASURE OF DAMAGES.

Where a corporation converts stock by illegally refusing to transfer it on its books to the name of the owner, the measure of damages is the value of the stock at the time of demand and refusal.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 520; Dec. Dig. § 133.*]

6. CORPORATIONS (§ 133*)—REFUSAL TO TRANSFER STOCK—LIABILITY FOR ACTS OF OFFICERS.

Under Civ. Code 1895, § 1861, providing that a corporation is liable for acts of its officers in the sphere of their appropriate duties, a corporation is liable for the illegal refusal of its president to allow the proper transfer of stock to the name of the true owner.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 513-520; Dec. Dig. § 133.*]

Error from City Court of Sylvania; H. A. Boykin, Judge.

Action by L. H. Hilton against the Syl-

vania & Girard Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

Hilton brought suit for damages against the Sylvania & Girard Railroad Company, alleging, in substance: That on July 5, 1906, he was the owner of five shares of capital stock of the defendant company, and was the holder of the stock certificate representing these shares. That this certificate had been originally issued to one Ennels, from whom he bought the stock, and who delivered the certificate to him. That on said date the plaintiff had an offer from a third person for the purchase of four of these shares. That the defendant had no by-law providing the mode in which transfers of stock should be made, but on the face of each of the stock certificates was printed the following: "Transferable only on the books of the corporation by the holder thereof, in person or by attorney, upon the surrender of this certificate properly indorsed." That the plaintiff, in order to make delivery of the four shares for which he had an offer of purchase, called upon the president of the defendant company to transfer this stock to his name, and stood ready to surrender the certificate properly indorsed, and made a formal demand for the transfer on the books of the corporation. That the defendant, through its president, without cause, refused to transfer the stock on surrender of the certificate, or to issue a new certificate in lieu of the old certificate, and therefore the plaintiff was unable to deliver the four shares he had sold. That he had previously accepted the offer made to purchase the stock, but that the proposed purchaser declined to take the stock, except upon condition that the transfer be made, and, the plaintiff not being able to have the transfer made by the defendant, the purchaser withdrew his offer. That the price offered for the four shares was the sum of \$2,500, or \$625 per share. By an amendment to his petition, to meet a special demurrer, the plaintiff alleged that this offer was made to him by Demere & Hammond, brokers of Savannah, Ga. He alleged that after the withdrawal of the offer he sold the five shares, making diligent effort to sell at the best price obtainable, and obtained for them \$1,000 less than he had been offered for the four shares. He sued for the special loss of \$1,000 on the four shares, and for \$625 as the value of the one share, which he alleged was worth that amount at the time he received the offer for the four shares and when his demand for transfer was refused by the company. He based his right to recover the value of the one share on the ground that the refusal of the defendant to transfer the five shares amounted to a conversion of the one share. On demurrer the court struck from the petition all allegations of damage

by reason of the conversion of the one share of stock, and restricted the issue to the actual loss of profit in the sale, alleged to be \$1,000, to which ruling the plaintiff excepted pendente lite. The defendant contended that the offer of purchase of the four shares was not made bona fide, but was made through the procurment of the plaintiff, and was fraudulent. The jury returned a verdict for \$100 in favor of the plaintiff, and he moved for a new trial, on the general grounds, and filed an amendment excepting to certain instructions of the court. The motion was overruled, and he sued out this writ of error.

It appeared from the evidence on the trial that in the year 1906 Hilton, with certain parties identified with him, together with one Morel and certain parties identified with him, formed a corporation known as the Sylvania & Girard Railroad Company, the defendant in this suit; that there were two so-called factions in this company, known respectively as the Hilton and Morel factions; and that the capital stock of the company was \$10,000, evenly divided between the two factions, neither having control. By agreement at the meeting for organization, the Morel faction was given the presidency and control of the directorate of the company; the Morel faction having three of the five directors. Later one of the directors died, and the Hilton faction applied for a writ of mandamus to compel a meeting of the stockholders, to be held for the purpose of electing a board of directors. This mandamus proceeding was decided by the Supreme Court in favor of the applicants. See *Sylvania & Girard R. Co. v. Hoge*, 129 Ga. 734, 59 S. E. 806. At the next meeting of the stockholders for the election of directors, the five shares of stock now in controversy were the cause of considerable dissension. Ennels, the original owner of the five shares, was one of the Morel faction. Becoming offended with Morel, he sold his five shares to Hilton, which gave the Hilton faction control of the corporation. Morel and his friends refused to recognize the sale from Ennels to Hilton as being valid, and at the next regular meeting of the stockholders, of which Morel was chairman, Hilton was not allowed to vote these five shares; their action being based on the contention that in the incorporation of the company it had been agreed between the two factions that Morel and his friends were to have indefinite control in the management of the company. Thereupon the two factions held separate meetings, electing separate officers and directors. Hilton and his friends brought an application for mandamus to compel Morel and his friends to turn over the physical property of the corporation to them, and the Supreme Court decided in favor of the applicants, on the ground that the agreement between the two factions of the shareholders to the effect that one of said factions, owning one-half of the corporation

stock, should have the right indefinitely to name a majority of the directors of the company, and thus manage and control its affairs, was against public policy, and therefore void. See *Morel v. Hoge*, 130 Ga. 625, 61 S. E. 487, 16 L. R. A. (N. S.) 1186.

The statement of the evidence up to this point, although not strictly relevant, illustrates to some extent the issues in the present case. Hilton proved substantially all the allegations of his petition. He proved positively and conclusively that he had been offered \$2,500 for the four shares of stock, by the brokerage firm of Demere & Hammond, of Savannah; that this firm, in making the offer for the stock, represented G. Noble Jones; that the \$2,500 was actually offered by Jones through the firm for this stock; that this money was in a bank at Savannah, subject to the order of Hilton, on presentation of the certificate of the stock duly transferred on the books of the corporation; that the only reason why the sale was not consummated was the failure of the defendant, through its president, Morel, to recognize as valid his purchase of the five shares of stock from Ennels, and to transfer the same to his name on the books of the corporation; that the purchaser refused to accept the stock certificate unless this transfer was made; that he had made, in person and by letter, repeated demands on Morel, as president of the company, to make this transfer, in order that he might consummate the sale, notifying Morel that he had had an offer of sale for the stock and could not consummate the sale unless the transfer was made, and that his refusal to transfer would subject him to great damage and loss; that after the refusal of the company to make the transfer, and the refusal of the proposed purchaser to accept the stock without the transfer, he used all due diligence to sell the same, even offering it to Morel himself; and that the best price he could get for it was \$1,500. The defense relied upon, that the sale to Jones was not a bona fide sale, but was fraudulent, was not sustained by any evidence, direct or circumstantial.

T. J. Evans and A. B. Lovett, for plaintiff in error. J. W. Overstreet and E. K. Overstreet, for defendant in error.

HILL, C. J. (after stating the facts as above). 1. In our opinion, under the evidence and the law applicable thereto, the plaintiff was entitled to a verdict for \$1,000. He was the owner of the five shares of stock bought by him from Ennels. His title to this stock had been settled by the adjudication of the Supreme Court in the case of *Morel v. Hoge*, supra. He had a bona fide offer of \$2,500 for four shares of this stock. This offer was clearly shown, and it failed of consummation solely because of the refusal of the president of the company to make the proper transfer upon the books of the cor-

poration. The effort made by the defendant to attack the bona fides of this sale was not successful. While it is true that fraud may be shown by slight circumstances, and by inferences fairly and reasonably deducible from the facts, yet the jury cannot arbitrarily assume its existence; but there must be some proof, direct or circumstantial, from which such an hypothesis can be drawn. In this case the evidence in behalf of the plaintiff is clear and undisputed that the offer of \$2,500 was made to him by the brokerage firm of Demere & Hammond, of Savannah, representing G. Noble Jones; that it was made in good faith; that the plaintiff did not know this firm, and had had no communication with them on the subject before they made the offer in a letter which he received from them. There is no evidence whatever that he had ever had any personal communication with G. Noble Jones, the alleged purchaser of the stock through the firm of brokers.

The court charged the jury the law of actual and constructive fraud, and this portion of the charge was assigned as error. The jury must have been misled by these instructions. There appears no evidence whatever upon which to base such instructions, and they should not have been given. The verdict for \$100 in favor of the plaintiff seems to have been purely arbitrary on the part of the jury. The suit was for an actual loss of profits on the sale of four shares of stock, amounting to \$1,000, and the proof established indisputably that this was the loss. The proof clearly established that the plaintiff could have procured \$2,500 for the four shares of the stock, but for the refusal of the defendant company, through its president, to make the transfer on the books of the company, and the evidence for the plaintiff is also uncontradicted that, after this sale had failed by reason of the company's conduct, he made all due diligence to sell the stock and could only get for the four shares \$1,500. The jury could not have found, under the evidence, any other sum than \$1,000; for if they believed that the sale was fraudulent, as contended by the defendant, their verdict should have been against the plaintiff entirely. There was no evidence upon which to base the verdict for \$100. But, of course, the plaintiff cannot recover damages against the company unless the refusal of the president to transfer the stock on the books of the corporation was illegal. Stock in a railroad corporation in this state is personal property (Civ. Code 1895, § 2165), and it has been universally held that the illegal refusal of a corporation to transfer stock to the name of the owner constitutes a conversion of the stock by the corporation so refusing; the measure of damages being the value of the stock at the time of demand and refusal. *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 576, 48 S. E. 226, 102 Am. St. Rep. 115; 26 Amer. & Eng. Enc. of Law, 887; 2 Cook on Corpora-

tions, § 392. That a corporation is liable for the illegal refusal of the president to allow the proper transfer of stock to the name of the true owner cannot be doubted. Civ. Code 1895, § 1861. "Subject to the right of the corporation to assert a lien on shares, * * * both the assignor and the assignee have a legal right to have a transfer made on the books of the corporation and a new certificate issued to the assignee." 4 Thompson on Corporations, §§ 4628, 4650. And in some jurisdictions this transfer may be compelled by mandamus. 2 Cook on Corporations, §§ 389, 392; *Thornton v. Martin*, 116 Ga. 115, 42 S. E. 348.

To meet these well-settled principles of law, it is contended by the defendant that under the decision of the Supreme Court in the case of *Sylvania & Girard R. Co. v. Hoge*, supra, there was no duty resting upon the defendant corporation to transfer any stock upon its books, as in that case Justice Evans held that the corporation had neither charter nor by-laws which required a transfer on the books. The learned justice further held that where neither the charter, statute, nor corporate by-laws required a book transfer, the assignee of the certificate of stock might vote thereon, although on the books of the company the stock stands in the name of the assignor. In that case, however, it was not shown that there was a mode of transfer provided by the corporation; it was not shown that the stock certificate itself provided on its face that the stock was transferable only on the books of the corporation. These stock certificates together with the charter and the statute under which the corporation is organized constitute the contract of association between the various stockholders, and between the stockholders and the corporation. 26 Amer. & Eng. Enc. of Law (2d Ed.) 831. Where there is a by-law on the subject, the transfer should be made in the manner prescribed by the by-law. Civ. Code 1895, § 2165. But if there is no by-law on the subject, and nothing in the charter on the subject (as in the present case), should not the transfer be made according to the provisions written across the stock certificate? And where the certificate of stock, the evidence of the purchaser's title and ownership, gives notice that, to secure a good title, he must have the transfer recognized by the corporation, by registry on its books, is not such purchaser entitled to have such transfer duly made; and does not an arbitrary refusal to so transfer the stock, by the officer of the company, render the corporation itself liable in damages? In other words, does not the provision written across the face of the stock certificate have the force and effect of a by-law of the corporation; and does it not follow, if this be true, that the corporation is under a legal duty to transfer the stock upon demand? "In the case of a sale of stock, the purchaser's right

to have the stock transferred from the name of the seller into his own and to surrender the old certificate, if he desires, and have a new one issued to him in his own name, is unquestioned and unquestionable." 26 Amer. & Eng. Enc. of Law (2d Ed.) 877.

We therefore conclude, under these authorities, that, although the charter or by-laws contain no provisions on the subject of transfers of stock, yet, in view of the statement on the face of the certificate that the stock was "transferable only on the books of the corporation by the holder thereof, in person or by attorney, upon the surrender of this certificate properly indorsed," the plaintiff in this case had the right to have his stock transferred on the books of the corporation to his name, and the corporation was under a legal duty to make such transfer, and the failure of its proper officer to do so rendered it liable for any resulting damage.

2. Another ground in the amended motion for a new trial is that the court erred in charging the jury that they should receive the evidence "from the witnesses upon the witness stand." It was contended that this charge was prejudicial, as almost the entire case for the plaintiff was made by documentary evidence, such as letters, telegrams, etc. While we do not think a jury of ordinary intelligence would probably have considered these instructions as depriving them of the right to take into consideration the documentary evidence, yet it has been repeatedly ruled that such instructions, where there was material documentary evidence, was reversible error. *Stiles v. Shedden*, 2 Ga. App. 317, 58 S. E. 515; *Myers v. State*, 97 Ga. 79, 23 S. E. 252. The other excerpts from the charge excepted to, when considered in connection with the whole charge, are without material error. Of course, this does not refer to the charge objected to on the subject of actual and constructive fraud, which, as above intimated, was erroneous because not authorized by the evidence. Indeed, we might put the reversal in this case solely on the general grounds, without reference to any of the special assignments of error.

3. The court did not err in sustaining the demurrer to that part of the petition seeking to recover \$625 for an alleged conversion of one share of stock. While the plaintiff was entitled to have that share transferred on the books of the corporation, there is no averment of any damage resulting from the refusal of the defendant company to do so. There is no allegation that the plaintiff had been offered \$625 for that share, or that it could have been sold for this sum but for defendant's refusal to transfer it on the books to the name of the plaintiff or of any alleged purchaser. The refusal to transfer on demand was illegal, but no damage is alleged to have been caused thereby.

Judgment reversed.

(3 Ga. App. 70)

GRAY LUMBER CO. v. HARRIS et al.

(No. 2,860.)

(Court of Appeals of Georgia. July 19, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1195*)—DECISION—CONSTRUCTION.

Where, on reviewing a judgment of non-suit, the Supreme Court has rendered a decision which could not have been correctly rendered, as rendered, if a certain insistence of one of the parties had been considered well taken, it will, in future trials of the case, be construed as a decision against that insistence, although the matter is not mentioned in the course of the opinion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

2. LOGS AND LOGGING (§ 3*)—TIMBER DEEDS—CONSTRUCTION.

Where the vendor of standing timber sells it to another, and in the conveyance makes a stipulation by which the right to cut the timber is to terminate upon the expiration of three years from the time the vendee or his assign begins to cut it, the three-year period will not be started to running by the act of an outsider in entering upon the lands and cutting a portion of the timber without the consent of the vendee or his assign; aliter, if the person doing the cutting has authority to do so from the then holder of the title to the timber under the conveyance mentioned.

(a) In a case like that just mentioned, if the person who wrongfully did the cutting should, more than three years thereafter, purchase the timber rights from the person who owned them at the time of the unauthorized cutting, his prior trespass, in having entered upon the timber and cut a portion of it without authority, would not operate to forfeit the title to the timber, on the theory that the period of three years had expired since he (the person thus acquiring the title) had commenced to cut it.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

3. LOGS AND LOGGING (§ 3*)—TIMBER DEEDS—ORAL WAIVER OF CONDITION.

Though standing timber is realty, and a conveyance of standing timber should be in writing, yet where such a conveyance contains a clause whereby the vendee's right to cut the timber is to expire within a certain time after the happening of a designated act, the vendor may orally waive his right to insist upon counting the time of this limitation as running because of the happening of an act which, but for his waiver, might be considered as the starting point.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

4. TRESPASS (§ 19*)—TITLE TO SUPPORT ACTION.

The plaintiff in trespass recovers on the strength of his own title, and not on the weakness of the defendant's. The alleged error in respect to the admission of testimony in regard to the asserted title of the defendant in this case was immaterial.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 18-31; Dec. Dig. § 19.*]

(Additional Syllabus by Editorial Staff.)

5. WORDS AND PHRASES—"WAIVER."

"Waiver" is a voluntary relinquishment of some known right, benefit, or advantage, which, except for such waiver, the person waiving would have enjoyed.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381, 7381, 7382.]

Error from City Court of Douglas; E. Wall, Judge.

Action by the Gray Lumber Company against E. G. Harris and others. Judgment of nonsuit, and plaintiff brings error. Reversed.

The Gray Lumber Company brought trespass against Harris et al. for the cutting of the pine timber suitable for sawmill purposes off certain lands in Coffee county. The plaintiff proved title to the lands in John Vickers, and then showed conveyances as follows: A deed dated September 18, 1889, from John Vickers to E. L. and H. Vickers, conveying the timber in dispute, and providing that the grantees were to have three years from the date of beginning to remove the sawmill timber, in which to remove the same. Also a conveyance of the same timber from E. L. and H. Vickers to W. W. Timmons and H. L. Covington, dated June 23, 1890. Also a conveyance from W. W. Timmons to H. L. Covington, dated June 10, 1899, transferring to him an undivided half interest in the timber in dispute; thus putting the entire title in Covington. Also a conveyance from H. L. Covington to the Gray Lumber Company, dated October 20, 1903, conveying not only the timber in dispute, but also the timber on many other lots of land in the same county. The plaintiff proved the value of the timber, and it was admitted that in the year 1904 the defendants cut and carried the timber away. The defendants introduced in evidence a conveyance from John Vickers to Peter Vickers, dated February 3, 1903, conveying the timber in dispute; and showed that Peter Vickers in March, 1903, transferred this conveyance to the defendants. Both parties, therefore, claim under a common grantor, John Vickers; and, so far as the question of title is concerned, it depends merely upon a comparison of the rights of the parties as respectively derived from John Vickers. No question of notice is involved as the plaintiff's conveyances were duly recorded. The case mainly hinges upon the fact that in the year 1897 the employees of the Gray Lumber Company, while cutting other timber in the vicinity of the timber in dispute, cut some few trees, variously estimated as being from 4 to 70, upon the lands in dispute. The contention of the defendants was that the three-year period designated by the lease, after which the right to cut the timber under the lease would expire, began to run from the date of this cutting in 1897, and that Vickers had the right to resell the timber after three years from that time. The plaintiff, however, insisted that it owned the title to the timber in fee, and that the restriction as to the time of cutting was a covenant, and not a condition; also that the cutting of the timber in 1897 having been done at a time when the title to the timber was not in the Gray Lumber Company, which did the cut-

ting, but in Timmons and Covington, the trespass of the Gray Lumber Company could not have operated to give a starting point for the running of the three years after which the rights of Timmons and Covington under the lease would expire; also that, even conceding that this cutting of the timber did operate as a starting point from which the three years was to be counted, Vickers, the owner of the reversion, had waived any right to insist upon this act as being sufficient to put the limitation clause of the lease into operation.

A previous suit between the same parties as to the same subject-matter has been before the Supreme Court for adjudication. See *Gray Lumber Co. v. Harris*, 127 Ga. 698, 56 S. E. 252. In that case a judgment of nonsuit was affirmed. In the present case the court directed a verdict for the defendant.

Lankford & Dickerson, for plaintiff in error. Lane & Park and J. W. Quincey, for defendants in error.

POWELL, J. 1. We consider that the decision of the Supreme Court has settled (at least so far as the present case is concerned) that the limitation clause of the timber conveyance from John Vickers, under which the plaintiff claimed, was such as to cause the estate held by the grantees in the timber to terminate within three years from the time that the grantees in that lease or any other person authorized by them began to cut the timber. If the point that the limitation clause in the lease was not a limitation upon the title—but merely upon the right of ingress and egress (i. e., was a covenant and not a condition), were well taken, it would have been a sufficient reason for the Supreme Court to have reversed the former judgment of nonsuit. Only upon the theory that the lease had terminated by the fact of the cutting and the running of the three years thereafter can the affirmance of the judgment of nonsuit be justified, under the facts presented by the record in the case then before the Supreme Court; and, therefore, while the court did not in express language refer to this feature of the case, the judgment rendered must be taken as having by necessary implication decided this branch of the plaintiff's case adversely to it.

2. The evidence was substantially different on the trial under review from what it was on the former trial, as appears from an examination of the facts set out in the course of the opinion of the Supreme Court and a comparison of them with the evidence in the present record. From the evidence on the former trial it appeared plainly that when the Gray Lumber Company, in 1897, did the cutting upon the timber in dispute, it did so intentionally, and with the consent of Covington, who was then the holder of the legal title to the timber under the first Vickers

lease. In the present record the defendants, in order to establish this element of the case (that the cutting was done intentionally and by the consent, actual or implied, of Covington), offered two witnesses who testified as to the declarations of one H. L. Gray, an employé of the plaintiff corporation, alleged to have been made just before the timber was cut, that they had bought this timber from Covington, and were going to cut it. However, Mr. Gray, as a witness on the trial, denied making any such statement. The woodsman of the Gray Lumber Company was introduced as a witness for the defendants, and testified that at the time this cutting in question was done he understood that the Gray Lumber Company had bought the Covington timber. He testified to some conversation had with one of the Messrs. Gray on the subject, but admitted on cross-examination that he did not know whether the Gray Lumber Company did at that time own the Covington timber or not; and that he did not remember whether Mr. Gray told him that he had bought the timber or merely that he had bargained for it, or merely had an option on it. He further testified that at the time he did this cutting he was under the impression that the Gray Lumber Company had bought all the timber owned by Covington, but later found that they had bought only part of it. Fairly construed, the testimony of this witness is susceptible of no other construction than that at the time this cutting was done Mr. Gray had said something to him about either having bought the Covington timber or some part of it, or having bargained for it, or having taken an option on it, and that the price was to be \$325 per lot, to be paid before they should have the right to cut it. The expression, "the Covington timber," it must be kept in mind, included a large amount of timber other than that contained in the tract in question. It was, therefore, under the evidence in the present case, issuable as to whether the Gray Lumber Company at the time of the cutting of the few sticks of timber on the tract in dispute, had any right to do so, under color of any authority from the then owners of the timber. The written conveyance which they acquired from Covington was dated several years after the cutting in question was done. As the court directed the verdict for the defendant, the plaintiff is to be given the benefit of all issues of facts and the inferences to be drawn therefrom; and in this view of the evidence, it may be stated that it does not appear that the cutting in question was done with the consent, actual or implied, of Timmons and Covington, or of either of them. The jury would have had the right to have found that the cutting was a mere trespass, having been committed either intentionally or under some mistake of right or of fact.

Defendants' counsel insist that the deci-

sion of the Supreme Court has adjudicated adversely to the plaintiff the point we are now discussing. The Supreme Court merely decided the case then before it upon the facts there presented, and we have before us a state of facts substantially different in principle. We cannot agree with counsel for defendant that the Supreme Court intended to hold, or did hold, that if the Gray Lumber Company trespassed on these lots in 1897, with no authority from the then owners of the timber conveyances to do so, this would operate to give a starting point from which the time mentioned in the limitation in the conveyance would begin to run, either generally as against all persons, or specially as against the Gray Lumber Company, upon its afterwards purchasing the timber from the then holders of the conveyance. If we understand the Supreme Court decision, what they held was that, if the Gray Lumber Company cut this timber with the authority of the holders of the timber conveyances, it would operate to start the limitation period to running; and that Mr. Gray's admissions that they were then the owners of the tract of timber, and that they had bargained for it from Covington, was sufficient to prove that the cutting was in fact done under the conveyance held by Covington, or by his consent. It seems too plain to admit of argument that if the Gray Lumber Company, in 1897, did the cutting without the consent or authority of Timmons and Covington, who then held the title to the timber as derived through the Vickers conveyance, it merely committed an act of trespass against Timmons and Covington, and that no act of the Gray Lumber Company could start the running of the limitation contained in this conveyance thus adversely held by the other persons. This being true, it follows that in 1908, the date on which Covington did convey to the Gray Lumber Company, he still held the legal title to the timber, and that the beginning of the limitation period had not then arrived. This being so, it must follow that Covington could convey the title to the timber to the Gray Lumber Company. But say the defendants: "Although as against Covington, or Timmons and Covington, the prior tortious cutting done by the Gray Lumber Company would not have given a starting point for the running of the time under the limitation clause in the conveyance, yet when the Gray Lumber Company became the holder of the rights formerly granted by Vickers, the transaction related back, so that as against the Gray Lumber Company its act is to be considered as sufficient to have started the time to running." We cannot concede this, for to impose such a penalty upon the Gray Lumber Company for its trespass would be to impose it indirectly upon Covington. It may be seen that if such were the legal result of the transaction, Covington would have been deprived of one of the most valu-

able rights which he had under the conveyance—the right to sell the timber to whomsoever would give the most of it. It is very probable that in 1903 the Gray Lumber Company, owing to the location of its sawmills and tramroads, was in a position to give more for this timber than any other prospective purchaser to whom Covington might have contemplated selling it, and yet if the contention of the defendant were to be considered well taken, Covington, howsoever unconnected he might have been with the commission of this trespass back in 1897, could not have sold the timber to the Gray Lumber Company; for, of course, a sale which could pass nothing, on account of the forfeiture which would immediately ensue, would in all fair contemplation have been the same as no sale at all. We know of no principle of law or of equity which would thus impair the rights of the holder of the legal title to sell and convey, on account of the act of a trespasser. The proposition here asserted is analogous to that stated in the Civil Code of 1896, § 3938, that, "if one without notice sell to one with notice the latter is protected, as otherwise a bona fide purchaser might be deprived of selling his property for full value." See, also, *Collins v. Heath*, 34 Ga. 443. There might have been some difference in principle if the cutting had been a trespass against Vickers.

It is very probable that the full facts of the transaction have not been developed in the evidence. It may be that if the whole truth were known, the Gray Lumber Company did have authority from the owner of the timber to cut it in 1897. If so, then under the decision of the Supreme Court when the case was up before, the verdict should be for the defendant, unless Vickers waived his right to insist that this act of cutting a few sticks of timber in 1897, started the limitation period to running.

3. A sale of standing timber is a sale of realty and is within the statute of frauds, and consequently, requires a written conveyance. Nevertheless, where such a conveyance contains a clause which forfeits the timber for nonremoval within a designated time, the right to insist upon the time limit may be waived orally. See *Wallace v. Kelly*, 148 Mich. 336, 111 N. W. 1049, 118 Am. St. Rep. 580; *Morgan v. Perkins*, 94 Ga. 353 (2), 21 S. E. 574. In the Michigan case cited, it

appears that the waiver was based on consideration. The Georgia case is silent as to this point. Waiver, however, usually needs no consideration to make it effective. "Waiver is a voluntary relinquishment of some known right, benefit, or advantage, which, except for such waiver, the party otherwise would have enjoyed." See the very excellent discussion as to the elements of waiver by Judge Russell, in *Kennedy v. Manry*, 6 Ga. App. 816, 66 S. E. 29. Waivers not based on consideration have been too frequently enforced by the courts to demand any citation of authority for the proposition that consideration is not an essential of waiver. There was some evidence in this case that Mr. Vickers, the owner of the reversion, after the time of the cutting in 1897 and within less than 3 years thereafter, told the woodsman of the Gray Lumber Company that on account of the previous cutting, the lease would soon expire, and upon the woodsman's saying that if this was so he would hurry to get it off, Mr. Vickers replied that he need not bother about that, as he had gotten pay for it once and that was all he wanted, and that the lumber company could cut it when they got to it, and the woodsman reported this conversation to the president of the company. It is true that Mr. Vickers denied this conversation to some extent, but this presented a question of fact for the jury, and not for solution by direction of the verdict. It was for the jury, under the evidence, to say what was the language of Mr. Vickers, used on the occasion in question, and whether he expressed at that time an intention not to insist upon the forfeiture, if any, which was about to come about through the previous cutting.

4. There is one other exception in the record. The plaintiff insists that the court erred in admitting in evidence in behalf of the defendant a transfer to the plaintiff of the second conveyance made by John Vickers. The point the plaintiff makes is that this transfer purports to assign the conveyance, and not the title to the timber. There is no merit in this point. The case turned on the strength of the plaintiff's title, and the strength of the defendant's title was not involved. We reverse the judgment because the court erred in directing the verdict, since there was evidence to support a finding for either party.

Judgment reversed.

(88 S. C. 545)

RICHLAND COUNTY v. OWENS et al.
(Supreme Court of South Carolina. Aug. 13, 1910.)

1. COUNTIES (§ 101*)—ACTION ON BOND OF OFFICER—BREACHES—COMPLAINT—DEFT-NITENESS.

The complaint on the bond of a county supervisor for failure to perform the duties of his office, when supplemented by an itemized statement filed according to order of court, the part of the statement referring to any class of acts being read with the part of the complaint referring thereto, *held* to be sufficiently definite and certain, and to inform defendants of what they are to meet, especially where the matters are nearly all on record in the supervisor county board of commissioners' office.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 152-159; Dec. Dig. § 101.*]

2. COUNTIES (§ 99*)—BOND OF SUPERVISOR—EXTENT OF LIABILITY—ACTS AS MEMBER OF BOARD OF COMMISSIONERS.

One of the duties devolving on a county supervisor being to act as a member of the county board of commissioners, his acts as a member of such are contemplated in his bond as supervisor, requiring him to "well and truly perform the duties of said office as required by law."

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 144; Dec. Dig. § 99.*]

3. DAMAGES (§ 141*)—ACTION ON BOND OF OFFICER—COMPLAINT—ALLEGING DAMAGES.

The complaint on the bond of a county supervisor sufficiently alleges damages to the county as a result of his failure to well and truly perform his duties as supervisor, it being stated in nearly all the assignments of breaches of the bond, "thereby causing a diversion and loss of the public funds of the county," in some "to the loss and detriment of the county," and in one "that by reason of the matters and things aforesaid plaintiff has suffered loss and damage" to a certain amount.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 406-412; Dec. Dig. § 141.*]

4. COUNTIES (§ 101*) — BOND OF OFFICER — BREACH—NEGLIGENCE AND CARELESSNESS.

Under the bond of a county supervisor conditioned that he would "well and truly perform the duties of said office as required by law," knowledge by him of breaches of the bond need not be alleged and proved, but his bond is breached if, and it is enough to allege and prove that, he so negligently and carelessly performed his duties that loss resulted to the county.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 152-159; Dec. Dig. § 101.*]

Appeal from Common Pleas Circuit Court of Richland County; Geo. E. Prince and R. W. Memminger, Judges.

Action by the County of Richland against Samuel H. Owens and another. From orders refusing to strike out parts of the complaint and overruling a demurrer to the complaint, defendants appeal. Affirmed.

Bellinger & Welch, for appellant S. H. Owens. Allen J. Green, for appellant American Surety Co. Solicitor W. Hampton Cobb and Thomas & Thomas, for respondent.

SEASE, J. This is a suit on the official bond of the defendant Samuel H. Owens as county supervisor for Richland county, commenced 1906. The defendant Owens, having

been elected supervisor for said county for three successive terms, gave bond as required by law for each term with the defendant American Surety Company of New York as surety on each bond. The complaint therefore contains three separate causes of action, one on each bond given. The whole complaint, excepting the itemized statement hereinafter mentioned, is as follows (the parts thereof stricken out by order of his honor, George E. Prince, being printed in italics):

"Complaint.

"The plaintiff above named, complaining of the defendants herein, alleges:

"For a first cause of action:

"(1) That the plaintiff, the county of Richland, is and was at the times hereinafter mentioned a body politic and corporate under the Constitution and laws of the state of South Carolina, and duly authorized by law to bring this action in its said name.

"(2) That the defendant American Surety Company of New York is now, and was at the times hereinafter mentioned, a corporation duly chartered and organized under and by the laws of the state of New York, and doing business in the state of South Carolina, and having full power, and authority to make and execute surety bonds for public officers in the state of South Carolina.

"(3) That on or about the 8th day of November, 1898, the defendant Samuel H. Owens was duly elected to the office of county supervisor for the county of Richland in the state aforesaid, in which county said defendant resided, and now resides, the term of said office being for two years and until his successor should have been elected and qualified, and on the 9th day of December, 1898, the said Samuel H. Owens, together with his codefendant, American Surety Company, executed and delivered to the state of South Carolina their certain bond in writing and under seal, dated on said day, whereby they became bound in the form and manner prescribed by law to the state of South Carolina in the penal sum of \$5,000, which bond recited that the said Samuel H. Owens had been elected to the office of county supervisor for the county aforesaid, and contained the condition that, if the said Samuel H. Owens should well and truly perform the duties of said office as then or thereafter required by law during the whole period he might continue in said office, then the said obligation to be void and of none effect, or else to remain in full force and virtue.

"(4) That the said defendant Samuel H. Owens having duly qualified and given bond as aforesaid did on or about the 1st day of January, 1899, enter upon the discharge of the duties of the office of county supervisor for the county of Richland, to which he had been elected, and continued in the discharge of the duties of said office until on or about

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

the 31st day of December, 1900, upon which day he was succeeded by himself, having been re-elected to said office.

"(5) That the condition of the bond aforesaid has been broken, in that the said defendant Samuel H. Owens, after entering upon the discharge of the duties of the office to which he had been elected, and between the 1st day of January, 1899, and the 31st day of December, 1900, failed as county supervisor to well and truly perform the duties of said office as required by law, and according to the true meaning and intent of the bond aforesaid and the condition thereof, in that:

"(a) *Said defendant gave out work upon the public highways, roads, and bridges of the county where the amounts exceeded \$10 without requiring contracts therefor, and without posting notice of the same; and, where the amount exceeded \$100, without advertising the same, and without requiring the proposals therefor to be accompanied by two or more sufficient sureties, as required by law; that said work so given out was given to incompetent and irresponsible persons, who failed to perform said work in good and substantial manner. That claims therefor were rendered in extravagant amounts, far in excess of the true value of said work. That said claims were unlawfully approved by the said Samuel H. Owens, as county supervisor, and warrants therefor drawn by him upon the county treasurer in violation of the law, and paid out of the funds of Richland county, to the loss and detriment of the said county.*

"(b) Said defendant was negligent and careless and unmindful of his duties in failing to scrutinize and examine claims presented against the county. That he approved claims that were rendered in extravagant amounts for labor that had never been performed, and for materials that had never been furnished. That he approved claims that were not itemized and were not accompanied by an affidavit made by the person or officer and presenting the same that the items thereof and that the labor, fees, disbursements, services, or other matters charged therein have been, in fact, done, made, rendered, or were due, and no part thereof paid or satisfied, and that he signed warrants or checks for the payment of such nonitemized and unverified claims, thereby causing a diversion and loss of the public funds of the county.

"(c) *Said defendant was grossly negligent and careless and utterly unmindful of the interests of the county in matters relating to the supervision, direction, and control of work upon the public highways, roads, and bridges of the county in failing to inspect work done by his order and direction, and by order and direction of the county board of commissioners, and in accepting work that was incomplete and defective.*

"(d) Said defendant was grossly negligent, careless, and lax in matters relating to the

disbursement of public funds for county purposes. That he signed his name as county supervisor to county warrants or checks in blank, leaving them with the clerk of the county board of commissioners to be filled out as occasion might require. That the said warrants or checks so signed in blank were in large numbers, and in considerable amounts subsequently filled in by the said clerk for the payment of fraudulent, illegal, and extravagant claims against the county, for the payment of claims made out in excess of the true and proper amounts, for the payment of claims in the names of fictitious persons for labor, services, and materials which had never been performed and furnished to the county, for the payment of individual debts and obligations of said clerk, and for many and various other purposes not authorized by law, and he, the said defendant, as county supervisor, was grossly negligent and careless in that, after signing the said warrants or checks and leaving them to be filled in by the clerk aforesaid, he failed to inspect the stubs of the said warrants or checks, and permitted and allowed the said warrants or checks to be paid without objection out of the public funds of the county, thereby permitting a fraudulent and unlawful diversion of the public funds of the county.

"(e) *Said defendant was careless and negligent in signing warrants or checks for the payment of claims purporting to have been approved by him and by the members of the county board of commissioners, when, in fact, the signatures evidencing such approval were forged signatures; thus permitting and causing a diversion of the public funds of the county and the payment of claims in large numbers and considerable amounts, which had, in fact, never been audited and approved as required by law.*

"(f) Said defendant violated his duties in the approval of false and fraudulent claims against the county, evidenced by false and fraudulent vouchers, signed with a cross-mark in the name of fictitious persons, and in the signing of warrants or checks for payment of such false and fraudulent claims, and was careless and negligent in failing to discover that said vouchers were false and fraudulent.

"(g) Said defendant was negligent and careless and violated his official duty in the approval and payment of claims for transportation of paupers to their alleged homes. That the allowances for this purpose were extravagant and unnecessary, not properly vouched, and the entry thereof negligently omitted from the records of his office. That he was negligent and careless and violated his official duty in the approval and payment of the weekly and monthly pay rolls of the laborers working upon the public works of the county, said pay rolls not being accompanied by proper vouchers, and not approved by the foreman in charge of the work, and contain-

ing the names of alleged laborers who had not performed the work or rendered the service claimed, and that he was negligent and careless, and violated his official duty in the approval and payment of claims upon contingent account, the same being not properly itemized, verified, or vouched as required by law.

"(h) Said defendant violated his official duty in failing to cause a record to be kept of all the proceedings of the board of which he was chairman, as well as a record of all contracts entered into with said board, by failing and neglecting to keep an accurate record of claims approved and ordered paid, and by failing to enter or cause the same to be entered upon the proceedings of the board for public inspection, thus preventing the discovery of false and fraudulent claims, to the loss and detriment of the county.

"(i) Said defendant violated his official duty in failing to publish the full statements required by law of all claims audited by the county board of commissioners by failing to examine into the nature and amount of the claims contained in these published reports, and by failing to detect the errors, omissions and false entries therein, thereby permitting and allowing said errors, omissions, and false entries to remain uncorrected, to the loss and injury of the county.

"(j) Said defendant violated his official duty by voting an extra allowance to the clerk of the board of commissioners, the salary of said clerk having been fixed by law, and in the approval and payment out of the county funds of such extra allowance.

"(k) Said defendant was careless and negligent in the care of the machinery, tools, mules, and other property of the county. That he was guilty of gross extravagance and mismanagement in the purchasing of chain gang supplies, in the contracting of blacksmithing accounts, and in purchasing, sweeping, and trading in the mules and other property of the county. That he was extravagant, careless, and negligent, and violated his official duty in the purchasing of lumber and in buying lumber unsuited for use upon the works of the county, and not necessary or needed therefor. That he made use of property of the county for his own benefit and for the benefit of private individuals without consideration. That he disposed of lumber, old bridge material, and other property of the county without rendering or making any account therefor, and permitted and allowed individuals to take and appropriate the same for their own use.

"(l) Said defendant violated his official duty in that he, as county supervisor, made and entered into contracts for expenditures for county purposes, and voted for the same in excess of the taxes levied for said purposes.

"(m) Said defendant violated his official duty in that he as county supervisor diverted or appropriated the funds arising from the taxes levied and collected for one fiscal year

to the payment of indebtedness contracted or incurred for a previous fiscal year.

"(6) That by reason of the matters and things aforesaid the plaintiff has suffered loss and damage to the amount of \$5,000, the amount of the penalty of the bond aforesaid, no part of which has been paid, and this action is brought in pursuance of the statute of this state in such case made and provided.

"For a second cause of action.

"(1) [Same as paragraph 1 of first cause of action, and need not be reprinted here.]

"(2) [Same as paragraph 1 of first cause of action, and need not be reprinted here.]

"(3) That on or about the 6th day of November, 1900, the defendant Samuel H. Owens was duly elected to the office of county supervisor for the county of Richland, in the state aforesaid, in which county said defendant resided and now resides, the term of said office being for two years, and until his successor should have been elected and qualified, and on the 17th day of December, 1900, the said Samuel H. Owens, together with his codefendant, American Surety Company, executed and delivered to the state of South Carolina their certain bond in writing and under seal, dated on said day, whereby they became bound in the form and manner prescribed by law to the state of South Carolina in the penal sum of \$5,000, which said bond recited that the said Samuel H. Owens had been elected to the office of county supervisor for the county aforesaid, and contained the condition that, if the said Samuel H. Owens should well and truly perform the duties of said office as then or thereafter required by law during the whole period he might continue in said office, then the said obligation to be void and of none effect, or else to remain in full force and virtue.

"(4) That the said defendant Samuel H. Owens, having duly qualified and given bond as aforesaid, did on or about the 1st day of January, 1901, enter upon the discharge of the duties of the office of county supervisor for the county of Richland, to which he had been elected, and continued in the discharge of the duties of said office until on or about the 31st day of December, 1902, upon which day he was succeeded by himself, having been re-elected to said office.

"(5) That the condition of the bond aforesaid has been broken, in that the said defendant Samuel H. Owens, after entering upon the discharge of the duties of the office to which he had been elected, and between the 1st day of January, 1901, and the 31st day of December, 1902, failed as county supervisor to well and truly perform the duties of said office as required by law, and according to the true meaning and intent of the bond aforesaid, and the condition thereof, in that:

"(a) Said defendant gave out work upon the public highways, roads, and bridges of the county where the amounts exceeded \$10

without requiring contracts therefor, and without posting notice of the same; and, where the amount exceeded \$100, without advertising the same, and without requiring the proposals therefor to be accompanied by two or more sufficient sureties, as required by law. That said work so given out was given to incompetent and irresponsible persons, who failed to perform said work in good and substantial manner. That claims therefor were rendered in extravagant amounts, far in excess of the true value of said work. That said claims were unlawfully approved by the said Samuel H. Owens, as county supervisor, and warrants therefor drawn by him upon the county treasurer in violation of the law, and paid out of the funds of Richland county, to the loss and detriment of the said county.

"(b) Said defendant was negligent and careless and unmindful of his duties in failing to scrutinize and examine claims presented against the county. That he approved claims that were rendered in extravagant amounts for labor that had never been performed, and for materials that had never been furnished. That he approved claims that were not itemized and were not accompanied by an affidavit made by the person or officer and presenting the same that the items thereof and that the labor, fees, disbursements, services, or other matters charged therein have been, in fact, done, made, rendered, or were due, and no part thereof paid or satisfied, and that he signed warrants or checks for the payment of such nonitemized and unverified claims, thereby causing a diversion and loss of the public funds of the county.

"(c) Said defendant was grossly negligent and careless and utterly unmindful of the interests of the county in matters relating to the supervision, direction, and control of work upon the public highways, roads, and bridges of the county in failing to inspect work done by his order and direction, and by order and direction of the county board of commissioners, and in accepting work that was incomplete and defective.

"(d) Said defendant was grossly negligent, careless, and lax in matters relating to the disbursement of public funds for county purposes. That he signed his name as county supervisor to county warrants or checks in blank, leaving them with the clerk of the county board of commissioners to be filled out as occasion might require. That the said warrants or checks so signed in blank were in large numbers, and in considerable amounts subsequently filled in by the said clerk for the payment of fraudulent, illegal, and extravagant claims against the county, for the payment of claims made out in excess of the true and proper amounts, for the payment of claims in the names of fictitious persons for labor, services, and materials which had never been performed and furnished to the county, for the payment of individual debts and

obligations of said clerk, and for many and various other purposes not authorized by law, and he, the said defendant, as county supervisor, was grossly negligent and careless in that, after signing the said warrants or checks and leaving them to be filled in by the clerk aforesaid, he failed to inspect the stubs of the said warrants or checks, and permitted and allowed the said warrants or checks to be paid without objection out of the public funds of the county, thereby permitting a fraudulent and unlawful diversion of the public funds of the county.

"(e) Said defendant was careless and negligent in signing warrants or checks for the payment of claims purporting to have been approved by him and by the members of the county board of commissioners, when, in fact, the signatures evidencing such approval were forged signatures; thus permitting and causing a diversion of the public funds of the county and the payment of claims in large numbers and considerable amounts, which had, in fact, never been audited and approved as required by law.

"(f) Said defendant violated his duties in the approval of false and fraudulent claims against the county, evidenced by false and fraudulent vouchers, signed with a cross-mark in the name of fictitious persons, and in the signing of warrants or checks for payment of such false and fraudulent claims; and was careless and negligent in failing to discover that said vouchers were false and fraudulent.

"(g) Said defendant was negligent and careless and violated his official duty in the approval and payment of claims for transportation of paupers to their alleged homes. That the allowances for this purpose were extravagant and unnecessary, not properly vouched, and the entry thereof negligently omitted from the records of his office. That he was negligent and careless and violated his official duty in the approval and payment of the weekly and monthly pay rolls of the laborers working upon the public works of the county, said pay rolls not being accompanied by proper vouchers, and not approved by the foreman in charge of the work, and containing the names of alleged laborers who had not performed the work or rendered the service claimed, and that he was negligent and careless, and violated his official duty in the approval and payment of claims upon contingent account, the same being not properly itemized, verified, or vouched as required by law.

"(h) Said defendant violated his official duty in failing to cause a record to be kept of all the proceedings of the board of which he was chairman, as well as a record of all contracts entered into with said board, by failing and neglecting to keep an accurate record of claims approved and ordered paid, and by failing to enter or cause the same to be entered upon the proceedings of the board for public inspection, thus preventing the dis-

covery of false and fraudulent claims, to the loss and detriment of the county.

"(i) Said defendant violated his official duty in failing to publish the full statements required by law of all claims audited by the county board of commissioners by failing to examine into the nature and amount of the claims contained in these published reports, and by failing to detect the errors, omissions and false entries therein, thereby permitting and allowing said errors, omissions, and false entries to remain uncorrected, to the loss and injury of the county.

"(j) Said defendant violated his official duty by voting an extra allowance to the clerk of the board of commissioners, the salary of said clerk having been fixed by law, and in the approval and payment out of the county funds of such extra allowance.

"(k) Said defendant was careless and negligent in the care of the machinery, tools, mules, and other property of the county. That he was guilty of gross extravagances and mismanagement in the purchasing of chain gang supplies, in the contracting of blacksmithing accounts, and in purchasing, swapping, and trading in the mules and other property of the county. That he was extravagant, careless, and negligent, and violated his official duty in the purchasing of lumber and in buying lumber unsuited for use upon the works of the county, and not necessary or needed therefor. That he made use of property of the county for his own benefit and for the benefit of private individuals without consideration. That he disposed of lumber, old bridge material, and other property of the county without rendering or making any account therefor, and permitted and allowed individuals to take and appropriate the same for their own use.

"(l) Said defendant violated his official duty in that he, as county supervisor, made and entered into contracts for expenditures for county purposes, and voted for the same in excess of the taxes levied for said purposes.

"(m) Said defendant violated his official duty in that he as county supervisor diverted or appropriated the funds arising from the taxes levied and collected for one fiscal year to the payment of indebtedness contracted or incurred for a previous fiscal year.

"(6) [Same as paragraph 6 of the first cause of action, and need not be reprinted here.]

"For a third cause of action:

"(1) [Same as first paragraph of first cause of action and need not be reprinted.]

"(2) Same as paragraph 2 of first cause of action, and need not be reprinted here.

"(3) That on or about the 3d day of November, 1902, the defendant Samuel H. Owens was duly elected to the office of county supervisor for the county of Richland, in the state aforesaid, the term of said office being for two years, and until his successor should have been elected and qualified, and on the

30th day of December, 1902, the said Samuel H. Owens, together with his codefendant, American Surety Company, executed and delivered to the state of South Carolina their certain bond in writing and under seal, dated on same day, whereby they became bound in the form and manner prescribed by law to the state of South Carolina in the penal sum of \$5,000, which bond recited that the said Samuel H. Owens had been elected to the office of county supervisor for the county aforesaid, and contained the condition that, if the said Samuel H. Owens should well and truly perform the duties of said office as then or thereafter required by law during the whole period he might continue in said office, then the said obligation to be void and of none effect, or else to remain in full force and virtue.

"(4) That the said defendant Samuel H. Owens, having duly qualified and given bond as aforesaid, did on or about the 1st day of January, 1903, enter upon the discharge of the duties of the office of county supervisor for the county of Richland, to which office he had been elected, and continued in the discharge of the duties of said office until on or about the 31st day of December, 1904.

"(5) That the condition of the bond aforesaid has been broken, in that the said defendant Samuel H. Owens, after entering upon the discharge of the duties of the office to which he had been elected, and between the 1st day of January, 1903, and the 31st day of December, 1904, failed as county supervisor to well and truly perform the duties of said office as required by law; and according to the true meaning and intent of the bond aforesaid, and the condition thereof, in that:

"(a) Said defendant gave out work upon the public highways, roads, and bridges of the county where the amounts exceeded \$10 without requiring contracts therefor, and without posting notice of the same; and, where the amount exceeded \$100, without advertising the same, and without requiring the proposals therefor to be accompanied by two or more sufficient sureties, as required by law. That said work so given out was given to incompetent and irresponsible persons, who failed to perform said work in good and substantial manner. That claims therefor were rendered in extravagant amounts, far in excess of the true value of said work. That said claims were unlawfully approved by the said Samuel H. Owens, as county supervisor, and warrants therefor drawn by him upon the county treasurer in violation of the law, and paid out of the funds of Richland county, to the loss and detriment of the said county.

"(b) Said defendant was negligent and careless and unmindful of his duties in failing to scrutinize and examine claims presented against the county. That he approved claims that were rendered in extravagant amounts for labor that had never been per-

formed, and for materials that had never been furnished. That he approved claims that were not itemized and were not accompanied by an affidavit made by the person or officer and presenting the same that the items thereof and that the labor, fees, disbursements, services, or other matters charged therein have been, in fact, done, made, rendered or were due, and no part thereof paid or satisfied, and that he signed warrants or checks for the payment of such non-itemized and unverified claims thereby causing a diversion and loss of the public funds of the county.

"(c) Said defendant was grossly negligent and careless and utterly unmindful of the interests of the county in matters relating to the supervision, direction, and control of work upon the public highways, roads, and bridges of the county in failing to inspect work done by his order and direction, and by order and direction of the county board of commissioners, and in accepting work that was incomplete and defective.

"(d) Said defendant was grossly negligent, careless, and lax in matters relating to the disbursement of public funds for county purposes. That he signed his name as county supervisor to county warrants or checks in blank, leaving them with the clerk of the county board of commissioners to be filled out as occasion might require. That the said warrants or checks so signed in blank were in large numbers, and in considerable amounts, subsequently filled in by the said clerk for the payment of fraudulent, illegal, and extravagant claims against the county, for the payment of claims made out in excess of the true and proper amounts, for the payment of claims in the names of fictitious persons for labor, services, and materials which had never been performed and furnished to the county, for the payment of individual debts and obligations of said clerk, and for many and various other purposes not authorized by law, and he, the said defendant, as county supervisor, was grossly negligent and careless in that, after signing the said warrants or checks and leaving them to be filled in by the clerk aforesaid, he failed to inspect the stubs of the said warrants or checks, and permitted and allowed the said warrants or checks to be paid without objection out of the public funds of the county, thereby permitting a fraudulent and unlawful diversion of the public funds of the county.

"(e) Said defendant was careless and negligent in signing warrants or checks for the payment of claims purporting to have been approved by him and by the members of the county board of commissioners, when, in fact, the signatures evidencing such approval were forged signatures; thus permitting and causing a diversion of the public funds of the county and the payment of claims in large numbers and considerable amounts, which had, in fact, never been audited and approved as required by law.

"(f) Said defendant violated his duties in the approval of false and fraudulent claims against the county, evidenced by false and fraudulent vouchers, signed with a cross-mark in the name of fictitious persons, and in the signing of warrants or checks for payment of such false and fraudulent claims, and was careless and negligent in failing to discover that said vouchers were false and fraudulent.

"(g) Said defendant was negligent and careless and violated his official duty in the approval and payment of claims for transportation of paupers to their alleged homes. That the allowances for this purpose were extravagant and unnecessary, not properly vouched, and the entry thereof negligently omitted from the records of his office. That he was negligent and careless and violated his official duty in the approval and payment of the weekly and monthly pay rolls of the laborers working upon the public works of the county, said pay rolls not being accompanied by proper vouchers, and not approved by the foreman in charge of the work, and containing the names of alleged laborers who had not performed the work or rendered the service claimed, and that he was negligent and careless, and violated his official duty in the approval and payment of claims upon contingent account, the same being not properly itemized, verified, or vouched as required by law.

"(h) Said defendant violated his official duty in failing to cause a record to be kept of all the proceedings of the board of which he was chairman, as well as a record of all contracts entered into with said board, by failing and neglecting to keep an accurate record of claims approved and ordered paid, and by failing to enter or cause the same to be entered upon the proceedings of the board for public inspection, thus preventing the discovery of false and fraudulent claims, to the loss and detriment of the county.

"(i) Said defendant violated his official duty in failing to publish the full statements required by law of all claims audited by the county board of commissioners by failing to examine into the nature and amount of the claims contained in these published reports, and by failing to detect the errors, omissions and false entries therein, thereby permitting and allowing said errors, omissions, and false entries to remain uncorrected, to the loss and injury of the county.

"(j) Said defendant violated his official duty by voting an extra allowance to the clerk of the board of commissioners, the salary of said clerk having been fixed by law, and in the approval and payment out of the county funds of such extra allowance.

"(k) Said defendant was careless and negligent in the care of the machinery, tools, mules, and other property of the county. That he was guilty of gross extravagances and mismanagement in the purchasing of chain gang supplies, in the contracting of

blacksmithing accounts, and in purchasing, swapping, and trading in the mules and other property of the county. That he was extravagant, careless, and negligent, and violated his official duty in the purchasing of lumber and in buying lumber unsuited for use upon the works of the county, and not necessary or needed therefor. That he made use of property of the county for his own benefit and for the benefit of private individuals without consideration. That he disposed of lumber, old bridge material, and other property of the county without rendering or making any account therefor, and permitted and allowed individuals to take and appropriate the same for their own use.

"(l) Said defendant violated his official duty in that he, as county supervisor, made and entered into contracts for expenditures for county purposes, and voted for the same in excess of the taxes levied for said purposes.

"(m) Said defendant violated his official duty in that he as county supervisor, diverted or appropriated the funds arising from the taxes levied and collected for one fiscal year to the payment of indebtedness contracted or incurred for a previous fiscal year.

"(6) [Same as paragraph 6 of first cause of action, and need not be reprinted here.]

"Wherefore, the plaintiff demands judgment against the defendant for the sum of \$15,000, and for the costs and disbursements of this action."

The defendants moved before his honor, D. E. Hydrick, then circuit judge, for an order requiring the plaintiff to make the allegations of paragraph 5 in each of the three causes of action of its complaint more definite and certain on some 10 or 12 particulars, which need not be set out here. Upon the hearing of this motion, his honor, Judge Hydrick, ordered: "That the plaintiff do on or before the 1st day of November, 1903, file and serve upon the defendant's attorneys, as a part of the complaint herein, itemized statements showing the various instances of the alleged failure of the defendant Samuel H. Owens to well and truly perform the duties of his office of supervisor as required by law, and according to the true meaning and intent of the bonds set up in the complaint under subdivisions 'a' to 'm,' both inclusive, of each of the three causes of action alleged in the complaint." From this order there was no appeal. Thereafter the plaintiff, in compliance with this order, filed and served itemized statements purporting to show various instances of the failure of the defendant Owens to well and truly perform the duties required of him by law and according to the true meaning and intent of the three bonds. Those itemized statements cover 100 pages in the printed case, and need not be set out here, but they are classified as follows:

"First cause of action—paragraph 5, subdivision 'b.' Claims not verified, 1899-1900.

"First cause of action—paragraph 5, sub-

division 'd.' Warrants signed in blank, 1900. Warrants signed in blank, 1899-1900.

"First cause of action—paragraph 5, subdivision 'f.' Cross-mark claims.

"First cause of action—paragraph 5, subdivision 'g.' Weekly pay rolls of macadam work on roads, 1900.

"First cause of action—paragraph 5, subdivision 'l.' Claims not in minute book, 1899-1900.

"Second cause of action—paragraph 5, subdivision 'b.' Claims not itemized and verified, 1901-02.

"Second cause of action—paragraph 5, subdivision 'd.' Warrants signed in blank, 1901-02.

"Second cause of action—paragraph 5, subdivision 'f.' Cross-mark claims, 1901-02, 'Roads and Bridges.'

"Second cause of action—paragraph 5, subdivision 'g.' Transportation of paupers, 1901-02.

"Second cause of action—paragraph 5, subdivision 'h.' Claims not in minute book, 1901-02.

"Third cause of action—paragraph 5, subdivision 'b.' Extravagant claims for labor and material not furnished, 1903-04.

"Third cause of action—paragraph 5, subdivision 'b' (2). Claims not itemized and verified, 1903-04.

"Third cause of action—paragraph 5, subdivision 'c.' Work not inspected, 1903-04.

"Third cause of action—paragraph 5, subdivision 'd.' Warrants signed in blank, 1903-04.

"Third cause of action—paragraph 5, subdivision 'e.' Forged claims, 1903-04.

"Third cause of action—paragraph 5, subdivision 'f.' Cross-mark claims, 1903-04.

"Third cause of action—paragraph 5, subdivision 'g.' Transportation of paupers, 1903-04.

"Third cause of action—paragraph 5, subdivision 'h.' Claims not in minute book, 1903-04.

"Third cause of action—paragraph 5, subdivision 'l.' Claims not in published list.

"Third cause of action—paragraph 5, subdivision 'k.' Extravagance and mismanagement in the purchasing of chain gang supplies.

"Third cause of action—paragraph 5, subdivision 'm.' Payment of claims in 1903 and 1904, which were contracted in 1902 and 1903, respectively."

These itemized statements contain lists of hundreds of claims, setting forth the number of the claim, the name of the claimant, the date of the claim, the amount of the claim, the date of payment and number of the warrant, and in the vast majority of instances the nature of the claim all particularly set out and according to the order of Judge Hydrick made a part of the complaint. There was no effort to comply with the order in respect to the subdivisions stricken out by Judge Prince. Upon the serving and filing of

the above itemized statements, defendant's attorneys excepted to the said statements on the ground that they were not in compliance with Judge Hydrick's order and moved before his honor, Judge Geo. E. Prince, at his chambers, to strike all of the said statements out of the complaint on the ground that the same failed to comply with the order of Judge Hydrick, and, failing in this, to strike out special matters and things in the fifth paragraph of each of the said causes of action.

Upon the hearing of this motion his honor, Judge Geo. E. Prince, ordered: "That the following subdivisions of the complaint herein be and the same are hereby stricken out, to wit, in the first cause of action, in paragraph 5, subdivisions 'a,' 'c,' 'e,' 'l,' 'j,' 'k,' 'i,' and 'm.' In the second cause of action, in paragraph 5, subdivisions 'a,' 'c,' 'e,' 'l,' 'k,' 'j,' and 'm.' In the third cause of action, paragraph 5, subdivision 'a,'" and in all other respects the motion was overruled. From this order defendant appealed upon the following exceptions:

"(1) That his honor erred in refusing to strike out all of said itemized statement upon the ground that the same fails to comply with the order of Judge Hydrick, in that the said statements are general, and not specific, and fails to apprise the defendants of the dates and particulars wherein the said several items of the several causes of action stated are a breach of the condition of the several bonds as alleged in the several causes of action in the complaint, and action herein, and of the itemized statement thereto, served as is required by law, and by the terms of the said order.

"(2) That his honor erred in refusing to strike out of subdivision 'b' of paragraph 5 of each of the causes of action alleged the sentence, 'that he approved claims that were rendered in extravagant amounts for labor that had never been performed, and for materials that had never been furnished.' Because under the law the approval of claims is a judicial function vested in the board of commissioners, and the same does not constitute a breach of defendant's bond, and also because no itemized statement has been served covering the same.

"(3) That his honor erred in refusing to strike out all the itemized statements covering 'b' of paragraph 5 of the three causes of action, because the items therein listed do not appear to be itemized and verified as alleged in the complaint, and, so refusing, he further erred in refusing to order subdivision 'b' of paragraph 5 of the several causes of action alleged made more definite and certain by specifying severally and particularly the year in which the alleged items were presented and paid, and the particulars wherein the said several items were extravagant, and those in which the labor and services had not been performed, and what labor and what service the same applied to.

"(4) That his honor erred in refusing to

strike out of subdivision 'c' of paragraph 5 of the third cause of action the words, 'and in accepting work that was incomplete and defective,' and in refusing to make said itemized statement served for said subdivision 'c' of said third cause of action more definite and certain, by specifying the date and year in which the alleged claim was made, the date and year of its payment, if paid, together with the number and date of the warrant, which of the several claims are bridges and what bridges they refer to, which were road and what roads, and to what part of the roads they refer.

"(5) That his honor erred in refusing to strike out all of the itemized statements covering subdivision 'd' of paragraph 5 of each of the three causes of action alleged in the complaint, because they fail to apprise the defendants of the facts upon which the alleged fraud is based, which, if any, are in the name of fictitious persons for labor and work never performed, which, if any, are for payment of the individual debts of the said clerk, and so holding he erred in refusing to order said statements made more definite and certain in the particulars above specified, and also erred in refusing to strike out of said subdivision of said paragraph in each of the several causes of action the clause: 'And for many and various other purposes not authorized by law,' just following the word 'clerk' on the thirteenth line, down to the semicolon on the following line, because no itemized statements had been served concerning the same.

"(6) That his honor erred in refusing to strike out subdivision 'c' of paragraph 5 of the third cause of action, and the itemized statement served purporting to cover the same, and, so holding, he erred in refusing to require said itemized statements to be rendered more definite and certain by stating particularly what items among those served, the signature to the approval of which were forged, and in what years the same were forged and whose signatures, if any, were forged.

"(7) That his honor erred in refusing to strike out subdivision 'f' of paragraph 5 of each of the three causes of action, because the statement served failed to show that the said items listed are false and fraudulent or fictitious; and, so holding, he erred in failing to require the said complaint and statement to be made more definite and certain by specifying particularly and severally what claims, if any, are false and fraudulent, what, if any, are fictitious, and setting out the facts showing the fraud and falseness relied on severally and specifically, and the items to which it refers, together with the year in which the same were severally approved and paid, and the date of payment.

"(8) That his honor erred in refusing to strike out subdivision 'g' of paragraph 5 of the three causes of action for the reason that under the law the approval of claims is a ju-

dicial function vested in the board of commissioners, and that the same does not constitute a breach of defendants' bonds, and, so holding, he further erred in failing to strike out of subdivision 'g' of paragraph 5 of the first cause of action all after the word 'claims' on the second line of said paragraph, down to word 'claimed' on twelfth line down to and including the end of said paragraph, so as to make the allegation of said paragraph conform to the statement covering the same, and in refusing to make the said statement more definite and certain by specifying which of said items were not accompanied by vouchers, and not approved by the foreman in charge of the work, who was the foreman, wherein the vouchers were improper, what items contained the names of laborers who had not performed the work or rendered the services claimed, and to what roads do said items relate, and his honor erred in refusing to strike out all of subdivision 'g' of paragraph 5 of second and third cause of action in the complaint after the word 'officer' on sixth line of said subdivision of said paragraph down to and including the end thereof in each of said causes of action, so as to make the same conform to the statement of particulars served, and make said statement of particulars served more definite and certain by specifying the year in which the said several alleged claims were paid, which of said items, and wherein they were extravagant and unnecessary, which and wherein not properly vouched, and in what the improper vouching consists, which were omitted from the records of the office, and from what records the same were omitted.

"(9) That his honor erred in failing to strike out subdivision 'h' of paragraph 5 of each of the three causes of action alleged in the complaint, and in failing to strike out of the statement served the itemized statement of each of the items covering said paragraph in each of the three causes of action, because it does not appear from the said statement that the said claims are false or fraudulent, or were not proper debts against the county, or that the county has in any way been injured thereby.

"(10) That his honor erred in failing to strike out subdivision 'i' of paragraph 5 of the third cause of action of the complaint, and the statement of particulars served as covering the same, because it does not appear from the statement that the said debts are false or fraudulent, or were not proper debts against the county, or that the county has in any way been injured thereby, and, so holding, he erred in refusing to require said statements to be made more definite and certain by specifying which of said items are false entries, which are erroneous, and wherein the error lies, which are omissions and specifying particularly the year in which said false entries, errors, and omissions occurred and were paid.

"(11) That his honor erred in refusing to strike out subdivision 'k' of paragraph 5 of the third cause of action in the said complaint, except so much thereof as alleges 'said defendants were guilty of gross extravagance in the contracting of blacksmithing accounts,' so as to make the allegations of said subdivision in some measure conform to the statement of particulars served, and further erred in not requiring said statement of particulars served more definite and certain by specifying which items, and wherein the same were extravagant, and in what respects the same were mismanaged, and also the year in which each of said items were contracted and paid.

"(12) That his honor erred in refusing to strike out subdivision 'm' of paragraph 5 of the third cause of action, and the statement of particulars served covering the same, because it does not appear that the said claims are false or fraudulent, or were not proper debts against the county, or that the county has in any way been injured thereby, and, failing in this, he further erred by failing to strike out all items on pages 131 and 132 of the said itemized statement served, except claims numbered '3138' on page 131 and numbers '1418, '1428,' and '1446' on page 132, because none of said items appear to have been contracted in a year different from the year of their payment."

The defendants also demurred to the complaint as it stood after Judge Prince's order on the ground that the assignments of breaches of the bonds do not state a cause of action and giving various reasons which need not be set out here. This demurrer was heard and overruled by his honor, R. W. Memminger, in a short order, from which the defendant appeals on the following exceptions:

"(1) His honor erred in overruling the demurrer to paragraph 'b' of the first, second, and third causes of action because the allegations of this paragraph in each of said causes of action allege negligence on the part of the defendant Samuel H. Owens in failing to examine claims and approving some that were extravagant, and in approving others that were not itemized and verified, and paying the same by drawing warrants on the county treasurer, whereas, it was the duty of the county board of commissioners to examine and approve claims, and not the duty of the supervisor; it being the duty of the supervisor, however, to pay all claims examined and approved by the board.

"(2) His honor erred in overruling the demurrer to paragraph 'd' of the first, second, and third causes of action because the allegations of this paragraph of each of said causes of action allege negligence in signing his name to warrants, and leaving them with the clerk of the county board of commissioners, and in failing to inspect the warrant stubs, and in allowing the warrants paid without objection; whereas, no breach

of duty on the part of the supervisor is here charged.

"(3) His honor erred in overruling the demurrer to paragraph 'f' of the first, second, and third causes of action because the allegations of this paragraph of each of the said causes of action allege violation of duty on the part of the supervisor in approving fraudulent claims made out in the name of fictitious persons, and in signing warrants to pay the same; whereas, all claims against the county are required by law to be approved, not by the supervisor, as such, but by the county board of commissioners, of which by law the supervisor is only a member, and he is not liable as supervisor for his actions as a member of the county board of commissioners; this paragraph, therefore, charging no breach of duty of supervisor as such.

"(4) His honor erred in overruling the demurrer to paragraph 'g' of the first, second, and third causes of action because the allegations of this paragraph of each of said causes of action allege the violation of duty in approving extravagant claims for the transportation of paupers and negligently omitting them from the records of his office, violation of his duty in approving the pay rolls for public works, when the same were not accompanied by vouchers, etc., and violation of his duty in approving and paying claims upon contingent account when the same are not verified; whereas no breach of duty on the part of the supervisor as such is herein charged, the approval of claims being a matter for the county board as such, and it being mandatory upon the supervisor to pay all claims approved by the board.

"(5) His honor erred in overruling the demurrer to paragraph 'h' of the first, second, and third causes of action because the allegations of this paragraph of each of said causes of action alleged a violation of duty in failing to cause a record to be kept of all proceedings and contracts; also, in failing to keep a record of claims approved, and failing to have them entered upon the record for public inspection; whereas, no violation on the part of the supervisor as such is herein alleged.

"(6) His honor erred in overruling the demurrer to paragraph 'c' of the third cause of action, because the allegation of this paragraph alleges negligence on the part of the supervisor in the supervision of the work on the public highways, in failing to inspect the same, and in accepting the same while incomplete and defective; whereas, no damages whatever are alleged as a result of said alleged breach, and if said breach occurred, as alleged, no damages flowed therefrom. It would be a case of *damnum absque injuria*.

"(7) His honor erred in overruling the demurrer to paragraph 'e' of the third cause of action because the allegation of this paragraph charges negligence in signing warrants in blank for the payment of forged

claims, causing thereby a diversion of the public funds; whereas no breach of duty on the part of the supervisor is charged, inasmuch as it is his duty to pay claims approved by the board by drawing his warrants on the county treasurer, and there is no allegation that he knew that said claims were forged as alleged, and, in the absence of such allegation, there is failure to charge any breach of duty on the part of the supervisor as such.

"(8) His honor erred in overruling the demurrer to paragraph 'i' of the third cause of action because the allegation of this paragraph charges a violation of duty in failing to publish a full statement of all claims approved and paid; whereas, no damages are alleged as flowing from said alleged breach, and, in the absence of such allegation, a case of *damnum absque injuria* is presented.

"(9) His honor erred in overruling the demurrer to paragraph 'j' of the third cause of action because the allegation of this paragraph charges a violation of duty while as a member of the board voting an extra allowance to the clerk of the said board and in paying the same out of the county funds; whereas, no breach of duty is here charged against the supervisor as such.

"(10) His honor erred in overruling the demurrer to paragraph 'k' of the third cause of action, because the allegation of this paragraph charges negligence in the case of machinery, tools, mules, and other property of the county, in purchasing chain gang supplies, in swapping and trading the mules and property of the county, being extravagant in the purchase of lumber, buying material, etc., for the county that was unsuited and not needed, using the property of the county for personal use without consideration, and in disposing of lumber, old bridge material, and other property without rendering an account therefor, whereas, the purchasing of such supplies is a matter for the board, and not for the supervisor, and, if extravagant, unsuited, and not needed, the work was done by the board, as such, and not by the supervisor, as such, and for that reason no breach of duty on the part of the supervisor, as such, is charged.

"(11) His honor erred in overruling the demurrer to paragraph 'l' of the third cause of action because the allegation of this paragraph charges a violation of duty in entering into contract for expenditure of public money and voting for the same in excess of the taxes levied for that year; whereas, no breach of duty under the law is here charged against the supervisor as such.

"(12) His honor erred in overruling the demurrer to paragraph 'm' of the third cause of action, because the allegation of this paragraph charges a violation of duty on the part of the supervisor in the payment of claims contracted for during one year out of the taxes collected for another year; where-

as, no damages are alleged as flowing from said alleged breach, and, in the absence of such allegation, a case of *damnum absque injuria* is presented, and because no breach of duty on the part of the supervisor is charged."

This appeal is therefore from the order of Judge Prince refusing to strike out certain portions of the complaint, and from the order of Judge Memminger overruling the demurrer to the complaint. The exceptions to these orders involve practically the same points of law, and are very numerous, and therefore for the purposes of this opinion it is not deemed necessary to consider them in detail. It is sufficient to say that the main contention of the appellants is that the itemized statement served was not a compliance with the order of Judge D. E. Hydrick, and, if it was a compliance, still the complaint, as it comes before this court, stated no cause of action for the reason that the acts complained of as breaches of the bond were done as a member of the board of county commissioners, and not as supervisor, and therefore his bonds are not liable therefor, they having been given as supervisor, and not as county commissioner, and for the further reason that there is no damages to the plaintiff alleged in the complaint, and therefore the doctrine of *damnum absque injuria* applies, and for the further reason that there is no allegation that the supervisor knew of the breaches and loss therefrom assigned in the complaint; thereby the supervisor and his bondsmen cannot be held liable. Reading the complaint with the itemized statement served under Judge Hydrick's order, putting each class in its proper place, it is apparent that the statement is a substantial compliance with Judge Hydrick's order, in so far as it relates to the subdivisions not stricken out of the complaint by Judge Prince's order; and it may well be assumed that certain subdivisions were stricken out by Judge Prince because the itemized statement was not a compliance with Judge Hydrick's order with respect to them.

Now, with respect to the question as to whether or not the defendant Owens' acts as a member of the county board of commissioners are contemplated in his bonds as supervisor. When the supervisor was elected as supervisor, he was elected to perform all of the duties devolving upon him as supervisor, and one of these duties under the law was to act as a member of the county board of commissioners. His bond required him to "well and truly perform the duties of said office as required by law." The law required him to perform the duty of acting as a member of the board of county commissioners, and in his bonds he so bound himself. It seems that this point is well settled, and against appellant's contention in the case of *Fort v. Assmann*, 38 S. C. 253, 16 S. E. 887, where the sureties on Assmann's bond as clerk of court sought to avoid liability

for money received by Assmann under an order of court directing him to sell land in a foreclosure proceeding on the ground that, when he received the money, he was not acting as clerk of court, and was not performing duties imposed upon him by law. This court held that the sureties were liable on his bond as clerk of court for the money received. Liberal construction should be placed upon the language of a pleading, but this liberality need not be invoked in this complaint in order to find that it alleges damages to the plaintiff as a result of the failure of Owens to well and truly perform his duties as supervisor. It will be seen that in nearly all of the assignments of breaches of the bonds it is stated in language as follows: "Thereby causing a diversion and loss of the public funds of the county"—and in some assignments the following language is used: "To the loss and detriment of the county." It is also alleged in paragraph 6 of each of the three causes of action "that by reason of the matters and things aforesaid the plaintiff has suffered loss and damage to the amount of five thousand dollars," etc. The matters and things refer to the assignment of breaches of the bonds under the various subdivisions of paragraph 5 in each of the three causes of action. It must be remembered that in reading the complaint as above indicated it is necessary to place each class of the itemized statement in its proper place; for example, that class designated as "warrants signed in blank, 1901-02," must be made a part of subdivision "d" of paragraph 5 of the second cause of action. When this is done, it will be seen that there is no room for complaint on the part of the defendants that the pleading should be made more definite and certain, or that they have not been informed as to what they are to meet, especially as these matters are nearly all, if not all, on record in the supervisor county board of commissioners' office, and are open to everybody's inspection.

But it is further contended that knowledge of the defendant Owens of the various breaches of the bonds and loss therefrom must be alleged and proven. The bonds given according to law as alleged in the complaint guarantee that Owens would "well and truly perform the duties of said office as then or thereafter required by law." These words constitute the gravamen of the bonds, and, this being a suit for breaches of the bonds, they become important. The principal and surety are bound by the terms of their bonds. The conditions named in the bonds are not that, if Owens knowingly fails to "well and truly perform the duties," etc. then he and his surety are bound in the penal sum of \$5,000. The complaint nowhere alleges that the various breaches of the bonds and the consequent loss therefrom were willful, or that they were knowingly made, and the loss therefrom was known to Owens, but

it is alleged that the defendant Owens was "negligent and careless." This is sufficient. If a bonded official is "negligent and careless," he cannot be said to have complied with his bond to "well and truly perform the duties of his office," etc., and, if he is shown to have been so negligent or so careless that loss resulted to the county, loss that could have been prevented by the exercise of care, his official bond would be liable. For example, if, as alleged in subdivision "d" of paragraph 5 in the first cause of action, the supervisor signed in blank warrants or checks and left them in the hands of his clerk to be filled in and negligently and carelessly failed to inspect such warrants or checks, can he be said to have "well and truly performed the duties of his office," etc.? We think not, and, if loss resulted to the county as alleged, then the bonds are liable.

The complaint is necessarily long, but the scope of its allegations is that Owens was elected supervisor for three terms and gave bond as required by law for each term, that he negligently and carelessly performed the duties of his office, and that by reason of such negligence and carelessness the county suffered loss to the amount claimed in the complaint. This constitutes a cause of action against the supervisor and his surety, and is not demurrable.

It is the judgment of this court that all of the exceptions in the appeals from the orders and rulings of Judge Prince and Judge Memminger be dismissed, and that the judgments of the circuit court be affirmed.

(86 S. C. 523)

TALBERT v. HAMLIN.

(Supreme Court of South Carolina. Aug. 6, 1910.)

1. APPEAL AND ERROR (§ 220*)—REVIEW—OBJECTIONS NOT MADE BELOW.

Plaintiff in an action for a partnership accounting cannot complain on appeal that the master did not require defendant to file an itemized account of money received and paid out, that plaintiff might scrutinize, surcharge, and falsify the account, there having been no request therefor, and objection having in no way been made to the form of the account, and time to examine, surcharge, or falsify it not having been asked.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1325-1332; Dec. Dig. § 220.*]

2. PLEADING (§ 36*)—DISREGARDING ADMISSION IN ANSWER.

While as a general rule an admission in a pleading is taken as conclusive of the thing admitted, though it, even if under oath, may be withdrawn by leave of court, error cannot be predicated on the master's finding that defendant's total receipts were a certain amount, when his statement of the account filed as an exhibit to his answer, which was under oath, showed they were more; it not appearing how the difference arose, which may have been through a mere difference in the method of stating the account, or through a mistake in defendant's addition, in either of which cases he should not

be concluded by his statement of the aggregate amount received.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 81-86; Dec. Dig. § 36.*]

3. APPEAL AND ERROR (§ 273*)—SUFFICIENCY OF EXCEPTIONS.

When an account has been stated by a master according to correct methods, an exception thereto must specify the item or items to which objection is made; and on a mere general exception alleging error therein the court will not enter on a detailed examination of the whole account.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1620-1630, 1764; Dec. Dig. § 273.*]

4. COURTS (§ 107*)—STATEMENT IN DECISION—CONSIDERATION OF EVIDENCE.

The statement of the court in its decree confirming the report of a master that "to review the testimony in full would require a tremendous amount of labor, and, according to the view which I take of the case, would be entirely," is not meant to indicate that the court did not fully review the testimony in the sense of weighing and giving it full credit, but merely that it was unnecessary to review it in the sense of going over it and discussing it in detail in the decree.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 360; Dec. Dig. § 107.*]

5. PARTNERSHIP (§ 83*)—ALLOWANCE FOR SERVICES OF PARTNER.

A partner is not to be allowed credit for his services to the firm, in the absence of agreement therefor, though he devote his whole time thereto, and his copartner do little or nothing.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 131; Dec. Dig. § 83.*]

6. PARTNERSHIP (§ 83*)—ALLOWANCE FOR SERVICES OF PARTNER—AGREEMENT.

The agreement of plaintiff when entering into an equal partnership with defendant that he would pay half the rent, the buildings being owned by defendant, and half the insurance and half the wages, is not an agreement that defendant should be paid for his services, but refers merely to the services of employes of the firm, where it is agreed what shall be paid defendant's son, and nothing is said as to any amount to be paid defendant.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 131; Dec. Dig. § 83.*]

7. PARTNERSHIP (§ 84*)—EXPENSE OF BUSINESS—RENT OF BUILDING OWNED BY PARTNER.

The rent of buildings occupied by a firm is a legitimate expense of the business, to be allowed the partner owning them, in the absence of any agreement.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 132; Dec. Dig. § 84.*]

Appeal from Common Pleas Circuit Court of Abbeville County; C. C. Featherstone, Special Judge.

Action by H. Q. Talbert against A. B. Hamlin. Judgment for defendant. Plaintiff appeals. Modified.

Grier & Park and W. P. Greene, for appellant. W. N. Graydon, for respondent.

HYDRICK, J. In December, 1905, plaintiff and defendant entered into a partnership in the business of carrying on a feed and sales stable. The defendant had practically the entire management of the business.

He kept no regular set of books. The only record of the transactions of the firm was kept on memorandum books which he carried in his pocket, and which were kept in an irregular and confusing manner. The business proving unprofitable this action was brought, in the fall of 1908, for an accounting and settlement of the affairs of the partnership. The defendant by his answer admitted his liability to account, and expressed his readiness to do so, alleging that, on such accounting, it would be found that plaintiff was indebted to him. He attached to his answer, as exhibits, certain statements, showing the amounts which he alleged that he had received and paid out in the conduct of the business, and moneys advanced by him for the use of the firm. Some of the entries were not itemized. For instance, on the debt sheet is, "Cash received from sale of stock and all other sources, \$14,683," and on the credit sheet is, "For feed and labor at stables, \$4,965," both being the aggregate of many smaller items. According to these statements, his total receipts were \$21,010, and his total disbursements \$23,845, the difference being the amount which he claimed the firm owed him.

The case was referred to the master to take the testimony, state the account, and report his conclusions of law and fact. The master reported that the firm was indebted to the defendant in the sum of \$2,235.65, and that plaintiff was liable for half that amount, and recommended that defendant have judgment therefor. His report was confirmed by the circuit court in a short decree, in which the court says: "The testimony in the case is very voluminous, consisting of testimony taken by the master and reduced to writing by him, and of many books and papers. To review the testimony in full would require a tremendous amount of labor, and, according to the view I take of the case, would be entirely unnecessary. The master has made a full, able, and satisfactory report, which shows that he has gone into the matter very thoroughly. I am satisfied that his mode of accounting is correct, and I am not prepared to say that his findings of fact are incorrect."

The appellant complains that the master erred in not requiring the defendant to file an account, showing item by item the cash received and paid out by him, so that the plaintiff might scrutinize, surcharge, and falsify the account. It does not appear that the master was ever requested by the plaintiff to require such an account to be filed. Nor does it appear that any objection was made by the plaintiff to the form or manner of the statement of the accounts attached by the defendant as exhibits to his answer. No demand was made for a bill of particulars. No motion was made to make the statement more definite and certain. Nor does it appear that, after the evidence of defendant as to the accounting had all been taken, the

plaintiff asked for time to examine it and introduce evidence surcharging or falsifying the account.

The next allegation of error is as to the finding that the total receipts of the defendant were only \$17,824, when he had admitted in the statement of the account filed as an exhibit to his answer, which was sworn to, that he had received \$21,010. Appellant contends that the court should have held this admission conclusive against respondent. While it is true, as a general rule, that an admission in a pleading is taken as conclusive of the fact admitted, and, so long as it remains in the pleading, evidence to the contrary will be excluded, still even such an admission, though made under oath, may be withdrawn by leave of the court. *Hall v. Woodward*, 30 S. C. 564, 9 S. E. 684. But this is not that kind of admission. The difference between the amount found by the master and the amount stated by the defendant may have arisen from a difference in the method of stating the account; for instance, the defendant may have charged himself with the whole amount received and the whole amount paid out in certain transactions, and the master may have debited or credited only the difference between the two amounts. Or the difference may have arisen from a mistake in the defendant's addition, or a mistake in some other respect. In either event, he should not be concluded by his statement of the aggregate amount received. We are not informed how the difference arose. But the master did just what the order of reference required him to do—to take up and report a statement of the account from the testimony.

Many of the exceptions to the report of the master and to the circuit decree assign error in the accounting without specifying the particular item or items debited or credited to which objection is made, so that, to determine whether there was error in respect to the matters complained of, a detailed examination of the whole account would be necessary. The purpose of referring matters of account to the master is to save the court the time and labor that would be necessary to do the work of an accountant. When the account has been stated, according to correct methods, the exceptions must specify the item or items of debit or credit to which objection is made. The court will not in response to a general exception alleging error in an account enter upon a detailed examination of the whole account. *Myers v. Myers, Bailey*, Eq. 23. In this connection, we will next consider the exception that the circuit court erred in not reviewing the testimony. We think the appellant has misapprehended the language of the circuit decree. When the court said: "To review the testimony in full would require a tremendous amount of labor, and, according to the view which I take of the case, would be entirely unnecessary," it was not

meant that the court had not fully reviewed the testimony in the sense of weighing and giving it due consideration, but merely that it was unnecessary to review it in the sense of going over it and discussing it in detail in the decree.

We think the court erred in allowing the defendant credit for his services to the firm. It is the legal duty of each member of a partnership to devote his time, skill, and energy to the business of the firm; and, in the absence of an agreement therefor, he is not entitled to extra compensation. The presumption is that his share of the profits is all that each expects to get for his efforts, and that notwithstanding one may devote his whole time and attention to the business and the other may do little or nothing. The plaintiff swears positively that there was no agreement to pay the defendant anything for his services. The only testimony tending to show such an agreement is that of the defendant and his son, neither of whom say in so many words that there was an agreement that the defendant should have extra compensation for his services. All that defendant said on that subject was: "His (plaintiff's) proposition was to pay me one-half of rent of stables, one-half of insurance and one-half of wages." His son, who was employed by the firm, testified: "Mr. Talbert said he wanted to be halfers with my father, and said he would pay half of the rent, the insurance, and half of the wages." Whose wages? Defendant's son and other assistants were employed and paid wages, and we think it was the wages of these assistants that were referred to. The defendant's son testified that the agreement was that he was to be paid \$40 per month for his services and for boarding his father. Neither of them say how much defendant was to be paid. It is not reasonable to conclude that they would have agreed upon the wages without some agreement as to the amount. The testimony shows, also, that defendant was in a similar partnership the two years before with another person, and did not get any extra compensation for his services to that firm, although he had, as in this case, the sole management of the business. Moreover, there is no proof whatever as to what the defendant's services to the firm were reasonably worth, and the finding that they were worth \$60 per month is unsupported by any testimony. The preponderance of the evidence is against the finding of the court below upon this point, and the accounting must be corrected by striking out that credit. The rent of the stables, though they were owned by one of the partners, was a legitimate expense of the business and would have been allowed the defendant without any specific agreement, but the preponderance of the evidence shows that there was an agreement to pay a reasonable rent. Judgment modified.

(86 S. C. 503)

STATE v. MESSERVY.

(Supreme Court of South Carolina. Aug. 4, 1910.)

1. HOMICIDE (§ 169*)—EVIDENCE—PRIOR ACTS—ADMISSIBILITY.

In a prosecution for the murder of a dispensary constable while he was attempting to arrest defendant as he was starting to leave a railroad station with several gallons of alcohol in his wagon, evidence of a conversation between a witness and defendant six months previous to the homicide in regard to a search by deceased of defendant's house for contraband liquors was admissible to show that defendant knew that deceased was a dispensary constable.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 169.*]

2. INTOXICATING LIQUORS (§ 129*)—CONSTABLES—BOND—STATUTE.

The requirement of Civ. Code 1902, § 1047, that constables shall "take the oath of office and give bond, does not relate to constables commissioned by the Governor under the Carey-Cothran act (Act Feb. 16, 1907 [25 St. at Large, p. 464]), but only to constables elected or appointed under section 1046.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 129.*]

3. INTOXICATING LIQUORS (§ 129*)—DISPENSARY CONSTABLES—APPOINTMENT.

The appointment by the Governor of dispensary constables is specifically authorized by Act Feb. 16, 1907 (25 St. at Large, p. 477) § 38.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 129.*]

4. CRIMINAL LAW (§ 830*)—INSTRUCTIONS—REQUESTS—ERRONEOUS REQUESTS.

Where, in a prosecution for murder, it appeared that deceased was a dispensary constable, who had been appointed by the Governor under the Carey-Cothran act (Act Feb. 16, 1907 [25 St. at Large, p. 464]) without giving bond, as not being required to do so under the act, even if it should be held that this act was not inconsistent with and did not repeal the former dispensary law, section 661 requiring the constables to give bond, yet it was no error for the court to refuse to charge that Civ. Code 1902, § 1047, should have been complied with before he could have authority to act as constable; that section not being applicable to constables appointed under the Carey-Cothran act.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 830.*]

5. INTOXICATING LIQUORS (§ 129*)—DISPENSARY CONSTABLE—OFFICER DE FACTO—WHAT CONSTITUTES.

Even if a dispensary constable was required by statute to file his bond and take the prescribed oaths before entering upon his duties, and did not do so, yet, if he was acting as constable in good faith under the commission of the Governor and the seal of the state, he was a constable de facto.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 129.*]

6. OFFICERS (§ 41*)—"OFFICER DE FACTO"—WHAT CONSTITUTES.

To constitute an officer de facto, he must have a presumptive or apparent right to exercise the office, resulting from either full and peaceable possession of the powers of such office, or reasonable color of title, with actual use of the office.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 63; Dec. Dig. § 41.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1845-1851.]

7. HOMICIDE (§ 111*)—SELF-DEFENSE—RESISTING ARREST—DE FACTO OFFICER.

The authority of a de facto officer cannot be questioned collaterally, so that one who resists and slays him while in the discharge of his apparent duty has only such defense as would exist were the person slain an officer de jure.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 143, 144; Dec. Dig. § 111.*]

8. HOMICIDE (§ 338*)—APPEAL—HARMLESS ERROR.

Where, in a prosecution for murder, the time of the offense had already been shown, the defendant was not prejudiced by the court's refusal to allow him to testify as to that fact, in the absence of any showing of a good reason for the repetition.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 709-713; Dec. Dig. § 338.*]

9. WITNESSES (§ 890*)—CONTRADICTORY STATEMENTS—EVIDENCE.

Where proper foundation has been laid, proof of inconsistent statements made by a witness may be given by any person who heard the statements, and is not restricted to the person to whom they were made.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1247; Dec. Dig. § 890.*]

10. COMMERCE (§ 40*)—INTERSTATE COMMERCE—INTOXICATING LIQUORS—DELIVERY TO CONSIGNEE—EFFECT.

After certain alcohol had been delivered to the consignee at the railroad station, it was no longer protected as an article of interstate commerce, if it was held for unlawful use.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30; Dec. Dig. § 40.*]

Appeal from Common Pleas Circuit Court of Colleton County; Chas. G. Dantzer, Judge.

J. W. Messervy was convicted of manslaughter, and he appeals. Affirmed.

Padgett, Lemacks & Morser, for appellant. John H. Peulfof, Sol., and Howell & Gruber (Jas. E. Peulfof, of counsel), for the State.

JONES, C. J. The defendant at fall term, 1909, was indicted for the murder of C. P. Fishburne at Ravenel station, in Colleton county, on July 6, 1909. The jury rendered a verdict for manslaughter, and defendant was sentenced to 20 years' imprisonment in the state penitentiary.

At the time of the homicide the deceased, Fishburne, was acting as a constable with a commission dated March 22, 1907, issued by Governor Ansel under the dispensary law known as the "Carey-Cothran act." The defendant had just received from the railroad station agent at Ravenel a barrel containing about 30 gallons of alcohol, and placed it in the wagon, and was about to drive off, when Fishburne seized the horse attached to the wagon and demanded surrender. Fishburne called to J. D. Altman, who was assisting him to come and hold the horse and let him take charge of the prisoner. The defendant gave this version of what then occurred: "When he said, 'Mr. Altman, come and hold the horse, and let me take charge of the prisoner,' Mr. Altman started to hold the horse, and then I cut the horse, and, when I cut the horse, Mr. Altman stopped, and I cut

the horse four times, and each time I cut the horse to make it go he tried to jerk the horse down and I continued to cut the horse four times. When I cut the horse, Mr. Fishburne said, 'If you won't surrender, we will have to kill you,' and he pulled his pistol and was going to shoot, and I shot him."

The first and second exceptions assign error in admitting the testimony of E. E. Fowler, state's witness, as to a conversation between the witness and defendant, Messervy, about six months previous to the homicide, relating to a search by deceased of defendant's house for contraband liquors. The court was correct in ruling the testimony admissible, as it tended to show that defendant has reason to know that Fishburne was acting as a dispensary constable.

Under exceptions 3, 4, 5, 6, 7, 8, 9, 17, 18, 19, 21, 22, 23, 24, and 25 appellant contends that, in addition to the commission by the Governor of Fishburne as constable under the Carey-Cothran act (Act Feb. 18, 1907 [25 St. at Large, p. 464]), it was necessary to Fishburne's authority to act as such for him to comply with section 1047, Civ. Code, which provides: "When any person shall be elected or appointed to the office of constable, he shall repair to the clerk's office of the county, and, together with the evidence of his election or appointment he shall lodge his bond, in the form prescribed by law in the penalty of five hundred dollars, with good sureties, not less than two nor more than five, to be approved in writing by the clerk; and, upon taking the oaths herein prescribed such person shall be entitled to a certificate from the clerk that he has filed his bond and taken the requisite oaths and shall thence forth be regarded as a regularly qualified constable; nor shall any person not so qualified exercise the powers of a constable: provided," etc. The court refused to allow testimony to show that this statute had not been complied with, and refused to instruct the jury that Fishburne was bound to comply with the statute before he could have authority to act as constable, and interfere with defendant if he was violating the dispensary law.

The court further refused to charge that under section 879, Cr. Code, Fishburne was acting unlawfully and committing a misdemeanor if he attempted to exercise the duty of a constable without having given bond as required. The requirement of section 1047 that constables shall take the oath of office and give bond does not relate to constables commissioned by the Governor under the Carey-Cothran act, but to constables when chosen by the qualified electors or appointed by magistrates, as provided for in section 1048. The appointment of dispensary constables is authorized by section 38 of the act of 1907, which declares: "It shall be the duty of the sheriffs and their deputies, magistrates, con-

stables, rural police, city and town officials to enforce the provisions of this act. If they fail to do so it is hereby made the duty of the Governor to enforce the same and he is hereby authorized to appoint such deputies, constables and detectives as may be necessary, the salaries and expenses of such officers to be paid out of the profits of the dispensaries in counties wherein they may be established and out of the ordinary county funds in counties wherein they have not been established." We do not find in this statute any requirement that the deputies, constables, and detectives authorized to be appointed by the Governor shall take the oath of office and give bond, as required in section 1047, *supra*. We do not find in the Constitution any requirement that constables shall give bond. Const. art. 3, § 26, does provide that all officers before entering upon the duties of their respective offices shall take the oath prescribed in the Constitution, and, if this provision should be construed as relating to constables, deputies, and detectives specially appointed by the Governor to enforce the dispensary law, there was no attempt to show that such oath was not taken by Fishburne before some officer before appointment by the Governor. The fact that ordinary constables have many duties to perform under various laws, and that the duties of dispensary constables are limited to enforcement of the dispensary law alone, affords a reason why the Legislature should fail to require dispensary constables to take the different oaths referred to in sections 582 and 1047. There is no reason for requiring dispensary constables to take the oath to enforce the laws against gaming and keeping gaming tables and to enforce the penalties prescribed against dueling required of constables elected or appointed under section 1046.

Section 534 merely prescribes the form of the bond which shall be given by officers who are required by law to give bond, but dispensary constables under the Carey-Cothran act are not by that act required to give bond. Under the former dispensary law (section 661) state constables were required to give bond to the state in the sum of \$500 with sureties to be approved by the Attorney General, and, even if it should be held that this legislation is not inconsistent with the act of 1907 and is not repealed thereby, still there was no error in the rulings to which exceptions are taken, as the question presented to the court was whether Fishburne should have complied with section 1047 as prerequisite to his qualification to act as constable in enforcing the dispensary law. But if it be true that a dispensary constable appointed by the Governor under the act of 1907 should take the prescribed oaths of office and file a bond for the faithful performance of his duty, and that Fishburne did not take such oaths and file such bond, still, if he was acting as constable in good faith under the commission of

the Governor and the seal of the state, as appears in this case, he was at least constable *de facto*. *State v. Hill*, 2 Speers, 150; *McBee v. Hoke*, 2 Speers, 138, *Kottman v. Ayer*, 3 Strob. 92; *State v. Hopkins*, 15 S. C. 156. *Tinsley v. Kirby*, 17 S. C. 1, cited for appellant, is not to the contrary, as it recognizes the general rule as to *de facto* officers and merely holds that there cannot be a *de facto* officer where there could be no *de jure* officer. "To constitute an officer *de facto*, he must have a presumptive or apparent right to exercise the office, resulting from either full and peaceable possession of the powers of such office, or reasonable color of title, with actual use of the office." *Ex parte Norris*, 8 S. C. 473; *Note to Hildreth v. McIntire*, 19 Am. Dec. 63. Public policy requires that the authority of one in fact holding a public office under color of legal title shall not be questioned collaterally. One who resists a *de facto* officer and slays him while in the discharge of his apparent duty has only such defense as would exist were the person slain an officer *de jure*. 1 *Bishop Crim. Law*, § 465; 29 *Cyc.* 1395; *State v. Dierberger*, 96 Mo. 666, 10 S. W. 168, 9 *Am. St. Rep.* 380.

It is contended under the tenth exception that the presiding judge refused to allow the prisoner to testify as to when the homicide occurred. As the defendant had already testified that the homicide was committed on the evening of July 6, 1909, and there was no issue on this point, he was not prejudiced. The court was not advised that there was any purpose in repeating testimony on this point, except possibly to show that a special session of the court had been called to try the case soon after the homicide, a wholly irrelevant matter.

There was no error, as alleged in the twelfth exception, in allowing T. J. Blanchard, witness for the state, to contradict defendant's witness, John Brown, as to a statement made by Brown to Murray concerning the homicide. Proper foundation had been laid by advertising the witness Brown as to the time, place, and person to whom the statement was alleged to have been made. While Blanchard was not the person to whom the statement was made, he was present and heard it; hence his testimony was supported by the foundation laid for the introduction of that statement.

The thirteenth and fourteenth exceptions assign error in refusing to instruct the jury that, if the alcohol was intended for unlawful use, the deceased had no right to seize it, or the horse and wagon, or to arrest defendant until the shipment arrived at the home of the defendant, if it was in unbroken package, said alcohol being an article of interstate shipment. The alcohol having been completely delivered to the consignee and owner at the point of its destination as an interstate shipment before the attempt to seize it, it was no longer protected as an

article of interstate commerce, if it was held for unlawful use. *State v. Moody*, 70 S. C. 56, 49 S. E. 8; *Jaro v. Holstein*, 73 S. C. 112, 52 S. E. 870; *State v. Pope*, 79 S. C. 90, 60 S. E. 234. *State v. Holleyman*, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567, does not support appellant's contention as the liquor was being transported for lawful use.

The remaining exceptions were not argued by counsel for appellant, and are either immaterial or controlled by the rulings announced.

The judgment of the circuit court is affirmed.

(86 S. C. 510)

KING v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. Aug. 4, 1910.)

1. CARRIERS (§ 20*) — CLAIM—PENALTY—PRE-REQUISITES.

Under the statute providing that claims against carriers shall be "filed" with the agent at the point of destination, a "verbal" complaint to such agent about the loss of goods is insufficient, in order to obtain the statutory penalty for the carrier's failure to adjust the claim within the statutory period after it was filed.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 20.*]

2. CARRIERS (§ 20*) — CLAIM—PENALTY—PRE-REQUISITES.

Under the statute requiring claims against carriers to be filed with the agent at the point of destination, such filing is a condition precedent to recovery of the statutory penalty for the carrier's failure to adjust such claims within the statutory period after their filing, unless there is waiver of strict compliance with the statute.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 20.*]

3. RECORDS (§ 7*) — FILING CLAIMS — REQUISITES — "FILED."

A paper is "filed" when it is delivered to the proper officer, and by him received to be kept on file.

[Ed. Note.—For other cases, see *Records*, Cent. Dig. § 6; Dec. Dig. § 7.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2764-2770.]

4. CARRIERS (§ 20*) — "FILING A CLAIM" — WHAT CONSTITUTES.

Such terms as "filing a claim" necessarily imply the placing of some written or printed paper showing the nature and amount of the claim and the person to whom due with the proper custodian.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 20.*]

5. CARRIERS (§ 20*) — CLAIM—FILING—"WAIVER."

In an action for goods lost by a carrier, and the statutory penalty for failure to adjust the claim within the time allowed after a claim is filed with the agent at the destination of the goods, it appeared that plaintiff had had a conversation with the carrier's local agent at the destination of the goods, who told him to send his claim to the general freight agent, which he did. In the correspondence with such agent there was no mention of the statutory penalty; and at that time defendant was not liable for it. Defendant had no right to compel plaintiff to file his claim with the local agent. *Held*, that

the direction by such agent to send the claim to the general agent was not a waiver of the statutory requirement that the claim must be "filed" with the agent at the destination of the goods before the penalty sued for can be recovered, because waiver is the voluntary relinquishment of some existing right.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 20.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 7375-7381; vol. 3, pp. 7831, 7832.]

6. CARRIERS (§ 20*) — CLAIM—PENALTY—WHEN IMPOSED.

The statutory penalty required of a carrier for its failure to adjust a claim within the statutory period after it was filed, being a creature of the statute, can be imposed only when all statutory conditions exist, and not otherwise.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 20.*]

Gary, A. J., dissenting in part.

Appeal from Common Pleas Circuit Court of Darlington County; Thos. S. Sease, Judge.

Action by A. L. King against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed as to the penalty.

W. F. Dargan and P. A. Willcox, for appellant. S. O. King, for respondent.

JONES, C. J. The circuit court affirmed the judgment of the magistrate in favor of the plaintiff against defendant for \$7.75, the value of freight lost in transportation, and for \$50, the statutory penalty for failure to adjust the claim within the time required.

The appeal relates to the judgment for the penalty, and the question involved is whether there was evidence of compliance with the requirement of the statute as to the filing of the claim with the agent at the point of destination, or of a waiver of such compliance so as to authorize the penalty. The circuit court held that there was a waiver of strict compliance with the statute, and further held that the evidence shows that it might be doubtful whether the defendant had an agent at the point of destination. The shipment was over defendant's line from Darlington, S. C., to Auburn, S. C. The plaintiff testified that P. R. McIntosh was the representative of defendant at Auburn, S. C., and P. R. McIntosh testified that he was defendant's agent at that point. There was no testimony to the contrary; hence there is no room to doubt that McIntosh was the agent at the point of destination.

It is also manifest that plaintiff did not file his claim with the agent at the point of destination. The plaintiff testified: "I filed my claim with the general agent at Wilmington. * * * I first made complaint to Mr. P. R. McIntosh, the A. C. L. representative at Anderson. I did not file any claim with Mr. McIntosh, only verbally. He advised me to send the claim to the general claim agent." McIntosh, the agent, testified that plaintiff and he talked about the shortage, but that no claim was filed with him. A mere verbal

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index.

complaint made to the agent at the point of destination is not a compliance with the statute, which requires that the claim for loss or damages shall be adjusted or paid within a specified time "after the filing of such claim with the agent of the carrier at the point of destination of such shipment." It is further provided that no such claim "shall be filed until after the arrival of the shipment," etc. It is further provided that the carrier shall be liable for interest "from the date of the filing of the claim." The words "filed," "filing," which we have italicized, show the legislative intent was to require more than a verbal claim. The word "file" is derived from the Latin word "filum," a thread, and, according to ancient practice, papers were filed when placed upon a cord or wire by the proper custodian for safe-keeping and convenient reference. In modern practice a paper is filed "when it is delivered to the proper officer and by him received to be kept on file." *Townsend v. Sparks*, 50 S. C. 384, 27 S. E. 801. Such terms as "filing a claim" necessarily imply the placing of some written or printed paper or papers showing the nature and amount of the claim and the person to whom due with the proper custodian. The statute positively designates the place of the filing to be the point of destination and the person to receive the paper to be the agent at that place. Such filing is a condition precedent to recovery of the penalty unless there is a waiver of strict compliance with the statute. *Brown v. Southern Ry.*, 71 S. C. 274, 51 S. E. 151; *Hawes v. Railroad*, 73 S. C. 274, 53 S. E. 285; *Walker v. So. R. R. Co.*, 76 S. C. 308, 56 S. E. 952; *Goldstein v. So. R. R. Co.*, 80 S. C. 523, 61 S. E. 1007.

The final question is whether there was evidence tending to show such a waiver of statutory requirement as to warrant imposition of the penalty. The evidence on this point was the testimony of plaintiff that the agent at the point of destination directed him to send his claim to the general freight agent and a letter from the general freight agent as follows: "Atlantic Coast Line Railroad Co., Freight Claim Department, Wilmington, N. C. Feb. 9, 1907.—Dear Sir: We beg to acknowledge receipt of papers in your claim. If you do not hear further from us in a reasonable time will appreciate your stirring us up and continuing to do at reasonable intervals until settlement is effected. In all cases refer to our number. Your number Oats 7.78. Our number K—175728. A. C. Kenly, Freight Claim Agent." Waiver is the voluntary relinquishment of some existing right. The plaintiff at the time of the correspondence had no right to the penalty, nor was defendant then liable for the penalty, nor was any reference made to the penalty in the correspondence; hence there is nothing to show the matter of the penalty was in the consideration of the parties. The com-

munication related solely to the claim filed for the first time with the general agent at Wilmington. Furthermore, so far as it appears, the defendant had no right to compel plaintiff to file his claim with the agent at the point of destination and therefore the filing and consideration of the claim at the Wilmington office was no evidence of waiver of any statutory requirement as a basis for a penalty. The penalty is the creature of the statute, and comes into existence when all statutory conditions exist, and not otherwise.

We do not regard the case of *Goldstein v. Southern Ry.*, supra, as holding that there may be a waiver of this requirement, as it expressly determined that there had been compliance with the statute by filing with the agent at the point of destination, the bill of lading, invoice of the goods, and a list of the shortage as a claim, as these papers showed the nature and amount of the claim and the name of the claimant within the rule stated in *Hawes v. Southern Ry.*, supra.

The judgment of the circuit court is reversed as to the penalty.

GARY, A. J. I dissent as far as the judgment of the circuit court as to the penalty is reversed.

(86 S. C. 514)

LEVAN et al. v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. Aug. 6, 1910.)

1. APPEAL AND ERROR (§ 1068*)—EXCEPTIONS ELIMINATED BY VERDICT.

Exceptions to refusal to charge that there was no evidence to support a finding of punitive damages are eliminated by the verdict not including any punitive damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4229, 4230; Dec. Dig. § 1068.*]

2. CARRIERS (§ 381*)—GIVING TICKET OVER WRONG ROUTE—EJECTION—DAMAGES—EVIDENCE.

Where passengers, a woman and young child, called for tickets to a place over one route, were given tickets there over a second route, boarded a train over the first route, and were put off at the next station, evidence of the conditions at such station—a cold winter day, an unheated waiting room, a boisterous crowd, and the next train to destination over the route called for by the ticket not being due for seven or eight hours—and of the injuries from a carriage ride back to the initial station, is admissible as tending to show the necessity of such ride and damages therefrom.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1473-1482; Dec. Dig. § 381.*]

3. TRIAL (§ 29*)—REMARKS OF COURT.

The mere repetition by the judge for the benefit of defendant's counsel of plaintiff's answer to a question as to where he first saw something is not objectionable as an expression of opinion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80-84, 508; Dec. Dig. § 29.*]

4. TRIAL (§ 29*)—REMARKS OF COURT IN RULING ON EVIDENCE.

For the court in accepting or rejecting evidence to merely state its reason therefor without any indication of opinion as to the merits of the case is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80-84, 508; Dec. Dig. § 29.*]

5. CARRIERS (§ 381*)—GIVING PASSENGER WRONG TICKET—ACTION—EVIDENCE.

There being evidence that defendant's ticket agent had made a mistake in selling plaintiffs tickets for a train over a different route than asked for, evidence that he was in a position where he could see they were boarding the train for which they had asked tickets, and not that for which the tickets called, is competent in an action for damages; they having been ejected and obliged to return.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1473-1482; Dec. Dig. § 381.*]

6. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Even if evidence that defendant's ticket agent who sold plaintiffs tickets for a train over a route other than that asked for was in a position to see they were boarding the train for which they had asked tickets, and not that for which the tickets called, was incompetent in an action for damages, plaintiffs having been ejected from the train and obliged to return, it could hardly have had any weight with the jury; the uncontradicted evidence being that the agent was hard pressed and absorbed in his work of selling tickets.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

7. EVIDENCE (§ 155*)—IRRELEVANT EVIDENCE—REBUTTAL.

It not appearing that the testimony was relevant or competent, it was not error to refuse to allow defendant's ticket agent, in an action for damages for selling a ticket over a route other than that contracted for, to contradict plaintiffs' testimony that the name of a certain railroad company was on the ticket.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 445-468; Dec. Dig. § 155.*]

8. CARRIERS (§ 384*)—CONTRACT FOR CARRIAGE—BREACH—EVIDENCE.

That one asks a ticket agent for a certain ticket, and the agent responds by stating and accepting the price, is evidence of an undertaking by the agent to furnish such ticket, and of a contract by the carrier to transport the passenger to his destination by the route specified; so that, defendant carrier having had on sale tickets for S. by way of C., evidence that its agent in response to a request for such a ticket, handed him instead thereof a ticket for S. by way of H., and that plaintiff, having boarded the train by way of C., was ejected at the next station, and obliged to return, warrants submission of the issues of defendant having contracted with plaintiff for a ticket by way of C., and having breached the contract to plaintiff's injury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 384.*]

9. CARRIERS (§ 384*)—EJECTION OF PASSENGER—DAMAGES—NECESSITY OF CARRIAGE TRIP—INSTRUCTIONS.

Plaintiff at S. asked defendant's agent for a ticket to A. by way of C., was handed one by way of H., and, having boarded a train for A. by way of C., was ejected at W., and there being no train returning to S. for seven or eight hours, and it being a cold day, and the waiting room at W. being unheated, and there being a boisterous crowd about it, returned to S. by carriage. Held that, as taking from the jury

the question whether the circumstances made the trip from W. to S. necessary, it was proper to refuse the bracketed part of the requested instruction: "It is the duty of a passenger who has been inadvertently informed by a ticket agent that a certain train would take her to her destination, if you believe that the agent did give such misdirection, to use all reasonable means known to her or suggested to minimize her damages, [and if she, by waiting at the station a few hours, could have returned to S. and proceeded to her destination on another train, after returning to S., she should have waited and taken that train and not have exposed herself. The law requires that]."

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 384.*]

10. CARRIERS (§ 383*)—EJECTION OF PASSENGER—DAMAGES—NECESSITY OF CARRIAGE TRIP—EVIDENCE.

Evidence that when passengers, a woman and young child, were ejected at W. from a train for S. by way of C., having asked defendant's agent for a ticket for S. by way of C., and been furnished with one for S. by way of H., the next train for S. by way of H. would not arrive for seven or eight hours, that it was a cold winter day, that the waiting room was unheated, and that they were without money to procure accommodations, is sufficient to go to the jury on the question of a carriage trip back to the initial station taken by them, having been a necessity forced on them by defendant's breach of duty, and so prevents it being said as matter of law that their duty to minimize the damage required them to remain at W., and obtain accommodations there till arrival of such next train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1497-1500; Dec. Dig. § 383.*]

11. CARRIERS (§ 384*)—GIVING TICKET OVER WRONG ROUTE—DILIGENCE OF PASSENGER—INSTRUCTION.

The bracketed words in the requested instruction, given in a case in which plaintiff, having asked defendant's agent for a ticket for S. by way of C., was given one used for trains for S. by way of H., and, having taken the train for S. by way of C., was ejected at the next station, that "It is the duty of a passenger before boarding a train to use all due diligence to ascertain if it is the right train, [the train on which his ticket entitles him to transportation], and, if the passenger fails to use the means of information at his command, he cannot complain of the resulting * * * damage, even if, on his refusal to pay the additional fare to the next station, or regular stopping place, he is ejected from the train"—imply that due diligence in ascertaining the right train requires the passenger to examine his ticket in every case to see if it expresses his contract of carriage, and are therefore properly rejected.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 384.*]

12. EVIDENCE (§ 407*)—CONTRACT OF CARRIAGE—TICKETS—PAROL EVIDENCE.

An ordinary unsigned railroad ticket is not the sole evidence of the contract of carriage. It is a token or receipt given to show the passenger has paid his fare from the place of departure mentioned therein to the destination mentioned therein; so that parol evidence is admissible to prove the terms of the contract entered into, or the representation made by the agent when the ticket was purchased.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1826-1828; Dec. Dig. § 407.*]

13. CARRIERS (§ 383*)—PASSENGERS—DUTY TO EXAMINE TICKETS.

A passenger is not in all cases obliged to see that his ticket expresses the carrier's con-

tract for the guidance of the conductor, so that having asked for a ticket for S. by way of C., and been given one used on another route for S., and boarded a train for S. by way of C., it is a question of fact whether due diligence in the effort to get on the right train required him to examine his ticket, though if he had examined it, and it had shown on its face, and he had discovered therefrom, that it was by a route different from that asked for, good faith would have required him to report the mistake to the ticket agent, and have the mistake corrected.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1492-1496; Dec. Dig. § 383.*]

14. CARRIERS (§ 370*)—GIVING PASSENGER WRONG TICKET—NOTICE.

Plaintiff, who asked defendant's agent at U. for a ticket to S. by way of C., and was given a ticket without a coupon, such as was used over the route to S. by way of H., was not charged with notice that the route by way of H. must be taken, because defendant neither owned nor operated a road from U. to S. by way of C., and did own and operate one by way of H., and the ticket had no coupon attached to it from C. to S. on some other road; there being no proof that defendant always indicated the route over roads in this way, and that plaintiff knew or ought to have known it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1459; Dec. Dig. § 370.*]

15. CARRIERS (§ 356*)—GIVING PASSENGER WRONG TICKET—KNOWLEDGE IMPUTED TO CONDUCTOR.

Knowledge by the ticket agent of the right of a passenger under a ticket, the passenger having asked for a ticket by one route and been given one by another route, and got on the train by the route for which he asked a ticket, is to be imputed to the conductor of the train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1409-1432; Dec. Dig. § 356.*]

16. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS.

The giving of an instruction for plaintiff affecting only the question of exemplary damages is harmless, the verdict having been for only actual damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4230; Dec. Dig. § 1068.*]

17. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS.

Where there was no evidence that one of the plaintiffs suffered physical injury, it is to be assumed the jury included in their verdict nothing on account of physical injury to him; so that inadvertent expressions in the instructions that the jury might find a verdict for suffering of either or both of plaintiffs were harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4230; Dec. Dig. § 1068.*]

Appeal from Common Pleas Circuit Court of Sumter County; Thos. S. Sease, Judge.

Action by Malinda L. Levan and another against the Atlantic Coast Line Railroad Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

P. A. Willcox and Mark Reynolds, for appellant. L. D. Jennings, for respondents.

WOODS, J. The plaintiff Barton Levan bought of the agent of defendant a ticket and a half ticket for his wife, Malinda L. Levan, and her child from Sumter, S. C., to Savannah, Ga., and return. There was evi-

dence from Barton Levan and other witnesses that he asked for a ticket by way of Columbia, and that, supposing tickets had been given him by that route, he put his wife and child on the train for Columbia; that between Sumter and Wedgefield, the next station, the conductor of the train told Malinda L. Levan that she had tickets for herself and child from Sumter to Savannah by way of Charleston; that the only explanation made by the passenger was that she thought she had the right tickets for that train, no claim being made by her to the conductor that the ticket agent had not given her the tickets asked for; that the plaintiff was charged no fare to Wedgefield, but was put off there, and directed to take the next train going to Charleston and thence to Savannah. The evidence of the plaintiff indicated that she was treated with courtesy by the conductor, but the plaintiff testified that it was a cold Christmas day, that there was no fire in the waiting room at Wedgefield; that there was a crowd of bolsterous persons about the station; that the train from Columbia to Charleston was not due in seven or eight hours; that, under these conditions, she undertook to return to Sumter in a carriage sent by her husband in response to her request by telephone; that on the journey she was exposed to a very severe storm which resulted in much discomfort and sickness. The action is for the alleged negligent and willful breach of duty by the defendant in refusing to carry the plaintiff to Savannah by way of Columbia under a contract to do so, and for the suffering and sickness alleged to have resulted from its refusal. On this allegation the verdict of the jury was for "three hundred dollars actual damages."

The 22 exceptions with utmost detail charge as erroneous almost every step taken by the court in the conduct of the trial. The exceptions as to the refusal of the circuit judge to charge that there was no evidence to support a finding of punitive damages and as to other alleged errors on the subject of punitive damages are put entirely out of the case by the fact that the verdict did not include any punitive damages.

Evidence as to the conditions which the plaintiff found at Wedgefield, and the injuries resulting from the carriage ride from Wedgefield to Sumter, was clearly admissible as tending to show that the journey was necessary, and that the plaintiff suffered injury therefrom. *Carter v. Southern Ry.*, 75 S. C. 355, 55 S. E. 771; *Entzminger v. Seaboard A. L. Ry. Co.*, 79 S. C. 151, 60 S. E. 441; *Campbell v. Railway*, 83 S. C. 448, 65 S. E. 628, 23 L. R. A. (N. S.) 1056.

The exception to the remark of the court in the course of the trial as to the time when the plaintiff Barton Levan said he observed on the tickets the words, "North Western

Railroad Company of South Carolina," was taken under an obvious mistake. The remark contained no suggestion of the expression of opinion, but was a mere repetition of an answer of the witness for the benefit of defendant's counsel. The objections to other remarks of the judge in passing on the admissibility of evidence have as little foundation. The court merely gave the reasons for the acceptance or rejection of evidence, without any indication of opinion as to the merits of the case. The case therefore falls under the principle applied in *Willis v. Telephone Co.*, 73 S. C. 379, 53 S. E. 639, and not under that applied in *Latimer v. Electric Co.*, 81 S. C. 374, 62 S. E. 438.

In view of the evidence that the ticket agent had made a mistake in the sale of the tickets, no argument seems necessary to show the competency of evidence that the agent was in a position where he could see that the plaintiffs were boarding the wrong train. But, even if incompetent, this testimony could hardly have had any weight with the jury, because of the uncontradicted evidence that the agent was hard pressed and absorbed in the work of selling tickets.

The contention that the court erred in not allowing the ticket agent to testify in contradiction of *Barton Levan* that the words "North Western Railroad Company" were not on the tickets sold cannot be sustained, because it does not appear that the testimony was relevant or material. There was direct evidence that defendant's agent handed the plaintiffs tickets to Savannah by way of Charleston in response to a request for tickets to Savannah by way of Columbia. There was no dispute that the defendant had on sale such tickets as the plaintiffs asked for. When one asks a ticket agent for a certain ticket, and the agent responds by stating and accepting the price, that is evidence of an undertaking on the part of the agent to furnish the ticket asked for, and of a contract on the part of the company to transport the passenger to his destination by the route specified. Therefore the court did not err in submitting to the jury the issue whether the defendant had contracted with the plaintiffs for tickets by way of Columbia, and whether the defendant had breached that contract to the injury of the plaintiffs.

The court, in accordance with the rule laid down in *Carter v. Ry.*, 75 S. C. 355, 55 S. E. 771, gave to the jury as part of his charge the following request, except the portion italicized: "It is the duty of a passenger who has been inadvertently informed by a ticket agent that a certain train would take her to her destination, if you believe that the agent did give such misdirection, to use all reasonable means known to her or suggested to minimize her damages, and if she, by waiting at the station a few hours, could have returned to Sumter and proceeded to her destination on another train, after

returning to Sumter, she should have waited and taken that train and not have exposed herself. The law requires that." The court could not have accepted the latter part of the request without taking from the jury the question whether the circumstances were such as to make the trip from Wedgefield to Sumter necessary. *Berley v. Railway*, 83 S. C. 411, 65 S. E. 456; *Campbell v. Railway*, 83 S. C. 448, 65 S. E. 628, 23 L. R. A. (N. S.) 1056.

The evidence of necessity for the trip in the carriage from Wedgefield to Sumter was weak, and brings the case close to that line where the court must reject the verdict of the jury as being without any evidence to support it. Yet a review of the testimony is not convincing that there was no evidence that the carriage trip was a necessity forced on the passenger by the defendant's breach of duty. The wait at Wedgefield would have been for almost the entire day. The passenger testified that she was without money to procure accommodations. There was no fire in the waiting room, and the record indicates that the passenger's inexperience in travel and her comparative helplessness in any emergency must have been obvious to the officers of the defendant. Under these peculiar conditions, it would not be safe for the court to say that the duty of the passenger to minimize the damage required her to remain at Wedgefield and obtain accommodations there until the arrival of a train to Savannah by way of Charleston. The question whether the suffering and sickness caused by exposure to an unexpected storm was a result too remote to be embraced in damages for which the defendant was responsible is not before us. Evidence on the subject was introduced without objection, and the court was not requested to charge the jury that in considering the effects of the journey in the cold they should eliminate the storm as a factor.

The court also properly refused to charge the words italicized in the following request: "It is the duty of a passenger before boarding a train to use all due diligence to ascertain if it is the right train, the train on which his ticket entitles him to transportation, and, if the passenger fails to use the means of information at his command, he cannot complain of the resulting inconvenience or damage, even if on his refusal to pay the additional fare to the next station, or regular stopping place, he is ejected from the train." The rejected words implied that due diligence in ascertaining the right train requires the passenger to examine his ticket in every case to see if it expresses his contract of carriage. The ordinary unsigned railroad ticket is not itself the sole evidence of the contract of carriage. Such a ticket is a token or receipt given to show that the passenger has paid his fare from the place of departure mentioned therein to the place

of destination mentioned therein. Hence parol evidence is admissible to prove the terms of the contract entered into, or the representation made by the agent at the time the ticket was purchased. 4 Elliott on Railroads, § 1593; Richardson v. A. C. L. Ry., 71 S. C. 444, 51 S. E. 261. Whether the ticket given in token of the undertaking of the railroad company properly indicates to the officers of the company that which they must do in execution of the contract is mainly the concern of the railroad company. The passenger is not in all cases rigidly charged with the obligation to see that the railroad company has properly expressed its undertaking for the guidance of the conductor and the other officials who are to act for the carrier under the ticket. It is therefore a question of fact as to whether due diligence in the effort to get on the right train requires the passenger to examine his ticket. Circumstances might arise where it would be his duty to do so. Whether the circumstances require such examination as due care on the part of the passenger is ordinarily a question for the jury. We think it safer for the court to avoid laying down hard and fast rules as to what particular acts constitute negligence or due diligence. The evidence here does not warrant the court in holding that no other inference could be drawn than that it would have been negligence on the part of the passenger not to examine his ticket. In this case, however, the purchaser of the ticket indicated plainly by his testimony that he did examine his ticket. If the ticket had shown on its face that it was by a route different from that asked for by the purchaser and he had discovered the mistake when he examined it, then good faith obviously required of him the duty to report the mistake to the ticket agent and have it corrected. The difficulty of the defendant is that there was no evidence that a thorough reading of the ticket could have made any mistake therein evident to a passenger. The tickets were taken up by the conductor and in possession of the defendant and were not produced. Coupons were introduced which the agent testified were in the same form as those sold to Levan. These coupons expressed that they were good for one first-class passage from Sumter to Savannah, but the route was left blank. The defendant's contention is that the purchaser of the ticket and the passenger were chargeable with notice that the Charleston route must be taken, because the defendant neither owned nor operated a railroad from Sumter to Savannah by way of Columbia, but did own and operate a railroad from Sumter to Savannah by way of Charleston, and the tickets did not have attached to them coupons from Columbia to Savannah on some other railroad. Had there been proof that the defendant always indicated the route over roads in this way and that

the plaintiffs knew or ought to have known that fact, observation by the passenger or purchaser of the lack of such coupons would afford strong reason to infer negligence in undertaking to use the ticket on a route requiring travel on other roads, but there was no such proof.

The last exception to be considered is as follows: "Because his Honor committed error of law in charging plaintiff's sixth request to charge, which was as follows: 'I further charge you that in proper cases the conductor must heed the statement and explanation of the passenger as to his rights, and that when he has requested and paid for a ticket to a certain place and he boards a train without fault, believing that he has obtained that which he sought, he is entitled to ride thereon, even though the agent has not furnished him with the proper evidence of his right to ride.' There was no statement or explanation of the plaintiff Malinda L. Levan, or any one else, made to Capt. Webb, the conductor, as to her rights, or what ticket she or her husband sought to buy, or that the ticket agent contracted to furnish her with any other kind of ticket, or tickets, than the one she presented." It is a task of great difficulty to define the duties which devolve on the conductor and on the passenger when the passenger takes a train not called for by his ticket and the conductor has no information except the statement of the passenger that he is in that situation by reason of the mistake of a ticket agent. The difficulty is still greater when the effort is made to impute willfulness to the conductor as the agent of the carrier because of incorrect information imparted by the ticket agent or a mistake made by him. The cases in other jurisdictions on this subject are in hopeless conflict. In view of the obvious embarrassment of both parties when such a situation arises, both passenger and conductor should meet it in a spirit of mutual accommodation. Oppression by the unreasonable assertion of authority on the part of the conductor and conduct by the passenger indicating a purpose to speculate on honest mistakes of the agents of the carrier should be rebuked by the courts with equal emphasis. In this case there is no evidence of such misconduct by either party. The rule that knowledge by the ticket agent of the rights of passengers must be imputed to the conductor is laid down in this state in Richardson v. Railway, 71 S. C. 444, 51 S. E. 261. The only division of the court in that case was on the issue of punitive damages, and that issue was taken out of this case by the verdict of the jury. The exceptions on this point therefore cannot be sustained.

As there was no evidence whatever that Barton Levan suffered any physical injury, it is not to be assumed that the jury included anything in their verdict on that account. Therefore inadvertent expressions of the

court that the jury might find a verdict for the suffering of either or both of the plaintiffs cannot affect this appeal.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(8 Ga. App. 1)

CENTRAL OF GEORGIA RY. CO. v. BUTLER MARBLE & GRANITE CO.

(No. 2,050.)

(Court of Appeals of Georgia. July 5, 1910.)

(Syllabus by the Court.)

1. DAMAGES (§ 69*)—LOSS OF GOODS—INTEREST.

The judgment must be amended by striking therefrom the sum returned as interest. "Where a suit is brought for damages arising from the destruction of property, and there is a basis of calculation as to the value, interest is not recoverable *eo nomine*. But the jury may consider the length of time damages have been withheld, the character of the tort, the conduct of the defendant, and all the circumstances of the transaction, and may in their discretion increase the amount of damages by adding to the value of the property destroyed a sum equal to the interest on such value; the entire sum found being returned as damages, and not exceeding the amount sued for."

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 137-140; Dec. Dig. § 69.*]

2. CARRIERS (§ 42*)—CARRIAGE OF GOODS—CUSTOM AS TO RECEIVING SHIPMENTS—WAIVER.

A custom imposing conditions as to the hours within which shipments will be received or forwarded by a carrier becomes immaterial if the conditions are waived and the shipment is in fact accepted by the carrier for the purpose of transportation and delivery to the consignee.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 42.*]

3. CARRIERS (§ 153*)—LIMITATION AS TO VALUE—VALIDITY.

While a common carrier may make a contract of affreightment embracing an actual and bona fide agreement as to the value of the property accepted for transportation, a mere general limitation as to value, expressed in a bill of lading, which is clearly nothing more than an arbitrary preadjudgment of the measure of damage in case of loss, will not, in any case, exempt a carrier from liability for the true value of a shipment lost or destroyed by the negligence of the carrier.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 687; Dec. Dig. § 153.*]

4. CARRIERS (§§ 158, 166*)—CARRIAGE OF GOODS—VALUATION—QUESTION FOR JURY.

Even where there is an attempt to limit liability in return for a lower rate of freight, the question as to whether there was an actual bona fide valuation of a shipment accepted by the carrier for transportation, or a mere effort arbitrarily to limit liability, is one of fact and for the jury. In the present case the jury were authorized to find that the valuation fixed in the bill of lading was not intended or understood to represent the mutual conclusion of the parties that the valuation mentioned had any reference to the real or actual value of the shipment. Where there is an arbitrary fixing of value before an inspection of the goods, and without any regard to their real worth, the assumed valuation may be treated as a mere attempt in advance to limit liability.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 640, 708; Dec. Dig. §§ 158, 166.*]

5. CARRIERS (§§ 129, 156*)—CARRIAGE OF GOODS—SHIPMENT "RELEASED"—LOSS OF GOODS—RIGHT TO RECOVER—EFFECT OF ILLEGAL RATE.

(a) The term "released," as a legal phrase, and when used in reference to a shipment, means no more than that a carrier is relieved from losses not occasioned by his negligence.

(b) The fact that a rate given to a shipper may be in violation of the rates fixed by the Interstate Commerce Commission does not affect the liability of the carrier to respond, or the right of a plaintiff to recover for the loss or destruction of property intrusted by him to a carrier for shipment, though both the carrier and the shipper might be subject to criminal prosecution, and although the carrier might recover, in an action brought for that purpose, the charges fixed by the commission.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 698-703; Dec. Dig. §§ 129, 156.*]

For other definitions, see *Words and Phrases*, vol. 7, p. 6061; vol. 8, p. 7783.]

6. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR.

So far as the ultimate effect upon the result of the trial is concerned, an objectionable feature in the pleadings can be as effectually removed by the charge of the court as by sustaining a demurrer thereto, and therefore, though the judgment upon the demurrer be erroneous, the error in such a case becomes harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4105; Dec. Dig. § 1040.*]

7. INSTRUCTIONS CORRECT.

There is no merit in any of the exceptions to the charge of the court. The pertinent contentions of both parties were clearly and fairly presented, and the jury properly instructed in the law applicable to every phase of the case.

8. APPEAL AND ERROR (§ 1051*)—TRIAL (§ 85*)—OBJECTIONS—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The assignments of error upon the admission of testimony do not require the granting of a new trial.

(a) The admission of testimony which was merely the conclusion of a witness could not in this instance have harmed the defendant, because there was ample legal evidence to sustain the inference of the witness.

(b) If objection is made to certain testimony as a whole, and a portion of it is legal and competent, the court is not required to sustain the objection.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4161; Dec. Dig. § 1051; Trial, Cent. Dig. § 223-225; Dec. Dig. § 85.*]

(Additional Syllabus by Editorial Staff.)

9. EVIDENCE (§ 48*)—JUDICIAL NOTICE—CLASSIFICATION AND RATES OF RAILROAD COMMISSION.

The court takes judicial cognizance of the classification and rates of the railroad commission.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 70; Dec. Dig. § 48.*]

Error from City Court of Americus; C. R. Crisp, Judge.

Action by the Butler Marble & Granite Company against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed, with directions.

The Butler Marble & Granite Company brought a suit against the Central of Georgia Railway Company to recover the actual

value of certain shipments of monument marble consigned to four different customers. The petition alleged that the goods were delivered to the railway company and accepted for transportation, but were never delivered to the petitioners or to the consignees, and that the defendant claimed that the property was destroyed by fire while in the defendant's possession. The plaintiffs charged that the loss was due entirely to the carelessness and negligence of the defendant's employes, and that by the use of reasonable diligence on the part of the defendant the damage could have been avoided. They sued for \$441.78 principal, interest at 7 per cent., and the penalty of \$50 prescribed by law for failure to adjust the claim within the time allowed by law. The defendant demurred to paragraphs 3, 5, and 6 of the petition, contending that the act of 1906 (Acts 1906, p. 102) is unconstitutional, that the city court of Americus has no jurisdiction of the recovery of the penalty, and that the plaintiff cannot recover at all as to any shipment destined to points without the state of Georgia. The defendant in its answer denied that it was guilty of any negligence, and alleged that the fire originated off the premises of the defendant, and, without any negligence on its part, was communicated to the car. The defendant further pleaded that the plaintiff fixed the value of the marble which was destroyed at 20 cents per cubic foot, and thereby obtained a rate of freight much lower than the plaintiff would have otherwise obtained, and that the defendant agreed to accept this valuation and issued its bill of lading at that valuation, at the plaintiff's instance, and therefore that, if the plaintiff was entitled to recover anything, it could only recover the amount so fixed, to wit, \$13, which the defendant averred it had tendered and continued to tender to the plaintiff. By way of replication to the answer of the defendant, the plaintiff, in an amendment to the petition, alleged: That neither the plaintiff nor its agents misrepresented the true value of the articles shipped, and that the agent and employes of the railroad company knew that 20 cents per cubic foot was not a reasonable valuation upon the property shipped; that the railroad company was not a victim of misrepresentation; that in fact the amount specified in the bill of lading was purely fictitious, and only represented an attempt on the part of the carrier to limit its liability to an arbitrary amount; that the loss was due to the negligence of the defendant, and that therefore the stipulation was not binding on the plaintiff; that the valuation stated was fixed without any reference to the real value of the goods, as was fully understood both by the carrier and the shipper. The amendment further set out that the defendant, instead of promptly shipping the goods to their destination, pulled the car which contained them "on the side track which runs along the Americus Compress

Company"; that the compress was full of jute bagging and lint cotton, which are very combustible materials; that these conditions were fully known to the employes of the defendant company; that a portion, if not all, of the compress was on the right of way of the defendant, and the combustibles mentioned were in close proximity to the main inside tracks of the defendant, where engines were passing and repassing, and said combustibles were subject to be ignited at any time; that, notwithstanding these conditions, the defendant allowed the car containing the plaintiff's goods to be pulled in on this side track, on which the compress company loaded and unloaded its cotton, and to remain there over Sunday (there being no freight trains run on Sunday), where it was destroyed by fire. The trial judge overruled the demurrer as to so much of the petition as referred to the recovery of a statutory penalty, and, also, over the defendant's objections, allowed the amendment to which we have referred. The trial resulted in a verdict in favor of the plaintiff for \$441.78, and \$19 interest. The defendant excepts to the refusal of a new trial.

E. A. Hawkins, for plaintiff in error. W. P. Wallis, for defendant in error.

RUSSELL, J. (after stating the facts as above). 1. We find no error in the judgment refusing a new trial, though the judgment must be amended. Under the rulings in *Western & Atlantic R. Co. v. Brown*, 102 Ga. 13, 29 S. E. 130, and in *Central R. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170, interest is not recoverable *eo nomine*. While the jury may consider the length of time the damages have been withheld, and all other circumstances connected with the transaction, and may, in their discretion, increase the amount of damages by adding to the value of the property destroyed a sum equal to the interest on such value, the entire sum found must be returned as damages, and not exceed the amount sued for. The judge might have sent the jury back to consider whether they desired to include as damages the amount mentioned by them as interest in their findings, if the sum total would not have exceeded the amount for which the plaintiff sued. But the mere fact that the jury found interest *eo nomine* is not sufficient ground for reversing the judgment. The forfeiture of the interest which the jury thought the plaintiff was entitled to recover is a sufficient penalty, and we therefore direct that the judgment be amended by striking therefrom the \$19 returned as interest.

2. It is not disputed in the evidence that the four several shipments of monumental marble delivered by the plaintiff to the defendant was destroyed by fire while in the custody of the defendant. Whether the plaintiff complied with the custom which requires shippers, if they desire a car to be forwarded

on a certain day, to deliver the shipment to the defendant before 9 o'clock, and whether the defendant was unable to forward the shipment, because it had no freight train on Saturday after the time it received the shipment, and no freight trains except for live stock and perishables on Sunday, is wholly immaterial in this case, because, as a matter of fact, the railroad company accepted the shipment and gave its bill of lading for it, and it was in proper condition to be transported. It might have declined to accept the shipment in violation of custom at the particular time; but there is no dispute that the employees of the defendant carried the car containing the marble from the Seaboard Air Line Railway's transfer track to its own side track near the Americus compress. It waived custom and accepted the shipment for transportation. The real issue in the case, therefore, turns upon the question whether the defendant carrier is entitled to have its liability diminished to the amount of its continuing tender, and in accordance with the valuation of the shipment mentioned in the bill of lading. If so, the plaintiff was only entitled to recover \$13 instead of the amount of the verdict actually rendered.

3. It is insisted by the learned counsel for the plaintiffs in error that the bills of lading were prepared by an agent of the marble company, and that by reason of the low valuation given the shipment, and the fact that it was billed "released," the shipper obtained a lower rate than he would otherwise have been entitled to; also, that the rate specified was one prescribed in the classification and rates of freight fixed by the railroad commission; also, that, because it being a violation of law and in contravention of the "Hepburn act" (Act Cong. June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]), regulating interstate commerce, for a carrier to charge or a shipper to obtain a higher or lower rate than that fixed, and the shipments in question having been made by classification fixed by law, the plaintiff's right to recover was limited to the classification selected by them. The controlling question is whether there was a bona fide valuation, or whether the assumed value was arbitrarily reached. We consider this as the only question to be viewed, because the evidence fails to show that the contents of the car were unknown to the carrier; for the agent of the company testifies that he knew the shipments going south from the marble company were monumental stuff. Each bill of lading specified the shipment as being marble, either boxed or crated. The value was fixed at 20 cents per cubic foot, and the number of cubic feet in each shipment was specified. In *Central Ry. Co. v. Hall*, supra, it was held that a railway company in its capacity as a common carrier, may, as a basis for fixing its charges and limiting the amount of its corresponding liability, lawfully make a con-

tract of affreightment with the shipper, embracing an actual and bona fide agreement as to the value of the property to be transported, and in such a case the shipper will be bound by an agreed valuation, when loss, damage, or destruction occurs. "But a more general limitation as to value, expressed in a bill of lading and amounting to no more than an arbitrary preadjustment of the measure of damage, will not, though the shipper assent in writing to the terms of the document, serve to exempt a negligent carrier from liability for the true value." It is a proposition undisputed in this state, so far as we are aware, that a carrier cannot, even by special contract, exempt himself from liability for the loss of goods intrusted to him, where a loss arises from his negligence or that of his servants.

4. And even where there is an attempt to limit liability in return for a lower rate of freight, and there is an issue of fact as to whether there was an actual bona fide valuation or a mere arbitrary effort to limit liability, the question is one for the jury. The case at bar is quite similar as to its facts to that of *Louisville & Nashville R. Co. v. Venable*, 132 Ga. 501, 64 S. E. 466, in which some of the bills of lading, as in the present case, expressed a value of 20 cents per cubic foot, and others erroneously 40 cents per cubic foot. In delivering the opinion of the court, Justice Atkinson said: "Especially did the court not err in not holding that the plaintiffs were limited in recovery of damages to the value of the stone as set out in the bills of lading received by the plaintiffs from the defendants."

5. Under the ruling in *Georgia Southern & Fla. Ry. Co. v. Johnson*, 121 Ga. 231, 48 S. E. 807, where goods are shipped "released," the burden is upon the carrier to show that the loss was within the exemption, and not occasioned by his own negligence. The term "released," as a legal phrase, is construed to mean no more than that the carrier is relieved from losses not occasioned by his negligence. In the case just cited, the judgment was reversed because it appeared that there was a bona fide valuation, and that the contents of the shipment (or at least the value of the contents) were entirely unknown to the carrier, as well as that the valuation was fixed solely by the shipper; but in passing upon the question it was held that where the carrier arbitrarily fixes the value of a consignment, or where, by the terms of the bill of lading, there is an arbitrary fixing of value before the goods are inspected, without any regard to their real worth, the assumed valuation in either event must be treated as a mere attempt in advance to limit liability. Applying these rules to the present case, we find that while it is true that the agent of the shipper inserted in the bills of lading the words, "Rel val. at 20. cents cu. ft.," this valuation bore no

relation whatever to the true value of the shipment, and that the jury were authorized to find not only this to be true, but that the agents of the defendant company, from having made very numerous shipments of the same kind for the plaintiff prior to that time, were fully aware of the disparity between the valuation mentioned in the bill of lading and the true worth of the shipment. It was not a case of a segregated instance in which the plaintiff for the first time tendered to the defendant a shipment of marble at a valuation of 20 cents per cubic foot. The evidence was ample to authorize the jury to find that the value of the consignment was merely arbitrarily fixed; in other words, that there was no bona fide effort, either on the part of the shipper or of the carrier, to value the shipment. This court takes judicial cognizance of the classification and rates of the railroad commission (Central Ry. Co. v. Cook, 4 Ga. App. 701, 62 S. E. 464); but the question in this case is not affected by the fact that there is a rate prescribed by the commission for monuments and grave-stones with a valuation limited to 20 cents per cubic foot. This rule might apply to an honest agreement as to the valuation of marble (if there be any worth only 20 cents per cubic foot); but in this case there is no evidence whatever that the parties conferred about the value of this marble or considered it at all. The jury were obliged to find that the valuation was arbitrary. Under the ruling in *G. S. & F. Ry. Co. v. Johnson*, supra, and the unbroken line of decisions holding that the value of the shipment cannot be arbitrarily fixed as a mere prearrangement against liability, it must be held that the rate announced in the classification of the railroad commission has no application to such a state of facts as those presented in this case. It appears here that the freight on marble from Marletta to Americus is 26 cents per cubic foot, and presumably it is much more on marble from Vermont. It is possible that the classification of the railroad commission might apply as a true measure of value to shipments from some points where the initial freight rate is less than 20 cents per cubic foot; but it certainly could not have been intended to apply, and cannot apply as a fair valuation, to a shipment where even the cost of transportation is greater than the agreed valuation.

(b) Nor is the result affected by the fact that the rate given to the shipper by the carrier may have been in violation of the rates fixed by the Interstate Commerce Commission and required to be published. As pointed out in *Creety's Case*, 5 Ga. App. 427, 63 S. E. 528, this might subject both parties to criminal prosecution, and would allow the carrier to sue for and to recover the charges fixed by the Interstate Commerce Commission in an action brought for that purpose. The amount of freight charged for the carriage of a shipment, however, has

nothing to do with the right of a plaintiff to recover for the loss or destruction of the property he has intrusted to a carrier for shipment, except in so far as the charge for freight may be a circumstance showing that there was a bona fide valuation of the shipment.

6. It is unnecessary for us to determine whether the trial judge ruled correctly upon the demurrer which sought to strike from the petition that portion thereof which related to a recovery of the penalty provided by the act of 1906, because the judge charged the jury that, under the evidence submitted the plaintiff was not entitled to recover the penalty, and the jury did not find the defendant subject to the penalty. In view of the judge's instructions upon that subject, the defendant's cause could not have been prejudiced. So far as its ultimate effect upon the result of a trial is concerned, an objectionable feature in the pleadings can be as effectually removed by the charge of a judge as by sustaining a demurrer thereto. The error then becomes harmless. The court's failure to sustain a demurrer, even though the demurrer be well founded in law, is not an error which affords just ground for complaint, if the charge of the judge to the jury effectually accomplishes the end sought to be attained by the demurrer, and precludes the plaintiff from the relief to which the defendant objected, or withholds from the plaintiff a defense to which he is not entitled by law.

7. The instructions of the court upon the effect of an arbitrary valuation of property received by a carrier for transportation, which are excepted to, so far from being objectionable, are clear, definite, and pertinent charges, presenting not only the view that an arbitrary valuation, if the jury found it to be such, would not relieve the defendant from its liability, if the jury thought it otherwise liable for the destruction of the property, but presenting with equal fairness the view that, if there was a bona fide valuation of the shipment, the liability of the carrier would be limited to that. There was no evidence in this case that the agent of the shipper overreached or misled the employees of the carrier, or that there was any concealment of the nature of the shipment.

8. Strictly construed, it was perhaps erroneous to have allowed one of the witnesses for the plaintiff to give to the jury his conclusion that "no fault or negligence whatever, on the part of the Butler Marble & Granite Company, occasioned the damages to them"; but the error is not such as to have called for the granting of a new trial. There is no evidence whatever to dispute this testimony of the witness, although it may be a conclusion. All of the testimony, every fact in the case, confirms his statement. There is certainly no contention that the plaintiff had anything to do with placing the car at the side track near the compress, and no dis-

pute as to the fact that it was burned because of its proximity to the compress.

The judge did not err in overruling the objection to certain testimony of C. A. Snyder, a witness for the plaintiff, for the reason that the objection was made (as appears from the record) to that testimony as a whole, and, while a portion of it might have been subject to the objection urged, many of the statements included in it were legal and competent. No effort was made to separate the objectionable portion from the legal testimony; and, under the well-settled rule, the duty of making this separation devolved upon the objector. After a careful review of the record, we are satisfied that the controlling issues in the case were properly submitted to the jury, that the verdict is sustained by ample evidence, and that the minor errors to which we have referred had no effect upon the result.

With the direction that the judge of the city court amend the verdict and judgment so as to exclude the amount returned as interest, the judgment is affirmed.

Judgment affirmed, with direction.

(8 Ga. App. 50)

ORR v. PLANTERS' PHOSPHATE & FERTILIZER CO. (No. 2,089.)

(Court of Appeals of Georgia. July 19, 1910.)

(Syllabus by the Court.)

1. TRIAL (§ 233*)—INSTRUCTIONS.

The court's statement of the defendants' contentions was more detailed, specific, and comprehensive than was required under the issue raised by the answer, but it was for that reason favorable rather than prejudicial to her interests.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 527; Dec. Dig. § 233.*]

2. TRIAL (§ 228*)—REVIEW—INSTRUCTIONS.

The fact that nicety of verbal criticism might suggest the use of a particular word more appropriate under the circumstances than the special word or phrase employed by the judge in his charge is not ground for new trial where, comparing the complaint with the context, it is apparent that the sense in which the inappropriate word was used is unmistakable, and the instruction (as it must have been understood by the jury) is pertinent and correct.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 512; Dec. Dig. § 228.*]

3. SALES (§ 201*)—TRANSFER OF TITLE—DELIVERY OF BILL OF LADING.

As between the seller and the purchaser the delivery of the bill of lading amounted to a delivery of the quantity of guano called for by the bill of lading. A bill of lading is symbolic of the goods shipped. For many purposes it stands as representative of the shipment itself, and title to the goods may be transferred by the owner by means of a transfer of the bill of lading as long as the goods are in the possession of the carrier. There is an exception in some instances in favor of the consignee's right of stoppage in transitu, but generally the delivery of a bill of lading by the person who, according to the terms of the bill, is entitled to the goods will transfer his title.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 538; Dec. Dig. § 201.*]

4. TRIAL (§ 251*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.

A party cannot complain of an instruction, which is favorable to his contentions even though the charge may not be nicely adjusted to the precise issue presented by the pleadings.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 537; Dec. Dig. § 251.*]

5. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—RESTRICTION OF CROSS-EXAMINATION.

While the right of subjecting a witness introduced by the opposite party to a thorough and sifting cross-examination should not be denied or abridged, yet where the fact sought to be elicited by the question which the court refused to allow is afterwards proved, the error becomes harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4145; Dec. Dig. § 1048.*]

Error from City Court of Sandersville; E. W. Jordan, Judge.

Action by the Planters' Phosphate & Fertilizer Company against S. H. Orr. Judgment for plaintiff, and defendant brings error. Affirmed.

Hardwick, Wright & Hyman, for plaintiff in error. Evans & Evans, for defendant in error.

RUSSELL, J. The Planters' Fertilizer & Phosphate Company brought suit upon an account against Mrs. Orr for certain fertilizer which it alleged it had furnished her. She filed a plea setting up that she did not know the fertilizer company in the transaction, but had bought the fertilizer from one B. B. Lovett, Jr., individually, and pleaded, by way of set-off, an account which she claimed was due her for hauling for said Lovett. It is not necessary to say more in regard to the general grounds of a motion for a new trial than that there was a conflict in the evidence, and the verdict in favor of the plaintiff was authorized by the evidence. The testimony for the defendant, it is true, tended to show that there was an agreement that the fertilizer should be paid for by hauling, and \$500 was paid to the fertilizer company by Lovett on Mrs. Orr's account; but whether this payment was made because the hauling was to be done for Lovett individually, or was assumed by him as a member of the copartnership known as the Davisboro Lumber Company, there still remained a conflict as to what was the agreed price to be paid for the services of the teams; and it appears that there was evidence from which the jury would have been authorized to find that in any view of the case there should be no further deduction from the purchase price of the guano on account of hauling. The real issue in the case, however, as presented by the pleadings was whether Mrs. Orr purchased the fertilizer from Lovett individually, or from the fertilizer company through Lovett as its agent, for, as the judge correctly informed the jury, if they were satisfied from the evi-

dence that Mrs. Orr purchased the guano from Lovett individually, there was no need for them to go further in the consideration of the case, but they should find their verdict in favor of the defendant. Naturally, if Lovett sold Mrs. Orr the guano, the fertilizer company would have no right of action, except under some doctrine of concealed principal. The plaintiff in error assigns error upon four portions of the charge and upon one ruling on testimony.

1. It was insisted that the judge, in his charge to the jury, erred in stating that one of the defendant's contentions was "that she [the defendant] paid Lovett by doing certain hauling for the Davisboro Lumber Company, and that the Davisboro Lumber Company was Byrd B. Lovett operating under a business name; that the Davisboro Lumber Company was not a partnership, but was Lovett acting under a business name as the Davisboro Lumber Company." When this excerpt from the charge is considered in connection with its context, it does not appear that there is any merit in the assignment of error. The statement to which exception is taken follows immediately a statement that the defendant denies the indebtedness alleged in the plaintiff's petition and alleges that she never at any time purchased any fertilizers from the fertilizer company, but dealt directly with Lovett as principal, and purchased 365 sacks of guano from Byrd B. Lovett, and paid him therefor \$700.85, and paid for the guano by doing certain hauling for the Davisboro Lumber Company. Then follows the explanatory statement to which exception is taken. It is true that the court's statement of the defendant's contention was more detailed, specific, and comprehensive than was required, under the issue as raised by the answer, but as the statement was in strict accord with the evidence which had been introduced in her behalf, certainly she has no right to complain. The specific recital of each point, presented step by step in the evidence in behalf of the defendant, called the special attention of the jury to the inferences arising from the evidence in support of her defense; and for that reason, if error was committed, it was favorable to the defendant rather than prejudicial to her interests.

2. Complaint is made in the second special assignment of error that the language employed by the judge in this portion of his charge was tantamount to an instruction that the jury might arbitrarily do as it pleased in regard to the defendant's plea of set-off. We cannot understand this contention. In our opinion the exception is without merit. After telling the jury that "there is an issue of fact between the parties in this case as to the agreed price of the hauling and the agreed value thereof," the court proceeded to tell the jury in the excerpt to which the complaint is addressed: "You look to the evidence submitted to you upon

this issue, and determine from all the facts the amount you will allow Mrs. Orr for the hauling done, if, under the evidence and rules of law I have given you in charge, you think she is entitled to set off the hauling account in this suit." It is argued that by the use of the word "allow," the court turned the jury loose to do as it pleased without regard to the evidence. The amount to be allowed Mrs. Orr, according to the judge's instructions, was to be determined by their opinion as to what was the true agreed price or agreed value of the hauling done according as the jury might find it from the evidence which they were charged to look to for the purpose; and as the jury must have understood the charge the instruction was absolutely correct, even if a phrase more apt than that used, as to allowing a set-off, can be suggested. It was no doubt plain to the jury that they were to determine from the evidence to what amount Mrs. Orr was entitled if she was entitled to anything under the evidence, and as there was dispute as to what was the contract price for the team which did the hauling, that they were first to determine from the evidence what was the true contract price. This exception seems to us to be totally without merit. The fact that extreme nicety of verbal criticism might suggest the use of a particular word more appropriate under the circumstances than the precise word or phrase which the court employed affords no ground for a new trial, when it is apparent, as it is here, from the sense conveyed by the instruction as a whole, that the jury could not have been misled, and that the unmistakable meaning of the charge as a whole conveyed a pertinent and correct instruction.

3. The court charged the jury in regard to the bill of lading which it was testified, had been delivered to the defendant's agent: "If you find that the plaintiff delivered to the defendant a bill of lading to a car of fertilizer in this case, and the defendant accepted such bill of lading, and that the bill of lading was for a certain number of sacks, she would be liable for such amount as the bill of lading called for, if, after she accepted it, she made no claim that the guano was short." Exception is taken to this instruction upon the ground that it is an incorrect statement of the law with reference to the liability of the defendant under the premises stated, and that there was no evidence to justify such a charge. So far as the evidence is concerned, the only dispute in regard to the bill of lading was that the defendant insisted that it was a bill of lading for a car of lumber, independent of the fertilizer transaction, while the plaintiff insisted that it was a bill of lading evidencing the receipt by the carrier of the quantity of guano therein specified, so that there was evidence authoriz-

ing an instruction upon the subject, and the only question is whether the law applicable to the plaintiff's contention was properly presented in case the jury found the testimony in the plaintiff's favor upon this point to be true. We find no error in the instruction. The assignment of a bill of lading constitutes a symbolic delivery of the property, and if Lovett, as agent of the fertilizer company, delivered the bill of lading for a car of fertilizers to an agent of Mrs. Orr, who was duly authorized to act for her in the premises, and she accepted it, she would be liable to the fertilizer company for the amount of guano called for by the bill of lading, in the absence of any fraud; and certainly she should be if she made no complaint. If there was a shortage in the guano, she might look to the carrier and hold the carrier liable for the value of that portion of the shipment which the carrier failed to deliver. *L. & N. R. Co. v. Pferdenges, Preyer & Co.* (this day decided) 69 S. E. 617. But so far as the fertilizer company is concerned the delivery of the bill of lading amounted to an actual delivery of the guano itself. Upon the subject of transfer by delivery of the bill of lading, Mr. Hale, in his work on Bailments, page 127, says: "A bill of lading may be pledged by a mere delivery without indorsement. It is well settled that where a party consigns goods to another and thereupon draws upon the consignee for funds, accompanying the draft with the delivery of the bill of lading or shipping receipt, as collateral security for its payment, the acceptance and payment by the consignee of the draft, accompanied with the bill of lading or shipping receipt, vests in him a special property in the goods. The bill of lading in such case is a symbol of the goods, and the delivery thereof with the intention to transfer the property in the goods, is a symbolical delivery of the goods." See, also, authorities cited in footnote on page 127 upon this subject. See, also, 6 Cyc. pp. 424, 426 (v).

As between Lovett and Mrs. Orr the delivery of the bill of lading amounted to a delivery of the quantity of guano called for by the bill of lading. A bill of lading is symbolic of the goods shipped, and if by the "giving" or delivery of the bill of lading, the consignee places another in a position where he can procure the shipment from the carrier (and it appears in this case that the railroad did not make any point on Mrs. Orr's right to take possession of the guano), certainly in such case the party who received the shipment by virtue of the possession of the bill of lading is in no position to insist that the assignment of the bill of lading was defective for lack of formality, or insufficient by reason of the fact that it was not reduced to writing. While bills of lading are not in a strict sense negotiable instruments (because they do not represent money), they are for many purposes representative of the ship-

ment to which they purport to refer. It is true as insisted by counsel for plaintiff in error that in the case of *Branan v. A. & W. P. R. Co.*, 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 28, the Supreme Court was dealing with the consignors' right of stoppage in transitu, and it was said that where the purchaser had an assignment of the bill of lading from a bona fide purchaser, a right of stoppage in transitu would not exist, but we do not construe this as a ruling that it is indispensable that there should be in every case a written assignment of a bill of lading, in order to pass title to the shipment which the bill of lading symbolizes; because the decision in that case really turned upon the fact that the carrier had never parted with the possession of the shipment up to the time that it had received notice not to deliver. While a bill of lading may be assigned in writing, such an assignment is not indispensable, for the carrier is the only party who can insist upon this formality, and if the carrier recognizes the one to whom the bill of lading has been delivered, as owner or as justly entitled to possession of the goods which the bill of lading represents, it does so at its own risk; and though the consignee might complain, a holder of the bill of lading who had used it as a means of securing possession of the shipment would certainly be estopped from saying that there was no assignment. As stated in 6 Cyc. 426(v), generally the delivery of a bill of lading by the person who, according to the terms of the bill, is entitled to the goods will transfer his title. It must be remembered that the transfer of a bill of lading is not a transfer of the contract itself, but merely a transfer of the goods represented by it.

4. It is insisted that the court erred in charging the jury that "if they found the Davisboro Lumber Company was a partnership consisting of Lovett and another person, and further found that Mrs. Orr did this hauling under these circumstances for the Davisboro Lumber Company, she would have no right to set off in this suit the account of the Davisboro Lumber Company for hauling." If we should consider this disjointed fragment of the charge by itself, we would adjudge it to be error, because it does not seem to be applicable to the issues presented by the pleading; but when it is considered in the light of the evidence and the manifest trend of the defendant's contention before the jury, and especially when it is considered in connection with the instruction given the jury at the close of the charge, in which the jury were told that if they found from the evidence "that Mrs. Orr did not know that the Davisboro Lumber Company was a partnership, and that she traded with Byrd B. Lovett to do this hauling for the Davisboro Lumber Company, then she would be entitled to a set-off, just as if the Davisboro Lumber Company was not a partnership," it is manifest that the instruction complain-

ed of was more favorable to the defendant than her plea would have authorized. And while the instruction complained of is not adjusted to the issues explicitly stated in the pleadings when it is noticed that in connection with this instruction the court clearly presented in a concrete form every possible contention for every phase of the case which could legally be favorable to the defendant, it is clear that the specific objection urged is not meritorious. The only ground of objection contained in the assignment of error is that this instruction took from the jury the question as to whether or not Byrd B. Lovett, Jr., as an individual, agreed to stand liable for the amount, and allowed it to go as a credit upon the guano account, as was contended by the defendant, and that it was an incorrect statement of the law for the reason that an individual member of a partnership may become liable individually for a partnership debt by assuming its payment, and the charge in question denied the defendant's right of recovery and set-off against Lovett even though he had assumed legal responsibility as an individual for the debt. Reference to the instruction which we quoted in the beginning of this division of opinion shows that the court expressly charged the principle, the benefit of which it is asserted was denied the defendant in the court below.

5. It appears from the record that the counsel for the defendant in the court below asked Byrd B. Lovett upon cross-examination the following question: "He [Mr. Dudley] received so much for sawing the lumber, didn't he, and then he was to get so much of the profits?" The court sustained the objection to the question, and repelled the answer, upon the ground that it was irrelevant whether there was a partnership existing between Mr. Lovett and Mr. Dudley or not. We think the court's ruling was correct, because the plaintiff contended that the fertilizer was not sold by Lovett individually at all, but that the fertilizer company was the seller, and, on the contrary, the defendant insisted that B. B. Lovett individually agreed to take pay for the guano in hauling; so that whether the jury sustained the contention of the plaintiff or that of the defendant, it would seem to have been immaterial whether Lovett was in partnership or not. But if we are mistaken as to this, the error in the court's ruling was harmless, because a review of the testimony shows that the defendant afterwards proved the facts which she insisted would be shown by the answer to the question which the court refused to allow. The right of a party to thoroughly sift the witnesses of the opposite party upon cross-examination should not be abridged. While this is so, the defendant's contentions in any case are to be gathered from his answer. There is in the defendant's answer no allegation referring in any way to a part-

nership, nor any averment that Lovett agreed (as he would have had the right to do) to individually assume the payment of the debts of the Davisboro Lumber Company. The whole theory of the defendant's defense was that she contracted with Lovett individually, as an original undertaking on his part, and therefore, under her answer, it was entirely immaterial to her defense whether Dudley was Lovett's partner in the Davisboro Lumber Company, or merely his employé.

In our view of the case, the trial was fair, and its result was authorized by the law and the evidence.

Judgment affirmed.

(135 Ga. 8)

VASSIE v. CENTRAL OF GEORGIA
RY. CO.

(Supreme Court of Georgia. Aug. 10, 1910.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 78*)—SECOND NEW TRIAL—
INSUFFICIENCY OF EVIDENCE.

There is no absolute and invariable rule which limits to one grant the power of the judge of the superior court to grant a new trial upon the grounds that the verdict is contrary to law, contrary to evidence, and without evidence to support it, and decidedly and strongly against the weight of the evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 162-165; Dec. Dig. § 78.*]

2. APPEAL AND ERROR (§ 979*)—REVIEW—
SECOND GRANT OF NEW TRIAL.

After one such grant, a subsequent grant on account of alleged conflict between the evidence and the verdict will be closely examined, to see that the discretion of the court below has been justly and wisely exercised, in view of the peculiar issues and facts of each case, and having due regard to the general consideration of the fitness of juries to ascertain facts and of the necessity that there must be some end to litigation. *Taylor v. Central Railroad & Banking Co.*, 79 Ga. 330, 5 S. E. 114; *Peavy v. Georgia Railroad & Banking Co.*, 81 Ga. 485, 488, 8 S. E. 70, 12 Am. St. Rep. 324; *Stewart v. Central of Georgia Ry. Co.*, 3 Ga. App. 397, 60 S. E. 1.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873; Dec. Dig. § 979.*]

3. SECOND NEW TRIAL.

Under the evidence in the present case, there was no abuse of discretion in granting a second new trial.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by H. A. Vassie against the Central of Georgia Railway Company. Verdict for plaintiff. From an order granting a new trial, she brings error. Affirmed.

Twiggs & Gazan, for plaintiff in error. Lawton & Cunningham and H. W. Johnson, for defendant in error.

FISH, O. J. Judgment affirmed. The other Justices concur, except BECK, J., absent.

(135 Ga. 81)

SHACKELFORD et al. v. ORRIS.

(Supreme Court of Georgia. Aug. 10, 1910.)

*(Syllabus by the Court.)***REVIEW ON APPEAL.**

Under the decree formerly rendered in regard to the trust estate involved in the present litigation, and the adjudication of this court in regard thereto in *Shackelford v. Covington*, 130 Ga. 858, 61 S. E. 984, there was no error in directing a verdict in favor of the defendant.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by S. E. Shackelford and others against A. A. Orris. Judgment for defendant, and plaintiffs bring error. Affirmed.

Salem Dutcher, for plaintiffs in error.
Hamilton Phinlzy, for defendant in error.

FISH, C. J. Judgment affirmed. The other Justices concur, except BECK, J., absent.

(135 Ga. 163)

HEATLEY v. LONG et al.

(Supreme Court of Georgia. Aug. 10, 1910.)

(Syllabus by the Court.)

**1. WILLS (§ 77*)—ADVERSE POSSESSION (§ 78*)
— OPERATION OF WILL—PROPERTY TRANSFERRED.**

A testator, the day before his death, sold and conveyed the east half of a certain land lot, "except one fourth the mineral interest," and in his will, executed on the same day, he provided that, with the exception of one mule, "all my property both real and personal" should go to his wife during her natural life, with remainder to her bodily heirs. After the death of the testator, the wife conveyed to one of her children one undivided half interest in the land lot. Ejectment was brought in the "John Doe" form against the grantee of the widow to recover one undivided half interest in the west half of the east half of the land lot. The defendant filed an answer, making a general denial of the allegations of the petition, and claiming title by prescription. A verdict was rendered in favor of the plaintiffs, and to the order of the court overruling his motion for a new trial the defendant excepted. *Held:*

(1) No attack being made on the validity of the deed of the testator conveying to the predecessors in title of the plaintiffs the land sued for, the will would not operate on the property previously conveyed by the deed; and such will could not, as to any of the land conveyed by the deed, be color of title under which the life tenant or the remaindermen named in the will could prescribe against the plaintiffs. See *Williamson v. Tison*, 99 Ga. 791, 26 S. E. 766.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 197; Dec. Dig. § 77; Adverse Possession, Cent. Dig. § 458; Dec. Dig. § 78.*]

2. DEEDS (§ 110*)—CONSTRUCTION—QUESTION FOR COURT.

The construction of an unambiguous deed, including the determination of the quantum of estate thereby conveyed, is a question of law for the court; and, no attack being made on the validity of the deed, it is the duty of the court to instruct the jury what is its legal effect as determined by him.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 255, 293; Dec. Dig. § 110.*]

3. TRUSTS (§ 23*)—DEEDS—VALIDITY—NECESSITY FOR RECORDING.

A deed creating a trust for the benefit of minors is not inadmissible in evidence because not recorded within three months after its execution. The provision contained in Civ. Code 1895, § 3149, declaring certain deeds void if not recorded within three months, has no application to trust deeds for the benefit of minors.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 33; Dec. Dig. § 23.*]

4. EVIDENCE (§ 347*)—DOCUMENTARY EVIDENCE—CERTIFIED COPIES OF COURT RECORDS OF ANOTHER STATE.

The court committed no error in admitting in evidence a certified copy of letters testamentary issued by the court of another state where the testator died and his will was probated over objections of the opposite party that such certified copy has not been filed with the clerk of the court wherein the suit was pending, in order that the same might become a part of the record in the case. Civ. Code, § 3318, requiring certified copies of the proceedings therein referred to to be filed with the court before foreign executors shall be entitled "to use the processes and remedies prescribed by the laws of this state," does not relate to the admission in evidence of certified copies of letters testamentary of such executors.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 347.*]

5. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Even if the evidence of admissions of the defendant claimed to have been made in the trial of another case was subject to the objections made, the admission of such evidence was not error requiring a new trial, as the defendant, upon the trial, delivered substantially the same testimony embraced in such alleged admissions.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1052.*]

6. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The court admitted testimony in behalf of the plaintiff that the defendant in this case was the defendant in a criminal case in the city court; that he was therein charged with trespass upon the property sued for; and that a named person, since deceased, testified upon the trial of such case. This testimony was objected to by the defendant on the ground "that parol evidence is inadmissible to show upon what property the indictment charged the alleged trespass was committed." If the testimony was subject to this objection, its admission was not error requiring a new trial, for the reason that the defendant delivered testimony substantially the same as that admitted by the court over the objection stated.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1052.*]

7. EVIDENCE (§ 580*)—EVIDENCE AT FORMER TRIAL.

Where one is charged with criminal trespass against the ownership of land, and defends by asserting ownership in himself, testimony of witnesses since deceased, which was introduced on the criminal trial, is admissible in evidence against him on a subsequent trial of an action of ejectment to recover from the defendant charged with trespass the land upon which it was claimed the trespass was committed, the plaintiffs in the ejectment suit being those who claimed to be the owners, or the successors in title of the owners, of the land at the time of

the commission of the alleged trespass. See *Gavan v. Ellsworth*, 45 Ga. 283.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 580.*]

8. EVIDENCE (§ 324*)—COMPETENCY—REPUTATION—TITLE TO LAND.

It was error to admit testimony of a witness for the plaintiffs, "I always heard this land in question spoken of as the mining company's mountain, the Long Mining Company," over objection of the defendant "that the title to land cannot be proven by general reputation." This evidence was not sufficient to show general reputation in the community, if offered as tending to prove notice of a fact already shown to exist.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 144, 1220; Dec. Dig. § 324.*]

9. EJECTMENT (§ 110*)—INSTRUCTIONS.

The evidence shows that B. M. Long was successor in title to the grantees of the testator to an undivided one-half interest in the east half of the land lot. He conveyed to certain trustees a one-fourth undivided interest in the whole of the land lot. One demise was laid in the grantees under this trust deed, and another demise in the executor of B. M. Long, the latter, as appears from the record, being a foreign executor. *Held*: (a) Title could not be shown in the executor unless it was shown that the will had been duly probated in this state. *Chidsey v. Brooks*, 130 Ga. 218, 60 S. E. 529. This not being done, no recovery could be had on the demise laid in the name of the executor. The suit was pending at the time of the adoption of the act of the General Assembly approved August 17, 1908 (Acts 1908, p. 85), and its effect is not in question. (b) Under the remaining demise, title was shown only to an undivided one-fourth interest in the west half of the east half of the land lot (the property sued for), and the recovery by the plaintiff of a greater interest therein was without evidence to warrant it. (c) Accordingly, it was error for the court to charge the jury: "Under the evidence in this case, I charge you that the plaintiffs are entitled to recover the land sued for in this case, unless the defendant has shown some legal reason why a recovery should not be had."

[Ed. Note.—For other cases, see *Ejectment*, Dec. Dig. § 110.*]

Error from Superior Court, Carroll County; R. W. Freeman, Judge.

Action by H. W. Long, trustee, and others against A. J. Heatley. Judgment for plaintiffs, and defendant brings error. Reversed.

W. F. Brown, R. D. Jackson, and Beall & Adamson, for plaintiff in error. S. W. Harris, S. Holderness, and Leon Hood, for defendants in error.

HOLDEN, J. Judgment reversed. BECK, J., absent. The other Justices concur.

(135 Ga. 19)

COLE v. COLE et al.

(Supreme Court of Georgia. Aug. 10, 1910.)

(Syllabus by the Court.)

1. DESCENT AND DISTRIBUTION (§ 67*)—ELECTION TO TAKE DOWER—EFFECT.

Where a widow of an intestate elects to take dower, she has no further interest in the realty of her deceased husband; but she is not

thereby prevented from claiming a child's part in the personality of the estate.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. §§ 202-205; Dec. Dig. § 67.*]

2. EXECUTORS AND ADMINISTRATORS (§ 195*)—OBTAINING YEAR'S SUPPORT—EFFECT ON RIGHT TO CHILD'S PART.

That a widow obtains a year's support to be set part to her does not prevent her claiming a child's part in the personal property not assigned as a part of such year's support.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 724; Dec. Dig. § 195.*]

(Additional Syllabus by Editorial Staff.)

3. WORDS AND PHRASES—"DOWER."

Dower is the right of a wife to an estate for life in one-third of the lands, according to valuation, of which the husband was seised and possessed at the time of his death.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 3, pp. 2188-2193; vol. 8, p. 7642.]

Error from Superior Court, Paulding County; Moses Wright, Judge.

Petition of E. C. Cole against W. A. Cole and others, administrators, for a child's part in an estate. A demurrer to the petition was sustained, and petitioner brings error. Reversed.

A. J. Camp and J. J. Northcutt, for plaintiff in error. A. L. Bartlett and W. E. Spinks, for defendants in error.

LUMPKIN, J. A widow filed her petition in the court of ordinary, alleging that her husband had died intestate; that out of his estate a year's support had been set apart to her; that out of the realty she had been assigned dower; and that, in addition to dower and a year's support, she was entitled to one-fifth part of the personality as a child's part. She prayed for a settlement. The case was carried to the superior court by appeal. A demurrer was filed on the ground that the petition set forth no cause of action, and that, having elected to take dower and having had a year's support assigned to her, the widow was entitled to no further interest in the estate of the intestate. The demurrer was sustained, and the petitioner excepted.

Dower is the right of a wife to an estate for life in one-third of the lands, according to valuation, of which the husband was seised and possessed at the time of his death. Civ. Code, § 4687. At common law the personal property did not descend by inheritance like the realty. By the act of 1804 (Cobb's Dig. p. 291) it was declared that: "When any person holding real or personal estate shall depart this life intestate, the said estate, real and personal, shall be considered as altogether of the same nature and upon the same footing, so that in case of there being a widow and child, or children, they shall draw equal shares thereof, unless the widow shall prefer her dower, in which event she shall

have nothing further out of the real estate than such dower; but shall nevertheless receive a child's part or share out of the personal estate." In 1807 an act was passed, the title of which was "An act for the more effectually securing the probate of wills, limiting the time for executors to qualify and widows to make their election." Cobb's Dig. p. 227. This did not purport to amend or change the act of 1804, except by putting a limitation upon the time within which the widow should make her election. In the body of the act it was declared that: "It shall be the duty of all widows, within one year after the death of their husbands, to make their election or portion out of the estate of the deceased; and any such widow so failing to make her election shall be considered as having taken her dower or thirds, and shall forever after be debarred from taking any other part or portion of the said estate." The last words of this section of the act of 1807, standing alone, might indicate that the election to take dower prevented a widow from taking any portion of the realty or personality; but, when construed in the light of the title of the act and of the fact that it did not purport to repeal or amend the act of 1804, save as to the time allowed the widow to make her election, it was evidently not the legislative purpose to change the widow's right with regard to the personal estate, which was not affected by the assignment of dower. By the act of 1839 (Cobb's Dig. p. 230) the application for dower was required to be made within seven years after the death of the husband, and by the act of December 9, 1841 (Cobb's Dig. 230), the limitation of one year within which the widow was required to make her election was made to commence running from the granting of letters testamentary instead of from the death of the husband. In *Odam v. Caruthers*, 6 Ga. 39, Nisbet, J., said: "Now, according to our statute, the wife occupies the same degree with the children. She is not entitled to any portion of the estate independent of the children, and before distribution to them, but is made to draw an equal share with them. She is a distributee with them, entitled to an equal share of the personalty, if she takes her dower, and of the whole estate, if she elects to take a child's part of the realty." The question of the election to take dower as affecting the widow's interest in personalty was not directly involved; but what was said showed the view taken by the learned judge who wrote the opinion as the state of the law prior to the adoption of the first Code. He cited the portion of the act of 1804 already quoted as being of force. When the Code of 1863 was adopted, it contained language which clearly indicated that the election to take dower debarred the widow from claiming any further interest in the realty of her husband, but not in the personalty.

The sections of that Code on the subject have been carried forward into the Code of 1895, and there again adopted. By section 3355, par. 3, declaring the rules of distribution of estates, it is said: "If there are children, or those representing deceased children, the wife shall have a child's part, unless the shares exceed five in number, in which case the wife shall have one-fifth part of the estate. If the wife elects to take her dower, she has no further interest in the realty." In section 4639, par. 3, it is provided that dower may be barred "by the election of the widow, within twelve months from the grant of letters testamentary or of administration on the husband's estate, to take a child's part of the real estate in lieu of dower." The language of these sections implies that the election to take dower does not prevent a widow from claiming a child's part in the personalty left by her husband; and, when the history of these provisions above set out is considered, we have no doubt that such is the correct construction of the law.

By section 3465 of the Civil Code it is declared that "among the necessary expenses of administration, and to be preferred before all other debts, is the provision for the support of the family," which is to be set apart in the manner therein prescribed. If there are no minor children, she may obtain a year's support for herself. If there are children, it is for their benefit as well as hers. There is nothing in the law which excludes her from inheriting a child's part if she has a year's support assigned to her.

From what has been said it will appear that the court erred in sustaining the demurrer and dismissing the petition of the widow. In her petition she made a claim in regard to prorating debts. But this is not involved in the ruling now under consideration.

Judgment reversed.

BECK, J., absent. The other Justices concur.

(135 Ga. 22)

SINGER SEWING MACH. CO. v. JOHNS.
(Supreme Court of Georgia. Aug. 10, 1910.)

(Syllabus by the Court.)

EVIDENCE (§ 419*)—PAROL EVIDENCE—VARYING WRITTEN CONTRACT.

Where one purchasing a sewing machine entered into a written contract by which such purchaser stated that she received the machine, valued at \$48, which she was to use with care, and keep in like good order as when received, and for the use of which she agreed to pay as rent \$5 in cash and an old machine at the price of \$4 on the delivery of the agreement, and \$3 per month thereafter, in an action by the sewing machine company to recover the machine, in which the plaintiff elected to take a money verdict for the balance due, it was error to allow the defendant, over objection, to testify that the agreement was that she was to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
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be allowed \$16 for the old machine; there being no proper proceeding seeking to correct the written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.*]

Error from Superior Court, Paulding County; Price Edwards, Judge.

Action by the Singer Sewing Machine Company against Mattie Johns. Judgment for defendant, and plaintiff brings error. Reversed.

F. M. Richards, for plaintiff in error. O. D. McGregor, for defendant in error.

LUMPKIN, J. Judgment reversed. The other Justices concur, except BECK, J., absent.

(135 Ga. 79)

TUCKER v. STATE.

(Supreme Court of Georgia. Aug. 13, 1910.)

(Syllabus by the Court.)

1. GRAND JURY (§ 19*)—OBJECTIONS—TIME FOR MAKING.

After the passage of an act of the Legislature changing the time for holding the superior court in a certain county, court was held at the time formerly fixed therefor. Grand jurors were drawn to serve at the next regular term, and at such succeeding term a grand jury was impaneled, which was composed of a number of grand jurors thus drawn and talesmen summoned to complete a panel. Held, that a person accused of murder, and who was in jail awaiting indictment, but made no objection to the grand jury until after they had found an indictment against him and he had been put upon trial thereunder, could not have the indictment quashed by a plea in abatement because of the illegality of the time when the term of court was held at which the grand jurors were drawn; and this is true, although the plea in abatement was interposed before pleading to the merits, and the attorney for the accused stated that he had not been employed until after the indictment had been found, and that he and his client did not know of the irregularity until after it had been so found. *Turner v. State*, 78 Ga. 174; *Lascelles v. State*, 90 Ga. 347, 372, 16 S. E. 945, 35 Am. St. Rep. 218; *Folds v. State*, 123 Ga. 167, 51 S. E. 305; *Parris v. State*, 125 Ga. 777, 54 S. E. 751.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 53-55; Dec. Dig. § 19.*]

2. CASE DISTINGUISHED.

In *Finnegan v. State*, 57 Ga. 427, no question seems to have been made as to the time when the objection should have been raised. The decision was also rendered by two judges, with a strong dissenting opinion by the Chief Justice. If the opinion of the majority of the court in that case should be followed, rather than the dissenting opinion, so far as the ruling went, it does not control this case. Moreover, the reasoning of the dissenting opinion has been followed in later cases. *Williams v. State*, 69 Ga. 11 (5c), 27; *Lee v. State*, 69 Ga. 706; *Roby v. State*, 74 Ga. 812 (a).

3. REVIEW ON APPEAL.

The evidence was sufficient to support the verdict, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Liberty County; P. E. Seabrook, Judge.

Frank Tucker was convicted of crime, and he brings error. Affirmed.

H. H. Elders, for plaintiff in error. N. J. Norman, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

LUMPKIN, J. Judgment affirmed. The other Justices concur, except BECK, J., absent.

(135 Ga. 26)

BUTTS COUNTY v. HIXON.

(Supreme Court of Georgia. Aug. 10, 1910.)

(Syllabus by the Court.)

1. BRIDGES (§§ 41, 46*)—COUNTIES—ACTION FOR INJURIES—INSTRUCTIONS—PROXIMATE CAUSE—APPLICATION OF RULE.

The plaintiff sued the county of Butts to recover damages for injuries received on account of the defective condition of a public bridge built by the county authorities since December 29, 1888. She alleged that the insecure condition of a hand railing on the side of the bridge, upon which she placed her hand for support while crossing the bridge at night, caused her to move towards the center of the bridge, and in doing so her foot became entangled in the rotten and jagged end of a beam on the floor of the bridge, causing her, without fault on her part, to fall and sustain the injuries for which she brought suit. She further alleged that the defective condition of the bridge was due to the negligence of the county authorities in failing to repair it, after knowing, or being charged with knowledge, of its unsafe condition. The plaintiff obtained a verdict, and the defendant excepted to the court's refusal to grant its motion for a new trial. Held, where two acts of negligence concur in producing an injury, in the absence of either of which the injury would not have occurred, and both acts are chargeable to the same person, the doctrine of proximate cause is not applicable; and where acts charged as negligence consist in the failure to remedy two defects in a public bridge, which would not constitute negligence until the county authorities charged with the repair of such bridge had actual or constructive notice thereof, and both defects combine in causing an injury, which would not have occurred had either not existed, the fact that the county authorities are charged with knowledge of only one of such defects will not excuse the county from liability. 1 *Thompson on Negligence*, § 69; *Kraut v. Frankfort, etc., R. Co.*, 160 Pa. 327, 28 Atl. 783.

(a) The following charge of the court: "In this case, if there was a defect in this bridge because of a beam placed there by authority of the county authorities, and it was suffered to decay and become rotten, and on that account it became dangerous, then if the county authorities, the county commissioners, had notice of it, or either of them, or if that condition remained for a sufficient length of time for them to discover it in the exercise of ordinary care, which would be notice to them, and if the plaintiff was injured on account of the defect, she would be entitled to recover"—was not subject to the criticism that it was error "for the reason that it is not adjusted to the issues in this case. The plaintiff alleges in her petition, and her proof tends to show, that she came in contact with two defects in the bridge, the loose railing and the beams of wood laid across the bridge, and that both these defects contributed to her injury." Nor was such charge subject to

the criticism that it was error because it "in effect instructs the jury that it was not necessary that the county authorities should have notice, either actual or constructive, of the defective condition of the railing, which she alleges was defective, and which, according to her allegations and proof, contributed to her injury."

[Ed. Note.—For other cases, see Bridges, Dec. Dig. §§ 41, 46.*]

2. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The refusal of the court to rule out the evidence of a witness for the plaintiff, "That bridge was rebuilt in 1891," upon objection of the defendant that it was an opinion of the witness, was not error requiring a new trial; it appearing that the same witness delivered other testimony substantially the same as that objected to, and it remained before the jury without objection. *Southern Ry. Co. v. Ward*, 131 Ga. 21, 61 S. E. 913.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

3. EVIDENCE (§ 213*)—COMPETENCY—EFFECT TO COMPROMISE SUIT.

The defendant offered the following testimony of a witness sworn in its behalf: "Soon after Mrs. Hixon was injured, Mr. J. O. Gaston, chairman of the county commissioners, turned over to me a letter from W. F. Hixon, the plaintiff's husband, and a witness in the case. The letter was apparently written with a view of getting the commissioners to pay something in compromise for the injury. No amount was mentioned in the letter, but he said in that letter 'that it was a matter which ought to be compromised,' inasmuch as the county and Mrs. Hixon were both at fault in causing the injury. I have lost the letter." The court committed no error in refusing to allow such testimony, and in sustaining the objection of plaintiff's counsel to its admission on the ground that the letter was written with a view to a compromise.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 745-753; Dec. Dig. § 213.*]

4. DEPOSITIONS (§ 92*)—FAILURE OF OPPOSITE PARTY'S COMMISSIONER TO ACT.

The petition alleged that the plaintiff was a resident of Mitchell county. Interrogatories were sued out for her in behalf of plaintiff, in the caption of which it was stated that she resided in the county of Effingham. The word "Mitchell" was written under the word "Effingham," and erased. Counsel for the defendant signed a writing on such interrogatories, wherein he acknowledged service and notice thereof and waived copy of same, and consented that they might be executed "without formal commission," and nominated "Eugene Cox as commissioner to represent the defendant." Cox did not act as commissioner in the execution of the interrogatories, and counsel for the defendant in writing, before the case was submitted to the jury and after giving notice to the opposite party, objected to the execution and return of the interrogatories, on the ground that Cox did not act as one of the commissioners. It appeared before the trial judge that the witness resided in Effingham county and Cox resided in Mitchell county, "200 miles or more from where the witness resided, and for this reason he did not act as commissioner." *Held*, the court committed no error in overruling the objections made, and in allowing the interrogatories to be used upon the trial of the case.

[Ed. Note.—For other cases, see Depositions, Dec. Dig. § 92.*]

5. REVIEW ON APPEAL.

The evidence supported the verdict, and the court committed no error in refusing a new trial.

Evans, P. J., and Atkinson, J., dissenting in part.

Error from Superior Court, Butts County; *El J. Reagan*, Judge.

Action by Mrs. W. F. Hixon against the County of Butts. Judgment for plaintiff, and defendant brings error. Affirmed.

J. B. Wall and W. E. Walkins, for plaintiff in error. Robt. L. Berner, for defendant in error.

HOLDEN, J. Judgment affirmed.

FISH, C. J., and LUMPKIN, J., concur. BECK, J., absent.

EVANS, P. J., and ATKINSON, J., dissent from the holding in the fourth headnote. When a party to a cause waives the issuance of a formal commission to take interrogatories, and nominates a named individual to represent him, the waiver amounts to a convention that the interrogatories may be taken by commissioners, one of whom must be the person named. If not executed agreeably to the convention, the interrogatories should be excluded from evidence.

(135 Ga. 22)

JETER v. JONES.

(Supreme Court of Georgia. Aug. 10, 1910.)

(Syllabus by the Court.)

1. CANCELLATION OF INSTRUMENTS (§ 51*)—APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

Where, in a proceeding brought for the purpose of canceling a deed, the plaintiff sought to prove that the maker was mentally incompetent to contract, and also that undue influence was exercised in its procurement, there was no error against the plaintiff in charging as to both grounds; and although the judge dealt with each separately, and in charging as to one used expressions which, taken alone, might have indicated that the jury should find for the plaintiff or the defendant according as they should determine that issue, yet when he charged in regard to each ground as affecting the validity of the deed, and from the entire charge it does not appear probable that any harm was done to the excepting party, no reversal will result.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 108; Dec. Dig. § 51.* Appeal and Error, Cent. Dig. §§ 4219-4224; Dec. Dig. § 1064.*]

2. DEEDS (§ 203*)—UNDUE INFLUENCE—MENTAL CAPACITY—EVIDENCE.

On an issue of whether or not a deed was procured by undue influence, evidence of statements of the maker of the deed to the effect that the grantee, who was her son, was worrying her a great deal, trying to get her to make him a deed to the land, and of a later statement that she had made the deed to him, and supposed that he was satisfied, were not admissible.

(a) It was contended that such statements were admissible as throwing light on the mental

capacity of the maker; but it is not stated in the motion for a new trial that they were offered for that purpose, nor does it appear that they would have been admissible in this case in behalf of the plaintiff, had they been so offered.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 602-611; Dec. Dig. § 203.*]

3. TRIAL (§ 812*)—INSTRUCTIONS AFTER SUBMISSION OF CAUSE—SCOPE OF JUDGE'S AUTHORITY.

Where, after they had retired for consideration of the case, the jury returned and requested a recharge on a certain question, it was not error that the judge, after instructing them on that subject, did not strictly confine himself to it, but also charged on another issue in the case. *Parker v. Georgia Pacific Ry. Co.*, 83 Ga. 539 (8), 10 S. E. 233.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 744, 745; Dec. Dig. § 812.*]

4. REVIEW ON APPEAL.

In view of the evidence and the general charge, none of the grounds of the motion for a new trial require a reversal.

Error from Superior Court, Haralson County; Price Edwards, Judge.

Action between A. B. Jeter and J. T. Jones. From the judgment, Jeter brings error. Affirmed.

Griffith & Mathews, for plaintiff in error. J. S. Edwards and Loyd Thomas, for defendant in error.

FISH, C. J. Judgment affirmed. The other Justices concur, except BECK, J., absent.

(125 Ga. 25)

B. C. KINARD & SON v. MANGHAM.
(Supreme Court of Georgia. Aug. 10, 1910.)

(Syllabus by the Court.)

1. JUDGMENT (§ 866*)—REVIVAL—JURISDICTION OF COURT.

In 1893 the county court existing in Butts county was abolished, and the records of that court were directed to be delivered to the clerk of the superior court. Acts 1893, p. 372. In 1900 a special act was passed by the Legislature, creating a county court of Butts county. Acts 1900, p. 151. It declared that such court should have the powers mentioned in sections 4170 to 4217, inclusive, of the Civil Code of 1895. But it also contained a number of special provisions, naming the judge and solicitor who should first serve, providing salaries, etc. It made no reference to any succession to the business or records of the original county court. *Held*, that the new county court thus established by special act was not identified with the former, which had been abolished, either as a revival of it or as a successor of its business, and the latter court had no jurisdiction by scire facias to revive a judgment which had been rendered in the former. A judgment of revival, by the second county court, of a judgment rendered in the original county court, was a mere nullity, and a levy of an execution issued therein could be successfully met by an affidavit of illegality.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1603-1607; Dec. Dig. § 866.*]

2. CROSS-BILL OF EXCEPTIONS DISMISSED.

The judgment complained of in the original bill of exceptions being affirmed, the cross-bill of exceptions is dismissed.

Error from Superior Court, Butts County; E. J. Reagan, Judge.

Action between B. C. Kinard & Son, for use, etc., and W. H. Mangham, administrator. From the judgment, Kinard & Son bring error; Mangham filing cross-exceptions. Judgment on main bill of exceptions affirmed, and cross-bill dismissed.

Lane & Park and Jos. F. Carmichael, for plaintiffs in error. Y. A. Wright, J. T. Moore, and O. M. Duke, for defendant in error.

LUMPKIN, J. Judgment on main bill of exceptions affirmed. Cross-bill dismissed. All the Justices concur, except BECK, J., absent.

(125 Ga. 60)

JONES v. MCKINNEY.

(Supreme Court of Georgia. Aug. 13, 1910.)

(Syllabus by the Court.)

1. MORTGAGES (§ 48*)—EXECUTION (§ 88*)—SUFFICIENCY OF DESCRIPTION.

A mortgage on realty, which describes the land as "100 acres of land No. 173, known as the Jones place, in the Fifth district of Wilcox county," is not on its face void on account of defective description.

(a) Nor is the levy of an execution based on the mortgage, which describes the property in substantially the same language.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 125-132; Dec. Dig. § 48;* Execution, Dec. Dig. § 88.*]

2. EXECUTION (§ 194*)—CLAIM BY THIRD PERSON—ADMISSIBILITY OF EVIDENCE.

The mortgage was valid, and on the trial of a claim which was interposed against the levy, the mortgage and *fi. fa.* were admissible in evidence over the objection that the description of the property was insufficient; there being extrinsic evidence tending to show that at the time the mortgage was given the mortgagor (whose name was T. J. Jones), claiming it under a deed, had for a number of years resided on the property with his family, including the claimant, who was his wife.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 194.*]

3. CORRECT INSTRUCTIONS.

There was no error in the charge or omission to charge, as complained of in the motion for a new trial, for any reason assigned.

4. REVIEW ON APPEAL.

The evidence was sufficient to support the verdict, and no error complained of required the grant of a new trial.

Error from Superior Court, Wilcox County; U. V. Whipple, Judge.

Action between Liza Jones and C. F. McKinney. From the judgment, Jones brings error. Affirmed.

E. H. Williams, for plaintiff in error. W. L. & Warren Grice, for defendant in error.

ATKINSON, J. Judgment affirmed. The other Justices concur, except BECK, J., absent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(135 Ga. 24)

SOUTHERN RY. CO. et al. v. WOODRUFF.
(Supreme Court of Georgia. Aug. 10, 1910.)*(Syllabus by the Court.)***1. NEW TRIAL (§ 35*)—EXCLUSION OF CUMULATIVE EVIDENCE.**

Where, on the trial of an action for a personal injury, the plaintiff, while on the stand as a witness, admitted that he had not made complaint in reference to the injury to any one save his wife until some days after he was injured, and other testimony was also admitted to show that he had made no complaint on the night of the injury, exclusion of the testimony of still another witness tending to show that he heard no complaint will not, even if admissible on account of the opportunity of such witness to have heard such complaint, if made, require the grant of a new trial, after verdict in favor of the plaintiff.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 51-55; Dec. Dig. § 35.*]

2. SUFFICIENCY OF EVIDENCE.

There was sufficient evidence to support the verdict.

3. REVIEW ON ERROR.

The remaining ground of the motion for a new trial was not meritorious, and requires no discussion.

Error from Superior Court, Pike County; E. J. Reagan, Judge.

Action by J. W. Woodruff against the Southern Railway Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

C. E. Battle and Howell Hollis, for plaintiffs in error. Westmoreland Bros. and E. C. Armistead, for defendant in error.

FISH, C. J. Judgment affirmed. The other Justices concur, except BECK, J., absent.

(125 Ga. 34)

OGLETREE v. BRAY.

(Supreme Court of Georgia. Aug. 11, 1910.)

*(Syllabus by the Court.)***DOWER (§ 99*)—JUDGMENT—ENTRY NUNC PRO TUNC—PARTIES WHO MAY ENTER.**

In 1908 J. F. Ogletree brought an action in the superior court of Meriwether county against Mrs. A. A. Bray; the substance of the petition being as follows: W. C. Bray, the husband of the defendant, died in 1880. Subsequently she applied to said court for dower, and in August, 1881, commissioners were appointed to assign it. In October, 1881, all the lands belonging to the estate of the deceased husband were sold at sheriff's sale, subject to the widow's (the defendant's) right of dower therein, and a deed thereto executed by the sheriff to the purchaser. In January, 1882, the commissioners, who had laid off and admeasured dower in such lands to the defendant, made their return to the court, accompanied by a plat of the survey made at their instance by the county surveyor. No further steps have ever been taken in the proceedings for dower, and the return of the commissioners has never been made the judgment of the court. The defendant, about the time that the return was made, went into possession as dowress of that portion of the land assigned to her as dower in the return. In 1889 and 1896 defendant sold and conveyed her life estate in

certain described portions of the land so assigned her as dower to the purchaser at the sheriff's sale. Defendant has continuously remained in possession of the balance of the dower land since it was assigned to her. By reason of the fact that the return has never been made the judgment of the court, and because of her long possession, the defendant is setting up title in the dower land adverse to plaintiff, and is claiming that she has title to the same in fee by prescription. Only two of the five commissioners who laid off the dower, and who know that defendant went into possession thereof as dowress, are living, and they are old and infirm, and their testimony may soon be lost to the plaintiff. Among the prayers were the following: (1) That the return of the commissioners be made the judgment of the court; (2) that it be decreed that the defendant has only a life estate in such of the land as she is in possession of and which was assigned her as dower, and that, as against her, the plaintiff owns the fee therein; and (3) that defendant be enjoined from disposing of the fee in such land. Held: (1) that as the purchaser at sheriff's sale of the fee in the land in question by reason of his interest therein was a party to the dower proceedings, and as he, after the assignment of dower, purchased from the defendant, as dowress, her life estate in certain portions of the dower, he had the right, not only for the purpose of protecting his interest in fee in the dower land, but also for the purpose of protecting his interest in the life estate in so much of the land as he bought from the defendant, to have the dower proceedings perfected by having the return of the commissioners made the judgment of the court nunc pro tunc, and that the plaintiff who held under such purchaser had the same right—23 Cyc. 840 (F); Id. 841 (n. 29); Id. 844 (4, n. 43); Id. 846 (2, n. 57)—(2) that, as the plaintiff was properly in court to have the return made the judgment of the court, he was entitled in the same action to the other relief sought in the prayers above named; and (3) that the court erred in sustaining a general demurrer to the petition.

[Ed. Note.—For other cases, see Dower, Dec. Dig. § 99.*]

Error from Superior Court, Meriwether County; R. W. Freeman, Judge.

Action by J. F. Ogletree against A. A. Bray. Judgment for defendant, and plaintiff brings error. Reversed.

Hill & Culpepper, for plaintiff in error. McLaughlin and Jones & Jones, for defendant in error.

FISH, C. J. Judgment reversed. BECK, J., absent. The other JUSTICES concur.

(135 Ga. 11)

SOUTHERN RY. CO. v. NICHOLS.

(Supreme Court of Georgia. Aug. 10, 1910.)

*(Syllabus by the Court.)***1. RELEASE (§ 52*)—PLEADING—AMENDMENT—PROCUREMENT BY FRAUD.**

In an action against a railroad company by an employé to recover damages for a personal injury, alleged to have been sustained by the employé while traveling as a passenger, where the railroad company pleads the employé's release upon a consideration of one dollar as accord and satisfaction, it is competent for the employé to amend his petition by alleging that the release was procured by fraud. An amendment which alleges that the employé

was induced to sign the release upon the false representation of the agent that the company's surgeon pronounced his injury slight, and that he would be able to resume work in a few days, and upon the company's agent delivering to him at the time an order directing the employe's superior officer to restore him to his former situation, signing the superintendent's name, which order was issued without the superintendent's authority and repudiated by the company, and that as soon as he was refused employment he tendered the dollar to the agent who gave it to him, which tender was refused, is sufficient to raise the issue of fraud in the procurement of the release.

[Ed. Note.—For other cases, see Release, Dec. Dig. § 52.*]

2. PLEADING (§ 241*) — PETITION — AMENDMENT.

The amendment related to a single subject-matter, and was properly incorporated in a single paragraph.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 241.*]

3. REMOVAL OF CAUSES (§ 46*)—DIVERSE CITIZENSHIP.

Where in a joint action of negligence in the state court against three defendants a peremptory instruction is given on the trial in favor of the two defendants who are residents of the state, this does not entitle the other, although a citizen of another state, to remove the case to the United States court because of diverse citizenship.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 73; Dec. Dig. § 46.*]

4. NEGLIGENCE (§ 141*)—INJURY TO PASSENGERS—COMPARATIVE NEGLIGENCE—INSTRUCTIONS.

Where the court, after reading from Civ. Code 1895, § 2322, that "if the complainant and the agents of the railroad company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him," immediately added, "but in this connection I charge you that the plaintiff can in no event recover if he could by the exercise of ordinary care and diligence have prevented the injury," such instruction is not open to the criticism as authorizing a recovery, although the plaintiff's negligence may have been the preponderating cause of the injury.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 141.*]

5. CARRIERS (§ 328*)—INJURY TO PASSENGERS—CONTRIBUTORY NEGLIGENCE.

Where it appeared that a passenger having plenty of time to get on a train while it was standing waited until it began to move, and in an attempt to get on board by seizing the railing of the car his projecting body came in contact with a pair of trucks left near the track on the station premises, and thus he was injured, he cannot recover damages on the ground that the railroad company was negligent in allowing the trucks to be placed near the track.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1367-1369; Dec. Dig. § 323.*]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by J. E. Nichols against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

McDaniel, Alston & Black and Maddox, McCamy & Shumate, for plaintiff in error. Geo. G. Glenn and Westmoreland Bros., for defendant in error.

EVANS, P. J. James E. Nichols brought suit against the Southern Railway Company, R. C. Craig, its depot agent, and J. W. Walker, the agent of the Southern Express Company, to recover damages for personal injuries. He alleged that he was employed as an engineer on a freight train of the railway company; that he ran his train into Chattanooga, Tenn., where he boarded an outgoing passenger train for Atlanta, Ga.; that he had previously asked for and was expecting a telegraphic pass, authorizing him to be carried on the passenger train, and so informed the conductor; that the plaintiff inquired of the operator at Ooltewah, Tenn., at the office, and the pass not being there, he reboarded the train and informed the conductor that he had not received the pass, but that he would get it when the train reached Dalton; that the conductor assented to this; that, when they reached Dalton, the plaintiff left the train, went into the office, and inquired about the pass, and, learning that it was not there, he determined to reboard the train and pay his fare; that, before he had time to get on, the train, without warning, started off, and he had to run to catch it; that he caught the train safely, and, while in the act of swinging himself on the steps and platform, his body came in contact with a pair of trucks which had been left so close to the coach as to strike him, knocking him off the steps before he swung his body clear; that but for the trucks striking him he would have boarded, as it was not moving so fast as to be dangerous to do so, he frequently having boarded trains safely going at a higher speed; that Craig, the depot agent, was negligent, in that it was his duty to see that the trucks were not left so near the side of the coach as to endanger passengers or others in attempting to board the car, and he failed to perform this duty; that the trucks belonged to the Southern Express Company, and had been placed so near the side of the coach as to endanger passengers or others attempting to board the train, and the express agent either placed the trucks there or allowed them to be so placed, which was negligence on his part; and that the conductor was negligent in starting the train without giving him time to get back from the office to board the same. The railroad company filed its plea, and at the trial amended it by setting up an accord and satisfaction, in that the plaintiff had been settled with, and in consideration of \$1 had signed a release covering the injuries sued for, whereupon the plaintiff amended his declaration, attacking the plea of accord and satisfaction, and alleging that the release was procured by fraud. The defendants demurred to the amendment, and the demurrer was overruled. At the conclusion of the evidence, the court announced that he would instruct the jury

that there could be no recovery against Craig and Walker, whereupon the railroad company filed its petition to remove the cause to the United States court. The petition was in the form prescribed by the act of Congress, and was accompanied with a bond. The court refused to grant the order of removal, and exception was taken. Pending the argument, the plaintiff again amended his declaration, alleging an additional act of negligence. A verdict was rendered for the plaintiff. The defendants moved for a new trial, which being refused, they accepted.

1, 2. The demurrer to the amendment attacking the release set up by the defendant as a plea of accord and satisfaction was upon the grounds that it was not set out in orderly paragraphs, consecutively numbered; that the facts alleged were insufficient to constitute fraud; that it did not appear that the tender was a continuing one, or made to a person having authority to receive it; and that the amendment undertook to vary a written contract. The original petition set out that the plaintiff had received serious and permanent injuries. The amendment alleged that the plaintiff would not have settled with the company for the nominal sum of \$1 except that the agent of the company had practiced an artifice to obtain the release. The device was a false representation by the agent that the surgeons of the defendant company, who alone had examined the plaintiff, pronounced his injuries of a trifling character, and the assurance that he would be allowed to resume his work as an engineer of the freight train. This assurance was in the form of an order purporting to be signed by the superintendent of the defendant company, afterwards repudiated by him and the company. If these be the facts, it is apparent that the plaintiff accepted a nominal sum in settlement of his injuries because of this artifice. A contract obtained under such circumstances is fraudulently procured. As soon as the plaintiff discovered that the agent's representations were false, and that the company would not allow him to continue in its employment, he tendered the money back to the company's agent from whom he received it. He properly tendered the money to the same person whom the company used as a means of obtaining the execution of the paper. The amendment related to only one subject-matter, and could properly be incorporated in a single paragraph.

3. The right to remove to the federal court a suit against three tort-feasors, one of whom is a nonresident, is dependent upon the case as made upon the pleadings, and is not contingent on the aspect the case may have assumed on the facts developed on the merits of the issues tried. The petition presented a joint cause of action against the resident and nonresident defendants. A peremptory instruction given upon the trial in

favor of the two defendants who were residents of the state does not entitle the other, although a citizen of another state, to remove the case to the federal court because of diverse citizenship. *Kansas City, etc., Ry. Co. v. Herman*, 187 U. S. 63, 23 Sup. Ct. 24, 47 L. Ed. 76; 2 *Foster's Federal Practice*, § 384 (b).

4. The court charged the jury in the language of Civ. Code 1895, § 2322, that: "No person shall recover damages from a railroad company for injury to himself or his property when the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him." This last sentence is said to be error, because it authorized a recovery if the plaintiff's negligence was equal to, or greater than, that of the defendant's. An inspection of the charge shows that immediately after reading this section the court added: "But in this connection I charge you that the plaintiff can in no event recover if he could by the exercise of ordinary care and diligence have prevented the injury." The qualification which the court put upon Civ. Code, § 2322, is that contained in Civ. Code, § 3830, which two sections are in *pari materia*; and neither did the court confuse the two sections, nor was the charge open to the criticism that the plaintiff was entitled to recover if his negligence was equal to, or greater than, that of the defendant's. Indeed, the charge was modeled after the form suggested in *Americus, etc., Railroad Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105.

5. If a passenger is given ample time to get on a train before it starts from the station, and he needlessly waits until the train is in motion before attempting to board it, and is injured in his effort to get aboard, but not from any negligence of the company, the latter would not be liable in damages for the injury. *Ricks v. Georgia Southern & Florida R. Co.*, 118 Ga. 259, 45 S. E. 268; *Meeks v. A. & B. Railroad Co.*, 122 Ga. 266, 50 S. E. 99. However, if it may be inferred from the circumstances that the passenger was not lacking in ordinary care in attempting to board the car in motion, and would not have been injured but for some supervening negligent act of the railroad company, it should be left to the jury to determine the relative diligence of the company and the passenger. If the company was negligent in allowing an obstruction upon the depot premises so near the track, and the passenger in boarding the car exercised ordinary care, he would be entitled to recover. On the other hand, if the company was not negligent, or if the passenger failed to observe due care in boarding the train, he could not recover. It then becomes neces-

sary, in reaching a conclusion in the case, to ascertain whether the evidence showed that the plaintiff's injury was caused by the failure of the railroad company to discharge any duty that it owed to him as a passenger. The plaintiff had been assured by the train dispatcher that he would be given a telegraphic pass, and was riding upon the car, with the consent of the conductor, expecting that the pass would be delivered at an intermediate station. When the train stopped at Dalton, the plaintiff left the car and entered the station house to inquire if his pass had been received. The telegraph operator informed him that he had not received it, but was wiring for it. According to the plaintiff's own testimony, after having received this information from the operator, he had ample time to return and board the train while it was stopped. Instead of doing this, he tarried in the station house to converse with a friend, and while thus engaged he saw the train moving off, and immediately ran to catch it. His purpose was to get aboard the forward end of the first-class coach, but a man was in his way, and he waited until the rear end of the coach reached him, when he seized the railing, and just as he placed his feet upon the steps for the purpose of drawing himself up he was struck by the trucks and knocked under the car. The plaintiff said the trucks which knocked him off were those employed by the company for handling the baggage. One of his witnesses declared that they belonged to the Southern Express Company, and were used in the express business. There was no dispute that the train stopped at the usual place sufficiently long to receive and discharge passengers. The train officers testified that the usual signals were given for the train to start. The plaintiff, who was in the station house talking with a friend, said he did not hear the signal. We do not think this negative testimony sufficient to raise a conflict on this point. The only act which the plaintiff by his testimony seeks to impute to the company as negligence is that contained in the amendment. There it was alleged that it was the duty of the railroad company to keep its depot premises in a reasonably safe condition, and free from obstructions so near its track as to endanger passengers in leaving or boarding its train, when in the exercise of ordinary care; that the railroad company failed to observe this duty when it permitted the trucks which struck the plaintiff to be placed dangerously near the track; that these trucks were an obstruction in plain view of the conductor in charge of the train, and it was negligent in him to move the train before the trucks had been moved to a safe way from the track, as passengers were in the habit of boarding the cars while in motion, and this

was known to the conductor. In *Central Railroad Co. v. Perry*, 58 Ga. 463, it was said by Bleckley, J., that "ordinarily a railroad company has a right to expect that passengers will get on and off at the place provided for them, and there only. It cannot be stated as a proposition of law that it is its duty to keep the track clear for pursuers, or that a passenger has a right to chase a flying train. As a general rule, on the contrary, no such duty or right exists, and, for the sake of the public as well as of the company, it is better they should not exist." It is unquestionably true that a railroad company must use due care in providing a reasonably safe place at depots and regular stopping places, so as to enable passengers to get on the train with safety to their person, and not move its train until passengers are given a reasonable opportunity to get off and on the cars. When the railroad company discharged its duty in this respect, it did not owe to the plaintiff the further duty to provide means by which he could board the cars while in motion. *Simmons v. Seaboard Air Line Ry.*, 120 Ga. 225, 47 S. E. 570; *Chicago & Northwestern Ry. Co. v. Scates*, 90 Ill. 586. The plaintiff, therefore, failed to show that the railroad company was negligent, and his injury was the consequence of his own voluntary act.

We have discussed the case on the hypothesis that the plaintiff was injured by coming in contact with the trucks. It was the contention of the railroad company (and evidence was submitted tending to prove it) that the plaintiff was in an intoxicated condition, and was injured by slipping from the steps in his effort to board the train, and was not struck by the trucks at all. The evidence did not warrant the verdict; and some of the instructions were not altogether in harmony with the views expressed herein. The rulings on the exclusion and admission of evidence were not erroneous.

Judgment reversed.

BECK, J., absent. The other Justices concur.

SCOTT v. STATE.

(156 Ga. 29)

(Supreme Court of Georgia. Aug. 10, 1910.)

(Syllabus by the Court.)

HOMICIDE (§§ 250, 309*)—MURDER—EVIDENCE—INSTRUCTIONS.

The evidence amply warranted the verdict, and did not authorize a charge on the subject of voluntary manslaughter.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 515-517, 649-656; Dec. Dig. §§ 250, 309.*]

Error from Superior Court, Washington County; B. T. Rawlings, Judge.

Charles Scott was convicted of murder, and brings error. Affirmed.

M. L. Gross and T. J. Swint, for plaintiff in error. Alfred Herrington, Sol. Gen., Hines & Jordan, and H. A. Hall, Atty. Gen., for the State.

EVANS, P. J. Charles Scott was convicted of the murder of Henry Harris, and sentenced to be hung. In his motion for new trial he complained that the court erred in failing to charge the law of voluntary manslaughter, and that the evidence was insufficient to support the verdict. The motion was overruled. The evidence discloses that the defendant entered a house where the deceased was sitting in a chair, reproached the deceased for slapping his little brother-in-law, and stated he was going to kill him, and simultaneously shot him with a pistol, inflicting a mortal wound. The evidence did not authorize an instruction on the law of voluntary manslaughter, and was amply sufficient to support the verdict.

Judgment affirmed. The other Justices concur, except BECK, J., absent.

(135 Ga. 24)

BRANAN v. SOUTHERN RY. CO.

(Supreme Court of Georgia. Aug. 10, 1910.)

(Syllabus by the Court.)

1. CARRIERS (§ 347*)—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

The plaintiff brought suit for damages, alleging substantially as follows: After the train of the defendant, on which he was a passenger, blew for his station and began to slow up, he started to go into another coach to get a bundle he had left therein. The door of the car had been left open by defendant's agents, ready for passengers to get out. As he got to the door, a violent jerk of the train caused him, in order to steady himself, to place his hand against the door, which swung to and cut off his finger. The door was defectively constructed. Defendant's agents negligently failed to push it back far enough to catch, and allowed it to swing loose. The engineer negligently caused the jerk of the train just as plaintiff grasped the door, causing it to swing to and catch his finger. The roadbed at the point of injury was defective in specified particulars, which "contributed to said jerk of the train." Held, whether, after the train blew for his station and began to slow up, the plaintiff, in undertaking to get into another coach to get a bundle which he had left therein, was in this particular, or otherwise under the allegations of the petition, guilty of such negligence as would bar a recovery, was a question for the jury. *Cotchett v. Savannah &c. R. Co.*, 84 Ga. 687, 11 S. E. 553; *Augusta So. R. Co. v. Snider*, 118 Ga. 146, 44 S. E. 1005; *Central of Ga. Ry. Co. v. Forehand*, 128 Ga. 547, 58 S. E. 44.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1346-1397, 1402; Dec. Dig. § 847.*]

2. CARRIERS (§ 314*)—INJURY TO PASSENGERS—ACTION—PETITION.

The court committed error in dismissing the petition upon the general demurrer thereto.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1260, 1270, 1273-1280; Dec. Dig. § 314.*]

Error from Superior Court, Henry County; E. J. Reagan, Judge.

Action by T. B. Branan against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Reuben R. Arnold, for plaintiff in error. C. E. Battle, Howell Hollis, Smith & Turner, and N. E. & W. A. Harris for defendant in error.

HOLDEN, J. Judgment reversed. The other Justices concur, except BECK, J., absent.

(135 Ga. 28)

FLETCHER v. HALL et al.

(Supreme Court of Georgia. Aug. 10, 1910.)

(Syllabus by the Court.)

MORTGAGES (§ 534*)—FORECLOSURE—SALE SUBJECT TO DOWER—INTEREST OBTAINED.

A widow made application in March, 1867, for dower in a tract of land containing 237 acres, more or less, and in 1868 was assigned a dower estate in 62¼ acres thereof. After the application for dower was made, the tract was levied upon by the sheriff by virtue of a mortgage *fi. fa.*, and in December, 1867, it was sold under such levy. The entry of levy and the deed to the purchaser described the tract as "containing 237 acres, more or less, widow's dower excepted." Held, that the sheriff's deed conveyed the fee in the entire tract to the purchaser, subject to the widow's right of dower therein, and after the death of the widow the purchaser was entitled to the 62¼ acres assigned to the widow as a dower estate. *Hawkins v. Johnson*, 131 Ga. 347, 62 S. E. 285.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 534.*]

Error from Superior Court, Butts County; E. J. Reagan, Judge.

Action between R. M. Fletcher, administrator, and John I. Hall, administrator, and others. From the judgment, Fletcher brings error. Affirmed.

H. M. Fletcher, for plaintiff in error. W. T. Davidson, J. T. Moon, and O. M. Duke, for defendants in error.

HOLDEN, J. Judgment affirmed. The other Justices concur, except BECK, J., absent.

(135 Ga. 25)

PRESTON v. DOZIER.

(Supreme Court of Georgia. Aug. 10, 1910.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 245*)—PRINCIPAL AND SURETY (§ 86*)—INDORSEMENT OF CHECK—LIABILITY AS SURETY.

Where a bank to which a check on another bank is presented for payment requires the payee to procure a third person to indorse the check, and this is done, and the bank to whom the check is presented then cashes it for the payee on the faith of this indorsement, which is neither necessary nor proper for the transmission of title to the check in the negotiation thereof, but is for the sole purpose of

guaranteeing payment of the check, such indorser becomes a surety thereon. *Sibley v. Bank*, 97 Ga. 128, 25 S. E. 470; *Atkinson v. Bennett*, 103 Ga. 508, 30 S. E. 599; *Buck v. Bank*, 104 Ga. 660, 30 S. E. 872; *Ridley v. Hightower*, 112 Ga. 476, 37 S. E. 733.

(a) In order to bind a surety, it is not necessary to give him the notice of dishonor and protest provided for by Civ. Code, § 3688, in respect to indorsers of promissory notes and bills of exchange. *Sibley v. Bank*, supra.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 558, 559; Dec. Dig. § 245; *Principal and Surety, Dec. Dig. § 86.*]

2. BANKS AND BANKING (§ 114*)—UNAUTHORIZED ACT OF AGENT—RATIFICATION.

Even if the cashier who paid the check, as agent of the defendant in error, who was a banker, was without authority to pay it with the funds of his principal, his action in so doing was ratified by the defendant in error, who brought suit on the check in his own name.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 277-280; Dec. Dig. § 114.*]

3. PRINCIPAL AND SURETY (§ 162*)—ACTION ON CHECK—DIRECTING VERDICT.

Under the pleadings, and the undisputed evidence showing that the defendant in error through his agent cashed the check, on which the plaintiff in error was surety, and which was never paid, there was no error in directing a verdict against the plaintiff in error.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 442-445; Dec. Dig. § 162.*]

Error from Superior Court, Butts County; E. J. Reagan, Judge.

Action between W. W. Preston and W. B. Dozier. From the judgment, Preston brings error. Affirmed.

Jno. R. L. Smith, for plaintiff in error.
H. M. Fletcher, for defendant in error.

HOLDEN, J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(135 Ga. 58)

GEORGIA ENGINEERING & CONSTRUCTION CO. v. HORTON & SMITH.

(Supreme Court of Georgia. Aug. 12, 1910.)

(Syllabus by the Court.)

1. DEMURRER PROPERLY OVERRULED.

There was no error in overruling the demurrer to the plaintiff's petition, based on the ground that the contract was one within the statute of frauds, and was not alleged to have been in writing. *Mobley v. Lott*, 127 Ga. 572, 56 S. C. 637.

2. CORPORATIONS (§ 513*)—SUFFICIENCY OF PETITION—ACTION AGAINST CORPORATION.

Where a petition alleged that the plaintiffs sold lumber to a corporation of the county where the suit was brought at a certain price and to be delivered at certain times, and sought to recover damages on account of a breach of the contract arising from a refusal to receive the lumber sold, it was not subject to special demurrer on the ground that it did not allege the name of the officer or agent of the defendant with whom the contract was made. 5 Enc. Pl. & Pr. 92; *Pierce v. Seaboard Air Line Ry.*, 122 Ga. 664, 667, 669, 50 S. E. 468; *Augusta Ry. Co. v. Andrews*, 92 Ga. 706, 710,

712, 19 S. E. 718; 81 Cyc. 1226, and notes.

(a) In *Cherokee Mills v. Gate City Cotton Mills*, 122 Ga. 268, 50 S. E. 82, it was alleged that the plaintiff, a corporation, conducted certain negotiations "through its proper officers," and that the defendant called on the defendant corporation, "through its proper officers," to make good the contract, and the defendant's officers were charged with bad faith, and attorneys' fees claimed on that account. It was held that on special demurrer it should be stated what "proper officers" were meant.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2018; Dec. Dig. § 513.*]

3. EVIDENCE (§ 332*)—DOCUMENTARY EVIDENCE—BRIEF OF EVIDENCE IN OTHER CASE.

On the trial of a case in the superior court, it was error to admit in evidence, over objection, an extract from an original brief of evidence prepared by counsel and approved by the judge of a city court of the same county, and used on the hearing of a motion for a new trial in a case in that court between the same parties. Original records of one court are not ordinarily admissible in evidence in a different court as proof of their contents. A certified copy of such brief, not the original, was the proper evidence to show what a witness testified on that trial, if such evidence was otherwise competent. Civ. Code, § 5212; *Belt v. State*, 103 Ga. 12 (3), 29 S. E. 451; *Cramer & Co. v. Truitt*, 113 Ga. 967, 39 S. E. 459.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1237-1246; Dec. Dig. § 332.*]

4. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

There was no evidence requiring a new trial in rejecting by-laws of the defendant corporation declaring the general powers of the board of directors and the general duties of the president. The question in issue was whether an agent of the company, whose agency was recognized and not denied, had authority to bind the company by purchase of lumber on certain terms, and whether he made the trade contended; or, if he did not have such authority, whether, if he made the trade, his act was ratified. The evidence showed that the person who was president was also general manager.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. § 1057.*]

5. REVIEW ON APPEAL.

If there were any inadvertences of expression in the charges complained of, they affect the accuracy of statement rather than the correctness of the principles announced. They will not probably occur again, and require no extended discussion. None of the other rulings in regard to the admission or rejection of evidence were such as to require a new trial, where considered in connection with the entire evidence.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by Horton & Smith against the Georgia Engineering & Construction Company. Judgment for plaintiff, and defendant brings error. Reversed.

Lipscomb, Willingham & Doyal and Dean & Dean, for plaintiff in error. M. B. Eubanks, for defendant in error.

LUMPKIN, J. Judgment reversed.

BECK, J., absent. The other Justices concur.

(135 Ga. 320)

BATEMAN v. BATEMAN.

(Supreme Court of Georgia. Aug. 11, 1910.)

*(Syllabus by the Court.)***1. PARTNERSHIP (§ 32*)—EXISTENCE OF RELATION.**

The following written contract was entered into: "This contract, entered into the date above written, between Chas. L. Bateman, party of the first part, and J. A. Goggins and O. C. Bateman, parties of the second part, witnesseth: That Chas. L. Bateman, party of the first part, agrees to sell J. A. Goggins and O. C. Bateman, parties of the second part, all pine timber down to (13) thirteen inches in diameter, and all oak and poplar timber that will square 15 inches, and all dogwood timber of merchantable size, on his plantation in the sixth district of Crawford county, Ga., for the sum of fifteen hundred (\$1,500.00) dollars, and payments to be made and half of each bill of lumber as sold, except such bills as O. L. Bateman, party of the first part, may see proper to have sawed for himself, and price of such bills shall be one (\$1.00) dollar per hundred for any class, and same to be credited on above account. J. A. Goggins and O. C. Bateman, parties of the second part, agree to pay \$1,500.00 for timber as above stated and on terms as stated, and to furnish lumber for bills as stated above for O. L. Bateman, party of the first part." Signed by the three parties. The evidence disclosed that one of the purchasers agreed with the other to furnish the mules and log carts, that the other was to pay for the work, and that each was to have an interest in the proceeds, the amount of which was not distinctly disclosed. *Held*, that the purchasers were liable as partners, and the fact that one of them collected the proceeds of certain sales and ran away, without accounting to his partner, furnished no ground of defense to the latter, in a suit on the contract.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 34; Dec. Dig. § 32.*]

2. LOGS AND LOGGING (§ 3*)—BREACH OF TIMBER CONTRACT—MEASURE OF DAMAGES.

Suit was brought by the vendor upon the contract set out in the preceding headnote. It was alleged that the vendees had cut, sawed, and sold more of the timber than was required to pay the plaintiff in accordance with the contract; that he had demanded of them one-half of the proceeds of each shipment of lumber made by them, and also one-half of the proceeds of the lumber sold by them to parties in the locality; that they had refused to pay him such sums, and also finally refused to cut and saw any more of the timber; that he had received only \$818.36, leaving a balance of \$681.64 still due. *Held*, that in such a suit it was erroneous to charge as follows: "As to the payment for lumber sold and delivered to other parties, the plaintiff contends that the truth of the case is that the defendants have never paid for lumber sold to other parties according to the terms of the contract, but that upon approaching Goggins and Bateman, that on every occasion when he tried to get any money out of them on their contract, that they complained that they were making no money, and used all of their receipts for sales to pay off their hands, and they could not give up to him one-half of the money. If you believe that to be the truth of the case, under the evidence, then that created a breach on the part of the defendants of their duty toward the plaintiff to pay to the plaintiff one-half; and I charge the jury that if a breach at that time occurred under the contract, because of a refusal of the defendants to pay the money due by the contract upon the sales of various bills of the

parties from time to time of the lumber sawed from this place, and the defendants refused to make any statement showing what was the amount received from those bills, that constituted such a breach of the contract that entitled the plaintiff to claim that his entire bill was due for the amounts of timber sold, and the reason for that is that the knowledge of the quantity of lumber sawed and knowledge of the amounts of the bills, and the party by whom those bills were owed to the defendants, Goggins and Bateman, therefore, if, having that knowledge of the amount that they owed the plaintiff those sums, withheld from him the information upon which he would base his claim for that, the law would hold the entire sum was due at once. To illustrate what I mean, if you hire a man on a farm to work for \$200 a year, and he stays six months and runs away, without any fault on your part, he is not entitled to recover a dollar, for he has made a breach of the entire contract. On the other hand, if you hire a man to work for \$200 a year and he renders proper service, and without just cause he is run off from the place, he can wait until the end of the year and recover the whole 12 months' wages. Why? Because there is a breach of the contract without fault on his part."

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

3. LOGS AND LOGGING (§ 3*)—BREACH OF TIMBER CONTRACT—MEASURE OF DAMAGES.

Under such a suit it was also error to charge as follows: "Where, however, a contract has no specified time within which the payments were to be made, but were to be made out of certain sales, and plaintiff shows the sales have been made, and there is nothing from the evidence in the case in consequence of the refusal of the defendants to make a disclosure, either from inability or other cause, but there is a breach of the contract in reference to that matter by the defendants in the case, so that the plaintiff has no way of ascertaining within what time his money is due, then the result of that breach on the part of the defendants is to give to the plaintiff the right of action for the entire amount due upon the contract for the purchase of the timber; and therefore I charge the jury in this case, if you believe that although Goggins and Bateman had a right under the contract not to be called upon to pay, except as there were sales of bills of lumber sawed on this land, the law holding they would have a reasonable time within which to saw the timber from the land and sell it, and that having that right they sawed the timber, or a considerable portion of it, and upon request of C. L. Bateman to make a showing and settle for such lumber as they had sawed, and they failed and refused to do it, so that he, Bateman, was left in ignorance, and without any means of ascertaining the amount of his timber they had sawed, and the prices at which they had sold it, so that he was not in a position of knowing from them, through their concealment of those facts, then as far as he is concerned the law would give him the right of action to recover the entire amount due, except as they were entitled to credit."

(a) The doctrine of anticipatory breach of contract, where one party to a contract involving mutual obligations repudiates it before the time of performance has arrived, was not involved in the case as laid by the plaintiff. Neither was the rule involved that one who enters into an entire contract, and abandons it after only part performances, is not entitled to recover on the contract at all.

(b) The fact that a plaintiff finds it difficult to prove his case as alleged, or to have an accounting and show the amount of timber which has been cut and sold by the defendants, be-

cause he is in ignorance of the actual amount cut and the prices thereof, and does not have the means of ascertaining it, will not authorize him to recover on a basis different from that on which he has sued.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

Error from Superior Court, Houston County; W. H. Felton, Judge.

Action between O. C. Bateman and C. L. Bateman. From the judgment, O. C. Bateman brings error. Reversed.

H. A. Mathews, M. G. Bayne, and W. D. & Custis Nottingham, for plaintiff in error. O. C. Hancock, for defendant in error.

LUMPKIN, J. Judgment reversed. The other Justices concur, except BECK, J., absent.

(135 Ga. 152)

UNITED GLASS CO. v. CHAMLEE.†

(Supreme Court of Georgia. Aug. 10, 1910.)

(Syllabus by the Court.)

1. DEMURRERS PROPERLY OVERRULED.

There was no error in overruling the demurrers to the sheriff's answer to the rule.

2. EXECUTION (§ 152*)—SHERIFFS AND CONSTABLES (§ 118*)—CUSTODY OF PROPERTY—DELIVERY ON FORTHCOMING BOND—DUTY OF SHERIFF.

If personal property was levied on under an execution, and a claim thereto duly interposed and a forthcoming bond given, with proper security, it was the duty of the sheriff to leave the property in the possession of the claimant. If found subject, and not forthcoming on the day of sale, there was a remedy on the bond. The sheriff was not for that reason liable to rule for not having made the money. Civ. Code, § 4616.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 406, 407; Dec. Dig. § 152.* Sheriffs and Constables, Cent. Dig. §§ 196-198; Dec. Dig. § 118.*]

3. SHERIFFS AND CONSTABLES (§ 93*)—LIABILITY FOR LOSS OF PROPERTY LEVIED ON.

Without special authority, attorneys cannot receive anything in discharge of a client's claim but the full amount in cash. Civ. Code, § 4418. But if the attorney for the plaintiff in *fi. fa.*, in the effort to collect the money due thereon, and while representing his client, made an agreement as to leaving the property levied on at a certain place, and so directed the sheriff as to cause an illegal sale to be made by the latter without having the goods in possession, and the attorney bid them in for his client, and afterwards they were burned in a fire occurring at the place where they were left by consent, on a rule against the sheriff for not having realized the amount of the execution he would not be liable for damages resulting from the above-stated causes.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 114, 140; Dec. Dig. § 93.*]

4. REVIEW ON APPEAL.

No formal traverse appears to have been made to the sheriff's answer. The pleadings and evidence were somewhat confused. The charges may not have been altogether free from inaccuracy. But, upon a review of the whole case, there was no error in overruling the motion for a new trial.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action between the United Glass Company and R. L. Chamlee, administrator. From the judgment, the glass company brings error. Affirmed.

Dean & Dean and Henry Walker, for plaintiff in error. McHenry & Porter, Geo. A. H. Harris & Sons, and R. L. Chamlee, for defendant in error.

FISH, C. J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(135 Ga. 56)

TUCKER v. KNIGHTS OF PYTHIAS OF NORTH AND SOUTH AMERICA.

(Supreme Court of Georgia. Aug. 12, 1910.)

(Syllabus by the Court.)

INSURANCE (§§ 771, 815*)—BENEFIT INSURANCE—PLEADING—PETITION—EVIDENCE—VERDICT—"REPRESENTATIVE"—"LEGAL REPRESENTATIVE."

The court committed no error in overruling the demurrer to the petition and directing a verdict in favor of the defendant.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1935, 1996-1998; Dec. Dig. §§ 771, 815.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4070-4076; vol. 8, p. 7704; vol. 7, pp. 6110-6115; vol. 8, p. 7785.]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by A. L. Tucker, administrator, against the Knights of Pythias of North and South America. Judgment for defendant, and plaintiff brings error. Affirmed.

Travis & Travis, for plaintiff in error. Gordon Saussy, for defendant in error.

HOLDEN, J. The administrator of a deceased member of the "Grand Lodge of the Knights of Pythias of the State of Georgia," a mutual benefit society, sued the latter on a policy issued by it to the member on December 18, 1904, which policy provided that the order, "under the following express conditions, stipulations, and agreements now existing or that may hereafter be enacted by the grand lodge, will pay to the widow, legal heirs or representatives, at the death of" the member, a specified amount, provided that the member shall have complied with all regulations and laws of the lodges, and the following conditions that the member shall be in good standing in his lodge at the time of his death, and the records of the endowment bureau shall sustain the same, that the policy shall not be assigned or hypothecated by the member before his death, or by his widow, legal heir, or representatives after his death. A copy of the policy was annexed to the petition, which alleged a compliance by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied September 24, 1910.

the member and the plaintiff "with all the terms, conditions, rules and regulations of the said grand lodge necessary or requisite to entitle the petitioner to collect the said sum of \$300, which the defendant refused to pay." The defendant denied liability to the plaintiff, and pleaded and proved payment of the amount of the policy to the mother of the deceased, who testified that "she was dependent upon the deceased member." The evidence showed that the deceased was never married, and left surviving him his father, mother, and one sister. The defendant introduced in evidence the preamble to the by-laws and the by-laws of the Grand Lodge of Georgia in existence at the time the policy was issued and at the death of the member. The preamble to the by-laws states: "Whereas the supreme lodge * * * has granted unto the several grand lodges under its jurisdiction the right and authority to manage a beneficiary fund and establish bureaus of endowment for the benefit of the families and heirs of deceased knights in their respective jurisdictions." The first section of the by-laws provides: "A bureau of endowment is hereby created, whereby, upon satisfactory proof of the death of the sir knight, * * * a sum of money named in his certificate shall be paid to his widow, orphans, or dependent relatives, in accordance with the provisions hereinafter made." Another section declared: "Upon the receipt and proof of the death of a knight in good standing, the secretary shall make due publication of the same; and, when there has been sufficient proof of the identification of the legal heir or heirs, the board of control shall cause to be paid to the heir or heirs the sum of money from the endowment fund due upon the certificate of endowment." Other sections provided: "Each applicant shall have entered upon his application the name or names of the person or persons to whom he desires his benefits paid. * * * In the event of the death of a member of the order, and no person or persons shall be entitled to receive such benefits by the law of this order, one-half shall revert to the benefit fund of the endowment bureau and one-half to the lodge of which the deceased brother was a member. * * * Upon receipt of order from the board of managers, he [secretary and treasurer] shall immediately pay to the legal representatives of deceased knights, through the chancellor commander of deceased member's lodge, the amount due from the benefit fund, receiving therefor receipt, and cancel said brother's policy." The secretary and treasurer "shall issue monthly a circular containing the following: * * * 5th. The amount paid to

legal representatives." Upon the conclusion of the testimony, the court directed a verdict in favor of the defendant, and the plaintiff excepted.

1. In view of the allegations of the petition that the deceased and the plaintiff (the administrator of the estate of the former) had complied "with all the terms, conditions, rules and regulations of the said grand lodge necessary or requisite to entitle the petitioner to collect the said sum of \$300," and the stipulation in the policy sued on that the defendant, who issued it, will pay "to the widow, legal heirs, or representatives" of the deceased member the amount specified in the policy, there was no error in overruling a general demurrer to the petition, the by-laws of the defendant not appearing therefrom, and nothing appearing which would preclude a recovery on the part of the administrator as coming within the class "legal heirs or representatives" referred to in the policy. The order overruling such general demurrer did not preclude the defendant from showing that under its by-laws the "legal heirs or representatives" referred to in the policy did not include the administrator of the deceased member, and that such administrator could not recover on such policy. "A contract entered into by a benefit society with a member is executory, and its terms will be ascertained from the certificate issued to the member, in connection with the charter and laws of the society, subject to the law of the state under which it is created." *Union Fraternal League v. Walton*, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350; Civ. Code, § 2135. The words "representative" and "legal representative" of a person do not necessarily include the administrator or executor of such person; but such words are to be construed in connection with the context and the writings forming a part of the contract in which such words are used. 25 Cyc. 175; 5 Words & Phrases, 4070, 4076. The words above referred to, as employed in the policy and by-laws of the defendant, construed in the light of the objects and purposes which the order sought to accomplish, were not intended to include the administrator of the member referred to in the policy. See 1 Bacon on Benefit Societies and Life Insurance, § 262; *Warner v. Modern Woodmen of America*, 67 Neb. 233, 93 N. W. 397, 61 L. R. A. 608, 108 Am. St. Rep. 634; *Masonic Mutual Relief Association v. McAuley*, 2 Mackey (D. C.) 70(2). The court committed no error in directing a verdict in favor of the defendant.

Judgment affirmed.

BECK, J., absent. The other Justices concur.

(135 Ga. 74)

SOUTHERN RY. CO. v. TOLLERSON.

(Supreme Court of Georgia. Aug. 13, 1910.)

*(Syllabus by the Court.)***1. NEW TRIAL (§ 162*)—REFUSAL—REMITTANCE.**

Where, in an action for damages to live stock which were shipped over a line of rail-ways, and some of which were alleged to have been injured by negligence in failing to properly care for, feed, and water them, the jury found for the plaintiff \$500, and the presiding judge granted a motion for a new trial unless the plaintiff would write off from the verdict the sum of \$100, which was done and a new trial refused; and where it did not appear from the evidence that the plaintiff was entitled to recover the sum thus reduced, or that a sum could be accurately ascertained to be written off from the verdict and leave the balance to stand as a lawful finding, such ruling was erroneous.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 324-329; Dec. Dig. § 162.*]

2. CARRIERS (§ 211*) — SHIPMENT OF LIVE STOCK—FAILURE OF SHIPPER TO FEED AND WATER—ACTION FOR DAMAGES.

If live stock were shipped under a valid written contract providing that the shipper or his agent should accompany the animals transported and should feed and care for them at his own expense, provided that, upon his failure to do so, the railroad company might feed and care for them at the expense of the owner, a failure on the part of the shipper to comply with such contract was a default on his part, and he could not recover for damages arising therefrom; nor could the consignee, who relied on such contract as having been made for him.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 926-928; Dec. Dig. § 211.*]

3. CARRIERS (§ 219*) — SHIPMENT OF LIVE STOCK—FAILURE OF SHIPPER TO FEED AND WATER—ACTION AGAINST CARRIER.

If such animals were shipped from one state to another, and, on default of the owner or shipper to comply with a valid special contract of shipment of the character indicated in the preceding headnote, it was necessary for one of a line of connecting railroads to feed and water the stock, under section 4397 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 2996), the fact that this was done, and that the last of the line of connecting carriers presented a bill for the amount of expenses so incurred to the consignee, who paid it, did not constitute a waiver of the provision of the contract in regard thereto.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 219.*]

Error from Superior Court, Henry County; E. J. Reagan, Judge.

Action by H. M. Tollerson against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

H. M. Tollerson brought suit against the Southern Railway Company, and alleged in brief as follows: Through his agent he had delivered a car load of live stock to the defendant at Shelbyville, Ky., to be shipped to McDonough, Ga., on December 12, 1905. The stock consisted of mules and horses, and when

delivered to the railroad company they were in good condition, but, when delivered to the plaintiff at McDonough, they were famished, depleted, exhausted, and damaged by reason of a lack of food, water, and proper care while en route. The jury found for the plaintiff \$500. The defendant moved for a new trial. The court overruled the motion provided the plaintiff would write off from the verdict \$100. This the plaintiff did, and the defendant excepted.

N. E. & W. A. Harris, for plaintiff in error.
Brown & Brown, for defendant in error.

LUMPKIN, J. When this case was before the Supreme Court on a former occasion, it was held that the stipulation in the contract for the shipment of live stock, requiring "that, as a condition precedent to any right to recover any damages for loss or injury to said live stock," written notice of a claim therefor shall be given "before said live stock is removed or is intermingled with other live stock," was reasonable and valid, and that the evidence failed to show that the shipper complied with such stipulation. The judgment in favor of the plaintiff was accordingly reversed. *Southern Railway Company v. Tollerson*, 129 Ga. 647, 59 S. E. 799. When the case was again tried, some additional evidence was introduced. It is not necessary to discuss the meaning of the expression "before said live stock is removed," whether this means a removal from the custody of the railroad, or a removal from the place of destination, as in *Southern Railway Company v. Adams*, 115 Ga. 705, 42 S. E. 35; or whether an agreement requiring written notice before removal of stock from a car would be reasonable, at least as applicable to injuries not patent and discoverable before such removal. The suit was for \$830, and the jury found a verdict for \$500. The presiding judge refused a new trial, provided the plaintiff would write off from the verdict \$100, which was done, and a new trial was thereupon denied. We have not ascertained from the evidence how the presiding judge arrived at the sum of \$100 which should be written off from the verdict, or why the verdict was improper for that amount, and not as a whole; nor have the briefs of counsel shown us how this amount was arrived at. *Seaboard Air-Line Railway v. Randolph*, 129 Ga. 796, 59 S. E. 1110; *Seaboard Air-Line Railway v. Bishop*, 132 Ga. 71, 63 S. E. 1103.

The special written contract made in regard to shipment of the live stock contained the following provisions: "That he [the shipper] will load and unload said animals at his own risk, and feed, water, and attend the same at his own expense and risk while they are in the stockyards of the railway company awaiting shipment, and while on the cars, or at feeding or transfer points, or where

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

they may be unloaded for any purpose, whether arising from accident or delay of trains, or otherwise, and to that end he or his agent in charge of said live stock shall pay regular published passenger fare when proper under rules governing transportation of live stock, and shall ride upon the freight train in which said animals are transported; and, in case the railway company shall furnish laborers to assist in loading and unloading or caring for said live stock, they shall be subject to the orders and shall be the employes of the party of the second part while so assisting; provided, however, that, in the event that the party of the second part shall fail to properly care for, feed, or water the said live stock during transportation, the railway company may itself care for, water, and feed the same at the expense of the owner thereof, and shall and may have a lien upon the said live stock for the amount of its expenditures in that respect." The damages sought to be recovered were claimed to have arisen from lack of proper care, feeding, and watering of the stock during transportation. It did not appear that the plaintiff or his agent or any one representing him accompanied the stock or sought to feed and water them, or that the railway company did not furnish ample facilities and opportunities for that purpose. It has been held in this state that such a contract, based on a reduced rate, is valid. *Central Railroad v. Bryant*, 73 Ga. 722; *Cincinnati, etc., Railway v. Disbrow & Co.*, 76 Ga. 253; *Boaz & Co. v. Central Railroad Co.*, 87 Ga. 463, 13 S. E. 711; *Central Railway Co. v. James*, 117 Ga. 832, 45 S. E. 223. There was nothing to show that the contract was not valid where made.

By section 4386 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 2995) it was declared that in interstate shipments of live stock they should not be confined in the cars for a longer period than 28 consecutive hours (by amendment changed to 36, upon written request of the owner or person in charge [Act June 29, 1906, c. 3594] 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]) "without unloading the same for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes." Section 4387 reads as follows: "Animals so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad company or owners or masters of boats or vessels transporting the same at the expense of the owner or person in custody thereof; and such company, owners, or masters shall have a lien upon such animals for food, care, and custody furnished, and shall not be liable for any detention of such animals." By section 4388 it was declared that

animals, who knowingly and willingly fails to comply with the provisions of the two preceding sections," shall be liable to a penalty of not less than \$100 or more than \$500. It will be noticed that these sections seem to contemplate that the owner or person having the custody of the live stock may be under a duty to feed and water them, and that the railroad company must do this "in case of his default in doing so." If by a valid contract the shipper undertakes to accompany the stock himself or have some person accompany them as his agent, and to feed and water them, and the railroad company furnishes him with facilities and opportunities for that purpose, he cannot violate his contract, and yet claim not to be in default. 4 Elliott on Railroads (2d Ed.) 1554; *Missouri Pac. Ry. Co. v. Texas & Pac. Ry. Co.* (C. C.) 41 Fed. 913; *Ft. Worth, etc., Ry. Co. v. Daggett*, 87 Tex. 322 (6), (7), 28 S. W. 325. This shipment was prior to the act of Congress of 1906, commonly called the "Hepburn Act" (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]), and it is therefore unnecessary to consider whether it would have affected the case.

The presiding judge recognized the general principle here announced, but charged the jury as follows: "That part of the contract, gentlemen, requires that Mr. Tollerson or his agent look after, feed, and water and care for the stock en route, and to that end he should have accompanied them, riding on the same train on which they were transported. If they failed to do that, and the stock was damaged by reason of that failure to feed and water them, then he would not be entitled to recover at all, unless you find that stipulation in the contract was waived by the railroad company." There was no evidence from which the jury would have been authorized to find that there was such a waiver, or on which to submit that question to them. The Revised Statutes of the United States, above cited, required the railroad company to feed and water the stock in default of the owner's doing so, and at his expense. This was a shipment from Kentucky to Georgia. At some point along the line of connecting railroads, it was claimed that an expense was incurred for feeding and watering the animals shipped. Upon their arrival, the defendant presented to the plaintiff a bill for such expense, which the latter paid. It did not appear that the plaintiff complied with his contract in respect to the matter of having the stock accompanied and cared for, but, on the contrary, it is plainly inferable from all the evidence that he did not do so. If by his own default he rendered it necessary for one of the connecting lines of railroad to feed the stock en route, and paid the expense so incurred, this did not amount to a waiver of that provision of the contract on the part of each of the railroad companies constituting the through line.

From what has been said, it is apparent that, under the evidence, the jury erred in their finding, and that the court erred in refusing to grant a new trial.

Judgment reversed.

BECK, J., absent. The other Justices concur.

(135 Ga. 17)

ROME MACHINE & FOUNDRY CO. v. DAVIS FOUNDRY & MACHINE WORKS.

(Supreme Court of Georgia. Aug. 10, 1910.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 49*)—CORPORATE NAME—RIGHT TO EXCLUSIVE USE.

A corporation has an exclusive right to the use of its own name, and it will be protected by a court of equity, by injunction, against the use of such name by another corporation. The corporate name is a necessary element of the corporate existence, and the right to its exclusive use will be protected upon like principles to those under which persons are protected in the use of trade-marks. *Creswill v. Knights of Pythias*, 133 Ga. 837, 67 S. E. 188; *Clark on Corp.* (2d Ed.) 64; *Hopkins on Unfair Trade*, § 54; *Paul on Trade-Marks*, § 168.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 137; Dec. Dig. § 49.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 9*) — NAMES SUBJECT OF OWNERSHIP.

Generally geographical names are not the subject of exclusive appropriation as trade-marks or trade-names. But such names, in connection with other words, may sometimes acquire a secondary signification, indicative not only of the place of manufacture, but of the name of the manufacturer or producer, or of the character of the product, so that the name or title thus employed, including the geographical word, may be the subject of protection against unfair competition in trade. *Paul on Trade-Marks*, § 241 et seq; *Elgin National Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; *French Republic v. Saratoga Vichy Spring Co.*, 191 U. S. 427, 24 Sup. Ct. 145, 48 L. Ed. 247.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 13; Dec. Dig. § 9.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 25*)—CORPORATIONS (§ 49*)—USE BY CORPORATION OF OTHER THAN CORPORATE NAME—RIGHT BY USER.

A corporation may, by user, acquire a right to a trade-name other than its corporate name in connection with goods manufactured and sold by it, and as descriptive of them; but such name is not a corporate name. *Paul on Trade-Marks*, § 169.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 28; Dec. Dig. § 25; *Corporations*, Cent. Dig. § 137; Dec. Dig. § 49.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 32*)—ABANDONMENT—RIGHT OF ANOTHER TO APPROPRIATE—REAPPROPRIATION.

A trade-mark, whether it consists of a symbol or a name, may be abandoned; and if it is, it may be appropriated by any one who by so doing adopts it as his own. If a trade-mark or trade-name has been abandoned, it may be re-

sumed and readopted by the original proprietor, if in the meantime it has not been taken possession of by another. *Paul on Trade-Marks*, § 101.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 36; Dec. Dig. § 32.*]

5. CORPORATIONS (§ 47*)—CORPORATE NAMES—RIGHT TO CHANGE.

Where a corporation was chartered under the name of the "Davis Foundry & Machine Works," it might obtain an amendment to its corporate name, if there were no legal objection to the amendment sought to be made. But there is no law which authorized a corporation, by way of obtaining an amendment to its charter, to file a petition setting out that some of its stockholders had previously been conducting a business similar in character to that done by the corporation, which was known as the "Rome Foundry & Machine Works," and which had been practically continuous and "under the same personal influence and control"; that the Rome Foundry & Machine Works spent considerable money and labor in advertising its business and was succeeded by a firm known by the petitioner's name; that the petitioner took over the business of such firm and adopted its name, and a part of the property was the advertisement of the "Rome Foundry & Machine Works"; that that name was liable and likely to be adopted by some other firm or corporation, or a name so similar that the petitioner would be injured thereby; and that it desired its charter to be so amended that the corporation might use the "Rome Foundry & Machine Works," in connection with its corporate name, upon its stationery and whenever it saw fit, preceding such name with the word "formerly"; but that it did not desire its name to be changed as thus set out for the purpose of suing or being sued, or for other corporate purposes, but so that petitioner might receive the benefit of a business done under the former name. Nor is there any provision of law by which a judge of the superior court is authorized to grant such an amendment to the charter. A corporate name may be amended, but under an application to amend the charter a judge of the superior court cannot grant the right to use, or omit to use, at will, some name in addition to the corporate name, so as to form no part of the corporate name, but to pre-empt it against use by other persons or corporations.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 134, 135; Dec. Dig. § 47.*]

6. REVIEW ON APPEAL.

The evidence was sufficient to make a case for submission to the jury, and the presiding judge erred in granting a nonsuit, or a motion to dismiss in the nature of a nonsuit.

Error from Superior Court, Floyd County; *Moses Wright*. Judge.

Action by the Davis Foundry & Machine Works against the Rome Machine & Foundry Company. Judgment for plaintiff, and defendant brings error. Reversed.

John W. & G. E. Maddox, for plaintiff in error. Seaborn & Barry Wright, for defendant in error.

FISH, C. J. Judgment reversed. The other Justices concur.

BECK, J., absent.

(87 S. C. 8)

LONG et al. v. DUNLAP et al.

(Supreme Court of South Carolina. Aug. 27, 1910.)

1. COLLEGES AND UNIVERSITIES (§ 6*)—TRUSTEES—POWER TO PURCHASE LAND—STATUTES.

The powers conferred on the trustees of Winthrop Normal and Industrial College by its charter (Civ. Code 1902, § 1288), whereby they could both purchase and sell real property for the benefit of the college, were not abridged in any way by subsequent acts (21 Stat. at Large, p. 869, and 22 Stat. at Large, p. 265), providing for the erection of the original college building, and making appropriations therefor, and providing that no new contracts or liabilities should be incurred in excess of the amounts appropriated, and that the trustees should not incur any obligations without the consent of the General Assembly, since the provisions referred to the erection of the original buildings only, as provided for in the act, and not to subsequent transactions.

[Ed. Note.—For other cases, see Colleges and Universities, Dec. Dig. § 6.*]

2. COLLEGES AND UNIVERSITIES (§ 6*)—TRUSTEES—POWER TO PURCHASE PROPERTY—STATUTES.

Civ. Code 1902, § 806, providing that it shall be unlawful for any public officer to make a contract for any purpose whatsoever, in a sum in excess of the tax levied, does not affect a contract made by the trustees of a certain college to purchase certain land, the purchase money to be secured by donation or bequest.

[Ed. Note.—For other cases, see Colleges and Universities, Dec. Dig. § 6.*]

3. CONTRACTS (§ 10*)—MUTUALITY.

Where a contract had been made with the trustees of a college by the trustees of a school district to sell a piece of land to the college, in a suit to prevent the sale, brought by the minority of school district trustees, who had voted against allowing such sale, they could not complain that there was a lack of mutuality in that the college trustees did not have the funds with which to make the purchase.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21-40; Dec. Dig. § 10.*]

4. VENDOR AND PURCHASER (§ 95*)—CONTRACT—LACK OF MUTUALITY—WAIVER.

If the lack of funds with which to purchase certain land would be a ground for the seller's rescinding the contract to sell, yet the defense may be waived and the contract completed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 158-160; Dec. Dig. § 95.*]

5. APPEAL AND ERROR (§ 1041*)—HARMLESS ERROR—AMENDMENT OF ANSWER.

A contract had been made with the trustees of a college by the trustees of a school district to sell a piece of land to them, to prevent which a suit was brought by the minority of the school district trustees, who had voted against allowing such sale. *Held*, that such minority trustees were not prejudiced by an amendment of the answer of the college so as to allege its readiness to pay the purchase price requesting specific performance on the money being tendered, where the answer of the school district and the original answer of the college both prayed specific performance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4108; Dec. Dig. § 1041.*]

6. APPEAL AND ERROR (§ 169*)—POINTS TO BE CONSIDERED.

The Supreme Court will not consider any point which was not presented to and consider-

ed by the circuit court, unless it involves the jurisdiction of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018-1034; Dec. Dig. § 169.*]

Appeal from Common Pleas Circuit Court of York County; Geo. W. Gage, Judge.

Suit by Alex Long and others against Ira B. Dunlap and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Wilson & Wilson and Stanyarne Wilson, for appellants. Witherspoon & Spencers, Dunlap & Dunlap, and J. E. McDonald, for respondents.

HYDRICK, J. The trustees of Winthrop Normal and Industrial College, desiring to build and equip a model practice school building in connection with the college, applied to the Legislature for an appropriation of \$20,000, stating that such a building, properly equipped, would cost \$45,000, but that they could raise \$25,000 of the amount needed. By an act, approved February 13, 1907 (25 Stat. at Large, p. 831) the sum asked for was appropriated on condition that the trustees raise \$25,000 additional for that purpose. The additional sum was raised and deposited in bank, whereupon, by the terms of the act, the appropriation became available.

Under the terms of the act, the said sum of \$45,000 was to be expended in erecting and equipping the building. Therefore, no part of it could be used for purchasing a site. It appears, however, that a friend of the college offered to give \$25,000 for this school on condition that the trustees raise \$30,000 more—making in all \$100,000. It does not appear that any other condition was attached to this offer—such as that the money should be used only in erecting and equipping the building, as was the condition of the appropriation. The trustees of the college reported this offer to the Legislature, in 1908, and stated that they expected to raise the additional sum of \$30,000. It appeared, however, that at the time of the trial before the referee, they had not succeeded in doing so. As there was no suitable place on the college property for the location of the practice school, negotiations were commenced with the Rock Hill school district for the purchase of a lot of eight acres, lying near the college, which had been conveyed to the school district by the Catawba Military Academy. The negotiations resulted in an agreement between the trustees of the college and the trustees of the school district for the sale of the property to the college for \$20,000 cash. The trustees of the school district, seven in number, were sharply divided as to the wisdom and expediency of selling the property—four being in favor of it, and three opposed to it. To prevent the consummation of the agreement, this action was brought by the minority of the trustees of the school district, as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r In Cases

such and in their own right as citizens and taxpayers, with whom Alex Long, as chairman of the board of trustees of the Catawba Military Academy, and as a citizen and taxpayer, was joined as a plaintiff, against the majority of the trustees of the school district, the trustees of the college, as a corporation, the school district, as a corporation, the Catawba Military Academy, as a corporation, and Ira B. Dunlap, as secretary of the board of trustees of the Catawba Military Academy, to reform the deed of the Catawba Military Academy to the trustees of the school district, and to enjoin the sale of the property to the college.

Reformation of the deed was prayed for on the allegation that it should have contained a covenant running with the land that it should never be sold, but should be held by the grantees in perpetual succession for the purpose of conducting a high school thereon. The cause of action for reformation was abandoned on circuit, and the facts are mentioned merely to explain the presence of some of the parties to the action.

Injunction against the sale by the school district was prayed for on the allegation that the price agreed upon was grossly inadequate, and that the sale of the property, under the circumstances alleged, was an abuse of discretion so gross as to amount to a breach of trust; and against the college, injunction was prayed for on the allegation that there was no necessity for the acquisition of the property by it, and that it was without power and authority under the statutes to make the contract. The alleged want of power was predicated upon the grounds that the college was prohibited by the statutes from making the contract, and that, having no funds with which to pay for the property at the time of making the contract, it was void for want of consideration and mutuality.

As stated above, the cause of action for reformation was abandoned, and the grounds upon which injunction against the school district was sought were also abandoned on circuit. The point presented for the decision of the court is thus stated by appellants' attorneys in their argument: "The complaint contained several allegations and matters which were not insisted upon before the trial judge, and the relief was sought before him only upon one ground, to wit, that the Winthrop trustees were without funds with which to purchase the property when they made the offer of \$20,000 therefor; and that, in consequence, the contract, or agreement, between them and the district trustees was void and not enforceable for want of mutuality."

After the case had been argued on circuit, but during the term and before the decision was filed, an order was submitted to the court by the attorneys for the college, upon which the consent of the attorneys for the school district was indorsed, allowing the college to amend its answer, by alleging its readiness to pay the purchase price of the property,

and praying that, upon its doing so, the trustees of the school district be required to execute and deliver to the trustees of the college a proper conveyance thereof. Notice of the presentation of this order was given attorneys for plaintiffs, and it was granted over their objection, on the ground that it was consented to by the parties directly interested, and none of the other parties to the action could be prejudiced thereby. In the prayer of the original answer, the college had asked that the trustees of the school district be required to specifically perform their agreement; and in the prayer of the original answers of the majority of the trustees of the school district and of the school district, as a corporation, the court was asked to compel specific performance of the agreement by the college. The circuit court found that there was no evidence that the college was not able to pay for the property, without using the funds appropriated specifically for the erection and equipment of the school building, and that there was no evidence of any intention on the part of the trustees of the college to misapply any of the funds of the college, and dismissed the complaint for injunction; and decreed that, upon payment by the college of the purchase price of the property, the school district execute and deliver to the trustees of the college a proper conveyance thereof. The court further decreed that the trustees of the college should not use any of the money appropriated by the Legislature, or any of the amount raised as a condition of obtaining that appropriation in paying for the property.

The grounds of appeal present the following questions: (1) Was the college prohibited by statute from making the contract? (2) If not, was the contract void for want of consideration, and, therefore, for want of mutuality, because the college did not have in hand, at the time it was made, funds sufficient to pay for the property; and, if so, could the plaintiffs take advantage of it, and have the contract annulled, even though the college was, at the time of the hearing on circuit, able and willing to buy and pay for the property without using any funds in which the plaintiffs, as citizens and taxpayers, were interested? (3) Were the plaintiffs prejudiced by the amendment allowed and the decreeing of specific performance between the contracting parties? (4) Can plaintiffs now, on this appeal, raise the point, for the first time, that it does not appear that the consent of the county board of education had been given to the sale of the property by the district trustees, as required by the provisions of section 1213 of the Code of 1902?

Among the powers conferred on the trustees of the college by the act of incorporation, it is provided (section 1288, Code 1902) that they shall have "the right * * * to contract and be contracted with, and may own, purchase, sell and convey property, both real,

personal and mixed, and are authorized and empowered to receive and hold donations, devises, bequests and legacies for the use and benefit of said institution: Provided, that all property purchased under the authority of this article shall be free from liens and incumbrances, and title to the same as well as to any donations that said board may receive shall be taken in the name of the trustees in their corporate capacity and shall become the property of the state of South Carolina. * * * They shall possess all the power necessary for the accomplishment of the trust committed to them, viz., the establishment, conduct and maintenance of a first-class institution for the thorough education of the white girls of South Carolina, the main object of which shall be (1) to give to young women such education as shall fit them for teaching; (2) to give instruction to young women in (numerous branches of education specified). Said trustees shall have authority to add, from time to time, such special features to the institution, and to open such new departments of training and instruction therein as the progress of the times may require."

It seems clear that the powers conferred by the parts of the act of incorporation above quoted are ample to sustain the making of the contract in question. In fact, we do not understand appellants to deny, but, on the contrary, to admit that the college had power and authority to make the contract in question, under the terms of its original charter. But they contend that the powers therein granted have been abridged or taken away by subsequent acts of the Legislature, which repealed, by implication, the above-quoted provisions of the charter, at least to the extent of denying to the college the power of making the contract in question. The acts relied upon by appellants as effecting this result are, first, "An act to provide for the economical completion of Winthrop Normal and Industrial College of South Carolina, now in process of erection at Rock Hill, and to appropriate money for the same," 21 Stat. at Large, p. 869; and, second, the supply bill of 1896 (22 Stat. at Large, p. 285). The first of said acts had reference to the completion of the main college building, and certain other buildings, which were then in process of construction. It provided that the labor of convicts should be furnished by the superintendent of the penitentiary, appropriated \$20,000 for the purchase of material and payment for additional labor, and provided that said sum should not be available or drawn from the treasury, until the board of trustees had satisfied the State Treasurer that the buildings could be completed and made ready for occupation by the expenditure of that amount. In the same act, another appropriation was made for the payment of "outstanding liabilities, contracts already

made, as set forth in the report of the board of trustees." The last section of the act appropriated a certain amount for the purchase of machinery for the laundry, and the furnishings for the main building, the kitchen, dining room, and dormitories, and provided that the said amount should be spent for said purposes and no other. The last sentence of the section reading: "That the board of trustees are hereby prohibited from incurring any obligations without consent of the General Assembly beyond those herein contemplated."

In the supply bill for 1896 (22 Stat. at Large, p. 265) after an appropriation for "running expenses, equipment and permanent improvements," another is made "for the payment of back indebtedness and existing liabilities" with this proviso: "That no new contracts or new liabilities in excess of the amounts herein appropriated shall be made or incurred, either directly or indirectly, in behalf of said college."

A consideration of these acts in all of their purposes and provisions shows clearly that the intention of the Legislature in the first of said acts was merely to limit the board of trustees in their contracts and expenditures in completing and furnishing the buildings then in process of construction to the amounts therein appropriated; and in the second, to limit their contracts and expenditures to the appropriations therein made for the purposes therein specified. No intention to limit or take away any of the general powers conferred upon the board by the charter is expressed, and none can be implied from the language used. On the other hand, the construction contended for by plaintiffs would long since have completely stopped the operations of the college. The fact that, since the adoption of the acts above referred to, the original charter of the college has been re-enacted in the Code of 1902 without change, shows, beyond controversy, that there was no intention on the part of the Legislature by said acts to annul or abridge any of the powers therein granted. When these acts are read in the light of the circumstances therein mentioned, there is no repugnancy whatever between them and the original charter of the college and therefore no room for the application of the doctrine of repeal by implication.

But, as the trustees of the college are public officers (*Sanders v. Belue*, 78 S. C. 171, 58 S. E. 762), the general power conferred upon them by the charter to contract is limited by the provisions of section 606 of the Civil Code of 1902, which reads: "It shall be unlawful for any public officer state or county, authorized by law to so contract, to enter into or (any?) contract, for any purpose whatsoever, in a sum in excess of the tax levied, or the amount appropriated for the accomplishment of such purpose." The manifest intention of that section was

to protect the state and counties against either legal or moral obligations incurred by state or county officials in excess of the taxes levied, or the amounts appropriated for the purposes specified by the levy or appropriation.

It does not follow however, that the college had no power to make the contract in question. Because, under the general power, the trustees could make a valid contract to apply to any particular purpose funds in their hands, or funds which they expected to receive from donations or bequests, and the courts should compel the performance of such contracts, provided such use of the funds would be within the terms of the appropriation, donation or bequest. The contract contemplated performance on condition that donations which could be applied to the payment of the purchase money should come into the hands of the trustees. The court decreed performance on that condition.

We do not see what right the plaintiffs have to complain of the alleged want of mutuality in the contract. That is a matter of which only the other party to the contract, and the state, from which the trustees derive their powers, may complain. To be sure, the plaintiffs, as citizens and taxpayers, had the right to prevent any misappropriation of the funds of the college. But the referee and the circuit court have found, and we concur in that finding, that there was no evidence of intention on the part of the trustees to misapply any funds of the college. They have been forbidden by the circuit decree from doing so. This is all the plaintiffs had the right to ask. Even if the contract was wanting in mutuality because the college did not have funds with which to pay for the property at the time of the purchase, and even if the school district could have successfully resisted performance of the contract on that ground, it does not follow that it could not waive that defense and voluntarily complete the contract. That is what it virtually asked to do in the prayer of its answer, and by consenting to the amendment of the answer of the college. We cannot see that any rights of the plaintiffs have been prejudiced by the amendment. It does not matter that neither of the contracting parties excepted to the report of the referee, recommending that the complaint be dismissed. By their consent, a decree for specific performance has been made, and it stands as their contract.

As to the last ground, it is too well settled to require citation of the cases that this court will not consider any point which was not presented to and considered by the circuit court, unless it involves the jurisdiction of the court.

Judgment affirmed.

(135 Ga. 72)

CENTRAL OF GEORGIA RY. CO. v. COLE.
(Supreme Court of Georgia. Aug. 13, 1910.)

(Syllabus by the Court.)

1. TRIAL (§ 194*)—INSTRUCTIONS—QUESTIONS FOR JURY.

The requests to charge, in effect, instructed the jury that certain acts and conduct on the part of the plaintiff would constitute negligence and prevent a recovery by him, and were therefore properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 438, 450; Dec. Dig. § 194; * Negligence, Cent. Dig. §§ 356-360.]

2. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Although a particular portion of the charge of the court excepted to, when considered by itself, may not have stated the rule of relative or contributory negligence with clearness and precision, yet as the general charge correctly instructed the jury on this subject, and the part to which exception was taken, when considered in connection with the whole, was not calculated to mislead the jury or to injure the excepting party, no cause for a new trial existed in consequence of the instruction alleged to be erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

3. REVIEW ON APPEAL.

The verdict was supported by the evidence, and there was no error in refusing to grant a new trial.

Error from Superior Court, Monroe County; E. J. Reagan, Judge.

Action by W. F. Cole against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hall & Cleveland, J. E. Hall, and Cobaniss & Willingham, for plaintiff in error. Persons & Persons, for defendant in error.

FISH, C. J. Judgment affirmed.

BEOK, J., absent. The other Justices concur.

(135 Ga. 71)

MOSLEY v. FEARS et al.

(Supreme Court of Georgia. Aug. 13, 1910.)

(Syllabus by the Court.)

1. EVIDENCE (§ 474*)—OPINION EVIDENCE—TESTAMENTARY CAPACITY.

Where a question of testamentary capacity was involved, it was not error to allow a witness to testify as follows: "I knew [the testator]. I was present the night he made his will. I formed an opinion as to the condition of his mind. I based that opinion on what he did and what he said; in my opinion he was of sound mind. I considered him of sound mind from what he said and the way he acted"—the objection being that the witness was not shown to be an expert, and that he did not sufficiently state the facts on which he based his opinion by testifying to what the testator said and how he acted. Frizzell v. Reed, 77 Ga. 725; Hern-

don v. State, 111 Ga. 178, 33 S. E. 634 (2); Proctor v. Pointer, 127 Ga. 134, 56 S. E. 111. [Ed. Note.—For other cases, see Evidence, Dec. Dig. § 474.*]

2. WILLS (§§ 53, 164*)—APPEAL AND ERROR (§ 204*)—REVIEW—OBJECTIONS NOT RAISED BELOW—PROCEEDING FOR PROBATE—ADMISSIBILITY OF EVIDENCE.

Where a will was propounded for probate in solemn form, and a caveat was interposed thereto, under which it was sought to show that the testator did not have testamentary capacity, and that the will was procured by undue influence on the part of his second wife, resulting in cutting off, without any bequest, his children by a former marriage, it was competent to show that the testator recited in his will that he had settled with all his children by his former marriage and held their receipts, except that of a daughter, as to whom he made a certain provision, and to introduce the receipts given to the testator by such children.

(a) A ground of objection to the admission in evidence of one of the receipts, not made or passed upon in the trial court, cannot be raised here for the first time.

[Ed. Note.—For other cases, see Wills, Dec. Dig. §§ 53, 164;* Appeal and Error, Cent. Dig. §§ 1258-1280; Dec. Dig. § 204.*]

3. REVIEW ON APPEAL.

The evidence was sufficient to support the verdict, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Henry County; **E. J. Reagan, Judge.**

Action between Delle Mosley and C. C. Fears, and others. From the judgment, Mosley brings error. Affirmed.

Lowndes Calhoun, for plaintiff in error. E. M. Smith, for defendants in error.

LUMPKIN, J. Judgment affirmed. The other Justices concur.

BECK, J., absent.

(135 Ga. 67)

LOUISVILLE & N. R. CO. et al. v. HAMES. (Supreme Court of Georgia. Aug. 13, 1910.)

(Syllabus by the Court.)

1. HIGHWAYS (§§ 1, 17*)—ESTABLISHMENT—PRESCRIPTION.

A road may become a public road by prescription. Evidence that the public had used the road continuously for 20 years, and that the proper county authorities during that time have recognized it as a public road by having the same worked, will be sufficient to authorize an inference that such road is a public road.

(a) In determining whether a road used by the public for the period of 20 years has been accepted by the authorities of the county, evidence that a public road overseer had caused it to be worked, and that, after complaint of a citizen to the ordinary of the county to take charge of the road, it had been worked by the road hands, is relevant and admissible.

[Ed. Note.—For other cases, see Highways, Dec. Dig. §§ 1, 17.*]

2. RAILROADS (§ 346*)—PERSONAL INJURIES—PRESUMPTION AGAINST COMPANY—APPLICATION OF STATUTE.

Civ. Code 1895, § 2321, which provides that a railroad company shall be liable for any dam-

age done to persons by the running of the cars, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company, has no application to a servant of the company, who is sued with the company as a joint tort-feasor. Where the engineer is jointly sued with the railroad company, it is error to charge that upon proof that the plaintiff has sustained his allegations that he was injured by the running of the cars of the railroad company, then the law would raise a presumption against the company and the defendant engineer that they were negligent, and that the burden would be upon them to show either that they were not negligent, or that the plaintiff by the exercise of ordinary care could have avoided the consequences to himself of their negligence.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 346.*]

3. RAILROADS (§ 324*)—INJURIES AT CROSSINGS—CARE REQUIRED IN APPROACHING RAILROADS.

A traveler upon a public highway, in approaching a railroad crossing, is bound to exercise ordinary care and diligence for his own safety; yet, though he may not observe that amount of care and diligence which would be exercised under like circumstances by an ordinarily prudent person, he is not necessarily precluded from recovering for injuries to his person, received on the crossing, if, after it is apparent that the engineer of the company is disobeying the provisions of section 2222 of the Civil Code of 1895, he then exercises ordinary care and diligence in endeavoring to escape the consequences of the company's negligence.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 324.*]

4. RAILROADS (§ 313*)—NEGLECTANCE PER SE—VIOLATION OF PENAL STATUTE.

Civ. Code 1895, § 2224, denounces the failure of the engineer to comply with the blow-post law to be a misdemeanor. The violation of a penal statute proximately causing an injury is negligence per se, and the court may so instruct the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1002, 1004, 1005; Dec. Dig. § 313.*]

5. RAILROADS (§ 347*)—INJURIES AT CROSSINGS—EVIDENCE.

It not being alleged that the community where the injury happened was populous, and there being no allegation of negligence as to the running of the train through a thickly populated community, testimony that the engineer had knowledge that the place where the plaintiff was injured was in a populous community is irrelevant.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 347.*]

6. CHARGES NOT ERRONEOUS.

The other charges complained of were not open to the criticisms made against them.

Error from Superior Court, Cobb County; **N. A. Morris, Judge.**

Action by J. S. Hames against the Louisville & Nashville Railroad Company and another. Judgment for plaintiff, and defendants bring error. Reversed.

Tye, Peeples & Jordan, J. G. Roberts, and D. W. Blair, for plaintiffs in error. **Clay & Morris,** for defendant in error.

EVANS, P. J. 1. J. S. Hames obtained a verdict against the Louisville & Nashville

Railroad Company and J. L. Latimer, its engineer, because of certain injuries sustained by the plaintiff in the running of the cars of the defendant company. It was alleged that the plaintiff, while walking upon a public road, in the exercise of due care, was struck by a passenger train of the company as he was about to cross the railroad track, and suffered certain injuries. The collision is alleged to have resulted from the failure of the engineer when he reached a distance of 400 yards, to blow the whistle of the locomotive and check the speed of the train as it approached the public crossing, and because the cars were running at the high and dangerous speed of 40 miles per hour in approaching and passing over the crossing. The scene of the collision was a place where the railroad traversed a road which connected the Bell's Ferry and the Cassville public roads; and it was contended by the plaintiff that this cross-road was a public road. In support of such contention the court allowed him to introduce evidence tending to show that the Bell's Ferry road was a public road. This evidence was offered as preliminary to the proof that the same road hands which repaired the Bell's Ferry road also worked the cross-road. He was also allowed to introduce evidence that the road was open and in use at the time of the construction of the railroad, and that the railroad company built the bridge leading to the crossing; and also that a witness who resided on the road complained to the ordinary, in 1867, of the condition of the road, and that, after such complaint was made, certain hands of the county worked the road. This evidence was admissible. Civ. Code 1895, § 2222 et seq., which requires railroad companies to erect blow posts 400 yards from any public crossing, and for the engineer to blow the whistle and check the train as he approaches such crossing, is applicable not only to roads that have been laid out by legislative act or by order of the proper county authorities or by dedication, but also to roads which have become public roads by prescription. *Southern Ry. Co. v. Combs*, 124 Ga. 1004, 63 S. E. 508. Twenty years' use by the public is insufficient to establish the public character of a road, unless some act is shown to have been done by the proper authorities of the county, indicating its recognition as a public road. *McCoy v. Central Ry. Co.*, 131 Ga. 378, 62 S. E. 297; *Penick v. County of Morgan*, 131 Ga. 385, 62 S. E. 300. This testimony tended to show that the public authorities had recognized the road by having the same worked by the road hands.

2. The negligence charged against the defendant was a failure to observe the blow-post law, and running the cars, in approaching and passing over the crossing, at a high and dangerous rate of speed. After charging that the burden of proof was upon the plaintiff to establish by a preponderance of evidence that he was injured as described in

the declaration; that the road upon which he was traveling at the time he was injured was a public road; that the defendants failed to observe the blow-post statute; that the engine and train run over the crossing at a high and dangerous rate of speed of about 50 miles per hour—the court instructed the jury as follows: "In this connection, the law is that if the plaintiff has sustained his allegations that he was injured by the running of the cars or train of the defendant company, then the law would raise a presumption against the defendant company, and against the defendant J. L. Latimer, that they were negligent, and the burden would be upon the defendants to show either that they were not negligent in so far as the particulars charged against them are concerned, or else that the plaintiff by the exercise of ordinary care on his part could have avoided the consequences to himself of the defendant's negligence, if that appears." Proof of the allegation that the plaintiff was without fault and was injured by the conduct of the engineer in running the train over the crossing at a high and dangerous rate of speed, even though the crossing may not have been a public road crossing, might make a case against the railroad company, by force of Civ. Code, § 2321, which raises a presumption of negligence against the railroad company upon such proof. But this section is not applicable to a servant of the company. *Southern Ry. Co. v. Cash*, 131 Ga. 537, 62 S. E. 823. It was therefore error to instruct the jury in the language of the excerpt to which exception is taken.

3. After charging the jury that the law requires of the plaintiff the exercise of ordinary care to protect himself against the consequences of any negligence that may have existed on the part of the defendant, otherwise he would not be entitled to recover, the court charged as follows: "Now, this rule means that he is not required to exercise ordinary care to protect himself against any negligence of the defendants until such negligence arises, or is impending over himself; such negligence as a reasonable man in the situation he was placed ought to have apprehended." This excerpt from the charge does not accurately state the rule of law, but, when considered in connection with its context, would not require a new trial. The court charged the jury that he was bound to exercise ordinary care in approaching the track, and if he failed to exercise this care he could not recover; and with respect to the phase of the case as to whether or not the plaintiff, after reaching and just before going on the track, exercised the proper care, the court gave the charge complained of, which, when considered in connection with its context, in effect states the principle enunciated in the case of *Comer v. Bartsfield*, 102 Ga. 485, 31 S. E. 89, that though a traveler upon a public highway, in approaching a railroad crossing, is bound to ex-

ercise ordinary care for his protection, yet, although, he may not have observed that amount of care and diligence which would be exercised under like circumstances by an ordinarily prudent person, he is not necessarily precluded from recovering for injuries to his person, received on the crossing if, after it is apparent that the engineer of the company is disobeying the provisions of section 2222 of the Civil Code, he then exercises ordinary care and diligence in endeavoring to escape the consequences of the company's negligence.

4. The rulings announced in headnotes 4 and 5 do not require discussion. Other than as indicated, there was no error in the charges complained of.

Judgment reversed. The other Justices concur.

BECK, J., absent.

(135 Ga. 35)

SOUTHERN RY. CO. v. ATLANTA SAND & SUPPLY CO.

(Supreme Court of Georgia. Aug. 11, 1910.)

(Syllabus by the Court.)

1. CARRIERS (§ 37*)—REGULATION—RULE OF RAILROAD COMMISSION—CONSTRUCTION.

Storage rule No. 9, of the Railroad Commission of Georgia, adopted under authority of the act of 1905 (Acts 1905, p. 120), reads as follows: "Railroad companies are required to furnish cars promptly upon request therefor. When a shipper files with a railroad company written application for a car or cars, stating therein the character of freight to be shipped, and its destination, such railroad company shall furnish same within four days (Sundays and legal holidays excepted) from seven o'clock a. m. of the day following the receipt of such application. For a violation of this rule the railroad company at fault shall, within thirty days after demand in writing is made therefor, pay to the shipper so offended the sum of one dollar per car per day, or fraction of a day, after expiration of free time, during which such violation continues." *Held*, that such rule applies where cars are intended to be used for intrastate shipments, and also where it is intended that cars are to be used for the shipment of freight from a point in this state to a destination in another state.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 37.*]

2. CARRIERS (§ 20*)—FAILURE TO FURNISH CARS—ACTION FOR FORFEITURE.

Prior to the repeal of the third section of the act of 1905 by Laws 1907, p. 78, § 11, a shipper filed with the Railroad Commission a complaint, setting forth a violation of rule 9, above quoted, and giving the details of such violation by a named railroad company. Thereupon the secretary of the Commission addressed a letter to the manager of the railroad company, who handled claims and demurrage complaints, inclosing a copy of the complaint, and adding, "You will please show cause at the earliest practical time, if any you had [can?], why this claim should not be paid." The manager replied, acknowledging the receipt of the letter, and setting up that he had investigated the complaint, and that his investigation had

developed that all orders for cars were promptly filled, that no discrimination was practiced in the distribution of cars, that shippers were furnished all cars that the railroad company had for loading, that he understood that suit had been brought on the claim, and that he did not suppose that it was worth while for him to undertake to answer the complaint in detail. *Held*, that this gave the Railroad Commission sufficient jurisdiction to authorize that body, on the next day after the receipt of the reply from the railroad manager, without further hearing, to pass an order declaring that the Commission was of the opinion "that sufficient cause had not been shown to relieve said railroad company of the penalty claimed," and thus to leave the complainant free to bring suit against the railroad company under the act of the Legislature and the rule of the Commission.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

3. CARRIERS (§ 20*)—FAILURE TO FURNISH CARS—RIGHT OF ACTION FOR FORFEITURE.

Under the third section of the act of August 23, 1905 (prior to its repeal, August 23, 1907 [Acts 1907, p. 78, § 11]), a decision of the Railroad Commission that a railroad company had not shown sufficient cause to relieve itself from liability did not conclude the company as to the question of such liability, upon a suit by the complaining shipper for the amount claimed by him against the company for a failure to furnish cars on written demand within four days, as provided by the rule of the Commission.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

4. CARRIERS (§ 20*)—REGULATION—RULES OF RAILROAD COMMISSION—REASONABLENESS.

Storage rule No. 9, of the Railroad Commission of this state, quoted in the first headnote, properly construed in the light of the act of the Legislature authorizing its adoption, is a reasonable rule.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

5. STATUTES (§ 181*)—CONSTRUCTION—PRESUMPTIONS—INTENT OF LEGISLATURE.

In the construction of a statute the courts will not generally attribute to the Legislature the intention to punish the failure to do an impossible thing, if another construction can legitimately be given to the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

6. CARRIERS (§ 20*)—FAILURE TO FURNISH CARS—ACTION FOR PENALTY—DEFENSES.

In a suit brought by a shipper against a railroad company for the amount specified in the rule of the Railroad Commission to be paid to him for failure by the company to furnish cars upon demand, if the carrier shows the existence of conditions for which it is not responsible, preventing the discharge of the duty, it will not be held liable.

(a) Questions of admissibility of certain evidence and of the sufficiency of certain particular defenses determined.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

(Additional Syllabus by Editorial Staff.)

7. CARRIERS (§ 10*)—REGULATIONS—RULES OF RAILROAD COMMISSION—REASONABLENESS—QUESTION OF LAW.

The reasonableness of a rule of the Railroad Commission is a question of law for the court.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 10.*]

8. CARRIERS (§ 40*)—DUTY TO FURNISH CARS.

It is the duty of a railroad company to provide cars sufficient to transport goods offered in the usual and ordinary course of business, but it is not bound to anticipate and prepare for an exceptional and extraordinary press of business.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 120-122; Dec. Dig. § 40.*]

9. CARRIERS (§ 20*)—DUTY TO FURNISH CARS—ACTION FOR PENALTY—EVIDENCE.

In an action against a railroad company for a penalty for failure to furnish cars for freight tendered, mere proof that the railroad did not have sufficient cars to comply with the demands made upon its services when cars were ordered from it, would be no defense, but if it had complied with its duty to furnish facilities for the transportation of goods, in the ordinary conduct of its business, it would be relevant to prove that at the time of the demand, the general movement of freight through the country traversed by the company's lines, was unusually large and more than was normally to have been expected, and that therefore it could not comply with the demand for cars.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

10. CARRIERS (§ 20*)—DUTY TO FURNISH CARS—ACTION FOR PENALTY—EVIDENCE.

Mere proof that there is a strike on a railroad is no defense to an action for failure to furnish cars on demand, since strikes may include only an insignificant number of employes or those engaged in some department in no substantial way interfering with the furnishing of cars or upon the happening of a strike, the company may without sufficient effort, fail to conduct its business, but if a strike is of such magnitude and character as to render the company unable, by the use of proper effort, to furnish cars on demand, it will be a good defense to a suit under Railroad Commission Storage Rule No. 9, prescribing a penalty for failure of a railroad company to furnish cars after written application therefor.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

11. CARRIERS (§ 13*)—CARRIAGE OF FREIGHT—DISCRIMINATION IN FURNISHING CARS.

Where there is a press of business, perishable goods, or goods the inherent character of which is such as to render them peculiarly liable to serious injury from delay, have been considered of such exceptional character as to authorize a reasonable preference, as to expedition in hauling them, over freight not of such a character, in absence of express statutory regulations on the subject, but such rule cannot be invoked as a cloak for making illegal discriminations for one shipper or class of shippers as against another without real ground for its application.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 23; Dec. Dig. § 13.*]

Action by the Atlanta Sand & Supply Company against the Southern Railway Company. From a judgment for plaintiff, defendant brought error to the Court of Civil Appeals, which certified the case to the Supreme Court. Questions answered.

The Court of Appeals certified to the Supreme Court the following questions:

(1) Does storage rule 9 of the Railroad Commission of Georgia, adopted under authority of the act of 1905 (Acts 1905, p. 120), commonly known as the "Steed act," apply to cars intended to be used for the shipment of

freight from a point in this state to a destination in another state; i. e., is the rule applicable to interstate transactions? Said rule is as follows: "Railroad companies are required to furnish cars promptly upon request therefor. When a shipper files with a railroad company written application for a car or cars, stating therein the character of freight to be shipped, and its destination, such railroad company shall furnish same within four days (Sundays and legal holidays excepted) from seven o'clock a. m. of the day following the receipt of such application. For a violation of this rule the railroad company at fault shall, within thirty days after demand in writing is made therefor, pay to the shipper so offended the sum of one dollar per car per day, or fraction of a day, after expiration of free time, during which such violation continues."

(2) Where, prior to August 23, 1907 (the date on which section 3 of the Steed act was repealed [Laws 1907, p. 78, § 11]), the shipper filed with the Railroad Commission a complaint setting forth a violation of the said rule 9 referred to in the preceding question, and giving the details of the violation by a named railroad company, was it necessary for the Railroad Commission to cause formal notice to be served upon the railroad company, requiring it to show cause on a named day, before any lawful order could be passed by the Railroad Commission upon the complaint? Was a letter addressed by the secretary of the Railroad Commission to the manager of the railroad company, who handled freight claims and demurrage complaints, enclosing him a copy of the papers filed by the complainant, and adding, "You will please show cause at the earliest practical time, if any you had, why this claim should not be paid," a sufficient notice under said act? If not, did a letter written by this manager to the secretary of the Railroad Commission, acknowledging receipt of the letter just referred to and setting up that he had investigated the complaint, and that his investigation had developed that all orders for cars were promptly filled; that no discrimination was practiced in the distribution of cars; that shippers were furnished all the cars which the railroad company had for loading; that he understood that the suit had been brought on the claim; and that he did not suppose that it was worth while for him to undertake to answer the complaint in detail—operate as a waiver of further notice? Did the foregoing correspondence give the Railroad Commission jurisdiction of the defendant, so as to authorize the Commission on the next day after the receipt of the letter last mentioned, without further hearing, to render a judgment "that sufficient cause had not been shown to relieve said company of the penalty claimed?"

(3) Prior to August 23, 1907, did a judgment or decision of the Railroad Commission (under section 3 of the act approved August 23, 1905, commonly known as the Steed act) that a railroad company, complained of as having violated said rule 9 of the Railroad Commission, had not shown sufficient cause to relieve itself of liability, conclude the parties, and especially the railroad company, as to the question of the company's liability to the complainant for the amount of demurrage claimed by the complainant and allowed by the Railroad Commission?

(4) Is said rule 9 of the Railroad Commission quoted above, a reasonable rule?

(5) In a suit by one who claims to have been damaged by reason of a railroad company's failing to furnish him cars as required by said rule 9, quoted above, and whose claim was presented to the Railroad Commission under the third section of the Steed act cited above, and was allowed by the Commission after a hearing prior to August 23, 1907, is it permissible for the defendant to show by testimony that the rule operated unreasonably as against the railroad company in the particular transaction in controversy? Can the railroad company show, in defense to the suit, that it did not own sufficient cars to comply with the demands made upon its service at the time when the plaintiff ordered the cars of it? Is it relevant to prove that at that time the general movement of freight throughout the country traversed by the defendant's lines of railroads was unusually large and more than was normally to have been anticipated, and that therefore the defendant could not comply with the plaintiff's demand for cars? Is it permissible in such a case for the defendant company to show that at the time when the plaintiff was demanding the cars in controversy its operatives were "on a strike," and that for that reason it was not able to comply with the plaintiff's demand? Would it be a sufficient defense to an action of the nature indicated for the defendant to show that it distributed its cars fairly and proportionately to its patrons throughout the several divisions of its railroad lines, and that it did not have and could not have gotten enough cars to fulfill all demands upon it? If the foregoing question is answered in the affirmative, how would the question be affected if it appeared that in the distribution of the cars the defendant company had given preference to the traffic paying the highest rate of freight; how far by the fact that it gave preference in the furnishing of cars for the hauling of those classes of commodities which were of greatest value or which would have been damaged the most if delayed?

McDaniel, Alston & Black, for plaintiff in error. Moore & Pomeroy and W. W. Hood, for defendant in error.

LUMPKIN, J. 1. The Constitution of the United States (article 1, § 8, par. 3) declares

that Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." In the English language few clauses can be found which have had a more far-reaching effect than that comprised in the seven words, "to regulate commerce * * * among the several states." If these words have a rival, it is to be found in those other four words in the fourteenth amendment of the same Constitution, "due process of law." On the first-quoted clause has been built up a vast structure of legislation and litigation, the appearance of which may, with some degree of aptness, be compared to a gigantic, inverted pyramid, with its apex resting on the brief clause mentioned, and its body stretching away into legal space—its limits or base being yet undefined. First was involved commerce in the sense of traffic between the states; then followed questions as to instrumentalities for carrying on commerce; then regulations in regard to certain things being prepared or manufactured to be put into interstate commerce; then as to other matters and legal relations and liabilities. At each step the police power of the individual states has been contested, and litigants have claimed that it was in part annulled or curtailed either by the Constitution or the act of Congress. We are not contesting the doctrine, which has been declared by the Supreme Court of the United States, that under the federal Constitution Congress has plenary power to enact laws on the subject of interstate commerce, and that state laws must yield to those of Congress within the realm of its power on that subject. But it must not be forgotten that the powers of the federal government are delegated, while those of the individual states are inherent; that the police power of the states has been well compared to the right of self-protection; and that a state without police power would be a state paralyzed. In determining, therefore, how far its inherent police power on a subject of great importance to its citizens has been superseded, destroyed, or withdrawn under the delegated powers of the federal government—either by the language of the Constitution itself or by the acts of Congress under it—the far-reaching effect upon the state's power to protect its citizens and those within its borders is not to be lightly overlooked. At least, the conflict between the law of the state and the Constitution of the United States, or acts of Congress passed in pursuance of it, ought to be clear, before the former is nullified. *Armour & Co. v. City Council of Augusta*, 134 Ga. 178, 67 S. E. 417. It must also be borne in mind that where it has been held that the Constitution of the United States, *proprio vigore*, excluded legislation on the part of the state, it was in cases where it was declared that the subject was one essentially "national" in character; and that in many other cases state legislation has been upheld

unless superseded by federal legislation, although affecting in some measure interstate commerce or its instrumentalities, or corporations engaged in it. We have dealt with rule 9 of the Railroad Commission as applicable to intrastate shipments, in *Southern Railway Co. v. Melton*, 133 Ga. 277, 65 S. E. 665. The first question in the present case inquires as to its application to cars intended for use in interstate shipments.

In *Louisville & Nashville R. v. Kentucky*, 161 U. S. 702, 16 Sup. Ct. 714, 40 L. Ed. 849, a provision of a state Constitution prohibiting consolidation by common carriers was involved. It was held to be a legitimate exercise of the police power of the state. In dealing with the commerce clause of the Constitution of the United States as affecting the subject in hand, Mr. Justice Brown, on behalf of the court, said: "It has never been supposed that the dominant power of Congress over interstate commerce took from the states the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers." In *Lake Shore & Mich. South. Ry. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702, the Supreme Court had under consideration a statute of Ohio which required that each railroad company should cause three of its regular daily trains carrying passengers to stop at a station, city, or village containing over 3,000 inhabitants. Mr. Justice Harlan filed an elaborate and able opinion citing and discussing numerous authorities. He said (at page 297 of 173 U. S., at page 470 of 19 Sup. Ct. [43 L. Ed. 702]): "But in our opinion the power, whether called police, governmental, or legislative, exists in each state, by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good. This power in the states is entirely distinct from any power granted to the general government, although when exercised it may sometimes reach subjects over which national legislation can be constitutionally extended." Again he said (at page 303 of 173 U. S., at page 472 of 19 Sup. Ct. [43 L. Ed. 702]): "We perceive in the legislation of Ohio no basis for the contention that the state has invaded the domain of national authority or impaired any right secured by the national Constitution. * * * It has not unreasonably obstructed the freedom of commerce among the states. Its regulations apply equally to domestic and interstate railroads. Its statute is not directed against interstate commerce, but only incidentally affects it." In *Atlantic Coast Line v. Wharton*, 207 U. S. 328, 334, 28 Sup. Ct. 121, 52 L. Ed. 230, the ruling in the case last mentioned was recognized as sound; but it was held that the order of the state Railroad

Commission then being considered directly and unreasonably burdened interstate commerce. In *Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1106, the question was whether a state statute requiring telegraph companies with lines of wires wholly or partly within the state to receive telegrams and on payment of the charges thereon to deliver them with due diligence, was a regulation of interstate commerce when applied to interstate telegrams. It was held that such an enactment did not in any just sense regulate interstate commerce. It was said: "While it is vitally important that commerce between the states should be unembarrassed by vexatious state regulations regarding it, yet, on the other hand, there are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those who are engaged in interstate commerce. We think the statute in question is one of that class, and, in the absence of any legislation by Congress, the statute is a valid exercise of the power of the state over the subject." We need not discuss subsequent congressional enactments in regard to telegraph companies. The principle remains the same, whether state legislation in the particular instance has been superseded by congressional legislation or not. In *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238, an act of the state of Alabama, entitled "An act to provide for the improvement of the river, bay, and harbor of Mobile" (Laws 1866-67, p. 507), was held not to be in conflict with the Constitution of the United States. Mr. Justice Field said (at page 702 of 102 U. S. [26 L. Ed. 238]): "Perhaps some of the divergence of views upon this question among former judges may have arisen from not always bearing in mind the distinction between commerce as strictly defined, and its local aids or instruments, or measures taken for its improvement." So state laws regulating pilots have been declared to be valid. *Cooley v. Board of Wardens, etc.*, 12 How. 319, 13 L. Ed. 906. So, also, certain state laws in reference to bridges over navigable streams have been upheld. *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet. 245, 252, 7 L. Ed. 412; *Gilman v. Philadelphia*, 70 U. S. 713, 18 L. Ed. 96. Other instances might be mentioned, some of which will be found referred to in the cases above cited. It will thus appear that it is a mistaken conception to suppose that whenever a railroad engages in interstate shipments, the Constitution of the United States by its own force in all respects inhibits the police power of the state from dealing with such railroad. As to matters relating to interstate commerce which essentially and exclusively appertain to the federal government the power of the states to directly regulate them may be inhibited; but there is a large

class of subjects which may be dealt with under the police power of the individual states, although its exercise may touch instrumentalities of interstate commerce, and indirectly to some extent affect such commerce. No catalogue can be made setting forth exactly what falls within the one class or the other. But the fact that a distinction between the two exists is well established.

In regard to the subject of statutes or rules of Railroad or Corporation Commissions of states, requiring the furnishing of cars, and providing for a penalty or amount which may be recovered for failure to so furnish them in accordance with the requirements made, and the application of such enactments or rules to cases where cars are desired for use in interstate shipments, the decisions are not many, but they vary widely in the views which they express. They may be grouped about the case of *Houston & Texas Central Railroad Co. v. Mayes*, 201 U. S. 321, 26 Sup. Ct. 491, 50 L. Ed. 772. A statute of the state of Texas provided, that, upon written application, it should be the duty of a railroad company to supply the number of cars required, at the point indicated in the application, within a reasonable time thereafter, not to exceed six days from the receipt of such application; and that if the railroad company should fail to furnish such cars, it should forfeit to the party so applying the sum of "twenty-five dollars per day for each car failed to be furnished," and all actual damages sustained, provided "that the provisions of this law shall not apply in cases of strikes or other public calamity." Other provisions of the act are immaterial here. The Court of Civil Appeals of Texas held that this law was a proper exercise of the police power of the state as applied to interstate shipments, and was valid. *Houston & Texas Central R. Co. v. Mayes*, 86 Tex. Civ. App. 606, 83 S. W. 53. An application for a writ of error to the Supreme Court of the state was overruled, and the case was carried to the Supreme Court of the United States. There it was held (201 U. S. 321, 26 Sup. Ct. 491, 50 L. Ed. 772, *supra*) that "An absolute requirement that a railroad engaged in interstate commerce shall furnish a certain number of cars on a specified day, to transport merchandise to another state, regardless of every other consideration except strikes and other public calamities, transcends the police power of the states and amounts to a burden upon interstate commerce. * * * Such a regulation cannot be sustained as to interstate commerce shipments as an exercise of the police power of the state." In the opinion, after referring to the power of Congress to regulate interstate commerce, it was said (at page 328 of 201 U. S., at page 492 of 26 Sup. Ct. [50 L. Ed. 772]): "That, notwithstanding the exclusive nature of this power, the states may, in the exercise of their police power, make reasonable rules with regard to the methods of

carrying on interstate business, the precautions that shall be used to avoid danger, the facilities for the comfort of passengers and the safety of freight carried, and, to a certain extent, the stations at which stoppages shall be made, is settled by repeated decisions of this court. Of course, such rules are inoperative if conflicting with regulations upon the same subject enacted by Congress, and can be supported only when consistent with the general requirement that interstate commerce shall be free and unobstructed, and not amounting to a regulation of such commerce. As the power to build and operate railways, and to acquire land by condemnation, usually rests upon state authority, the Legislatures may annex such conditions as they please with regard to intrastate transportation and such other rules regarding interstate commerce as are not inconsistent with the general right of such commerce to be free and unobstructed." Again it was said, referring to the Texas statute (at page 329 of 201 U. S., at page 493 of 26 Sup. Ct. [50 L. Ed. 772]): "It makes no exception in cases of a sudden congestion of traffic, and actual inability to furnish cars by reason of their temporary and unavoidable detention in other states, or in other places within the same state. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, wash-outs or other unavoidable consequences of heavy weather. The dereliction of a road in this particular, which may have occurred from circumstances wholly beyond the control of its officers, is made punishable not only by damages actually incurred by the shipper in the detention of his stock, but in addition thereto by an arbitrary penalty of \$25 per car for each day of detention." Finally it was said (at page 331 of 201 U. S., at page 494 of 26 Sup. Ct. [50 L. Ed. 772]): "While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance. Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the Legislature." The Chief Justice, Mr. Justice Harlan, and Mr. Justice McKenna dissented, evidently believing that the statute was valid. Mr. Justice White did not take part in the decision.

In *St. Louis Southwestern Ry. Co. v. State*,

85 Ark. 311, 107 S. W. 1180, 122 Am. St. Rep. 33, certain sections of the digest of that state and an order of the Railroad Commission were under consideration. By the statutes of that state carriers were required to "receive, load, unload, transport, store, and deliver to the consignee thereof all property tendered for shipment," and to furnish cars for shipments; and a violation of these requirements was declared to furnish a cause of action in favor of the shipper. Power was conferred upon the Commission to make rules on the subject. They made a rule providing that, upon application by the shipper, giving not less than five days' notice, cars should be furnished. The Supreme Court of Arkansas held that the statutes were valid as applied to interstate shipments, and that the defense set up to an action to recover the penalty was insufficient. The case was carried to the Supreme Court of the United States where it was decided April 4, 1910 (217 U. S. 136, 30 Sup. Ct. 476, 54 L. Ed. —). After an analysis of the decision of the Supreme Court of Arkansas, and of its effect in excluding the defense offered in relation to interstate shipments, Mr. Justice White declared that, as thus construed, the law of that state excluded a certain defense, and operated to unlawfully burden interstate commerce. He said: "Coming to the merits, we think it needs but statement to demonstrate that the ruling of the court below involved necessarily the assertion of power in the state to absolutely forbid the efficacious carrying on of interstate commerce, or, what is equivalent thereto, to cause the right to efficiently conduct such commerce to depend upon the willingness of the company to be subjected to enormous pecuniary penalties as a condition of the exercise of the right. * * * If it be that the court below was right in its assumption that the rules of the American Railway Association, governing, as was conceded by the court, 90 per cent. of the railroads, and hence a vast proportion of the interstate commerce of the country, are inefficient to secure just dealing as to cars moved by the carriers engaged in interstate commerce, that fact affords no ground for conceding that such subject was within the final cognizance of the court below, and could by it be made the basis of prohibiting interstate commerce or unlawful burdening the right to carry it on."

We have quoted at some length from these two recent decisions of the Supreme Court of the United States, in order to show that in neither of them was it declared that a state Legislature, or a Railroad Commission under its authority, could not make a rule requiring cars to be furnished within a reasonable time, although they were to be used for interstate shipments, unless such rule or act excluded legitimate defenses. To say that all of the discussion in the *Mayes Case*, which has been set out above, meant merely to declare that the states could not make such

rules, regardless of the defenses permissible in suits brought thereunder, would be to attribute to that high court the employment of a large amount of needless circumlocution, and the basing of its opinion upon the illegal restriction of defenses made by the Texas statute, when in fact the extent of the defenses allowed thereby had nothing to do with the case. We cannot suppose this to be the fact in regard to a decision of that great court. And while the decision in the case of *St. Louis Southwestern Ry. Co.* did not refer to the *Mayes Case* or deal as specifically with the limitation of defenses under the state statute, the analysis of the decision of the state court and the conclusion drawn therefrom apparently proceed on the ground of the exclusion of a lawful defense, and not upon the ground that the state could enact no such law in any event. Nor do we think that this position is altered by the last sentence in the opinion, which reads as follows: "In the nature of things, as the rules and regulations of the association concern matters of interstate commerce inherently within federal control, the power to determine their sufficiency we think was primarily vested in the body upon whom Congress has conferred authority in that regard."

As already indicated, the line of demarcation between the authority of Congress and that of state Legislatures is not one which has been defined with mathematical exactness. It has rather been determined as a concrete question on which side of the line a particular case fell. As the Supreme Court of the United States have mentioned reasonableness as a guide in determining the extent to which a state law may affect interstate shipments without being invalid, and as reasonableness or unreasonableness is a matter for which no absolute standard can be prescribed, but a thing sometimes appears reasonable to one mind yet unreasonable to another, and even the same person may change his view as to what is reasonable with age, experience, and reflection, the determination of questions like that now before us involves no small difficulty. We believe, however, that the effect of the rulings above mentioned is that the states are not absolutely precluded from making rules of the character of that here involved, either as to cars to be used in intrastate shipments, or those to be used in interstate shipments; but that the exclusion of proper defenses as to cars to be used in interstate shipments would render the act or rule ineffectual as to that class of business. As to intrastate shipments, the interstate law would have no application; but as to them the question would remain whether the act or rule was in conflict with the clause of the Constitutions, both state and federal, guaranteeing due process of law.

After the decision in the *Mayes Case*, the Court of Civil Appeals of Texas held that the sections of the Revised Statutes of that

state imposing a penalty on carriers for delay in furnishing cars for shipments were invalid under the federal Constitution, as an interference with interstate commerce. *Texas & Pacific Ry. Co. v. Allen*, 42 Tex. Civ. App. 331, 98 S. W. 450. That court treated the state statutes as applying to interstate shipments, and as excluding all defenses save those enumerated. In Kansas the statute on the subject was very similar to that of Texas, except that where the Texas statute provided that it should not apply "in cases of strikes or other public calamity," the Kansas statute permitted no excuse to be set up except "strikes, unavoidable accidents, and other public calamities." The Supreme Court of the latter state distinguished the two statutes on the ground that the Texas law provided the heavy penalty of \$25 per car per day, while that imposed by the Kansas statute was \$1 for each car per day, which was reasonable, and the same amount as was allowed as demurrage to the railroad companies for a failure on the part of shippers to promptly unload cars; and also on the ground that the addition in the Kansas law of the words "unavoidable accidents," to the excuses allowed by the Texas statute, made a material difference. It was said: "If, therefore, as said in the opinion in the *Mayes Case*, the Texas statute 'is not far from the line of proper police regulation,' we are justified in concluding that the car service act of 1905 in question is well within that line."

In Virginia the Corporation Commission, in pursuance of an act of the Legislature, made a rule that when a shipper should make verbal or written application to a railroad company for a car or cars, the company should furnish the same within four days; and that for a failure to comply with this rule the company so offending should forfeit and pay to the shipper \$1 per car per day. In *Atlantic Coast Line R. Co. v. Commonwealth*, 102 Va. 509, 46 S. E. 911, it was held that the state could make valid enactments, in the exercise of its police power, to promote the welfare and convenience of its citizens, though such laws, in their operation, might incidentally interfere with interstate and foreign commerce; and that the rule of the Corporation Commission was not void because in its operation it affected incidentally interstate and foreign commerce. It was further said that the validity of the rules prescribed by the Commission, so far as they in their operation might unlawfully interfere with interstate and foreign commerce or deprive transportation companies of their property without due process of law, might be determined in any particular case in which the question should be raised. After the decision of the *Mayes Case*, it was held by the Supreme Court of Appeals of Virginia that the rule was unreasonable and void as applied to shipments to points outside the state. *Southern Railway Co. v. Commonwealth*, 107 Va. 771, 60 S. E. 70, 17 L. R. A.

(N. S.) 364. No change in the former decision as to the reasonableness or the rule in regard to intrastate business was made; but the severe arraignment of the rule of the Commission and its operation contained in the opinion of Cardwell, J., would seemingly point to the result that as to any class of business it was contrary to the provision of the Constitution in regard to due process of law. Two of the judges, in concurring specially, said: "Their reasoning, if followed to its logical result, as we understand it, would not only render the rule in question invalid, but would make it impossible for the State Corporation Commission to make any valid rule in the subject."

In North Carolina an act was passed requiring a railroad company to pay a penalty for a failure to ship goods promptly. In *Branch v. Wilmington, etc., R. Co.*, 77 N. C. 347, the act was held to be valid. It was said: "That the regulation in question is within the scope of the police power of the state seems clear to us. * * * The Legislature considered the common-law liability as insufficient to compel the performance of the public duty. * * * The penalty in the case provided for is superadded. The act merely enforces an admitted duty." Similar statutes have several times been before the Supreme Court of North Carolina. Section 2631 of the Revisal of 1905 of that state provides that transportation companies "whose duty it is to receive freight for shipment" shall, for refusing to receive all freight, "whenever tendered" to its agent, etc., forfeit and pay a penalty of \$50 for each day it refuses to receive said freight, together with actual damages sustained. The validity of this statute came before the court in *Garrison v. Southern Ry. Co.*, 150 N. C. 575, 64 S. E. 578. It was held that, "when a carrier shows the existence of conditions for which it is not responsible, preventing or rendering impossible the discharge of the duty, it will not be liable for the penalty. The court will not attribute to the Legislature the intention to punish the failure to do an impossible thing." It was held that the statute which imposed a penalty for a carrier's refusal to receive freight for shipment, as applied to a shipment between points within the state, was valid, and that as applied to shipments to other states, in the absence of specific action by Congress or the Interstate Commerce Commission, it was not invalid as a regulation of interstate commerce, though it might indirectly affect interstate commerce. In the opinion, referring to the application of the rule to interstate as well as intrastate shipments, it was said (at page 592 of 150 N. C., at page 585 of 64 S. E.): "We do not think that, in the light of the authorities, it is material whether the shipment is interstate or, as in this case, intrastate." See, also, *Michigan Central R. Co. v. Burrows*, 33 Mich. 6; *Houston, etc., Ry. Co. v. Campbell*, 91 Tex. 551, 45 S.

W. 2, 43 L. R. A. 225, and note. In the present case it was said by counsel that there was no common-law duty to furnish cars. Of course, at the time of the separation of this country from England, there were no railroads and no cars. But, even without a statute, such duty has been held to exist in this country. 4 Elliott on Railroads, § 1470. This will be dealt with more fully later.

While some of the reasoning of the Supreme Court of North Carolina, and the references made to certain statutes, may not be entirely applicable to the statutory law of this state, we think that the general conclusion arrived at is sound. We apprehend that some of the courts, in the effort to escape from collision with the Scylla of the interstate commerce laws, are in danger of rushing into the Charybdis of violating the constitutional provision in regard to due process of law.

The act of this state of August 23, 1905 (Acts 1905, p. 120), does not in terms provide how the shipper is to obtain payment of the "forfeitures or penalties" prescribed in the second section thereof. This being so, impliedly he must resort to the courts and bring suit therefor. Did the Legislature intend that the amount fixed by the rule of the Railroad Commission adopted under authority of the act should be absolutely recoverable, and that in a suit therefor no possible defense should be available? Suppose, for instance, that before the cars arrived at the place where they were to be furnished, an earthquake, a cloudburst, or other similar convulsion of nature should wreck the track and destroy the cars, did the Legislature intend that the company should nevertheless be compelled to pay the forfeiture or penalty, though entirely without fault? Suppose that there should be a hostile invasion of the state, or such an insurrection as to require the declaration of martial law, and that the cars and track of the railroad company should be destroyed, or the company should be prevented by armed force from furnishing the cars at the time required, did the Legislature mean that the company should nevertheless be held liable under this act and the rule passed in pursuance of it? We cannot think so without attributing to a co-ordinate branch of the government an unreasonable and unconstitutional intent. If the act and rule were so construed, and the carrier was allowed no opportunity for exculpation, there could be little doubt of its unconstitutionality. We hold that it does not do so. The difference between this act and the Texas statute was suggested in *Southern Railway Company v. Melton*, 133 Ga. 277, 298, 65 S. E. 665. Certain language from the opinion of the majority of the court in that case was cited by counsel for the railroad company in the present case, in support of the contention that the rule of the Railroad Commission under consideration was a regulation of commerce, and, as ap-

plied to cars to be used in transporting freight to another state, it would be a regulation of interstate commerce. We do not think that such an interpretation of the language employed in that opinion is correct. The main point then discussed was whether the act of 1905, which authorized the making of the rule of the Commission, was an unconstitutional delegation of legislative power. In the opinion of the majority of the court (the Chief Justice dissenting) the writer endeavored to show that the Legislature could constitutionally authorize the Railroad Commission to make the rule. What was said on that subject must be considered in the light of the point then under consideration. It was not held, nor do we now hold, that the act of 1905 or the rule of the Railroad Commission constituted a regulation of interstate commerce in any such sense as to be obnoxious to the Constitution of the United States, or to acts of Congress authorized thereby. Nor do we think that Congress has specifically dealt with the matter covered by the act of the Legislature and the rule of the Commission, so as to render them ineffective in respect to cars to be used in shipping goods to another state. In our opinion neither the provision in section 3 of the act of Congress, entitled "An act to regulate commerce" (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), which declares it to be unlawful for any common carrier subject to the provisions of the act "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, or locality, or any particular description of traffic, in any respect whatsoever," etc., nor section 23, which authorizes the circuit and district courts of the United States to issue writs of mandamus in certain cases, is such a specific dealing with the matter covered by the act of 1905 and rule 9 of the Railroad Commission as to render them invalid in respect to applications for cars intended to be used in shipments to points beyond the limits of the state. Mandamus is a remedy which does not exclude other statutory rights to sue for penalties or common-law rights to sue for damages. We have not had brought to our attention any act of Congress of such a character as to exclude the exercise of the police power of the state.

From the foregoing discussion it follows that storage rule No. 9 of the Railroad Commission of this state, adopted under authority of the act of 1905, applies to applications for cars intended to be used for the shipment of freight between points within the state, and also to applications for cars intended to be used for the shipment of freight from a point in this state to a destination in another state; that the act and rule, correctly construed, are not invalid as an unlawful interference with interstate commerce; but that in a suit by a shipper, based thereon, the railroad company may plead

and prove sufficient excusing cause for non-compliance.

2, 3. It must be admitted that there is some doubt as to the exact meaning of the third section of the act of 1905. By the second section the Legislature provided that, in order to require cars to be furnished, there must be a written application, and that the Railroad Commission should, by reasonable rules, provide the time within which a car or cars should be furnished "and the penalty per day per car" recoverable by the shipper for a failure on the part of the company to furnish them. In that section such amounts were also referred to as "forfeitures or penalties." The third section declared that before any railroad company "is subject to the penalties provided by this act" the Railroad Commission "shall require it to show cause therefor; and, if sufficient cause is shown, then the company shall be relieved from any further liability under this act." Next followed section 4, which prescribed a public penalty of not exceeding \$250 for a violation of any of the rules, orders, or regulations of the Commission, to be recovered by suit in accordance with existing laws on the subject. The third and fourth sections have been eliminated by amendment. But they were not repealed in time to relieve the courts from the task of dealing with section three in this case. It is not quite clear why, before a railroad company should be subjected to penalties, it should be required to show cause "therefor"; not what was meant by relieving it from "further liability under this act." If the third section had followed the fourth, it might with much reason have been construed as applying only to the public penalties dealt with in the latter section. But wedged, as it is, between sections 2 and 4, it may have been intended to operate in both directions. It could not have been the legislative purpose to provide for the obtaining by a shipper of a conclusive judgment against a railroad company, before the Commission. That body could not, like a court, render conclusive money judgments between parties. The shipper would have to go to the court finally and seek to recover by suit. The section did not in terms provide for any notice to the shipper or for any hearing on his part. It declared that "if sufficient cause is shown," the company "shall be relieved from any further liability under this act;" but it said nothing as to what would happen if sufficient cause were not shown. It would seem that the shipper could then go ahead and sue. Treating the third section as relating to both the second and fourth, it apparently provided for a hearing of the company's reasons, *ex gratia*, a species of breakwater, or, as it might be termed, "breaksuit," interposed between the railroad company and an unwarranted action in court. The act provided for certain penalties or forfeitures. Suit would have to be

brought for their recovery. The statutory right to sue was coupled with a statutory requirement or condition. Section 3 provided for a preliminary step to be taken before any such suit should be brought, namely, that the Railroad Commission should afford to the railroad company an opportunity to present its excuses or causes; and, if that body deemed them sufficient, the company was relieved from "any further liability under this act." In that event no suit could be brought; otherwise suit could be instituted. But if it were brought, the courts, not the Railroad Commission, must determine the sufficiency of the defenses or excuses set up. The preliminary investigation by the Railroad Commission was not a judicial inquiry in any such sense as to make their finding conclusive on the company in a suit against it. This may be a somewhat unusual provision to prevent useless, unfounded, and harassing suits against the carrier. But in some of the states it has been provided that the Railroad or Corporation Commission may suspend the operation of a rule at any time; Congress made the findings of the Interstate Railroad Commission *prima facie* evidence; and one or more states have made a similar provision as to the *prima facie* effect of findings of their Commissions. If there is a legitimate choice between constructions of an act, one of which would render it constitutional, and the other unconstitutional, the former will be preferred. Holding, as we do, that the hearing provided before the Railroad Commission was of the character indicated, and not a conclusive adjudication of liability on the part of the company, the letter of the secretary of the Railroad Commission (which we infer was sent by authority) and the reply of the agent of the company, mentioned in the second question of the Court of Appeals, authorized the Commission to declare that the company had not shown sufficient cause to relieve itself, so as to prevent a suit.

4. From what has been said above, it will appear that rule 9 of the Railroad Commission, properly construed in connection with the act of 1905, is reasonable.

5. The fifth division of the questions propounded includes several questions, some of which cannot be readily answered categorically, because, taken separately, each does not cover the whole field in regard to the subject mentioned. It may be said generally, that, in a suit by a shipper or consignor to recover from a railroad company the amounts provided by rule 9 of the Railroad Commission, the defenses held to be proper by the Supreme Court of the United States in *Houston & Texas Central R. Co. v. Mayes*, 201 U. S., 26 Sup. Ct., 50 L. Ed., *supra*, and *St. Louis Southwestern Ry. Co. v. State*, *supra*, are open to the company as excuses for non-compliance with the rule; and evidence is admissible to sustain such defenses. The reasonableness of the rule of the Commission

is a question of law for the court, not of fact for the jury. As construed by us, we have held it to be reasonable.

It is the duty of a railroad company as a common carrier to provide cars sufficient to transport goods offered in the usual and ordinary course of business; but it is not bound to anticipate and prepare for an exceptional and extraordinary press of business. 4 Elliott on Railroads, § 1470, supra; 5 Am. & Eng. Enc. Law (2d Ed.) 167, 168; Michigan Central R. Co. v. Burrows, 33 Mich., supra. Merely to show that a railroad did not have enough cars to comply with the demands made upon its services, at the time when cars were ordered from it, would not alone suffice. It may have been negligent in providing for the ordinary conduct of its business; and its own negligence would be no defense to it. But if it complied with its duty in this respect, evidence of a want of cars may be admissible, as tending to show that the company was not at fault. If it complied with its duty in regard to providing facilities for the transportation of goods, it would be relevant to prove that, at the time of the demand, the general movement of freight throughout the country traversed by the defendant's lines of railroads was unusually large and more than was normally to have been expected, and that therefore it could not comply with the demand for cars, without fault on its part.

Mere proof that there is a strike of hands on a railroad, without more, does not furnish a defense for failure to discharge its duty as a common carrier. Strikes may include only an insignificant number of employees, or those engaged in some department of the work which in no substantial way interferes with the furnishing of cars; or, upon the happening of a strike, the company may, without sufficient effort or reason, cease or fail to conduct its business. The word "strike" does not necessarily describe the entire situation. But if a strike of operatives on a railroad is of such magnitude and character, and under such conditions, as to render the company unable, by the use of proper efforts, to furnish cars on demand, it will be a good defense to a suit under rule 9 of the Railroad Commission. There is some difference between what will excuse the failure of a common carrier to deliver goods received by it for transportation, and what may excuse delay in furnishing cars. Evidence on the subject just mentioned is admissible.

One of the questions propounded by the Court of Appeals was as follows: "Would it be a sufficient defense to an action of the nature indicated for the defendant to show that it distributed its cars fairly and proportionately to its patrons throughout the several divisions of its railroad lines, and that it did not have and could not have gotten enough cars to fulfill all demands upon it?" We answer this question in the affirmative, if the railroad company has complied with its duty as to providing sufficient cars for the conduct of its business. This does not mean that a railroad company can arbitrarily scatter its cars over its line, and refuse to furnish cars to a shipper on application, at its mere will. Nor does it mean that a failure in duty to supply itself with cars sufficient for the transaction of its ordinary business, naturally to be expected, can be excused merely by showing that it has scattered insufficient equipments at different points along its track.

The company could not legitimately give a preference to the traffic paying the highest rate of freight. To so hold would be to say that discrimination might be made for extra compensation. Nor would the mere fact that certain classes of commodities were more valuable than others authorize a preference in shipment to be made in favor of the former. Where there is a press of business, perishable goods, or goods the inherent character of which is such as to render them peculiarly liable to serious injury from delay, and which must be transported promptly or else lost or greatly damaged, have been considered as of such exceptional character as to authorize a reasonable preference, as to expedition in hauling them, over freight not of such a character, in the absence of express statutory regulation on the subject. 5 Am. & Eng. Enc. Law (2d Ed.) 253; Peet v. Chicago, etc., Ry. Co., 20 Wis. 294, 91 Am. Dec. 446; Tierney v. New York Central, etc., R. Co., 78 N. Y. 305. This does not, however, authorize preferences on account of mere slight differences in commodities; nor can the rule be invoked as a cloak for making illegal discriminations in favor of one shipper or class of shippers as against another, without real ground for its application. Ocean Steamship Co. v. Savannah Supply Co., 131 Ga. 831, 839, 63 S. E. 577, 20 L. R. A. (N. S.) 867, 127 Am. St. Rep. 265.

We think what has been said answers all of the questions propounded. All the Justices concur, except BECK, J., absent.

(37 S. C. 44)

THOMAS et al. v. LYNCH et al.

(Supreme Court of South Carolina. Sept. 1, 1910.)

1. APPEAL AND ERROR (§ 1217*)—LOSS OF JURISDICTION—REMITTITUR.

Where the remittitur has been properly sent to the lower court, the Supreme Court loses jurisdiction, so that thereafter neither it nor a justice thereof can make an order in the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4717, 4718; Dec. Dig. § 1217.*]

2. APPEAL AND ERROR (§ 1218*)—MOTIONS—NOTICE.

Even if the Supreme Court or a justice thereof had jurisdiction after the remittitur had been sent to the lower court, a motion to recall it could not be entertained; notice of motion and the affidavits on which it is based not being served on the opposite party, as required by Supreme Court Rule 19.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4719; Dec. Dig. § 1218.*]

Action by B. C. Thomas and another against Z. C. Lynch and another. Defendants, whose appeal was dismissed, move to recall the remittitur. Motion dismissed.

See, also, 85 S. C. 529, 67 S. E. 1135.

J. W. Ragsdale, for the motion.

HYDRICK, J. During the April term of the Supreme Court, a motion was made to dismiss the appeal herein on the ground, amongst others, that appellants had failed to file with the clerk the printed copies of the "case" within the time required by the statutes and rules of the court. By an order filed April 20, 1910, the court refused the motion on terms, amongst others, that the attorneys for appellants should have the case ready for hearing by June 1, 1910, so that it might be heard at that term and at such time after June 1st as the court should direct. Thereafter the court set the case for hearing on June 2d. Upon the call of the case, on June 2d, the attorneys for appellants failed to appear, and it having been made to appear to the court that they had failed to file with the clerk their printed points and authorities, as required by rule 8, an order was passed dismissing the appeal on the ground that the former order of the court had not been complied with, and for want of prosecution. The remittitur was sent down on June 16th. The court adjourned for the term on June 17th.

This is an ex parte application made to me at my chambers on August 23, 1910, for an order recalling the remittitur, and reinstating the appeal, and enjoining the sheriff of Florence county from enforcing the execution until the appeal can be heard on its merits. Rule 20 (19 S. E. v) of the Supreme Court provides that the remittitur shall not be sent to the court below until 10 days after the final determination of the cause, unless the court direct otherwise; and, when a

decree or order shall be affirmed or an appeal dismissed by default of appearance by appellant, the remittitur shall not be sent to the court below, unless the court direct otherwise, until 10 days after notice of the affirmation or dismissal shall have been served on the attorney of the party in default, and that, upon application to either of the justices at chambers, an order may be granted for a further stay of the remittitur for such time as he may deem proper, not beyond the third day of the next ensuing term. The manifest purpose of these provisions is to give parties and their attorneys ample time and opportunity to examine the orders and opinions of the court, and the grounds upon which they are based, and bring to the attention of the court any errors or omissions therein, before the court has lost jurisdiction of the cause by sending the remittitur to the court below.

It is to be regretted in any case when a party loses the opportunity afforded by the law and the rules prescribed for the administration thereof to present his cause on the merits. But it must always be remembered that the other party to the cause has the right to the orderly disposition thereof, and that his rights must be respected, and that it is essential to the due and orderly administration of the law that the methods of procedure prescribed by the statutes and rules of court be complied with. Otherwise, there would be no end to litigation. It has frequently been decided that, when the remittitur has been properly sent to the court below, the Supreme Court loses jurisdiction, and thereafter neither the court nor any justice thereof can make any order in the case. *Carpenter v. Lewis*, 65 S. C. 400, 43 S. E. 881; *State v. Adams*, 83 S. C. 149, 65 S. E. 220, and cases cited therein. See, also, *State v. Keels*, 39 S. C. 553, 17 S. E. 802, a case very much like the one under consideration.

There is another reason why the motion could not be entertained, even if I had jurisdiction; because the notice thereof and the affidavits upon which it is based were not served upon the opposite party, as required by rule 19 of the Supreme Court.

The motion is therefore dismissed.

(37 S. C. 1.)

ZEIGLER v. SHULER et al.

(Supreme Court of South Carolina. Aug. 25, 1910.)

1. DEEDS (§ 196*)—UNDUE INFLUENCE—PRESUMPTION—RELIEF.

While a court of equity will not protect those who make improvident or even reckless contracts, yet it will set aside a deed given to a party by his half-brother, who was mentally weak; undue influence being presumed from the relationship of the parties, and the inadequate consideration for the land.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587-591; Dec. Dig. § 196.*]

2. CONTRACTS (§ 96*) — VALIDITY — MENTAL WEAKNESS OF PARTY—UNDUE INFLUENCE.

The contract of a person of weak understanding, and who is thereby liable to imposition, will be held void in a court of equity, if the nature of the contract justify the conclusion that undue influence has been practiced.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 441; Dec. Dig. § 96.*]

Appeal from Common Pleas Circuit Court of Orangeburg County; Ernest Gary, Judge.

Suit for partition by Lawrence M. Zeigler against D. Weston Shuler and Govan A. Shuler. From a decree for defendants, plaintiff appeals. Affirmed.

The following is the decree of the trial court:

"This is an action, as appears from the complaint for partition of certain real estate in the county of Orangeburg, which the plaintiff alleges is owned by him and the defendant D. Weston Shuler as tenants in common in equal proportions. The defendant D. Weston Shuler answers the complaint, denying the allegations thereof, and alleges that the plaintiff has no interest in the said real estate as a tenant in common or otherwise, but that the said real estate was owned by himself and his brother, Govan A. Shuler. He further alleges that his brother, the said Govan A. Shuler, was confined in the hospital for the insane of this state; he having been declared insane and incapable of managing his affairs. The case was referred to Robert E. Copes, Esq., as special referee, to take the testimony on the issues raised by the pleadings herein and report his conclusions of law and fact thereon.

"The special referee states in his report that at a reference held before him it appeared that Govan A. Shuler, who made the deed under which the plaintiff claimed his interest in the said real estate, had twice prior to the execution of the said deed been committed to the State Hospital for the Insane, having been adjudged a lunatic, and that, after the execution of the said deed, he had been again committed to the said hospital for the insane, where he was still confined, and that he was a necessary party to the final determination of the issues raised in the pleading, and he thereupon made an order directing that the said Govan A. Shuler be made a party defendant to the action, and that the summons and complaint be amended accordingly. This was done. After Govan A. Shuler had been served with the amended copy of the summons and complaint, a guardian ad litem was duly appointed and directed to appear and defend the action on his behalf. The guardian ad litem interposed a formal answer to the complaint. The case came on to be heard before me at the October term, 1909, of the court of common pleas for Orangeburg county, upon the pleadings, evidence, and exceptions to the report

of the special referee on behalf of the defendants.

"The basis of plaintiff's claim to the said real estate and his right to the partition thereof is the deed executed to him by his half-brother, the defendant Govan A. Shuler. The special referee found, among other things, that, while it has been shown by the evidence that Govan A. Shuler was of unsound or weak mind, and that twice prior to the execution of the said deed he had been committed to the State Hospital for the Insane, having been adjudged a lunatic in ex parte proceedings, neither of which had ever been traversed and that shortly after the execution of said deed he was again committed to the said hospital having been adjudged a lunatic in ex parte proceedings which had never been gainsaid or traversed and is now an inmate of that hospital still the evidence also shows that at the times he was not confined in the hospital his unsound or weak mind did not render him incapable of transacting business and of knowing the nature and consequences of his acts. The testimony abundantly sustains the special referee in his finding that the defendant Govan A. Shuler was found of unsound and weak mind, and that twice prior to the execution of said deed he had been committed to the State Hospital for the Insane, having been adjudged a lunatic, as he states, and that very soon after the execution of said deed he was again committed to the Hospital for the Insane, having been adjudged a lunatic and was then an inmate in that hospital.

"The special referee further held that at the moment Govan A. Shuler executed the said deed to Lawrence M. Zeigler, which was recorded in the office of the clerk of court for Orangeburg county aforesaid, on April 4, 1903, in book 43, at page 64, whereby he conveyed his interest in the real estate, which is described in the complaint, to the plaintiff, he was in the enjoyment of a lucid interval, and that, although the deed was largely voluntary, yet he was under no undue influence, and no fraud was practiced on him, and that, when he made the deed, he put into effect what he had predetermined during former lucid intervals, and concluded that the said deed was a valid conveyance of the interest of Govan A. Shuler in the said real estate to the said Lawrence M. Zeigler, and that the same should not be set aside.

"I am not prepared to assent to the finding of the special referee that the defendant Govan A. Shuler was in the enjoyment of a lucid interval when he executed the deed, in the face of the testimony of Dr. A. S. Hydrick, corroborated by other testimony, that he could not have lucid intervals, as his injury was a permanent one, and he was satisfied from his mental condition that he was absolutely incapable of managing his business.

"But, aside from that, after a careful review of the testimony, I am satisfied that the deed cannot be sustained. The special referee seems to have entirely overlooked the fact that this is a case in which the court of equity is asked to set aside a deed of conveyance between persons sustaining to each other the confidential relations of half-brothers; the one being extremely weak mentally, if not entirely non compos mentis, and in failing to apply the rules governing such cases.

"The defendant Govan A. Shuler at the time of the execution of the deed and long prior thereto was, to say the least, as shown by all the testimony, a person of an extremely weak mind, and incapable in my opinion of comprehending the nature and consequences of his act. The deed was almost wholly voluntary. The plaintiff testified that the tract of land was worth from \$6,000 to \$7,000. He stated that he paid him no money on the day the deed was executed, but that he, the plaintiff, bought him some clothing about six or eight months before the execution of the deed, and otherwise the deed was wholly voluntary. Mr. Henry Zeigler, cousin of the plaintiff, testified that he went to an attorney and had the deed prepared, and afterwards he, with the plaintiff, went to Branchville where the deed was executed. Under these facts, even if the defendant Govan A. Shuler was a person of strong mind, the inadequacy of price was so gross as to shock the conscience, and furnish satisfactory evidence of fraud sufficient for canceling it. But here we have a very feeble-minded person on the one side, without any competent or independent adviser, and on the other a half-brother, who, the deed states, has been his most staunch and constant friend, procuring from his feeble-minded half-brother an absolute conveyance of all his property for the nominal consideration of \$5, which was not paid, and a few clothing, which he had given him six or eight months prior to the execution of the deed. While a court of equity is not intended to protect those who make improvident or even reckless contracts, it will always interpose to shield a helpless and weak-minded person from his half-brother, such as Govan A. Shuler is shown to be, who would take his all, and pauperize him for practically nothing.

"The court in the case of *Willie v. Willie*, 57 S. C. 413, 35 S. E. 804, quoting from *Allore v. Jewell*, 94 U. S. 506, 24 L. Ed. 260, says: 'It is not necessary in order to secure the aid of equity to prove that the deceased grantor was at the time insane, or in such a state of mental imbecility as to render her incapable of executing a valid deed. It is sufficient to show that from her sickness and infirmity she was at the time in a condition of great mental weakness, and there was gross inadequacy of consideration for the conveyance. From these circumstances imposition or undue influence will be inferred.'

In the case of *Harding v. Wheaton*, reported in 2 Mason, 373, Fed. Cas. No. 6,051, a conveyance executed by one to his son-in-law for a nominal consideration, and upon verbal arrangement that it should be considered as a trust for the maintenance of the grantor, and after his death, for the benefit of his heirs, was after his death set aside, except as security for actual advances and charges upon application of his heirs, on the ground that it was obtained from him when his mind was enfeebled by age and other causes. 'Extreme weakness,' said Mr. Justice Story, in deciding the case, 'will raise an almost necessary presumption of imposition, even when it stops short of legal incapacity; and, though a contract in the ordinary course of things reasonably made with such a person might be admitted to stand, yet if it should appear to be of such a nature that such a person could not be capable of measuring its extent or importance, its reasonableness or its value, fully and fairly, it cannot be that the law is so much at variance with common sense as to uphold it.' The case subsequently came before this court; and in deciding it Mr. Chief Justice Marshall, speaking of this, and it would seem of other deeds executed by the deceased, said: 'If these deeds were obtained by the exercise of undue influence over a man whose mind had ceased to be a safe guide of his actions, it is against conscience for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience to set them aside. That a court of equity will interpose in such a case, is among the best-settled principles. *Harding v. Handy*, 11 Wheat. 125, 6 L. Ed. 429. The same doctrine is announced in adjudged cases almost without number; and it may be stated as settled law that whenever there is great weakness of mind in a person executing a conveyance of land arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, court of equity will, upon proper and reasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside.'

"The court in the case of *Banker v. Hendricks*, 24 S. C. 1, and *Gaston v. Bennett*, 30 S. C. 473, 9 S. E. 515, approved the principles as stated in 1 Story Eq. Jur. § 238, that 'the acts and contracts of persons who are of weak understandings and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented or overcome by cunning artifice or undue influence.' See, also, case of *Way v. Insurance Co.*, 61 S. C. 501, 39 S. E. 742. Mr. Pomeroy says (2 Pom. Eq. § 957): 'This principle is applied with great emphasis and vigor to gifts, whether they are simple bou-

ties or purport to be the effects of liberality based upon antecedent favors or obligations.' The special referee also finds that there was no undue influence and no fraud was practiced on the defendant Govan A. Shuler. This finding is based upon the misconception of the rule applicable to a case like this, which presumes undue influence from the relationship of the parties, and the absence of an adequate consideration. When the testimony is viewed in the light of these well-settled principles of law, the deed cannot be sustained.

"It is further ordered and adjudged that the deed of conveyance herein involved is set aside and canceled, and that the plaintiff, Lawrence M. Zeigler, do deliver up the same to the clerk of court, to be canceled by him, and on the record of the same on the clerk's office, and that the complaint be dismissed.

"It is further ordered that the plaintiff pay the costs of this action."

P. T. Hildebrand, Thos. F. Brantley, and M. E. Zeigler, for appellant. Raysor & Summers, Wolfe & Berry, and Jas. F. Izlar, for respondents.

WOODS, J. The judgment of this court is that the judgment of the circuit court be affirmed for the reasons therein stated.

(86 S. C. 576)

WHITE et al. v. HEWITT et al.

(Supreme Court of South Carolina. Aug. 19, 1910.)

1. COMPROMISE AND SETTLEMENT (§ 8*)—VALIDITY—MISREPRESENTATION—EFFECT.

A compromise settlement may be invalidated by false representations as to material matter made to induce, and which did induce, the other party to make the contract while ignorant of the truth, and reasonably relying upon the representations.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 17-31; Dec. Dig. § 8.*]

2. COMPROMISE AND SETTLEMENT (§ 8*)—CONCEALMENT OF FACTS—EFFECT.

Equity will not allow a party to a compromise to conceal facts which the other party has a right to expect to be disclosed.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 17-31; Dec. Dig. § 8.*]

3. COMPROMISE AND SETTLEMENT (§ 8*)—MISREPRESENTATIONS—EFFECT.

In a compromise, equity will not allow a party to whom facts have been misrepresented to be injured thereby, whether the misrepresentation was made innocently or designedly.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 17-31; Dec. Dig. § 8.*]

4. COMPROMISE AND SETTLEMENT (§ 8*)—CONCEALMENT—EFFECT.

Where, on the death of an intestate, plaintiffs and defendants sought to effect a compromise as to the settlement of the estate, defendants should have disclosed certain proceeds of the estate obtained from the sale of personalty, and their use of such proceeds to pay for land conveyed to defendants under the settlement was

a fraud on plaintiffs, which invalidated the settlement.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 17-31; Dec. Dig. § 8.*]

5. COMPROMISE AND SETTLEMENT (§ 8*)—CONCEALMENT—INVALIDATION—NEGLIGENCE.

In a compromise settlement of the estate of an intestate, where plaintiffs' representative knew of certain personalty having been sold, and then inquired of defendant's representative if there was any money in the estate, to which he replied in the negative, he was not guilty of negligence in failing to use available means to discover that the proceeds of such sale belonged to the estate, so as to prevent plaintiffs from impeaching the settlement for concealment of such proceeds.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Dec. Dig. § 8.*]

6. COMPROMISE AND SETTLEMENT (§ 18*)—SUIT TO INVALIDATE—RETURN OF MONEY—NECESSITY FOR.

Where, in the compromise settlement of the estate of an intestate, plaintiffs had received money for their release of property of the estate under the settlement, but were entitled to it without the settlement, they were not bound to tender it back before attacking the settlement on the ground of the fraudulent concealment of money belonging to the estate.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. § 81; Dec. Dig. § 18.*]

7. EXECUTORS AND ADMINISTRATORS (§ 509*)—SUIT TO INVALIDATE—ACCOUNTING BY ADMINISTRATOR.

In a suit to set aside a compromise settlement of the estate of an intestate because of certain money belonging to the estate having been concealed by defendants, the administrator to whom the money had been given should not be required after his discharge by the probate court to make a further accounting; there being no evidence that he was aware of the concealment.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 509.*]

Appeal from Common Pleas Circuit Court of Florence County.

Suit by Theodosia White and David White against Minnie R. Hewitt and others. Decree for defendants, and plaintiffs appeal. Reversed.

W. F. Clayton, for appellants. J. W. Ragsdale, for respondents.

JONES, C. J. This action was brought to set aside a compromise settlement of the estate of Henry White, deceased, upon the ground of concealment, misrepresentation, and fraud, and for an accounting. The appeal is from a decree of Judge Purdy dismissing the complaint.

Henry White married plaintiff Theodosia on October 27, 1879, and about 10 days after the marriage the plaintiff David, their son, was born. Henry and Theodosia lived together at the home of Theodosia's father, William Hill, near Timmons ville, S. C., six months, and then separated, although Henry continued to visit her as husband for several years. On May 12, 1889, the husband and wife entered into a written agreement to live apart, and in consideration of \$50, Theo-

dowia agreed to make no further claim or demand upon her husband or his estate. At that time Henry was very poor. Theodosia and her son thereafter made no claim or complaint whatever against Henry White during his life, and lived about from place to place in toil and poverty, and at his death were living in Brooklin, S. C., David being employed in a cotton mill there at 75 cents a day. In July, 1889, Henry White married the defendant Minnie R. Simpson, now Hewitt, and had four children by her, the defendants Ann, Ralph, John, and Henry. Henry White died intestate on October 7, 1901, and left an estate consisting of two tracts of land in Florence county, one containing 25 acres, and the other 80 acres, and personal property including chases, which, according to the returns of the administrator, the defendant Duncan McKensie realized \$4,087.38, against which there were debts and charges amounting to \$2,088.48. In response to a telegram from his uncle, Jesse L. Hill, announcing the death of Henry White, the plaintiff David arrived at Timmons ville on the night of October 8, 1901, and with his uncle had an interview with Dr. J. A. Cole in reference to the claim of himself and mother to the estate, and all thought that it would be best to agree upon a compromise. Accordingly, on the next morning Jesse L. Hill, representing the plaintiffs, Dr. J. A. Cole, representing defendants Minnie and her children, and Jeff McLendon, selected by both sides, met at Henry White's residence as a committee or arbitrators with a view to arrange a compromise based upon a valuation of the estate. David White had proposed to divide the estate equally. The committee valued the personal property, stock, etc., upon the farm at about \$500 and the 80-acre tract at \$2,000, and recommended a settlement on that basis, and that plaintiffs execute deeds to the land and release claim to the personal property upon the receipt of \$1,250. This included making a deed to George White for the 25-acre tract. Both parties agreed to this, and accordingly, on October 10, 1901, at Columbia, S. C., plaintiffs executed a deed to George White for the 25-acre tract and to Minnie R. and her children for the 80-acre tract, and signed a receipt in full of all claims to the real and personal estate of Henry White.

The main ground upon which it is now sought to set aside this settlement is that there was fraudulent concealment and misrepresentation as to the property of the estate by which plaintiffs were misled. The testimony shows beyond all doubt that on the evening of the funeral of Henry White, and in anticipation of his arrival, cotton and tobacco belonging to the estate amounting to \$703 were carried off with haste and sold or disposed after dark in the name of others, and the money placed in the hands of defendant McKensie, and was used in paying the \$1,250 to the plaintiffs. Baxter White

testified that his wagon was used in moving the cotton at the request of defendant Minnie. George White, who lived on the premises and was managing the farm for Henry White, testified that the cotton was hauled off from Henry White's on the day of the funeral about 7 o'clock p. m.; that the cotton was sold in Frank Lee's name and the tobacco in Baxter White's name; that defendant Minnie knew he was hauling the cotton, and it was done with her consent; that she expected David would come and claim it. Defendant Minnie testifies that the cotton and tobacco were not sold by her direction; that she had nothing to do with it; that George White had charge of the crop and place during the illness of Henry; that they had raised George; that she did not attempt to conceal anything from plaintiff; that she did not ask Baxter White for his wagon; and that she did not tell George White that she wanted the property moved, and did not tell him she was afraid David would get it. Nevertheless the conclusion cannot be resisted that, if she did not directly cause the removal and disposition of the cotton and tobacco, she must have had reason to know of it and acquiesced in it. It was done in her interest by George White, then in charge of the premises, and she used the proceeds in making settlement with plaintiffs. Although this money was in the hands of McKensie at the time of the compromise settlement, nothing was said about it, and plaintiffs were wholly ignorant of it. Furthermore, Dr. Cole himself testified that he owed Henry White \$400, and paid it to defendant McKensie on the day of the funeral to be used in the settlement. So that, at the time of the valuation of the estate by the committee or arbitrators, there was the sum of \$1,103 belonging to the estate in the hands of one who afterwards became administrator and charged himself with these sums as collections, and was credited with the payment of the \$1,250 paid to the plaintiffs in settlement.

The testimony shows that during the consideration by the committee Jesse L. Hill inquired if there was any money belonging to the estate, and that Dr. Cole answered that there was none. Jesse L. Hill and Jeff McLendon so testify. David White testified that Dr. Cole made a similar declaration to him the night before. We do not hesitate to treat Dr. Cole as representing the defendant Minnie in effecting the compromise settlement. He so professed by his acts, was so dealt with by the others, and defendant Minnie testified that she "ratified what Dr. Cole did about the settlement." Dr. Cole testified that he made no misrepresentation as to the property of the estate. He doubtless did not know of the clandestine disposition of the cotton and tobacco the night before, and he may have considered that his payment to McKensie after the death of Henry White could not be technically consid-

ered money left by Henry White, still the fact is he knew at the time of the compromise negotiation, when inquiry was made as to money, that he himself had paid to Duncan McKensie for the estate the sum of \$400 in anticipation of some settlement, no doubt the compromise settlement he was largely instrumental in effecting. The representation to plaintiffs that there was no money was further shown by the testimony of Jesse L. Hill, who stated that, when the proposition was made for Mrs. Hewitt to pay plaintiffs \$1,250, something was said about not having money, and that George White said "she would have to mortgage her property." At that time George had reason to know that the money realized from the sale of cotton and tobacco, which he has caused to be removed, was in the hands of McKensie, and Dr. Cole knew that \$400 had been placed there by himself. It further appears by the testimony of Mrs. Hewitt and Duncan McKensie that on the day the deeds were executed Mrs. Hewitt sent to McKensie by the hand of George White something over \$200 for the purpose of paying the \$1,250.

A compromise settlement may be invalidated by false representations as to a material matter which were made to induce and did induce the other party to make the contract, while ignorant of the truth and reasonably relying upon the representations. See text and cases cited in 8 Cyc. 528, 529, 530. So also an unfair concealment of facts may constitute ground for relief against a compromise. The principle is well stated in *Mills v. Lee*, 6 T. B. Mon. (Ky.) 91, 17 Am. Dec. 125: "Courts of equity will hold the one party or the other responsible for the truth of the representations made in their communications relative to the contract, and if the facts be unfairly or untruly represented, whether innocently or designedly, the party to whom the representation is made shall not be injured by it. So, also, it holds a party contracting to abstain from fraud or deceit by concealment of facts which in fair dealing the one party has a right to expect to be disclosed, and which the other party is bound to disclose. It may be difficult at all times to discern the true line between that which a party may lawfully forbear to disclose and that which he cannot withhold without incurring the guilt of fraud or deceit. The circumstances not disclosed must always be compared with the object and the end in view by the contracting parties." Here the end in view of the contracting parties was a compromise of their claims to the estate based upon a valuation of the estate.

Jeff McLendon, accepted as arbitrator by both sides, testified: "We consulted over the matter and put on the appraisement. We came to terms as to valuation. There was nothing brought up except the 80 acres and the stock supposed to be plantation stock. We appraised it at \$2,500. We then called in Baxter White, and told him what we valued

it at. Mr. Jesse Hill (one of the arbitrators) asked about money. The proposal was then made to the two parties, David and Minnie, and they accepted; that is, that Minnie was to give \$1,250 to David and his mother, and she and her children were to take the property and pay laborers' bill and doctor's bill, and I think other indebtedness. I know nothing only of stock and plantation. We did not know of the property. It was in a sense a sort of pig in the bag. We settled as far as matters were brought to our attention. I regarded this as a settlement between the two families to avoid any litigation. * * * It was my opinion that the settlement reached was a final settlement of Henry White's affairs between these parties. It was an estimate of the property that we had before us. I did not understand that any of the property was excluded or excepted. So far as we were concerned, it was a complete settlement of the estate. This settlement was desired, as I understood it, on account of the peculiar circumstances of each family. I consider that we put a fair valuation on the property. It was a compromise settlement on valuation. It was a compromise settlement in a nutshell on property in sight. We did not enumerate the property. We did not know what the debts were, except doctor's bill and labor bill. It was not predicated on Minnie's legal rights. To a certain extent it was predicated on the fact that both parties claimed it. We made the proposition to give or take. We proposed, if there were any debts, Minnie was to pay them. We did not know exactly what the personal property was. There were two estates consisting of real and personal property, and the proposition was made to David to give or take, and David said he would take \$1,250 for self and mother. Minnie was to take estate and pay debts. Nothing was shown us by Minnie. She was not present until we went in and made the proposition. * * * Jesse L. Hill asked about money; don't think David was there then and Minnie was not. There was reply that there was no money. Dr. Cole made the reply. It was put before the two. That is, David proposed before we went in to divide the estate equally."

The defendant claimant in possession had superior knowledge of the property of the estate, and plaintiffs were entirely ignorant with respect thereto, except as to the matters brought into the appraisement. If plaintiffs had been told that they could have the entire estate upon payment of \$1,250, and that there were \$1,103 belonging to the estate in the hands of McKensie which they might use to make the payment, there would have been something like equality of knowledge and situation. The parties were not upon an equal footing as to knowledge or ignorance of the situation, and the circumstances called for a disclosure of the money in the hands of McKensie. Concealment of this fact impeaches the settlement as unfair.

The circuit judge based his decree dismissing the complaint upon the ground that plaintiffs had a partial knowledge of the situation and the means at hand at any time by any sort of inquiring to ascertain the true situation, and the contract was the result of their own improvident conduct. The court further stated: "They had knowledge at the time that part of the property of the deceased was being hauled off and disposed of and no question from their standpoint was made of that; so that it really appears that they were willing to give up the situation and all benefits accruing from it for the sum of \$1,250, and having so elected they are bound by it."

We think this conclusion clearly against the testimony. The plaintiff Theodosia was never present and knew nothing. Plaintiff David, who was acting for himself and mother, testified that he had no knowledge of the disposition of the property until a short time before the suit, that he relied upon the information received through Dr. Cole, acting as agent for Minnie White. Jeff McLendon, who represented plaintiffs on the committee of arbitrators, testified: "The night before I saw George White have cotton at depot, weighing cotton. He had Henry's team, Baxter White's team, and maybe others. * * * I knew that the cotton had been hauled. I knew that Henry had made a crop. I tried to get some information. Dr. Cole said he knew about the estate. I asked about money. Dr. Cole said there was no money. I did not see cotton." If McLendon knew the cotton had been disposed of, the natural inquiry would be whether there was any money, and, when assured there was none by the representative of Mrs. Hewitt, his suspicions, if any, would naturally be lulled into a belief that the proceeds of the cotton had been rightfully used for the benefit of the estate. There was no such negligence on the part of plaintiffs or their representatives in using available means of information as should prevent plaintiffs from impeaching the settlement for concealment of material facts.

No question was raised on circuit as to whether plaintiffs should have made tender back of the money received by them before they could proceed to set aside the settlement. As plaintiffs received only what belonged to them without the settlement, they were not bound to tender it back. *Du Pont v. Du Bos*, 52 S. C. 244, 29 S. E. 665. We hesitate, however, as to the extent of the relief which justice and equity demands under all the circumstances of the case. With respect to the deed for the 25-acre tract to the defendant George White, we are disposed to sustain the settlement. The plaintiffs were fully informed that Henry White had bought that tract for George White his half-brother who lived with him and whom he partly raised, and set it apart for him and intended to make him a deed, but neglected it until it was too late. It does not appear that there

was any misrepresentation or concealment. This was a case of the compromise of a doubtful right fairly made between the parties. *Durham v. Wadlington*, 2 Stro. Eq. 258. With respect to the deed to Mrs. Hewitt and the infant children, we are disposed to permit the settlement to stand conditionally, as hereinafter mentioned, because there was no misrepresentation or concealment with reference thereto and plaintiffs with equal opportunity for information have voluntarily conveyed the same, and justice may be done to plaintiffs by compliance with the judgment of the court hereafter rendered.

The same conclusion has been reached with respect to the personal property on the farm, stock, household furniture, etc., which was appraised at \$500 in the compromise settlement and subsequently appraised at \$505 in the administration proceedings. All the testimony shows that this property was intended by both parties to be embraced in the settlement. We reach the same conclusion with respect to the choses in action, not including the account against Dr. Cole paid at the time of the compromise, because the settlement was intended to be a full settlement of the estate, and plaintiffs made no inquiry concerning the same, and there is no evidence that Mrs. Hewitt or any representative had any knowledge concerning the same. The choses were discovered by Duncan McKensie in the Bank of Timmons ville after his appointment as administrator.

This leaves the settlement impeached only because of the misrepresentation and concealment with reference to the \$1,103 that were in the hands of McKensie. The evidence leaves no room to doubt, if this fund had been fairly brought into the settlement, plaintiffs would have executed the deeds and receipt upon the payment of one-half thereof in addition to the estimated one-half of the remainder of the estate, which has been received, and the settlement may be carried out justly towards plaintiffs by compelling further payment to them of \$551.50, with interest from October 10, 1901. Further accounting from Duncan McKensie, the administrator, is not deemed necessary or proper. He was discharged by the probate court in 1903. While he permitted himself to become the custodian of funds of the estate before administration, there was no evidence that he was aware of the misrepresentation and concealment with respect to the fund in effecting the compromise. The debts of the estate all appear to have been paid. He had no reason to doubt the validity of the receipt of plaintiffs acknowledging full settlement with respect to their claims to the estate, and in good faith he has disbursed the funds of the estate going into his hands. From his accounts it appears that he not only paid the \$1,250 in the compromise settlement, an additional \$1,250 for indebtedness of Henry White incurred in buying for Mrs. Hewitt a short time before his death a tract of land

deeded to her by G. C. McEachern, and the further sum of \$768.90 was paid to Mrs. Hewitt for herself and her children, the balance of the estate in the administrator's hands after debts and expenses. This settlement included the personal property on the farm appraised at \$505.

The judgment of this court is that the judgment of the circuit court dismissing the complaint be reversed, and that the defendant Mrs. Minnie Hewitt for herself and children within 60 days from the filing of the remittitur herein pay to the plaintiffs or their attorneys the sum of \$551.50, with interest from October 10, 1901, and that, upon compliance herewith, the compromise settlement shall not be further disturbed, but, upon failure to comply herewith, then that the deed of the 80-acre tract and the settlement receipt with respect to the personal estate given by plaintiffs to Mrs. Hewitt and her children be set aside.

(86 S. C. 596)

WILSON v. ALL et al.

(Supreme Court of South Carolina. Aug. 20, 1910.)

APPEAL AND ERROR (§ 167*)—DECISIONS REVIEWABLE—EFFECT OF CONSENT.

Where a temporary injunction was issued against defendants, and, upon their motion to dissolve it, was continued, and they then agreed that they would give bond for a certain amount, provided the injunction be dissolved, and an order was made to that effect, the right of appeal from such order was waived by the agreement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1008-1014; Dec. Dig. § 167.*]

Appeal from Common Pleas Circuit Court of Barnwell County; T. S. Sease, Judge.

Suit by Mrs. Z. I. Wilson against Daisy J. All and F. D. Bessinger. From an order requiring defendants to give bond in lieu of an injunction, they appeal. Appeal dismissed.

James A. Willis, for appellants. James M. Patterson, for respondent.

JONES, C. J. Plaintiff brought this action to recover damages from defendants for wrongful and wanton flooding of her land and injury to same and the crops thereon by draining water from defendants' land onto plaintiff's land by means of a ditch, and for an injunction to prohibit continuation of such trespasses. A temporary injunction was granted by Judge Sease, and upon motion of defendants to dissolve the same he stated that he would continue the injunction, and at the request of defendants declared that he would require plaintiff to give bond in the sum of \$1,000, whereupon plaintiff's attorney offered that if the defendants would give plaintiff a bond of that sum, with two sureties, the plaintiff would not insist upon the injunction being enforced, and would allow

the water to continue to be discharged through said ditch. Defendants' attorney agreed to this, and the bond was given by the defendants. Provision was made for this in the order of Judge Sease, from which defendants now appeal. The terms of the order, dated April 9, 1910, were: "That said injunction be and the same is hereby continued pending the trial of the cause on the merits, but on the defendants entering into a bond to plaintiff in the sum of one thousand dollars with two sureties who shall justify, to be approved by the clerk of the court, the said injunction shall not issue; that the condition of said bond shall be that the defendants will pay to the plaintiff any damages she may sustain by reason of said injunction not being enforced."

The exceptions are to the refusal of the motion to dissolve the injunction, on the grounds (1) that the verification of the complaint upon which the injunction was granted was so defective as to render the complaint unverified; (2) that the complaint fails to allege irreparable injury, and shows that plaintiff has a complete and adequate remedy at law. We do not regard the exceptions as properly before the court. The temporary injunction has in fact been dissolved by acceptance of and compliance with its terms by appellant. The order is in effect a consent order adjusting the situation pending the litigation in accordance with the agreement of the parties. The right of appeal from such order must therefore be regarded as waived. *Clement v. Dean*, 51 S. C. 317, 28 S. E. 942; *State v. Scarborough*, 56 S. C. 53, 33 S. E. 779.

The appeal is dismissed.

(87 S. C. 18)

RHODES v. GRANBY COTTON MILLS.

(Supreme Court of South Carolina. Sept. 1, 1910.)

1. APPEAL AND ERROR (§ 231*)—RULINGS ON EVIDENCE—OBJECTIONS—SUFFICIENCY.

An objection to the admission of testimony which fails to specify the ground thereof is too general, and will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. § 231.* Trial, Cent. Dig. §§ 194-210, 223-227.]

2. CONSPIRACY (§ 19*)—BLACKLISTING—LIABILITY OF MASTER—EVIDENCE.

Where, in an action for blacklisting an employé, the evidence showed that the employer had prepared a list of strikers including the employé, and had furnished the list to other employers engaged in similar business, evidence that another employer refused to employ the employé because his name was on the list was admissible.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 25, 26; Dec. Dig. § 19.*]

3. APPEAL AND ERROR (§ 1032*)—RULINGS ON EVIDENCE—REVIEW.

A party complaining of the admission of testimony and of the refusal to strike out tes-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

timony must show that he was prejudiced by the rulings complained of.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.*]

4. APPEAL AND ERROR (§ 273*)—EXCEPTIONS—REVIEW.

An exception complaining of rulings on evidence which fails to point out the specific rulings sought to be reviewed is too general for consideration on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1620-1630; Dec. Dig. § 273.*]

5. TRIAL (§ 39*)—INTRODUCTION OF DOCUMENTARY EVIDENCE.

Where, in an action by an employé for blacklisting, the court admitted in evidence a blacklist prepared by the employer which included the name of the employé, and permitted the employer to introduce other papers attached to the list, and the other papers when introduced furnished evidence for the employé, the court did not err in admitting the list in evidence when offered by the employé without requiring him at the same time to introduce the other papers.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 92-98; Dec. Dig. § 39.*]

6. APPEAL AND ERROR (§ 232*)—QUESTIONS NOT RAISED IN TRIAL COURT.

Where, in an action by an employé for blacklisting, the blacklist offered in evidence was not objected to by the employer on the ground that its communication to other employers engaged in similar business was confidential, the exception that the list was inadmissible because a privileged communication could not be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1430; Dec. Dig. § 232;* Trial, Cent. Dig. §§ 211-222.]

7. APPEAL AND ERROR (§ 273*)—EXCEPTIONS—SUFFICIENCY.

In an action by an employé for blacklisting, an exception that the court erred in the opening general remarks of his charge in conveying to the jury his impression that the employer had done wrong to the employé and that such wrong was of a grave nature, and that the court erred in addressing to the jury the opening remarks of the charge, thereby applying statements of the Bible to the facts of the case, is too general, and will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1620-1630; Dec. Dig. § 273;* Trial, Cent. Dig. §§ 256, 257.]

8. TRIAL (§ 217*)—INSTRUCTIONS.

It is not reversible error for the trial judge merely to call to the attention of the jury the gravity of the issues involved in the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 483, 485; Dec. Dig. § 217.*]

9. CONSPIRACY (§ 20*)—PUNITIVE DAMAGES.

Where, in an action by an employé for blacklisting, a conspiracy between the employer and other employers was relied on, punitive damages were recoverable.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 27; Dec. Dig. § 20.*]

10. CONSPIRACY (§ 20*)—PUNITIVE DAMAGES.

The refusal of an employer to withdraw the name of an employé from a blacklist, after becoming aware of the fact that the employé was not a striker, and that he could not get employment from others while his name remained on the blacklist, proved malice on the part of the employer justifying punitive damages in

favor of the employé suing the employer for blacklisting him.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 27; Dec. Dig. § 20.*]

11. CONSPIRACY (§ 8*)—COMBINATIONS—ILLEGALITY.

A combination of employers to furnish to each other the names of striking employes and other persons whose employment for any cause is undesirable is not unlawful, so long as it is formed and used for promoting the legitimate business of the employers, but, when the combination is made an instrumentality of injuring others through malice or threats of intimidation, a right of action for resulting injuries arises, and where more than one of the parties to the combination agree to use it for an illegitimate purpose a conspiracy arises, and, when one against whom the conspiracy is directed suffers injury in consequence thereof, he may sue either one or all of the parties to the unlawful agreement, charging them as conspirators, and such action does not fail because there is no evidence of a conspiracy between two or more of the employers, for one of the parties to a legitimate combination gives a cause of action by using maliciously such a combination as a means of injuring another.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 7-11; Dec. Dig. § 8.*]

12. CONSPIRACY (§ 19*)—BLACKLIST—EVIDENCE.

Evidence held to show an agreement between employers to furnish to each other a list of striking employes, and not to employ strikers, and that an employer after knowing that his employé was not a striker willfully persisted in representing him to be one, preventing him from obtaining employment, authorizing a recovery.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 19.*]

Appeal from Common Pleas Circuit Court of Richland County; R. W. Memminger, Judge.

Action by Olin M. Rhodes against the Granby Cotton Mills. From a judgment for plaintiff, defendant appeals. Affirmed.

The following are the exceptions of defendant:

"(1) Because, counsel for defendant having previously objected to testimony along the line, his honor against the objection of defendant allowed the witness J. C. Kirby to testify as follows, to wit: 'Mr. Edmunds: Q. Who furnished you the list? A. Mr. Wallace, superintendent of the mill at that time (meaning the Columbia Mills). The Court: It will be relevant to show that he refused him employment on account of having received that list, if you can show the Granby Cotton Mills is connected with it. Mr. Edmunds: We expect to connect it. The Court: If you do not connect it, it will be stricken out. Mr. Edmunds: Q. Was it as a result of the strike at the Granby Mill and your receiving that list that employment was refused? Mr. Shand: We object to that. The Court: State whether or not. Mr. Edmunds: State whether or not the strike at the Granby Mill and his name being on that list, that employment was declined him? A. Yes, sir—it being error to allow such witness to testify that he was refused employment

in said Columbia Mills because of a strike at the Granby Mills, and because plaintiff's name was on an alleged list of strikers at the Granby Mills, when there was no testimony showing that such list of strikers had been furnished by the Granby Mills.

"(2) Because his honor, the presiding judge, did not upon motion of defendant's counsel at the close of the testimony for the plaintiff strike out the testimony of the witness J. C. Kirby, there having been up to that time no testimony showing any connection between the Granby Cotton Mills, and the list testified to by the said J. C. Kirby.

"(3) Because his honor erred in allowing the witness C. S. Green, against the objection of the defendant, to testify to a tacit courtesy recognized by the Columbia Mills in 1900 with reference to the giving of information upon the request of the superintendents of other mills without connecting the defendant with it then and without showing that such a tacit courtesy existed in 1907.

"(4) Because his honor did not, upon the motion of the defendant's counsel at the close of plaintiff's testimony, strike out the testimony of the witness C. S. Green as to any tacit understanding or tacit courtesy practiced by the superintendent of the Columbia Mills when there had been no testimony to connect the defendant or its superintendents with such tacit courtesy or understanding, and there had been no testimony to show that such tacit courtesy or understanding existed in 1907.

"(5) Because, against the objection of the defendant, his honor allowed the witness C. S. Green to testify that the Columbia Mills or the said C. S. Green would make use of such tacit understanding or courtesy to which the said witness had testified when it had not been shown that the defendant company was in any wise a party to such tacit understanding or courtesy.

"(6) Because his honor erred in permitting the plaintiff, against the objection of defendant, to testify that he sent messages to mills in other states and received no response thereto without testimony to show that the messages so sent were ever received, or that a failure to receive a favorable response was in any wise due to any act or communication of the defendant.

"(7) Because his honor erred while the plaintiff was on the stand as a witness in ruling as follows: 'I rather think the court is satisfied that there is some evidence prima facie of conspiracy between these mills to prevent these people getting work and sending around lists, making it impossible for them to get work, that there is some prima facie evidence showing combination and conspiracy between them'—when, first, there was no prima facie evidence of agreement or combination between any mill for any purpose touching the subject-matter of this action; and, secondly, even if there was prima

facie evidence of some combination or agreement between some mills, the defendant Granby Mills had not been connected with it; and, thirdly, even if there was some prima facie evidence to show a combination or agreement between certain mills to do some act in connection with the subject-matter of this suit, it was not to do any unlawful act or any lawful act by unlawful means; and, fourth, even if there was some evidence as to a combination between certain mills to do an unlawful act, the defendant, Granby Mills, had not been connected with it.

"(8) Because under the erroneous ruling complained of in exception 7 his honor erred in admitting, against the objection of the defendant, the testimony of plaintiff, and thereafter of witnesses L. E. Rhodes, Dozier Rhodes, and A. L. Knight as to declarations as to defendant's acts and statements made to them, or in their hearing, by persons in no wise connected with the defendant.

"(9) Because his honor erred in ruling: 'The combination having been testified to being established to some extent, the declaration of parties connected with and in furtherance of that combination are admissible,' when no such combination had been to any extent established or testified to, and in pursuance of such ruling in admitting as testimony the declarations of Wallace and others who were in no wise connected with the defendant, and which declarations were in no wise binding on defendant.

"(10) Because his honor erred in permitting the witness Knight to testify against the objection of the defendant as to the contents of a list seen by him at the Palmetto Cotton Mills, when there was not sufficient to show that said list was made by the defendant or authorized by it.

"(11) Because his honor erred as matter of law in permitting the witness Knight to testify, against the objection of the defendant, as to the contents of a list alleged to have been seen by him at the Palmetto Cotton Mills, when no sufficient proof had been made of the loss of the original according to the rules of law.

"(12) Because his honor erred in holding sufficient proof to have been made of the loss of the original of the letter referred to in the preceding exception, and in admitting secondary evidence of its contents as upon sufficient proof when the last custodian, the former Superintendent Bagwell, had not been examined as to his disposition of the letter, and the facts failed to show that a bona fide and diligent search had been unsuccessfully made for the original in the place where it was most likely to be found, and thus all sources of information and means of discovery had not been exhausted in a reasonable degree.

"(13) Because the defendant, upon notice to produce served by the plaintiff, having produced in court an original list of strikers, written in ink and indelible pencil, which

had never been out of the possession of the defendant or exhibited to any one else until so produced, and also having produced in court a document which consisted of a typewritten letter, a typewritten list and a printed slip, all three fastened together as one document, stating expressly the terms of the production, namely, stating that 'this is the only letter we have in our possession containing a copy of that list, with such additional names as were given to the president, etc.,' his honor erred in permitting such typewritten list to be used as a list furnished by defendant on demand, without submitting the letter and printed exhibit at the same time, when there was nothing else than such production by the defendant to show that such typewritten list had been sent out by defendant.

"(14) Because his honor erred in ruling that a part of a letter might be introduced in evidence by plaintiff with the privilege to defendant of introducing the other parts and in permitting the plaintiff so to introduce said list detached from the entire letter; whereas, the letter having been produced as a whole and the list only as a part of it, all the parts were admissible in evidence as a whole, or none of them.

"(15) Because the production having been made simply as a letter in the possession of the defendant, containing a list, etc., without any statement on the part of counsel as to the nature of the letter or the character of the reference in the letter to the list, and more particularly without any statement on the part of counsel that the said list had been sent out, his honor erred in permitting a part of the said letter to be introduced in evidence by plaintiff as a list which had been sent out by defendant, when there was no evidence that such part had been sent out by the defendant or that it had been set out as a list of strikers, or that it had come from the defendant at all, except as might be explained by the letter.

"(16) Because his honor erred in not granting, upon motion of the defendant, a nonsuit, because (a) there was no competent testimony of any conspiracy, agreement, or combination between the defendant and any other mills as to nonemployment of strikers at other mills, or as to any other unlawful act, or lawful act to be accomplished by unlawful means; (b) the communication of the names of strikers to other mills, if legally proved, was a confidential communication and gave to plaintiff no cause of action; (c) it was an entire failure to prove the material allegations of the complaint to a wrongful act by the defendant.

"(17) Because his honor erred in the opening general remarks of his charge in conveying to the jury his impression that the defendant had done wrong to the plaintiff and that such wrong was of a grave nature, thereby expressing his opinion on the facts, in violation of the provisions of the Constitution.

"(18) Because, the case being one between employer and employe, between a corporation and a laborer, the issue being an alleged unlawful combination between the corporations to prevent the defendant from pursuing the labor of his hands, and the testimony having been introduced for the plaintiff in the effort to show that he was driven from his home into enforced exile, his honor erred in addressing to the jury the opening remarks of his charge, the said remarks having the effect of applying the statements of Holy Writ to the facts of this case, and so applying them, both in the substance of the quotations and the manner of their introduction, as to inflame the prejudices of the jury and to play upon their sympathies, thus tending naturally to prejudice the defendant in the minds of the jury, and to lead to a capricious verdict without regard to the facts of the case.

"(19) Because his honor violated the provisions of the Constitution in charging that, upon the issues raised by the pleadings in this case, 'it appears to me to be one of the most serious and far-reaching in the principle involved of any which has come under my observation'—thereby indicating punitive damages being involved, that the charge was of a serious nature, and indicating his opinion to the jury.

"(20) Because his honor erred in refusing defendant's request to charge numbered 5 (11), which was as follows: 'That if defendant, a cotton mill corporation, was reflected upon for its conduct in the matter of a strike, in a published article in a newspaper, with the names of those who helped to break the strike also published, a reply by said corporation defending its course and giving the names of those concerned in the strike, sent only to other cotton mill corporations, engaged in the same line of business, is a privileged communication and in itself furnishes no cause of action for resultant cause or damage to those whose names are properly on such list'—it being a correct proposition of law, not a charge on the facts, and asked of him a construction of a written document.

"(21) Because his honor erred in refusing, upon request of the defendant, to charge that the jury could not find punitive damages in this case.

"(22) Because his honor erred in refusing, upon request of defendant, to charge that the jury must find a verdict for defendant.

"(23) Because his honor erred in refusing defendant's motion for a new trial, he having charged that plaintiff could not recover unless plaintiff established 'a combination, or conspiracy, or agreement among these mills to which the Granby Mills was a party,' and there being no legal evidence to sustain such allegation of the complaint.

"(24) Because, his honor having charged, in effect, that plaintiff could not recover unless he established a conspiracy between these mills to which the Granby Mills was a

party, a conspiracy being an agreement to do an unlawful thing or a lawful thing by unlawful means, there was no competent evidence of such agreement between Granby Mills and any other mill, and his honor erred in refusing a new trial on this ground.

"(25) Because his honor erred in charging the jury as follows: 'If it (that is, the act of the defendant) was merely a wrong on their part, you could only give him actual damages, such actual damages as he may be sustained by reason of the violation of his legal right to get work, but, if you found that there was (a) willful, wanton, malicious conduct on their part, * * * why, you go into the question of punitive damages also' again, after charging plaintiff's fifth request, 'If the act was merely wrongful, only actual damages can be recovered; if willful or malicious, punitive damages'—the error being that such charge ignores the quasi privilege of a communication between those engaged in the same business, and ignores the justification of honest mistake and reasonable grounds for belief, even where the publication was in fact wrong.

"(26) Because his honor confuses in his charge throughout conspiracy—that is, an agreement to do an unlawful act or a lawful act by unlawful means—with mere agreement or combination to an act which may become unlawful when done beyond and outside of the scope of agreement.

"(27) Because the uncontradicted testimony of the witnesses Parker, Beaty, Black, Duncan, Praddy, and Wallace that there was no such agreement or combination as was charged in the complaint was not overcome by the statement of the witness Green that as a matter of courtesy, existing several years before, information would be given to an inquiring mill superintendent of the reasons why an applying employé had been discharged by the mill of whom such inquiry was made, and there being no other legal testimony on this point.

"(28) Because his honor in his order refusing a new trial erred in stating that the list referred to in defendant's thirteenth ground for a new trial 'was not one and the same paper as the others which defendant had attached to it, but was the list which plaintiff referred to in his complaint,' and upon such misapprehension, clearly shown by the record, he erred in refusing a new trial."

Shand & Shand, Lyles & Lyles, and W. H. Parker, for appellant. Clark & Clark and Logan & Edmunds, for respondent.

GARY, A. J. This is an action for damages alleged to have been sustained by the plaintiff as the result of a conspiracy between the defendant and other like corporations, whereby a number of such mills refused to give employment to the plaintiff, after being notified by the defendant that it had black-listed him. The answer to the complaint

was a general denial. The jury rendered a verdict in favor of the plaintiff for \$2,000 actual and \$3,000 punitive damages. The defendant's attorneys made a motion for a new trial, and his honor, the presiding judge, ordered that it be granted, unless the plaintiff remitted upon the record \$3,000 of the amount awarded for punitive damages, which was done, and the defendant appealed upon exceptions, which will be set out in the report of the case.

We proceed to the consideration of the exceptions.

First exception:

The objection to the testimony was too general, as it failed to specify the ground thereof. *Norris v. Clinkscales*, 59 S. C. 232, 37 S. E. 821. It would be unjust to the plaintiff, as well as to the presiding judge, to consider the ground of error assigned by the exception, when the presiding judge was not requested to rule thereon. There is, however, another reason why the exception must be overruled. The following statement appears in the record: "Before any witness was sworn Mr. Edmunds, plaintiff's attorney, inquired of defendant's attorney what response they would make to their notice to produce. Mr. Shand, defendant's attorney, produced and handed to Mr. Edmunds a paper, which he said was the original list of strikers, and had never been out of the possession of defendant until this moment. This paper is the one hereinafter printed as the paper introduced in testimony numbered 1. Mr. Shand also at the same time produced and handed to Mr. Edmunds the three papers attached together by a pin, which were afterwards taken apart by plaintiff's attorneys, and the one below, numbered 3 of the documentary testimony, was offered in evidence by plaintiff's attorneys, and the two hereinafter referred to in documentary evidence numbered 5 were offered in evidence by defendant."

J. H. M. Beaty, a witness for the defendant, thus testified: "Q. When this strike took place, do you know whether or not a list of the strikers was furnished other mills? A. I didn't personally. Q. Just whether you knew it? A. Well, I know it was done, but I was going to say I didn't see it done, and a copy of it was not furnished me, but I know it was done. Q. Did you see any of those lists? A. I afterwards did; yes. Q. Whereabouts, Mr. Beaty? A. I had to get a copy of what was sent out from Mr. Parker in Greenville. The original list that he used, of course, was made up at the mill. Q. The original list was sent out from Greenville? A. Sent out from Columbia. Mr. Parker was in Columbia at that time."

Mr. Lewis W. Parker, president of the Granby Mills, testified as follows: "Mr. Shand: Now, here is the typewritten list of the weavers containing a good many names, and among others is O. M. Rhodes, L. E. Rhodes, Hoyt Rhodes, Harley Rhodes,

and Sally Rhodes, and about a dozen or so of loom fixers. We offer that in evidence. You sent that to the Palmetto Mills, to the manager of the mills and to some others? A. Some other mills in the state. I sent none outside of the state, but to a certain number of mills in the state where my personal relations were pleasant. * * * Q. Were the ones you sent out all alike? A. Exactly alike, manifold copies. The lists were manifolded, and this is one of the manifold copies, and the list of strikers so attached to the letter was the manifold list. Q. If all were in the courthouse, they would look like that and read that way? A. Yes, sir. * * * Q. Where did you get the list that you attach to the letter? A. That list was furnished me by the office at the Granby Mill. Q. On your demand? A. On my request." Thus showing that the list of strikers was furnished by the Granby Mills.

Second exception:

The testimony just set out shows such connection.

Third, fourth and fifth exceptions:

Even conceding that there was error, it has not been made to appear that it was prejudicial to the rights of the appellant.

Sixth exception:

The statement and the testimony reproduced in considering the first exception show that the question presented by this exception is without merit.

Seventh exception:

The error assigned by this exception will be determined when the court comes to consider the exceptions, assigning error in refusing to direct a verdict and grant a new trial on a similar ground.

Eighth exception:

This exception fails to point out the specific ruling which the appellant seeks to bring in review, and is therefore too general for consideration.

Ninth exception:

Previous rulings on other exceptions dispose of this question.

Tenth, eleventh and twelfth exceptions:

What was said in considering the first exception shows that, even if erroneous, these rulings were not prejudicial.

Thirteenth and fourteenth exceptions:

The following ruling of the presiding judge shows that this exception cannot be sustained: "As to the ground which seeks to charge error in admitting the list in evidence, and not requiring plaintiff at the same time to introduce and read to the jury other papers, which had been attached to the list in response to plaintiff's notice to produce said list, the report of the case will show that the list was not one and the same paper as the others, which defendant had attached to it, but was the list which the plaintiff referred to in his complaint. He did not consider the other attached matter relevant to prove his case. I gave defendant permission to introduce said other papers whenever he

saw fit, and as a matter of fact, when introduced, they furnished most effective evidence for plaintiff, and were constantly read and referred to in his behalf, and sought to be explained away on behalf of defendant in the arguments."

Fifteenth exception:

What has already been said disposes of this exception.

Sixteenth exception:

When the defendant produced the list of strikers, it did not object to its introduction on the ground that its communication to other mills was confidential; so that, even if it could be regarded as a privileged communication, the exception cannot be sustained. The other assignments of error mentioned in this exception will be determined when the court shall consider whether there was error in refusing to direct a verdict or grant a new trial on the ground that there was no testimony tending to prove a conspiracy.

Seventeenth and eighteenth exceptions:

These exceptions are too general for consideration, but, waiving such objection, they cannot be sustained, as the appellant has failed to satisfy this court that such rulings were prejudicial.

Nineteenth exception:

It is not reversible error for the presiding judge merely to call to the attention of the jury the gravity of the issues involved.

Twentieth exception:

What was said in considering the sixteenth exception shows that this exception must be overruled.

The consideration of the twenty-first and twenty-fifth exceptions will be postponed until it is determined whether there was any evidence of a conspiracy.

Twenty-eighth exception:

What has already been said shows that this exception cannot be sustained. We next come to the consideration of the seventh, sixteenth, twenty-second, twenty-third, twenty-fourth, twenty-sixth, and twenty-seventh exceptions, which, in the language of appellant's attorneys, raise the question whether there was "error in holding that there was some evidence of a combination, conspiracy, or prior agreement between the defendant and other cotton mills, and in failing, because of such erroneous rulings, to grant a nonsuit, direct a verdict, and grant a new trial."

J. C. Kirby, an overseer of weaving in the Columbia Mills, thus testified as a witness for the plaintiff: "Q. Do you remember whether or not the name of Olin M. Rhodes was on that list? A. As well as I remember, it was. * * * Q. Did he apply to you for employment? A. Yes, sir. Q. Was it given to him? A. No, sir. * * * Mr. Edmunds: State whether or not the strike at Granby Mills, and his name being on that list, that employment was declined him? A. Yes, sir. * * * Q. What was your objection to tak-

ing him? A. The objection was with me. In the first place, Mr. Wallace instructed me not to employ any one of the strikers. * * * Q. You had need for labor in the mill at that time? A. I do not remember. We generally do. Q. You cannot say whether you would have employed him or not, if he had not been reported as a striker? A. I rather think I would have. Q. If he had come and told you he had struck at Granby, and wanted employment in your mill, would you have employed him? A. No, sir. Q. When was that, that he applied to you; how long after the strike at Granby? A. Probably two or three days. I can't tell you. Q. Did he tell you he had not struck? A. Yes, sir. Q. He said so? A. Yes, sir. Q. Did he tell you his family had not struck? A. No, sir; he told two of his family had struck, as well as I remember. Q. But that he had not? A. Yes, sir. Q. And the other two had not? A. I think that is the way it was, as near as I can remember now."

C. S. Green, an employé of the Columbia Mills, testified as a witness for the plaintiff as follows: Q. Do you know as a fact whether or not there is any agreement or understanding, written or verbal, between the various mills about the employment of labor, help, leaving one mill and going to another? * * * Q. If there is any verbal understanding, please state it? A. There is a tacit understanding, commonly known as 'mill courtesy,' whereby one superintendent has information from the other superintendent as to help leaving one mill, and seeking employment in another mill. * * * Mr. Edmunds: Is that agreement and understanding, tacit understanding, does that exist with your mill and the Granby Mill and other mills here? A. It is entirely within the jurisdiction of the superintendent. Q. But as a matter of fact do you know whether or not these superintendents of these mills are in that agreement? A. There is no agreement. Q. Well, tacit understanding? A. Courtesy. I expect they would extend the courtesy to us, if we were to request it. We would, I know. Q. So, Mr. Green, if one applies to the Columbia Mills, and your inquiry showed that they had left the Granby Mill in a manner that was displeasing to it, raised any disturbance, left owing money, or like matters, then, in view of that mill's courtesy, state whether or not the Columbia Mills would give such a one employment? A. I would say not. * * * The Court: Ask whether that would apply to the Granby Mill? A. It would apply to any mill that chooses to give us the courtesy. No understanding, simply over the phone, we ask if certain people left there regularly. * * * Q. Who in the mill is held responsible for the employment and discharge of the help? A. The superintendent primarily, and the overseer secondarily. Q. Then I ask you, that being true, if whether or not it is true that the superintendent of the Granby, Col-

umbia Mills, and other mills of Columbia are in that understanding? Mr. Shand: Speak of your own knowledge and confine yourself to 1907, please. A. I cannot confine myself to 1907. I was in New York at that time. * * * Q. I mean this: You say that a tacit understanding existed prior to the time you left here? A. Yes. Q. Is that tacit understanding still—is it still in effect? A. I cannot say it is or not. No occasion has arisen to make a necessity to use it, or to make a necessity to raise the question. Mr. Edmunds: Q. If a case should arise, state whether or not from your position as agent of the Columbia Mills Company, or the agent here at the Columbia Mills Company, you would make use of that understanding? A. I certainly would. Mr. Parker: We object. He is asking the conclusion of the witness on a hypothetical question. The Court: I think that admissible. The charge is that the Granby Mill blacklisted this man, and the charges are also that by that blacklist he was unable to secure work at other mills. This testimony tends to show, if it be true, that he was blacklisted, and that he could not secure employment at other mills. It is competent. * * * Q. You say that, when you left here, there was this tacit understanding on the part of superintendents of the mills? A. Yes, sir. * * * Q. This tacit understanding between the superintendents, was it anything more than an agreement to stop that practice, of trying to get the help from other mills. Is not that what you are thinking about? A. No; it was more of a mutual protection from undesirable employes. We advanced, and I suspect other mills did the same thing, money to help them when they needed it, and we required them to give notice two weeks' duration before ceasing term of service with us. If they left before serving out the notice, they often left owing money, and we would have no chance of collecting it. This understanding, tacit understanding, we had with other superintendents. * * * Q. What do you mean by tacit? A. I think I explained that more fully in stating mutual courtesy. Q. It was not one mill agreeing with another mill, but each particular superintendent did not care to take hands from other mills that had been discharged from those mills for what reason? A. Did not care to get undesirable help. Q. It was the habit more than a tacit understanding? A. I prefer to call it courtesy. Q. Just a courtesy of one mill to another? A. One superintendent extending it to another. It was purely a mutual arrangement between the superintendents. Q. The courtesy consisted of your informing other mills, and asking information of other mills, and on that information to act upon it? A. Or not, as we see fit. Q. And it was courtesy on the part of other mills to give you information? A. Yes, sir; and which we reciprocated on like occasions. Q. If they had

heard there was a strike, would they have asked whether the party applying was in that strike or not? A. They would not have waited to ask. They would instruct that nobody from that mill should be employed.

* * * Q. Well, now, when you would instruct those parties who had been on strike, or anything of that sort, should not be employed, would that instruction be in the interests of your own mill and for your own protection, or by reason of courtesy to other mills? A. Absolutely for our own protection. Q. And you could have employed them if you wanted to? A. Might, taking chances. Q. And, if you did not employ, it was entirely with an eye to your own interests? A. Yes, sir; absolutely. Q. And there was no agreement or understanding to the contrary? A. None whatsoever. Mr. Edmunds: Q. But the courtesy existed, and was a practice? A. The courtesy was to give information. Q. And it was practiced, was it not? A. I don't think I can answer that point, as I do not practice it myself. I can answer from hearsay. Q. You can answer from general custom? A. Yes, sir. Q. Well? A. Practice. Q. Mr. Green, the mill itself is a body corporate, and does not undertake to employ weavers, loom fixers, and truckers? A. We hold the superintendent responsible for the mill help. Q. Those matters are left in charge of them? A. Absolutely. Q. And the mills recognize their authority to do these acts? A. They hold them responsible for doing these acts."

O. M. Rhodes, the plaintiff, thus testified: "Q. After seeing Mr. Wallace, where did you go? A. I went back home, and then to the Granby Mills office, to see Mr. Black. Q. State what conversation took place between you and Mr. Black, at the Granby Mills office, when you returned after having seen Mr. Kirby, and after having seen Mr. Wallace? * * * A. I asked if he would not give Dozier and Hoyt work, if he would not give Harley and myself work, that we had nothing to do with the strike, wouldn't he give us work back. Q. You asked if he would not give you work, if he would not give you and your boys work? A. Yes, sir. Q. What response did he make to that? A. He would not do it. Q. Did any further conversation take place between you at that time? A. Yes, sir. Q. Please relate it. A. Then I asked him if he would not do that to give me a pass to the Columbia Mills, that Mr. Wallace would give me work, if he would release our names off the list, and if he would hold no claim over us; and his remark was: 'I could not do that, if I was ever so willing. You are in the hands of the American Cotton Association.' Q. At that time did you tell him the result of what had taken place between you and Mr. Wallace? A. Only I told him that Mr. Wallace said he would give me work, would be glad to have us, if he would give us the pass. Q. State whether or not at that time you said any-

thing to Mr. Black, the superintendent of the Granby Mill, about your name being on any list furnished to Mr. Wallace? A. I told him if he would release our names off of that list, Mr. Wallace would give us work.

* * * Mr. Edmunds: Q. Coming back to the time when you went to see Mr. Wallace, please state to the court and jury exactly what took place between you and Mr. Wallace, what you said and what he said. * * * A. I told him we had nothing to do with the strike at the Granby Mills, that two of my boys was in that went out with the weavers, but my daughter and myself had nothing to do with it, and asked couldn't he give us work under the circumstances. Q. What did he say? A. He said if I would go back to the Granby Mill and work that he would be glad to hire us, or if Mr. Black would give me a transfer, stating that he would release our names from off the list, and that they held no claims over us whatever, that he would be glad to hire us, but otherwise he could not do it. * * * Q. You did not get any work from that time until you went to Danville, Va.? A. That is the only place that I applied for a job that I could get. That happened to be an independent company that did not belong to the American Cotton Association, and therefore they had the right to hire when they pleased."

L. E. Rhodes, a witness for the plaintiff, testified as follows: "Q. Did Mr. Wallace give Mr. Rhodes any reason which related to any act of the Granby Cotton Mill why he could not give him employment? A. He did. Q. Please state it. * * * A. Mr. Wallace said that Mr. Black informed him on the morning of the strike, and told him he had trouble, and not to hire any of the help, and about three days later he sent him a list of names of loom fixers, known as blacklist, and later he sent him a list that was known as an additional list, and he told father, if he would get Mr. Black to release his name off the list, that he would give him employment, for him and his whole crowd, and be glad to get them. That was pretty much the words Mr. Wallace used."

Dozier Rhodes thus testified in behalf of the plaintiff: "Q. Now, after this strike took place, did you have any conversation with Mr. Black, the superintendent of the Granby Cotton Mill, about going back to work, about your going back to work, and about your father and his people going back to work? A. I had a little conversation with him, about giving me a pass to the other mill, and he said: 'I have got nothing to do in giving you a pass. I did not tell you all to quit, and I would not give a pop of my finger to keep you from getting work, but, if the president should find out you is working, you will be turned right off.' He said this American Cotton Mill business has got money. And I went to the Capital City Mills, after he would not give me a pass. I went to the Capital City

Mill and I asked Mr. Ed. Thomas for work, and he said, 'Where are you from?' Mr. Shand: We object, he is not the plaintiff. (Objection sustained.)" The objection to the testimony had reference to the last question, as the defendant had permitted similar evidence to be introduced during the examination of L. E. Rhodes as a witness without objection.

T. B. Wallace, superintendent of the Watts Mills, thus testified in behalf of the defendant: "Q. If one comes to you as a striker, as one who has struck, would you consider him as a suitable employé? A. Not in my business. Q. Would you wish to employ such a person? A. No, sir. Q. Is it or not the interest of the mill that such a person should not be employed? A. That is my position. Q. Is that generally recognized among mills? A. That is recognized among mills. Q. If one comes to you as a striker, and you are satisfied that the cause of striking is unjustifiable, and that he is an unsuitable employé, would you employ that man? A. Most emphatically no. Q. Suppose you heard there was a strike, would you or not pursue the inquiry as to what it was about, who were the strikers and how many? A. Yes, sir; I think we would. Q. If you were to get that message, what was the natural thing for you to do, when you got the message that there was a strike? A. To protect my own interest, I would try to find it out who the strikers were. Q. If you had their names, if the names were given to you, in response to the request, what would you do? A. I would instruct my overseers not to employ them. Q. Do you remember receiving a list of the strikers at the Granby Mill, being handed to you at any time? A. If my memory serves me right, there was a list that came to the Duck Mill, and I think that list fell into the hands of Mr. Ball, but I was acquainted with the facts before I received that list. Q. Was that on the day of the strike, or after the strike? A. That was on the day of the strike. I do not know what day the list came in, but I was in possession of the facts of the strike before receiving the list. Q. As soon as you were in possession of the facts, did you or not give orders about it? A. I did. Q. Did you or not give orders before you received the list? A. I had. Q. What were the orders? A. I gave instructions to the overseers not to employ any of the strikers of the Granby Mill. Q. Were those orders given of your own discretion in the course of your duty or not? A. They were."

W. A. Black, superintendent of the Granby Mills, testified in behalf of the defendant, as follows: "Q. If you knew a man was a striker, and had struck for an unjustifiable cause, would you or not employ that man? A. I would be afraid to employ a man who had that reputation. * * * Q. Did you sometimes have a request from mills to give a list of employés who had struck? Did you or not have such requests; and, if you knew of a

strike, would you or not wish to know who were the strikers? A. Well, yes, sir."

J. H. M. Beaty, general manager of the Granby Mills and a witness for the defendant, thus testified: "Q. How long after the strike before these lists were prepared? A. I couldn't say positively. I don't think it was over three or four days. Q. You know as a matter of fact that a number of people who were on these lists were refused employment on that account, do you not? A. I can't say that I do positively."

It will be observed that the foregoing testimony is of two kinds—direct and circumstantial. Even though it be conceded that the direct testimony only tended to prove that the defendant and other mills sustained towards each other a relation denominated a courtesy or understanding, but that it did not tend to show an agreement that they would not employ those blacklisted by any of said mills, still it does not follow that there was error in refusing to grant a nonsuit, direct a verdict, or order a new trial. If the circumstantial evidence tended to show that the relation which the mills sustained towards each other was so intended and did have the direct effect of preventing those who were blacklisted by one mill from getting employment at the others, then it would make very little difference whether such relation was called a courtesy, or an understanding or an agreement, as it is the result which is expected to follow from the relation, and not the name by which it is called, that characterizes it. *Blackwell v. Mtge. Co.*, 65 S. C. 105, 43 S. E. 395. In other words, a person is presumed to intend the natural consequences that may reasonably be expected to result from his act. *State v. Chemical Co.*, 71 S. C. 544, 51 S. E. 455. Therefore, if the plaintiff was prevented from getting employment at the other mills as the direct or proximate result of being blacklisted by the defendant, then it could reasonably be inferred that there was such an understanding or agreement between the mills as naturally to cause such result, and such understanding or agreement would in effect constitute a conspiracy; the name by which it was called being immaterial.

In considering the circumstantial evidence, even if no single fact is sufficient to establish prima facie a conspiracy, nevertheless, when the several circumstances are considered together, they may have such effect. The rule is thus stated in *Dantzler v. Cox*, 75 S. C. 334, 55 S. E. 774: "The ninth exception assigns error in overruling the motion for a new trial on the ground that there was no testimony to support the verdict. While there was no direct and positive testimony sustaining the defenses set up in the answer, still there were facts and circumstances from which the jury might properly have drawn the inference in favor of said allegations. The rule is thus stated in *Railroad v. Partlow*, 14 Rich. Law, 237: 'It may be that no

one of the facts would of itself warrant the inference, and yet, when taken together, they may produce belief, which is the object of all evidence.' In 1 Greenleaf, Ev. § 51a, it is said: 'It is not necessary that the evidence should bear directly upon the issue. It is admissible if it tends to prove the issue, or constitutes a link in the chain of proof, although alone it might not justify a verdict in accordance with it. All the circumstances mentioned in this ground may be regarded as links in the chain of proof, from which the jury might deduce the inference of the defendants' privity and direction in the acts of trespass. This is usually the case where an issue depends on circumstantial evidence.' This principle is affirmed in *Wertz v. Railway*, 76 S. C. 388, 57 S. E. 194. The circumstances tending to show a conspiracy are (1) the keeping of a blacklist by the mill discharging the employe, not only as a matter of information for itself, but also for the benefit of those mills with which it sustained a certain relation denominated a courtesy or understanding; (2) the fact that as a result of such courtesy or understanding a discharged employe was prevented from getting employment at any of the other mills. These facts at least tended to establish an implied agreement which was in effect a conspiracy, and the exceptions raising this question are overruled. As the appellant's attorneys concede that the charge of the presiding judge upon the question of conspiracy was free from error, it is unnecessary to discuss the law upon that phase of the case.

Having reached the conclusion that there was testimony tending to show a conspiracy, we proceed, lastly, to consider the twenty-first and twenty-fifth exceptions, which assign error on the part of the presiding judge in refusing to charge when requested by the defendant's attorneys that the plaintiff was not entitled to punitive damages. There are two reasons why the request to so charge was not erroneous: (1) The conspiracy alleged in the complaint imports an intentional wrong, and for such wrong punitive damages are recoverable. *Pickens v. Railway*, 54 S. C. 498, 32 S. E. 567. (2) The refusal of the defendant to withdraw the name of the plaintiff from the blacklist after becoming aware of the fact that he was not a striker, and that he could not get employment at the other mills while his name remained upon the blacklist, tended to prove malice.

It is the judgment of this court that the judgment of the circuit court be affirmed.

WOODS, J. I concur in the result. It was not necessary that the evidence should show that the defendant had formed with other mills a conspiracy—a combination to do an unlawful thing or a lawful thing in an unlawful manner—and had injured plaintiff by acts done in furtherance of such conspiracy. Had the court instructed the jury to that effect, the defendant would be enti-

tled to a new trial, for there was no evidence of conspiracy between the defendant and other mills. There was evidence of an agreement or combination among the mills to furnish to each other the names of strikers and other persons whose presence at the mills would for any cause be undesirable. But such a combination of employers is no more unlawful than similar combinations of laboring men not to work for certain persons regarded as unfair in their dealings with their employes. As long as such combinations are entered into and used for promoting the legitimate business purposes of those concerned, others have no cause of action on account of the combination, although the effect of it may be to injure them; but, when the combination is made an instrumentality of injuring others through malice or threats of intimidation, a right of action arises for the resulting injury. When more than one of the parties to the combination agree to using the combination for such illegitimate purposes, a conspiracy arises; and, when one against whom such conspiracy is directed suffers injury in consequence of it, he has a right to action against one or all the parties to the unlawful agreement charging them as conspirators. The plaintiff's action does not fail because there was no evidence of such a conspiracy between two or more of the mills, for one of the parties to a legitimate combination or agreement gives a cause of action by using maliciously such a combination as a means of injuring another person. These principles are now generally recognized by the courts of this country. *Wabash Ry. Co. v. Young*, 4 L. R. A. (N. S.) 1091, note; *Gray v. Building Trades Council*, 108 Am. St. Rep. 477, note; 1 Am. & Eng. Ann. Cas. 172, note.

The main question involved in the trial of this case was whether defendant's officers had willfully perverted a lawful combination between itself and other mills so as to inflict injury on the plaintiff. Stated more specifically, Did the defendant, with knowledge that the plaintiff was not a striker, put his name on a list of strikers sent to other mills, or with such knowledge refuse to take plaintiff's name off the list, and thus willfully prevent his employment by other mills? The court did not charge that proof of a conspiracy was necessary to a recovery, but that the case was stated on an alleged combination or conspiracy between the defendant and other cotton mills. The jury might well have found a verdict for the plaintiff upon reaching the conclusion that there was no conspiracy with other mills, but a lawful combination with them perverted by the defendant in the way above indicated, to the injury of the plaintiff. The court charged, in effect, that it was not sufficient for the plaintiff to prove that he was injured by a combination not to employ strikers, because such a combination was lawful, but that the plain-

tiff must go further, and show that the defendant maliciously perverted such combination to the injury of the plaintiff. The language of the charge in this connection was: "As a matter of law the right of employers to combine for blacklisting purposes or of an employer to circulate a blacklist among its various employing agents seems to be in the absence of malice undoubted. But the presence of that element, according to the trend of the decisions, gives the injured employé a right of action." The testimony quoted in the opinion of Mr. Justice GARY, while not tending, as it seems to me, to show a conspiracy, was evidence from which the jury could infer that there was a lawful combination not to employ strikers, and that defendant, after knowledge that plaintiff was not a striker, willfully persisted in representing him to be one with the resulting injury that he was unable to obtain employment.

It follows that the plaintiff's contention that the verdict of the jury was contrary to the charge of the court cannot be sustained.

JONES, C. J., and HYDRICK, J., concur in opinion of WOODS, J.

(110 Va. 805)

HARRIS v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Nov. 30, 1909.)

CRIMINAL LAW (§ 1186*)—REVIEW—REVERSAL ON CONFESSION OF ERROR.

A judgment of conviction will be reversed on the commonwealth's confession of the trial court's error in refusing to allow the foreman of the grand jury to testify to statements made by a witness before the grand jury at variance with the same witness' testimony at the trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1186.*]

Error to Circuit Court, Fauquier County.

One Harris was convicted of an offense, and he brings error. Reversed.

Richard E. Byrd and Marshall McCormick, for plaintiff in error. Wm. A. Anderson, Atty. Gen., for the Commonwealth.

No opinion was delivered, but the following order was entered:

PER CURIAM. This day came as well the plaintiff in error, by counsel, as the Attorney General on behalf of the commonwealth. Whereupon the said Attorney General, being of opinion that this court would be compelled to reverse the judgment of the circuit court of Fauquier county, rendered on the 2d day of October, 1909, upon the ground that the said circuit court erred in refusing to allow W. B. G. Shumate, foreman of the grand jury which found the indictment upon which the accused was tried, to be called as a witness on behalf of the accused to testify to statements made by Irvin Maxheimer when called as a witness before the grand jury, which were in direct conflict upon a

material point with the testimony of said Maxheimer when he was called and examined as a witness for the commonwealth on the trial of the case, on the ground that the proceedings of the grand jury were privileged, and that a member of the grand jury should not be allowed to testify as to any statements made before the grand jury by any witness called to testify before it, and the Attorney General and his assistant also being of the opinion that the rule indicated by Judge Moncure in Little's Case, 25 Grat. 921, and approved in Massachusetts and other states, is the correct rule, deemed it their duty to confess error in this case upon that ground alone.

Therefore it is considered by the court that the said judgment be reversed and annulled, the verdict of the jury set aside, and a new trial awarded the plaintiff in error, which is ordered to be forthwith certified to the said circuit court of Fauquier county.

Reversed.

(135 Ga. 60)

GRESS et al. v. KNIGHT et al. (six cases).

(Supreme Court of Georgia. Aug. 13, 1910.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 80*) — SUBSCRIPTION TO STOCK—RESCISSION FOR FRAUD.

As between a stockholder and the corporation, unless special circumstances alter the case, the general rule that contracts obtained by fraud may be avoided by the party defrauded applies to a stock subscription induced by the fraud of the company through its authorized agents, and so likewise where only the rights of other shareholders are affected, the company being solvent and "a going concern."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244-265; Dec. Dig. § 80.*]

2. CORPORATIONS (§ 80*) — SUBSCRIPTION TO STOCK—RESCISSION FOR FRAUD.

If a person subscribes for stock in a corporation, and thereupon the company proceeds to do business upon the basis of the stock subscribed, and incurs indebtedness, the subscriber cannot, after insolvency of the company and the appointment of a receiver, obtain relief on the ground of fraudulent representations, as against creditors thus obtaining rights, or a receiver representing them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 264; Dec. Dig. § 80.*]

3. CORPORATIONS (§ 80*) — SUBSCRIPTION TO STOCK—RESCISSION FOR FRAUD.

Where a subscriber for stock in a corporation seeks to set aside the subscription on the ground of fraud in its procurement, after a receiver has been appointed for the company, in determining whether he can do so, it is to be considered what length of time has elapsed since the subscription was made; whether the subscriber has actively participated in the management of the affairs of the corporation; whether there has been any lack of diligence on his part, either in discovering the fraud, or in taking steps to rescind after its discovery; and whether any considerable amount of corporate indebtedness has been created since the subscription was made which remains outstanding and unpaid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 262, 264; Dec. Dig. § 80.*]

4. CORPORATIONS (§ 80*) — SUBSCRIPTION TO STOCK—RESCISSION FOR FRAUD—SUFFICIENCY OF INTERVENTIONS.

The interventions did not show on their face such facts of the character indicated in the preceding headnote as to render them subject to general demurrer.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 262, 264; Dec. Dig. § 80.*]

5. CORPORATIONS (§ 80*) — SUBSCRIPTION TO STOCK—PROCEEDINGS TO RESCIND FOR FRAUD—SUFFICIENCY OF INTERVENTIONS.

None of the grounds of the special demurrer were properly sustained, except those which objected to the allegation that the bank owed "an item of about twenty thousand dollars of accrued interest," without stating to whom it was due or showing any sufficient reason for the failure to do so, and the allegation that at least \$75,000 of the loans and discounts set out in its statement were worthless, without any further specification.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 264; Dec. Dig. § 80.*]

Error from Superior Court, Ware County; Paul E. Seabrook, Judge.

Proceedings for the appointment of receivers for the Bank of Waycross. A. M. Knight and others were appointed receivers, and M. C. Gress and others intervene, praying for a rescission of their subscription to the stock of the bank. Demurrers to the interventions were sustained, and interveners bring error. Reversed, with directions.

On November 23, 1907, the Bank of Waycross made an assignment for the benefit of its creditors. Later receivers were appointed. Certain persons intervened, alleging in brief as follows: The bank had long had an authorized capital stock of \$50,000, of which \$25,000 had been issued and fully paid up. On July 11, 1907, the capital stock was increased from \$50,000 to \$150,000. All of this was sold to or divided among the original stockholders, except about 250 shares of the par value of \$100 per share. These shares were sold to new subscribers, including the interveners. False and fraudulent representations were made by the bank and its agents to induce the taking of these shares, some being printed, some written, and some oral, each intervention stating those on which the intervener relied. The dates of these purchases of stock ranged from August 1st to September 4th. Each of the interveners alleged reliance on the representations in taking the stock, and each intervention contained an allegation of this character: "Petitioner has never participated in any meeting of stockholders of said bank, that he has never been an officer thereof, and has never received or accepted any benefit of any character whatsoever from said bank or by reason of his ownership or possession of the said stock thereof." Some of them also alleged that they proceeded immediately upon the discovery of the fraud, and one set out specifically certain reasons why he could not have known of the fraud before the assignment. Some had paid for the stock, some had given notes

therefor. The prayers were for a rescission and other equitable relief. General and special demurrers were filed. They were sustained and the interventions dismissed; and the interveners each excepted.

Shelby Myrick and Toomer & Reynolds, for plaintiffs in error. Bennet & Conyers. Myers & Parks, S. W. Hitch, Wilson, Bennett & Lambdin, Lankford & Dickerson, Adams & Adams, and J. L. Sweat, for defendants in error.

LUMPKIN, J. 1. In England it is settled that after the commencement of winding up proceedings against a corporation an application to be relieved from liability as a shareholder on the ground of fraud practiced upon him by agents of the company in procuring the subscription comes too late. *Oakes v. Turquand*, L. R. 2 H. L. 325; *Stone v. City & County Bank*, 3 C. P. Div. 282. By the companies act of 1862 (Statutes at Large; 25 & 26 Vict. 434, §§ 23, 26, 37, 38) every company was required to keep a register of members or shareholders, showing the name and address of each, and the date of becoming a member and of ceasing to be a member, and a penalty was provided for a failure so to do. Once a year a list was required to be made up and forwarded to the public registrar. The register of members was made prima facie evidence of what it was required to contain. On winding up every present and past member who had not ceased to be a member for a year was liable to contribute to the payment of debts. How far the English decisions may have been affected by the requirements of that act need not be considered. In this state there is no similar law. The courts must determine the question by applying general principles of equity. A stockholder occupies a threefold relation: First, to the corporation itself; second, to other stockholders; and, third, to creditors of the corporation. Fraud does not render a contract absolutely void, but voidable. It remains valid until repudiated or avoided. As between a stockholder and the corporation, unless special circumstances alter the case, the general rule that contracts obtained by fraud may be avoided by the party defrauded applies to a stock subscription induced by the fraud of the company through its authorized agents. So also where only the rights of other shareholders are affected; the company being solvent and "a going concern." These matters are of comparatively easy solution. But, where the rights of creditors are involved, the question is one of greater difficulty. Some American decisions have announced in general terms the rule laid down by the English courts; but in most of them additional circumstances existed, such as receiving benefits after knowledge or notice of the fraud, acts done, after

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

notice or knowledge, inconsistent with a disaffirmance, laches, estoppel, the intervening of rights of innocent third parties, or the like. Thus in *Chubb v. Upton*, 95 U. S. 685, 667 (24 L. Ed. 523), Mr. Justice Hunt said: "It has been several times adjudged in this court that in an action by such assignee to recover unpaid subscriptions upon stock in such an organization the defense of false and fraudulent representations inducing such subscription cannot be set up, especially when the subscriber has not been vigilant in discovering such fraud, and in repudiating his contract." It cannot be easily determined just how far a rule laid down in general terms would be applied in the absence of the facts added to it under an "especially." In the case just cited *Chubb* was sued by an assignee in bankruptcy of the company. He sought to set up irregularities and informalities in the increase of capital stock to which he became a subscriber, and also fraud in the procurement of his subscription. It appeared that he was president of a branch of the company, took part in its meetings, paid money on his stock, and at one time gave a proxy to another person to attend and vote at a stockholders' meeting at the main office. He made no effort to cancel his subscription. The company incurred liabilities, and was adjudicated a bankrupt about 15 months after his subscription. Clearly he should not have been relieved. In *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203, the shareholder had delayed repudiating his subscription for three years and until an assignee in bankruptcy had been appointed, and there were other circumstances showing laches. Discussions of the subject will be found in 2 *Thompson on Corporations*, §§ 1440, 1449; *Upton v. Englehart*, 3 Dill. 496, Fed. Cas. No. 16,800; *Farrar v. Walker*, 3 Dill. 506, Fed. Cas. No. 4,679 (reported unofficially); *Newton National Bank v. Newbegin*, 74 Fed. 135, 20 C. C. A. 339, 33 L. R. A. 727, and note; *Parker v. Thomas (Ind.)* 81 Am. Dec. 385, 401, note. A number of American decisions are to the effect that where one subscribes to stock and the company proceeds to do business, incurs liabilities and later fails and is adjudged a bankrupt, or its assets are placed in the hands of a receiver for the purpose of winding it up, no rescission will be allowed, unless under exceptional circumstances. *Thompson, Corporations*, § 1450.

Turning now to the decisions in this state, in *Grangers' Insurance Co. v. Turner*, 61 Ga. 561, a subscriber proceeded by attachment to recover of the company the amount paid by him on his subscription before discovering the fraud. It was alleged that the stock was worthless. The defendant demurred to the declaration in attachment. The demurrer was overruled, and defendant excepted. It was held that the action would lie; that if the fraud had been condoned by acquiescence or otherwise, or if such legal or equitable rights had attach-

ed in favor of creditors of the corporation as that the plaintiff could not, on that account, recede from his subscription, these matters could be shown, but that, as they did not appear on the face of the declaration, it was not demurrable. In *Turner v. Grangers', etc., Ins. Co.*, 65 Ga. 649, 38 Am. Rep. 801, it was held that, though a subscription to stock may have been induced by fraud, the subscriber could not recover the amount paid by him, if there were creditors to an equal or larger amount on debts contracted after his subscription. In that case it was alleged that the stock was worthless, and that the defendant, a foreign corporation, had made an assignment. In *Hamilton v. Grangers', etc., Ins. Co.*, 67 Ga. 145, the ruling was approved. In *Stewart v. Rutherford*, 74 Ga. 435, the plaintiff had been induced by fraudulent means to join in obtaining a charter, entering into a venture and putting in money. He filed an equitable petition against the other members (who were alleged to be conspirators) and the company. It was held that equity would grant him relief, whether the company was insolvent or not. It was said: "Of course, if innocent parties have been affected by the corporation during its operation, the court will protect them." In *Beck v. Henderson*, 76 Ga. 360, it was held that where a corporation had held itself out to the world and contracted debts on the faith of its organization, and a stockholder had stood by and interposed no objection he was bound, and in a suit by the receiver, on a promissory note given for the amount of his subscription to the capital stock, he could not successfully defend by showing fraud in procuring his subscription. In *Howard v. Glenn*, 85 Ga. 233, 11 S. E. 610, 21 Am. St. Rep. 156, it was held that if one became a stockholder in a corporation, though his subscription was obtained by fraud, he would be liable to its creditors for so much of his unpaid subscription as in connection with the amounts due by other corporators might be necessary to pay its debts. The defendant, however, was an original corporator and subscriber, and whatever debts were incurred were made after his subscription.

When a person becomes a stockholder of a corporation, he becomes a part of it. Its agents are in a sense his agents. They go out and deal with the public. If through their dealings debts are incurred, assuming both the stockholder and the creditor to be innocent and that one must suffer, the former, who put it in the power of the agents to do the wrong, should suffer rather than third parties who dealt with such agents. Civ. Code 1895, § 3940. As to creditors whose claims arose after the stockholders became such, their rights are superior to any right of rescission. The status of a stockholder relative to creditors who became such after he took the stock is not

in all respects identical with that relative to antecedent creditors. As to creditors whose debts were created before he took the stock, questions of laches, acts inconsistent with rescission, estoppel, etc., might arise. The new stockholder may have permitted the increase of indebtedness and the lessening of the assets with which to pay. It does not affirmatively appear in this case whether debts were created after the interveners became stockholders, or their amount. There was originally an allegation in each intervention on information and belief that all the creditors were the same as those existing before the new stock was issued; but this was stricken by amendment. We do not think that it can be said as matter of law that such laches or conduct on the part of the interveners affirmatively appears on the face of the respective interventions as to authorize us to declare that no rescission could be had, whatever may be developed by the evidence. It was error to sustain the general demurrers. If the interventions were not otherwise demurrable, they did not become so by reason of failing to negative the existence of any debts incurred after they took their stock. That was matter of defense to the intervention under the facts alleged. Most of the special demurrers were not meritorious. These were not original suits, but interventions in the main suit, where the assets, books, and memoranda were in the hands of the receivers. The special demurrers, if they were all sustained, would have required the attaching to each intervention of a large part of the items from such books, in order to show insolvency, or that the representations that there were no overdrafts and that there was a large surplus; etc., were false. We do not think this was necessary. When the facts are shown, it can be made to appear whether a fraud was really perpetrated on each of the interveners, whether there was any lack of diligence in discovering such fraud or unreasonable delay in seeking relief after its discovery, whether there was any active participation by the interveners in the management of the corporation, or whether debts had been incurred after the intervener became a stockholder, which either gave corporate creditors superior equitable rights or estopped the intervener from denying that he was a stockholder, and generally whether his conduct was such as to prevent relief.

In three of the interventions (those of Mrs. Rigby, Knox, and Hay) it was not alleged in terms when the interveners discovered the fraud. But the special demurrers, though containing 13 grounds each, and making a variety of points, do not distinctly raise any question upon that ground. Under the allegations in the interventions, and in view of the short time from the taking of

the stock to the assignment, less than four months in one instance, and still less in others, we do not think that for this reason they were subject to general demurrer. Some of the grounds rested upon the idea that, though it was alleged that the interveners were induced by false and fraudulent published statements of the bank and oral statements of its officers (which were set out) to subscribe for the stock, and also that the interveners had no other means of knowing the condition of the bank, the interventions were demurrable for not alleging that the interveners demanded an inspection of the books and papers of the bank before taking the stock, or immediately afterward. Such allegations were not necessary.

Two grounds of the special demurrers only do we think should have been sustained. It was alleged that the bank owed "one item of about \$20,000 of accrued interest." A ground of the demurrer made the point that it was not stated to whom this "item" was due. The point was well taken. It appeared to be a single item, and no reason is apparent why it should not have been described more definitely. But this should not have caused the sustaining of all the other grounds of demurrer, general and special, and the dismissal of the interventions. Another ground of special demurrer attacked the general allegation that at least \$75,000 of the loans and discounts were worthless, with no specification as to them. This was well taken. Opportunity should be given to amend as to these points before dismissing any portion of the interventions for that reason.

Judgment in each case reversed, with direction. All the Justices concur, except BECK, J., absent.

(125 Ga. 71)

BROWDER, MANGET & CO. et al. v.
BLAKE & MADDEN et al.

(Supreme Court of Georgia. Aug. 13, 1910.)

(Syllabus by the Court.)

1. EXECUTION (§ 5007)—DISTRIBUTION OF PROCEEDS.

A firm bought certain mules, and gave to the vendors a purchase-money note in which it was provided that the title should remain in the latter until payment. This was duly attested and recorded. Later common-law judgments were obtained against the purchasers, and the executions issued on them were levied on the mules. None of the purchase money had been paid. The vendors attempted to foreclose their note by affidavit, as in case of a chattel mortgage or bill of sale given as a security for a debt not exceeding \$100 (Civ. Code 1895, § 2753; Acts 1899, p. 82), and placed the execution issued upon such foreclosure in the hands of the sheriff in order that they might claim the fund arising from the sale. The mules were sold under the common-law executions, and brought their full value. The debtors were insolvent. One of the holders of the note containing the

provision for the retention of title was present at the sale and bid thereat, and bought one or more of the mules. A money rule was brought to distribute the fund arising from the sale. *Held* that, although the note could not be foreclosed by affidavit, like a chattel mortgage (Berry v. Robinson & Overton, 122 Ga. 576, 50 S. E. 378), yet on a rule to distribute money equitable principles are applied (Civ. Code, § 4776); and, under the facts above cited, there was no error in ordering the proceeds of the sale to be paid to such vendors (Winter v. Garrard, 7 Ga. 183; Green & Colwell v. Hill, 101 Ga. 258, 28 S. E. 692; Civ. Code, § 3974).

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 326.*]

2. CASE DISTINGUISHED.

The ruling here made does not conflict with the decision in Rich v. Colquitt, 65 Ga. 113. That case involved only the foreclosure of a chattel mortgage (which in this state conveys no title, but only creates a lien), and an effort to claim funds under an execution issued upon a void foreclosure. Likewise the facts do not make a case falling within Civ. Code 1895, § 2759.

Error from Superior Court, Meriwether County; R. W. Freeman, Judge.

Action between Browder, Manget & Co. and others and Blake & Madden and others. From the judgment, Browder, Manget & Co. and others bring error. Affirmed.

Robt. T. Daniel and Hill & Culpepper, for plaintiffs in error. McLaughlin & Jones, for defendants in error.

LUMPKIN, J. Judgment affirmed. The other Justices concur.

BECK, J., absent.

(125 Ga. 29)

SHACKELFORD et al. v. ORRIS.

(Supreme Court of Georgia. Aug. 11, 1910.)

(Syllabus by the Court.)

1. EVIDENCE (§ 419*)—CONSIDERATION—SUBJECT OF INQUIRY.

Certain heirs at law of an intestate brought a statutory complaint to recover an undivided interest in a described tract of land against the grantee of the husband of the intestate. The intestate had made a deed to the land to her husband, reciting as a consideration the love she bore him and \$10, and containing words of conveyance applicable to both a gift and a sale. Upon the trial of the case, the plaintiffs contended that the deed was one of bargain and sale from the wife to the husband, not authorized by an order of court, and therefore void; and further contended that if the deed was one of gift, it was void because a wife could not make to her husband a valid gift of property belonging to her separate estate. *Held*:

The consideration of a deed may always be inquired into when the principles of justice require it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1917; Dec. Dig. § 419.*]

2. DEEDS (§ 210*)—NATURE OF CONVEYANCE—INTENT OF PARTIES.

Whether a deed which expresses as a consideration love for the grantee and a small sum of money is a voluntary conveyance depends upon the intention of the parties; and this in-

tention is to be ascertained by an inquiry into all the facts and circumstances at the time of its execution which will throw light upon the question as to whether the deed was executed as the consummation of a sale or as the evidence of a gift. *Martin v. White*, 115 Ga. 866, 42 S. E. 279.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 635, 636; Dec. Dig. § 210.*]

3. HUSBAND AND WIFE (§ 49%*)—CONVEYANCE FROM WIFE—GIFT.

A wife may give property to her husband, but a gift will not be presumed. The evidence to support it must be clear and unequivocal, and the intention of the parties must be free from doubt. Civ. Code 1895, § 2491; *Brooks v. Fowler*, 82 Ga. 329, 9 S. E. 1089.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 260; Dec. Dig. § 49%.*]

4. HUSBAND AND WIFE (§ 49%*)—CONVEYANCE BY WIFE—GIFT—EVIDENCE.

Evidence having been submitted tending to show the deed to be one of gift, the court committed no error in admitting it in evidence, over objections that it showed on its face that it was a deed of bargain and sale of the wife's private property, and it did not appear that it had been allowed by the superior court of her domicile.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 260; Dec. Dig. § 49%.*]

5. EVIDENCE (§ 278*)—HUSBAND AND WIFE (§ 49%*)—CONVEYANCE BY WIFE—DECLARATIONS BY GRANTOR.

As the plaintiffs claimed to own the property as heirs at law of the wife, evidence that the latter stated subsequently to the execution of the deed, that it was one of gift, and that she had given the property to her husband, was admissible in behalf of the defendant, who purchased from the husband, for the purpose of showing that the deed was one of gift, and not of bargain and sale. Civ. Code 1895, § 5181; 2 Wigmore on Ev. §§ 1080-1082; 1 Enc. Ev. 523.

(a) Evidence of such statements made at the time of the execution of the deed from the wife to the husband were likewise admissible.

(b) Such evidence was not rendered inadmissible because it was not shown that the statements were ever communicated to the defendant, the purchaser of the land from the husband.

(c) Evidence of such statements was admissible whether they were made in the presence of the husband or when he was not present.

(d) Testimony of one who witnessed the deed from the wife to the husband that "I did not see any money pass in my presence and it was right before me" was admissible as a circumstance to show that the deed was one of gift.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1137, 1138; Dec. Dig. § 278;* Husband and Wife, Cent. Dig. § 260; Dec. Dig. § 49%.*]

6. HUSBAND AND WIFE (§ 49%*)—GIFTS BETWEEN—ACTION TO VACATE—PLEADING.

One plea of the defendant averred that she employed an attorney to examine the title, and that the wife represented to him that the deed made by her to her husband was a deed of gift, and not one of sale, and that he was induced thereby to recommend to the defendant that the husband had a good title to the property, and that the defendant was induced by such recommendation to make the purchase from the husband, and that the plaintiffs, who claimed the land as heirs at law of the wife, were estopped from setting up title thereto on the ground that the deed to the husband was void because it was one of bargain and sale, and had not been allowed by the superior court of the wife's domicile. *Held*, that the court committed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

no error in refusing to strike this plea and in admitting testimony in support thereof.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 256-260; Dec. Dig. § 49½.*]

7. HUSBAND AND WIFE (§ 49½*)—GIFTS BETWEEN—ACTION TO VACATE—ADMISSIBILITY OF EVIDENCE.

The attorney referred to in the preceding headnote testified that at the time the defendant bought the land from the husband the wife stated to him that her deed to the husband was one of gift, and that he relied upon such statement in recommending to the defendant that the title of the husband was valid, and would have recommended the title without the paper herein-after referred to, and would not have so recommended if the wife had not said that her deed to her husband was one of gift. He testified, "I wanted to make doubly sure of it, and I also fixed up the consent deed," which was a paper signed by the wife reciting that she consented to her husband deeding the property to the defendant, and relinquished "any and all right, title, and interest that I may have to the within-described property." Held, that the court committed no error in admitting in evidence such paper signed by the wife, over objection that it evidenced a contract of sale by her "as to her separate estate with her husband, * * * and it not appearing that said sale was allowed by the superior court of the county of the wife's domicile."

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 256-260; Dec. Dig. § 49½.*]

8. NEW TRIAL (§ 104*)—NEWLY DISCOVERED EVIDENCE.

Even if the alleged newly discovered evidence of statements made by the wife was such as to be admissible upon a trial of the case, it was cumulative in its nature, and the judge did not abuse his discretion in refusing a new trial because of such newly discovered evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218-220; Dec. Dig. § 104.*]

9. REVIEW ON APPEAL.

The charge was clear and full, and fairly presented to the jury every material issue in the case; no error of law requiring a new trial was committed, and the evidence supported, if it did not demand, a verdict in favor of the defendant.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by H. A. Shackelford and others against A. A. Orris. Judgment for defendant, and plaintiffs bring error. Affirmed.

Salem Dutcher, for plaintiffs in error. Hamilton Phinizy, for defendant in error.

HOLDEN, J. Judgment affirmed. The other Justices concur.

BECK, J., absent.

(135 Ga. 73)

BELOHER v. CRAINE.

(Supreme Court of Georgia. Aug. 13, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

Where on the trial of an action brought by a married woman against an executor, for the recovery of the value of her services rendered to his testator, the judge instructed the jury to the effect that a husband generally is

entitled to the earnings of his wife, but he may by an express or an implied agreement waive his right to them, and consent that they may be paid to and retained by her as her separate estate, and, where the judge subsequently in his charge correctly made a concrete application of the law as above stated to the controlling issue in the case, it was not cause for a new trial that, prior to such concrete application of the rule, he used language from which it might be inferred that plaintiff would be entitled to recover for her services if her husband merely consented for her to enter into a contract with such testator to perform them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221; Dec. Dig. § 1064.*]

2. EXECUTORS AND ADMINISTRATORS (§ 206*)—CONTRACT OF EMPLOYMENT—SCOPE OF RECOVERY.

The court did not err in giving to the jury the following instruction: "If you believe that the contract was made between the plaintiff and [the testator]; that she was to go to his home and care for him and wait on him; and if you believe that the cooking of his meals and the serving of the same was part of her duty under the contract, if it was contemplated by both parties that [such] was to be a part of the taking care of him and waiting on him—then she would be entitled to recover for that, and that would be taken into consideration in fixing the worth of her services, if you find she is entitled to recover." Under the hypothesis stated by the judge, the cooking and serving of the meals by the plaintiff could not fairly be considered as the mere boarding of the testator by the plaintiff.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 733; Dec. Dig. § 206.*]

3. EXECUTORS AND ADMINISTRATORS (§ 451*)—ACTION FOR COMPENSATION—INSTRUCTIONS.

The court also charged that the defendant "pleads that he does not owe the plaintiff anything, for the reason that she has been paid. I charge you, * * * if you believe that the contract was made and services rendered, then the burden would be on the defendant to prove payment." This entire extract was excepted to on the ground that it "in effect instructed the jury that the defendant admitted the contract and filed a plea of payment," whereas there was no such plea, "but simply a plea setting up that plaintiff had been paid more money than any services she rendered were worth, if she could recover on quantum meruit." Such exception was without merit.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1880; Dec. Dig. § 451.*]

4. EXECUTORS AND ADMINISTRATORS (§ 206*)—ACTION FOR COMPENSATION—SCOPE OF RECOVERY.

The court did not err in instructing the jury to the effect that if they should find that plaintiff was entitled to recover at all, she could not recover for anything she may have furnished for "the support of the family," if she, her husband, and their children lived in the house with the testator, nor would she be chargeable in such circumstances for anything consumed by herself, her husband, and children, as it was his duty to support them; nor would she be chargeable with anything that she may have received as a gift from defendant's testator, but would be chargeable with whatever he may have paid her for her services in taking care of and waiting on him.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 733; Dec. Dig. § 206.*]

5. WITNESSES (§ 141*)—COMPETENCY—PERSON INTERESTED AGAINST REPRESENTATIVE OF DECEDENT.

The court did not err in permitting the husband of the plaintiff, over the defendant's objections, to testify as follows: "He [defendant's testator] came up after her [the plaintiff] a number of times and wanted her to move back in the house with him to help take care of him and wait on him, that he was feeble and could not take care of himself. He wanted her to move back over there and wait on him. I did not want her to go, but finally I consented for her to go. I moved back with her, and helped her to look after her grandfather." The objections urged against this testimony were that the witness "was the husband and entitled to the wife's services and was her agent, and would be interested in anything she might get for her services; * * * that it was a transaction between him and her that would disqualify him, on the ground that [defendant's testator] is dead, and he could not testify in this case as to any transaction or communication with [the testator] and his wife and himself, and * * * that he appeared to be acting as her agent."

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 576-579; Dec. Dig. § 141.*]

6. EXECUTORS AND ADMINISTRATORS (§ 221*)—ACTION FOR COMPENSATION—ADMISSIBILITY OF EVIDENCE.

Nor was it error for the court to refuse to permit the plaintiff's husband to testify, on cross-examination, over the objection of her counsel, that the witness got \$100 from a named bank during the time plaintiff was at the house of defendant's testator, on a note signed by witness and the testator, and that this money was used for the benefit of the family of the witness.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 902, 1865; Dec. Dig. § 221.*]

7. EXECUTORS AND ADMINISTRATORS (§ 221*)—ACTION FOR COMPENSATION—ADMISSIBILITY OF EVIDENCE.

It was not error for the court to refuse to permit the defendant to testify that plaintiff's husband "made no crop and that he did not support his family, and that [defendant's testator] had the family to support."

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 902, 1865; Dec. Dig. § 221.*]

8. EXECUTORS AND ADMINISTRATORS (§ 221*)—ACTION FOR COMPENSATION—ADMISSIBILITY OF EVIDENCE.

The court properly declined to permit a witness for defendant to testify that defendant's testator told the witness, not in the plaintiff's presence, "that he did not owe plaintiff anything, and this was after she came back the last time and was living with him, and that she did not wait on him, and that he declared that he owed the plaintiff nothing."

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 902, 1865; Dec. Dig. § 221.*]

9. REVIEW ON APPEAL.

The second item of the will of defendant's testator was as follows: "I desire my executor to pay my granddaughter, Lula Craine [the plaintiff], for her services for staying and waiting on me as long as I live, whatever she charges in the bounds of reason." There was sufficient evidence to authorize the verdict in favor of the plaintiff, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Fayette County; E. J. Reagan, Judge.

Action by L. M. Craine against S. I. Belcher, executor. Judgment for plaintiff, and defendant brings error. Affirmed.

J. W. Wise and J. F. Golightly, for plaintiff in error. W. C. Cousins, J. W. & J. D. Humphries, and A. O. Blalock, for defendant in error.

FISH, C. J. Judgment affirmed. The other Justices concur.

BECK, J., absent.

(8 Ga. App. 126)

CLECKLEY v. RANSOM et al. (No. 2,164.)
(Court of Appeals of Georgia. May 12, 1910.
Rehearing Denied Sept. 6, 1910.)

(Syllabus by the Court.)

ATTACHMENT (§ 180*)—LIEN—PRIORITIES.

"The lien of an attachment is created by the levy," and as between themselves the attachment first levied takes precedence. This applies to the amount claimed under the original attachment. As to this amount the lien of the attachment is not lost by an amendment to the attachment lawfully made subsequent to the levy. If, by amendment, an additional sum is added to that claimed by the original attachment as levied, the lien as to this additional amount will not take precedence of an intervening attachment or intervening lien creditor.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 550-575; Dec. Dig. § 180.*]

Error from City Court of Richmond; W. F. Eve, Judge.

Action by E. S. Cleckley and S. H. Ransom against the Mutual Fidelity Company of Delaware. Judgment for plaintiffs in attachment, and, from an order granted for the distribution of the funds claimed by attachment, Cleckley brings error. Reversed.

W. K. Miller, for plaintiff in error. Wm. H. Fleming, for defendant in error.

HILL, C. J. Emily S. Cleckley and Susie H. Ransom each brought separate attachment suits against the Mutual Fidelity Company of Delaware on the ground of nonresidence, these attachments being levied by serving summons of garnishment on the same garnishee, and they were returned to the same term of court. The attachment of Emily S. Cleckley was for \$350 and was levied November 7, 1901. That of Susie H. Ransom was for \$375, and was levied December 4, 1901. Declarations in attachment were duly filed, and judgments thereon subsequently taken. The questions in the present case arise on the distribution of the fund which the garnishee had paid into the court. The case was heard on an agreed statement as to the facts, and the court awarded precedence to the attachment of Susie H. Ransom, and the correctness of this judgment is challenged by the writ of error sued out by Emily S. Cleckley.

It is admitted that the lien of the judgment dates from the levy of the attachment. Civ. Code, §§ 4578, 4524, 4564. And it is also admitted that the attachment of Emily S. Cleckley was levied by service of summons of garnishment before that of Susie H. Ransom. It is insisted, however, in support of the judgment of the court below that this prior attachment lien of Emily S. Cleckley had been lost by an amendment which she had made to her declaration before she took judgment, that this amendment rendered void the attachment as against that of Susie H. Ransom or that of any other intervening lien creditor. It appears that M. T. Cleckley had sued the insurance company on a cause of action identical in legal import with that of Emily S. Cleckley, and, to meet the judgment of the Supreme Court in that case, Emily S. Cleckley amended her declaration before taking judgment. In the M. T. Cleckley Case the Supreme Court held that, as it appeared that the plaintiff had received from the defendant company in dividends on the contract more than he had paid the company, before he could ask for a rescission of the contract on the ground of fraud, he should have tendered back the amount which he had received in dividends, and, as there was no offer to restore, a nonsuit should be granted as to this branch of the case. *Cleckley v. Mutual Fidelity Company*, 117 Ga. 466, 43 S. E. 725. When the case of Emily S. Cleckley was called for trial on June 8, 1903, the plaintiff, in order to meet this decision of the Supreme Court, amended her declaration by electing to rescind the contract between her and the insurance company on the ground of fraud, and tendered back to the insurance company on that day the amount of \$210 which she had received from the company in dividends. Thereupon the insurance company withdrew its answer, and consented that judgment be taken by the plaintiff for the principal sum of \$560, being the aggregate amount of the sum which the plaintiff had paid to the insurance company under the contract and the premiums which she had received. It cannot be doubted that the plaintiff had the legal right to amend her declaration in attachment so as to comply with the decision of the Supreme Court in the other Cleckley Case. By this amendment she did not change her cause of action, but amplified it and made it a good cause of action under the ruling of the Supreme Court. Her original suit was for money had and received for her benefit by the insurance company, and her amendment amplified this cause of action by electing to have a rescission of the entire contract under which the money had been paid to the company; but,

before she could have a rescission of the contract, she was compelled, under the law, to restore the status quo between herself and the defendant company, and this she could only do by offering to pay back the amount of dividends which she had received from the company. We think it clear that she had the right to make this amendment. *C. & W. Railway v. Lyons*, 5 Ga. App. 668; 63 S. E. 862; *Dolvin v. Hicks*, 4 Ga. App. 653, 62 S. E. 95; *Boyce v. Day*, 3 Ga. App. 276, 59 S. E. 930; *High v. Padrosa*, 119 Ga. 649, 46 S. E. 859; *City of Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318. If she had the right to make the amendment, it would be illogical to hold that by the exercise of this right she lost her existing right of priority of lien arising from the priority of the levy of her attachment. We think that she did not lose priority of lien as to the original amount of her suit, which amount is included in the judgment rendered in her behalf. We do not think, however, that she would have a priority of lien as to the amount which she added to her suit by amendment. The lien as to this amount would date only from the date of the judgment. Getting down to the substance of the case, it seems to us that Emily S. Cleckley had only a legal right as against the company to a judgment for the amount of money which she had paid to the company, less the dividends which she had received from the company, and that, therefore, she could not have any lien on the fund paid into court by the garnishee for a greater amount than that for which she was entitled to have a judgment against the company. But the learned judge of the trial court held that the attachment of Susie H. Ransom was entitled to precedence over the attachment of Emily S. Cleckley. He gives no reason for this decision, but, in support of it, it is submitted by counsel for defendant in error that this precedence was lost because of the amendment which had been made to her attachment suit by Emily S. Cleckley. As above stated, we do not concur in this opinion of learned counsel. Under the statute, the lien of the attachment dates from the levy of the attachment for the amount on which the attachment is based. The lien on this amount is not lost because of an amendment which plaintiff in attachment has a right to make, but would remain as a valid existing lien on the amount of the attachment as originally sued out. This lien would not attach in favor of any increase added to the amount of the attachment by amendment as against subsequent lien attachments or intervening creditors.

Judgment reversed.

(8 Ga. App. 149)

LOCOMOTIVE ENGINEERS' MUT. LIFE & ACCIDENT INS. ASS'N v. BOBO.

(No. 2,357.)

(Court of Appeals of Georgia. July 5, 1910.
Rehearing Denied Sept. 6, 1910.)*(Syllabus by the Court.)***1. INSURANCE (§ 750*)—BENEFIT INSURANCE—DEFAULT IN ASSESSMENTS.**

Where in a policy of life insurance issued by a benefit association and in the by-laws of the association it is expressly provided that "any member of this association neglecting or refusing to pay any assessment, when ordered as provided in the by-laws, * * * shall forfeit all right and title to membership, and be debarred from further participation in the insurance or benefits arising from the same," the nonpayment of assessments, when so ordered, will, in the absence of any waiver by the association, forfeit the policy and all benefits thereunder.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 750.*]

2. INSURANCE (§ 817*)—BENEFIT INSURANCE—DEFAULT IN ASSESSMENTS.

A benefit association sued by the beneficiary of a policy cannot successfully defend on the ground that the policy was forfeited by nonpayment of assessments, unless proof is made that the assessments in question were ordered or levied, and notice thereof given to the insured, in accordance with the by-laws of the association.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1909-2002; Dec. Dig. § 817.*]

3. INSURANCE (§ 819*)—EVIDENCE.

In this case the evidence clearly and satisfactorily shows that the insured had neglected and failed to pay assessments against his policy made in accordance with requirements of the by-laws of which he had due notice, and it does not appear that the forfeiture of the policy resulting from the nonpayment was in any manner waived by the association. The verdict against the association is without evidence to support it, and must be set aside as contrary to law.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 819.*]

Russell, J., dissenting.

Error from City Court of Polk; F. A. Irwin, Judge.

Action by Laura Hutchings Bobo against the Locomotive Engineers' Mutual Life & Accident Insurance Association. Judgment for plaintiff, and defendant brings error. Reversed.

Lipscomb, Willingham & Wright and J. A. Wright, for plaintiff in error. Trawick & Ault, for defendant in error.

HILL, C. J. Laura Hutchings Bobo brought suit against the Locomotive Engineers' Mutual Life & Accident Insurance Association as the beneficiary in a policy of insurance on the life of her brother, W. H. Hutchings. A demurrer to the petition was overruled, and exceptions pendente lite preserved. The jury found a verdict in her favor for the full amount of the policy, and the defendant's motion for a new trial was

denied. We may dispose of the exceptions arising on the judgment overruling the demurrer by the statement that they were without merit, and that the judgment was correct. Besides the usual general grounds in the original motion for a new trial, there are numerous assignments of error in the amended motion. Omitting, as a useless consumption of the valuable time of this court, any discussion of many immaterial questions raised by the numerous assignments of error, we come directly to the essential and controlling issues in the case. The evidence elucidating and illustrative of these issues will appear in the course of the opinion.

1. The insured was killed by the explosion of a boiler in August, 1907. Was the policy in force at the time of his death? The defendant claims that it was not, that it had been forfeited by the failure of the insured to pay the assessments made by the company against the policy for the months of April, May, June, and July, 1907. This makes the first issue of fact. On this issue the only evidence that the insured had kept his policy in force by the payment of the assessments thereon is found in two letters or reports made by the secretary of a subdivision of the insurance company located at Cedartown, Ga. After the death of the insured, this secretary wrote to the company at its principal office that the insured had paid his assessments up to the date of his death, and that the failure to mention that fact to the company in his monthly report "was an error of mine." Acting on this statement, the insured was entered upon the general register of the company as having paid his assessments. On the trial of the case this local secretary at Cedartown testified that the report which he had made out and sent to the home office that the insured had paid his monthly assessments up to the date of his death was untrue; that, in fact, the insured had not paid the assessments for April, May, June, and July; that he had been induced to make this false report after the death of the insured for the following reasons: That just before the death of the insured early in the month of August he had a conversation with the insured at Cedartown, when he called his attention to the fact that his assessments had not been paid; that, on that occasion, the insured promised to pay the assessments on the following pay day, which was the 18th of August, and that in the same conversation the insured informed him that he wanted to change the name of the beneficiary in the policy from that of his sister to that of his wife, he having married subsequently to the inception of the policy, and that he then requested the agent to write out the proper transfer, changing the name of the beneficiary in the policy, and for this purpose

he delivered to the agent his policy. The widow was very poor, the agent states, and he had been informed by the husband of the sister named as beneficiary that his wife did not desire to make any claim on the proceeds of the policy, and, wishing to secure the money for the widow, he himself wrote out the statement changing the beneficiary, signed the name of the insured thereto, and sent this transfer along with the proof of loss to the company, with a statement that the assessments had been duly paid, and from his own money remitted the amount of the assessments. The agent testified that all of these things were done by him after the death of the insured, and that he was prompted solely by the motive to secure the insurance for the benefit of the penniless widow of a brother engineer. It is contended that the jury had the right to believe the report made by the agent to the company notwithstanding his testimony on the subject. It must, however, be conceded that this report by the local secretary or agent possesses little evidentiary value, in view of the sworn explanation made by the agent on the trial of the case. But other evidence shows that the insured during his life and just before his death stated that his insurance had lapsed, and was not in force; and there is no evidence whatever in the form of receipts or vouchers that the assessments had ever been paid, nor was there any record of the fact in the office of the company either at the local office at Cedartown or at the home office, except the record which was made at the home office, based upon the untrue report of the agent after the death of the insured. Taking all these facts and circumstances into consideration, and giving to them due weight, the conclusion is irresistible that the insured had not paid the assessments on his policy during the months of April, May, June, and July, prior to his death in August, and that, if the verdict of the jury was based on the finding that these assessments had been paid, it was without evidence to support it. If the assessments had not been paid under the terms and conditions of the policy and according to the constitution and by-laws of the company, the contract of insurance was forfeited. The policy provides that: "Any member of this association neglecting or refusing to pay any assessment when ordered as provided in the by-laws, * * * shall forfeit all right and title to membership, and be debarred from further participation in the insurance or benefits arising from the same." The constitution and by-laws of the association provide, in section 15, that "the secretary of each subdivision shall keep a list of the members of the association connected therewith, and forward their names to the general secretary-treasurer as soon as possible after placing them on the list. He shall also erase the names of those who fail to pay any assessments within the specified

time, and report the same to the general secretary-treasurer, that they may be erased from the general register." Section 28 provides that "any member failing to pay the assessments when ordered as provided in the by-laws, or within the prescribed time, shall forfeit his membership, and shall forfeit all right and title he or his beneficiaries may have to any benefits or claims in or against this association." It follows from the provisions of the contract and the constitution and by-laws quoted that the insured and his beneficiary forfeited all right to any benefit or claim arising from the policy upon the failure of the insured (or some one for him during his life) to pay the current assessments made by the company against the policy.

2. To avoid this result, it is contended by learned counsel for the plaintiff in error that it was not satisfactorily shown that any assessments had been levied or declared against the policy which had not been paid by the insured. It is contended that the burden was on the association to show that the assessments had been duly levied or declared. This court is unreservedly committed to the proposition that no presumption will be indulged in favor of forfeitures, and especially of forfeitures of contracts of insurance; and, where a beneficial association sued upon a policy seeks to escape liability upon the ground of a failure to pay premium or assessments, or upon any other ground of forfeiture, the burden would be upon the association to prove the fact relied upon as establishing the forfeiture; and we hold that the association cannot successfully defend upon the ground that the policy lapsed by nonpayment of assessments, unless proof is made of the levy of the assessments, and that notice of such assessments was duly given to the insured, in accordance with the requirements of the policy, or of the constitution and by-laws of the association. 29 Cyc. 246; *Tourville v. Brotherhood of Locomotive Firemen*, 54 Ill. App. 71. Section 26 of the constitution and by-laws of the association is as follows: "The assessments and all notice pertaining to the business of the L. E. M. L. & A. I. A. as printed in the B. of L. E. Monthly Journal shall be deemed or taken to be lawful, sufficient, and the only notice thereof to all the members." It is insisted by the defendant in error that this provision applies only to the notice of the assessments, and not to the levy of the assessments; and, if the provision quoted was the only provision on the subject, this might be well contended. It is insisted by counsel for the plaintiff in error that the levy or declaration of the assessments on the policy is made in no other way than by the publication of the assessments in the *Brotherhood of Locomotive Engineers' Journal*; and, in proof of this assertion, attention is directed to the following extract from the *Journal*: "Locomotive Engineers' Mutual Life & Accident

Insurance Association. Official notice of assessments 1037-1041. Series G. Office of Association, Room 808, Society for Savings Building, Cleveland, Ohio, March 1, 1907. To the Division Secretaries L. E. M. L. and A. I. A.: Dear Sirs and Bros.: You are hereby notified of the death or disability of the following members of the Association. Five assessments for the payment of these claims are hereby levied and Secretaries ordered to collect \$1.25 from all who are insured for \$750, \$2.50 from all who are insured for \$1,500, \$5 from all who are insured for \$3,000, and \$7.50 from all members insured for \$4,500, and forward same to the General Secretary and Treasurer. Members of the Insurance Association are requested to remit to Division Secretaries within thirty days from date of this notice, * * * on penalty of forfeiting their membership." Section 45 of the by-laws provides that, when the general secretary-treasurer shall receive from the secretary of the subdivision a report of a loss under a policy by death or accident, the president and general secretary-treasurer "shall issue a notice through the Journal, stating the age and date of admission and date and cause of death; also name of party to whom his insurance is payable, and order an assessment, to pay the same, of not less than fifty cents for each \$1,500 policy held, upon each assessable member." Construing all these sections together, we are clearly of the opinion that the publication of the assessments in the Brotherhood of Locomotive Engineers' Monthly Journal constituted a levy or declaration of such assessments. Section 28, above quoted, provides that the assessments as printed in the Brotherhood of Locomotive Engineers' Monthly Journal shall be deemed or taken to be "lawful and sufficient," and that the notice of such assessments published in this monthly journal shall be "the only notice thereof to all members." We think the words "lawful and sufficient" apply to the levy of the assessments, and not to the notice of the assessments, for it is further provided that the notice as published shall be the only notice thereof to all members; and the language of the notice quoted from the Journal distinctly declares that "five assessments for the payment of these claims [those specified in the notice] are hereby levied." The levy consists in the publication of the assessments in the Journal. In other words, the only provision that the by-laws contain with reference to the levy of an assessment is that which relates to the publication of this assessment in the Brotherhood of Locomotive Engineers' Monthly Journal, and the provisions from the by-laws which we have quoted deal not only with the notice of the assessments, but also with the declaration or levy of the assessments. Usually the by-laws of similar organizations provide that the levy shall be made and entered on the minutes, or made and entered on a book kept for that

purpose; but the only provision for the assessment and the levy and the notice thereof in the by-laws of the present association introduced in evidence is that relating to publication of the assessments in the Brotherhood of Locomotive Engineers' Journal. When the president and the general secretary-treasurer receive from subdivision secretaries information of losses under the policies, it is made their duty, under the by-laws, to order assessments through the Journal. It is not provided that the assessments so ordered shall be spread on the minutes of the association, or kept in the book for that purpose, but that they shall be published in the journal, and it is distinctly declared that this publication shall be "deemed lawful and sufficient," both as to the levy of the assessments and as to the notice of the assessments to the members. Any other method of levying, declaring, or ordering the assessments is entirely imaginary and speculative. But, even if the argument based upon the provisions of the constitution and by-laws of the association be not conclusive of this question, it would seem not unreasonable to hold that the publication by the association in its monthly journal of assessments against its policy holders would be sufficient to raise a presumption that such assessments had been levied and declared by the association. In other words, it would seem to be unreasonable to say that the assessments against policy holders had not been levied or declared, although such assessments had been published. The publication of the assessments presupposes their levy or declaration. "Acts done by a corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proof of the latter." *Demings v. Supreme Lodge Knights of Pythias*, 131 N. Y. 522, 30 N. E. 572. "The record of an assessment of a mutual insurance association reciting that the resolution ordering the assessment 'was unanimously adopted by the directors as a body, and by the executive committee,' is prima facie evidence against the members of the association." *Van Frank v. Association*, 158 Ill. 560, 41 N. E. 1005; *Anderson v. Mutual Reserve Fund Life Association*, 171 Ill. 40, 49 N. E. 205. It would seem from these authorities, as well as on principle, that when the association published in its monthly journal, recognized and treated as its official organ, the assessments to pay losses, the presumption would follow, in the absence of an attack on the legality of the assessments otherwise, that all necessary steps preliminary to making the assessments had been duly taken by the association.

3. Did the association under the evidence in this case waive the forfeiture of the policy by the failure to pay the monthly assessments? It is contended by counsel for the defendant in error that the forfeiture was waived first by the conduct of the secretary of the subdivision at Cedartown in ignoring the pro-

visions of the by-laws and the terms of the contract relating to the payment of assessments due by members. It is claimed that this agent or secretary had a very loose way of conducting his business; that he permitted the members to pay their dues whenever they saw fit, not insisting upon prompt payment; and that, therefore, the fact that the agent failed to collect the assessments when due, this being his general custom and practice, was sufficient to lull the members into inactivity on the question of prompt payment. The evidence does not show that the association itself approved of such slack methods of business on the part of the agent at Cedar-town, but shows that the nonpayment of assessments by the members as required by the by-laws was excused only when the secretary himself assumed the payment. The evidence on this subject was positive by the agent himself. He testified: "It is not true that the policy of this organization and the general custom is to accept dues from these members after they are delinquent. I did not do it regularly at this place; only in a few instances, and the company always accepted them when I took it on my part." Even admitting that the business methods of the secretary permitted a delay in the payment of assessments, such delay was in the very teeth of the by-laws on the subject which declared in positive terms that the members of the association should remit to the division secretaries within 30 days from the date of the publication of the notice in the monthly Journal on penalty of the forfeiture of their membership. If a member, therefore, delayed in paying his assessments in accordance with the by-laws, he took the risk of forfeiture, but, if, after the delay, he did in fact pay the division secretary the assessment, and the division secretary accepted the payment and afterwards forwarded it to the association, his failure to pay according to the by-laws would not be attended with the penalty of forfeiture, for the company would not have known whether the delay was due to the member or its agent; but this advantage to the member could accrue only during his lifetime. The assessments which had not been paid during his life could not be paid after his death so as to amount to a waiver. The beneficiary in the policy or any one else after the death of the insured could not by paying the assessments due by the insured which he had failed to pay during his lifetime avoid the forfeiture. *Mutual Benefit Life Ins. Co. v. Ruse*, 8 Ga. 545. In this case the division secretary testifies (and it is not controverted) that the insured did not pay the assessments for April, May, June, and July, and that after the death of the insured, for the purpose of securing the money for the penniless widow of the insured, he himself remitted the money to cover the assessments, and untruthfully reported to the company that the insured had paid them. In other words, the secretary, forgetful of his fiduciary relationship to the

company, and actuated by sympathy for the widow of the deceased, attempted to restore the forfeited policy after the death of the insured, and knowingly made this attempt by means of untrue statements. Under section 2063 of the Civil Code of 1895, this conduct clearly made him guilty of a misdemeanor, and, by the same section, any certificate or renewal so secured was made absolutely void.

In the next place, it is said that the company issued a policy to the wife, in accordance with the direction as to change of beneficiary, signed by the insured; but surely this could not be construed as a waiver of the forfeiture under the uncontroverted fact. The association did not at that time know of the forfeiture. It had a report from its secretary that the policy with the sister as the beneficiary was in force, and, believing these things to be true, it accepted the money in payment of the assessments, which the agent had sent, and issued the new policy to the wife. If these facts proved anything, they proved payment of the assessments, and not a waiver of the forfeiture on account of their nonpayment. As they were accepted in ignorance of the true situation and in reliance upon the false statement made by the agent, and as the evidence shows that the money was returned to the agent on the discovery of his false representations, we think the evidence did not show either payment or waiver, but that the policy issued to the wife by virtue of the false statements was expressly void under the code section cited, *supra*. But, if not void under this code section, it would be void because the insured was at the time of its issuance not in an insurable condition, but dead.

In the third place, it is insisted that the company waived the forfeiture by demanding the payment of assessments after the insured had failed to pay them, and after the policy had lapsed thereby. There are several reasons why this contention is unsound. The publications of the assessments in the journal for the four months was directed to all the members of the association. It was not a notice sent to one who had ceased to be a member by reason of the lapse of his policy, nor was it a demand made on any one member for the payment of his assessment after notice of previous nonpayment and a forfeiture resulting therefrom. This court has held that subsequent demand of assessments or premiums is a waiver of the forfeiture of the policy and an acknowledgment that the delinquent policy holder is still entitled to the benefits conferred by his contract with the association. *Farmers' Mutual Life Protective Association v. Elliott*, 4 Ga. App. 342, 61 S. E. 493. But we do not think that this principle is applicable to the facts of this case, for the assessments called for in the publication of the monthly journal were a demand on the members of the association, members who held policies for certain amounts. It was not a demand on those who had ceased

to be members because of a failure to pay their assessments.

It is contended in the next place that the general register kept at the home office showed that the association had received the assessment from the insured for the month of July on his policy. The local secretary at Cedartown testified positively that the insured had not paid the July assessment; that he himself had paid it after the death of the insured, and it was placed upon the general register after the false report of the payment by the insured had been received by the company from its agent at Cedartown. In the light of this evidence it cannot be rationally assumed that the insured did in fact pay the July assessment.

We have thus considered what we think are the material issues under the evidence in this case. There may have been inaccuracies in some of the instructions given by the court in his charge to the jury, though the charge as a whole seems to have been full and explicit as to the material issues in the case. There may be some merit in some of the numerous assignments of error, but, on the main questions which should control, we are convinced from an examination of all the facts that the forfeiture of the policy set up by the defendant was clearly and most satisfactorily shown, that the levy of the assessments which were not paid by the insured was made according to the by-laws of the association, and that there was no evidence whatever of any waiver by the association of the forfeiture of the policy which resulted from failure on the part of the insured or the beneficiary to pay the assessments lawfully made. Under the view we entertain of the law applicable to these controlling questions, the facts demanded a judgment for the defendant.

Judgment reversed.

POWELL, J., concurs specially. RUSSELL, J., dissents.

(8 Ga. App. 166)

LIBERTY FRUIT PRODUCTS CO. v. MALOOF. (No. 2,117.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

NEW TRIAL (§ 70*)—GROUNDS—INSUFFICIENCY OF EVIDENCE.

The jury were properly instructed by the court, and the evidence authorized the inference that the agent who sold the goods was authorized to collect therefor. There was, therefore, no error in refusing a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by the Liberty Fruit Products Company against S. Maloof. Judgment for defendant, and plaintiff brings error. Affirmed.

T. O. Hathcock and Anderson, Felder, Rountree & Wilson, for plaintiff in error. Moore & Branch, for defendant in error.

RUSSELL, J. The Liberty Fruit Products Company brought a suit against S. Maloof to recover the purchase price of certain kegs of cider. The defendant pleaded payment, and set up that an unknown man came to him, and at his solicitation the defendant bought \$60 worth of cider; that, shortly after the cider was delivered, the same man came and presented a bill, and requested the defendant to pay the bill, offering to discount it at 10 per cent. for cash; and that he paid him the amount of the bill, less the discount. The plea also set up that the defendant is an ignorant man and a foreigner, who could neither read nor write the English language. The defendant also pleaded that he dealt with the person who sold him the cider, and to whom he paid the money, as the owner of the goods. There was also a plea of failure of consideration, and the defendant testified that the cider had soured and was worthless. Exceptions taken to the charge of the court are all based upon the idea that the court should not have instructed the jury that, if the agent had authority to collect for his principal, the principal would be bound by the payment made to him.

It is well settled, of course, that a mere salesman, clothed only with the authority to take orders, is not, by reason of that fact, authorized to collect accounts for his principal; but it is equally well settled that the principal is bound by collections made in his behalf by a general agent clothed with authority to collect. Although one of the plaintiffs testified by interrogatories that Huddleston, who sold the cider, had no authority to collect, we think the circumstantial evidence in behalf of the defendant was sufficient to rebut this testimony, if the jury saw proper, as they evidently did, to prefer it to the testimony for the plaintiff. It is undisputed that Huddleston presented to the defendant an account for the identical cider which he had sold, written upon a printed bill head of the plaintiff, and we think the jury were authorized to infer from this that the account had been sent by the plaintiff to Huddleston for collection; and the lapse of time before they insisted upon payment from the defendant confirms the suggestion that they only disavowed Huddleston's authority after his disappearance with the money. Furthermore, the verdict can be sustained upon the proof in support of the plea of failure of consideration, and is likewise sustainable upon the ground that the evidence shows that this foreigner, who could not read or write English, and did not know the salesman, or whom he represented, and was not informed in regard to it, dealt with the salesman as the agent of an undisclosed principal, and

as if he were the owner. Upon any one of these grounds we think the judgment of the court in refusing a new trial was fully authorized.

Judgment affirmed.

(8 Ga. App. 202)

LAW et al. v. SMITH & KELLY CO.
(No. 2,427.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

1. QUESTION FOR JURY.

As to the element of the defendant's negligence, there was ample evidence to make a case for submission to the jury.

2. MASTER AND SERVANT (§ 289*)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

As to the element of the contributory negligence of the deceased: He and other laborers were employed in unloading gravel from a ship. The buckets of gravel, as they were filled in the hold by the deceased and his collaborators, were being hoisted by a donkey engine. The laborers had been instructed to stand clear of the hatches through which the buckets were being hoisted. The clutch on the engine slipped, and one of the buckets fell as it was being hoisted through the hatch, and struck and killed the deceased as he was working in the hold below. *Held*, that if the deceased voluntarily, and without the exigencies of his work so necessitating, assumed a position under the hatch while the bucket was being hoisted through it, the plaintiff should not recover. On the other hand, if the gravel was so piled in the hold that the deceased could not do the work he was expected to do without standing under the hatch, the question of his contributory negligence would be for solution by the jury. There was enough evidence tending to sustain the latter theory to prevent the granting of a nonsuit on this ground.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

3. RULINGS ON EVIDENCE.

The exception as to the rejection of evidence is not well taken.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Mary Law and others against the Smith & Kelly Company. Judgment for defendant, and plaintiffs bring error. Reversed.

Osborne & Lawrence, for plaintiffs in error. O'Byrne, Hartridge & Wright, for defendant in error.

POWELL, J. Judgment reversed.

(8 Ga. App. 213)

CITY OF ATLANTA v. TURNER.
(No. 2,728.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

BAIL (§ 75*)—FULFILLMENT OF CONDITIONS—LIABILITY OF SURETY.

A prisoner was convicted in a municipal court, and sentenced to pay a fine, and additionally to serve a term on the chain gang. He sought certiorari, and gave a bond, with security, conditioned that he should "personally appear

to abide the final order, decree, judgment, or sentence" in the case. The certiorari was dismissed, and the prisoner surrendered himself into custody and served out the chain gang portion of the sentence, but did not pay the fine. *Held*, that the condition of the bond was complied with by the prisoner's having duly surrendered himself into custody, and that no action could be maintained on the bond for the purpose of collecting the fine.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 309-321; Dec. Dig. § 75.*]

Error from Superior Court, Fulton County. Action by the City of Atlanta against H. M. Turner. Judgment for defendant, and plaintiff brings error. Affirmed.

J. L. Mayson and W. D. Ellis, Jr., for plaintiff in error. Anderson, Felder, Rountree & Wilson and Moore & Branch, for defendant in error.

POWELL, J. The headnote states enough of the facts for an understanding of the case. The bond is an appearance bond. *Tucker v. City of Moultrie*, 122 Ga. 160 (4), 50 S. E. 61. The words, "to abide the final order," etc., operate to limit, not to extend, the liability of the obligors. For instance, if the sentence had imposed a fine only, either directly or as an alternative to some other punishment, the bondsman could have discharged his liability either by the production of the prisoner or by paying the fine. The liability might be different if the condition of the bond were that the prisoner should appear and abide the sentence.

The prisoner having personally appeared and surrendered himself into custody for punishment in accordance with the sentence, the bondsman was discharged from further liability. The other obligor, the prisoner, remains liable for the fine, and the city may yet collect it from him by any authorized method.

Judgment affirmed.

(8 Ga. App. 206)

FORD v. MAYOR, ETC., OF CITY OF
BRUNSWICK. (No. 2,545.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1135*)—REVIEW—AFFIRMANCE.

The decision of the Supreme Court (68 S. E. 733) upon the constitutional question certified by this court being against the contention of the plaintiff in error, the other assignments of error containing no merit, and the finding of the municipal court being fully sustained by the evidence, the judgment of the superior court, overruling the certiorari, is affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1135.*]

Error from Superior Court, Glynn County; C. B. Conyers, Judge.

Action by the Mayor, etc., of the City of Brunswick against Lee Ford. From the judgment, Ford brought error. Case certi-

fled to Supreme Court. Question answered (68 S. E. 733), and on remand, affirmed.

F. H. Harris, for plaintiff in error. Boling Whitfield, for defendant in error.

HILL, C. J. Judgment affirmed.

(8 Ga. App. 162)

CARSTARPHEN v. CENTRAL OF GEORGIA RY. CO. (No. 1,898.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

1. NEGLIGENCE (§ 134*)—ACTION—EVIDENCE—WEIGHT AND SUFFICIENCY.

The evidence in behalf of the defendant authorized the finding in its favor if the jury believed the circumstances detailed by the witnesses and from which the plaintiff's knowledge of the existence of the sewer must necessarily have been inferred or presumed.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 134.*]

2. APPEAL AND ERROR (§§ 1032, 1068*)—HARMLESS ERROR—INSTRUCTIONS—BURDEN OF SHOWING PREJUDICE FROM ERROR.

"When the jury find for the defendant, the plaintiff cannot have been hurt by any error in the court's instructions as to the measure of damages." *Conant v. Jones*, 120 Ga. 563 (12), 48 S. E. 234. While this general statement may be subject to exceptions, it is not apparent in the present case that there would or should have been a finding in favor of the plaintiff even if the trial judge had charged the jury that the plaintiff was entitled to recover the amount of rental which he lost by reason of the defendant's failure to abate the nuisance complained of; and he who assigns error must show not only error, but material injury in consequence thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051, 4225-4230; Dec. Dig. §§ 1032, 1068.*]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by T. J. Carstarphen against the Central of Georgia Railway Company. From ejectment in favor of defendant, plaintiff brings error. Affirmed.

Miller & Jones and J. C. Morcock, for plaintiff in error. J. E. Hall and Wimberly & Jordan, for defendant in error.

RUSSELL, J. The plaintiff brought suit in the city court of Macon against the Central of Georgia Railway Company for \$25,000 damages. He alleged that in consequence of the discharge of steam and water discharged under his building by the defendant through a drainpipe from the defendant's premises the building itself had been damaged \$3,000, and, in addition thereto, he had sustained a monthly loss of \$125 in the way of rent. According to the allegations in the petition, the presence of the pipe or sewer was unknown to him at the time he erected his warehouse, and the steam and water were surreptitiously discharged. The proof in be-

half of the plaintiff tended to show that he (and his associates and predecessors in title) had no knowledge of the existence of this pipe or sewer at the time the warehouse was erected, and that from the appearance of the lot on which the building was erected the presence of the sewer could not have been detected by ordinary care and prudence. On the other hand, testimony in behalf of the defendant was introduced to the effect that the sewer was built in 1873, several years prior to the erection of the plaintiff's building, and that the brick bulkhead stood in plain view of every one, and was used as a seat and resting place by some of the witnesses. There was testimony in behalf of the plaintiff that no water or steam was discharged through it until after the plaintiff's building was erected. But, on the other hand, at least one witness for the defendant, Ben Goodyear, testified to seeing water flowing through it prior to the erection of the building. The testimony abounds with material conflicts, especially as to the plaintiff's knowledge of the sewer prior to the erection of the building, or at least as to knowledge of such facts that as an ordinarily prudent man he ought to have known of its existence and use. The suit was filed February 6, 1904. The evidence is undisputed that the first notice to abate the nuisance was given in December, 1903. The evidence is likewise undisputed that the sewer was not constructed by the present defendant, but by its predecessor in title—the Central Railroad and Banking Company—and the condition of the sewer, so far as appears from the record, was unchanged from what it was in 1896, when the Central of Georgia Railway Company purchased the property. It is therefore apparent that, allowing the defendant a reasonable length of time in which to comply with the notice to abate, the period for which there could be a recovery of lost rental, as against it, would in any event be only a little over one month. It matters not, however, how small the amount may be. If the plaintiff was entitled to it under the evidence, he should receive it. For that reason we have made a very exhaustive examination and a second review of the voluminous record in this case.

We are convinced that the court erred, as insisted by the learned counsel for the plaintiff in error, in not presenting to the jury the proper measure of damage, representative of the plaintiff's allegation of damage arising from loss of rentals due to the condition of his building, caused by the alleged nuisance. The court gave the jury only one measure of damage which was the difference between the market value of the building before the injury and its market value thereafter. The jury should have been specially instructed that, if the defendant was liable, they should also consider any depreciation in the rental

value, or, in other words, any loss in diminution of rents suffered by the plaintiff in consequence of the nuisance maintained by the defendant. But, conceding this error to exist as insisted by counsel for the plaintiff in error, it is not apparent that it affected the result or that the error was harmful to the plaintiff. In *Conant v. Jones*, 120 Ga. 568, 48 S. E. 234, following the rule in several earlier cases, the Supreme Court distinctly held that, in an action for damages where the jury found for the defendant, it was not reversible error that the measure of damage was incorrectly charged. We think perhaps that this general rule is subject to exceptions. For instance, in a case like the one now before us, if the judge had told the jury distinctly that the only measure of damage was the difference in the market value of the property before and after the notice to abate the nuisance was given, in the opinion of the writer this would perhaps have misled the jury into believing, even if there had been a loss of rentals to the plaintiff, that he could not recover it in the action then pending. However, the ruling of the Supreme Court in the *Conant Case*, supra, makes no exception; and it would seem to be sound, because in natural sequence the jury should always consider first whether the defendant is liable. If the defendant is found not liable, that is an end of the matter, and the verdict must be for the defendant. Only after the jury has determined that the defendant is liable does it become necessary for the jury to consider and determine the amount of the defendant's liability.

Upon a review of the evidence in the case at bar, while the testimony in behalf of the plaintiff might have authorized the conclusion that the plaintiff did not know of the existence of the sewer at the time the building was erected, nor thereafter, until a short time before he gave the defendant notice to abate the nuisance, the evidence in behalf of the defendant and the very circumstances of the case are so strong to the effect that the plaintiff was bound to have known of the existence of the sewer, and that he consented to its use, that the plaintiff in error has not borne the burden which devolves upon him at law of showing that the jury did not find, or they were not authorized to find, that the plaintiff was not entitled to recover at all, and therefore that the error of the court as to the measure of damages was harmful to him. From the nature of the evidence it can only be inferred that the jury resolved the conflict therein in favor of the witnesses for the defendant, and reached the conclusion that the plaintiff was entitled to nothing. Especially is this true because diminution in rental value is so universally evidence itself of diminution of the market value. In this, the logical view of the case, the failure of the judge to give the jury the correct meas-

ure of damages, was immaterial because the instruction given, whether correct or not, could not be applied.

Judgment affirmed.

(8 Ga. App. 178)

MARTIN v. CARTER. (No. 2,254.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 977*)—REVIEW—GRANT OF NEW TRIAL.

Where facts are involved, the first grant of a new trial will not be disturbed; and, even where the first grant of a new trial depends upon the legal construction of the evidence, the judge's view of the law will not be closely scanned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

2. APPEAL AND ERROR (§ 854*)—REASONS FOR DECISION.

Where a wrong reason is assigned for the grant of a new trial, and yet it is apparent that there was good reason why a new trial should have been granted, the discretion of the trial judge will not be controlled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3408; Dec. Dig. § 854.*]

Error from City Court of Dublin; El. W. Jordan, Judge.

Action between J. W. Martin and J. W. Carter. From an order granting a new trial, Martin brings error. Affirmed.

Jas. B. Sanders, for plaintiff in error. W. C. Davis, for defendant in error.

RUSSELL, J. Judgment affirmed.

(8 Ga. App. 129)

CABANISS v. STATE. (No. 2,252.)

(Court of Appeals of Georgia. June 14, 1910. On Rehearing, Sept. 6, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1163*)—TRIAL FOR MISDEMEANOR AS FOR FELONY.

Prima facie, a person charged with a misdemeanor suffers no prejudice from having his case tried as if it were a felony, provided the court sentences him as for a misdemeanor.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1163.*]

2. BANKS AND BANKING (§ 62*)—ILLEGALLY DECLARING A DIVIDEND—NATURE OF OFFENSE.

The offense of a president or director of a bank declaring a dividend from funds of the bank other than the legitimate profits is a several rather than a joint offense; and, in an indictment against the president or one of the directors, it is not necessary to set out the names of other directors not indicted, though they may have participated in the declaration of the dividend.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 62.*]

3. BANKS AND BANKING (§ 61*)—DIVIDEND FROM FUNDS OTHER THAN PROFITS.

It is criminal for the president and directors of a bank to declare a dividend from funds

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

other than profits, whether the bank in question be a bank of issue or not.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 61.*]

4. CRIMINAL LAW (§ 278*)—PLEA IN ABATEMENT—GROUNDS.

The alleged disqualification of grand jurors propter affectum is not valid ground for plea in abatement to an indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 640; Dec. Dig. § 278.*]

5. INDICTMENT AND INFORMATION (§ 15*)—PLEA IN ABATEMENT—GROUNDS.

The fact that there is another indictment pending in court against the defendant charging him with the same offense affords no ground for plea in abatement.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 83; Dec. Dig. § 15.*]

6. INDICTMENT AND INFORMATION (§ 137*)—MOTION TO QUASH—GROUNDS.

It is no ground for quashing an indictment that the oath was administered to the regular grand jurors, who served during the term, by a judge of the superior court who happened to be disqualified from trying the case arising on the particular indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-482; Dec. Dig. § 137.*]

7. BANKS AND BANKING (§ 62*)—ILLEGAL PAYMENT OF DIVIDEND—EVIDENCE.

The evidence shows, practically without dispute, that during the defendant's incumbency as president of a bank it suffered losses through taking papers that proved to be insolvent and worthless; that these bad debts and worthless papers were not charged off, but were allowed to accumulate until they were sufficient not only to offset all surplus and undivided profits, but also seriously to impair the original capital of the institution; that while this state of affairs existed, and at a time when the defendant in all human probability knew it existed, he joined with the board of directors in declaring a dividend. *Held* that, irrespective of the defendant's motives in the matter, the transaction was a violation of the penal statutes of this state, and that these main facts are so strongly established as to preclude the granting of a new trial for slight errors in the admission or rejection of testimony relating to collateral issues.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 62.*]

8. CRIMINAL LAW (§ 923*)—NEW TRIAL—GROUNDS.

It is not sufficient ground for new trial that the court caused a disqualified juror to be put upon the defendant, where it appears that the juror was stricken, especially where it does not appear that the defendant was thereby caused to exhaust his peremptory challenges.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2225-2235; Dec. Dig. § 923.*]

9. JURY (§§ 41, 110, 149*)—DISQUALIFICATION OF JUROR—AGE—WAIVER.

In a criminal case it is ground of challenge that a juror is over 60 years of age. If the fact is known in advance, the right of challenge is waived by his being accepted as a juror. But if the fact of his being over age is discovered after he has gone into the box, but before the state has begun the introduction of testimony, either party may call the attention of the court to the matter, and it thereupon be-

comes the duty of the court to cause him to be removed from the jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 246, 507; Dec. Dig. §§ 41, 110, 149.*]

10. BANKS AND BANKING (§ 62*)—ILLEGAL DIVIDEND—PROSECUTION—ADMISSIBILITY OF EVIDENCE.

In the prosecution of a bank president for illegally declaring a dividend on a given date, evidence going to show that the conditions which made the declaration of the dividend illegal had existed for some time prior thereto is relevant, as tending to establish the condition of the bank's affairs on the day in question, as well as to show the president's opportunities for knowledge of these conditions. Proof of the fact that while this condition of affairs was in existence prior dividends had been declared is relevant, as showing that the profits of the bank, instead of having been used to restore the bank to such a condition as would justify the declaration of a dividend, had been distributed to the stockholders.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 62.*]

11. CRIMINAL LAW (§ 400*)—EVIDENCE—COMPETENCY.

Though the charter and by-laws of a bank may be the highest evidence as to who should control its affairs, yet it is competent for a witness to testify that a designated person in fact controlled it; that is, had personal charge and direction of its business and affairs.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886; Dec. Dig. § 400.*]

12. WITNESSES (§ 240*)—EXAMINATION—LEADING QUESTIONS—DISCRETION OF COURT.

Whether a party shall be allowed to ask a witness a leading question is a matter addressed solely to the discretion of the trial judge.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 837-839, 841-845; Dec. Dig. § 240.*]

13. CRIMINAL LAW (§ 400*)—IDENTIFICATION OF DOCUMENTS.

Where only the existence or identification of documentary evidence is involved, or where the contents of the writing is not the thing material to the inquiry, it is permissible for a witness to refer to the papers in question and to describe them in a general way.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886; Dec. Dig. § 400.*]

14. CRIMINAL LAW (§§ 400, 1169*)—TRIAL—RECEPTION OF EVIDENCE—CURE OF INCOMPETENT EVIDENCE—SUMMARY OF BOOKS OF ACCOUNT.

Where facts can be ascertained only by an examination of a large number of details on books of account, it is permissible for an expert accountant, who has made an examination of the books and figures, to testify as a witness and to give a summarized statement of what the books show, provided the books themselves are made accessible to the court and to the parties. Moreover, any error in the admission of evidence of this kind is cured where the books themselves are introduced in evidence, and it is admitted that they show the same facts testified to by the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886, 3146; Dec. Dig. §§ 400, 1169.*]

15. CRIMINAL LAW (§ 921*)—NEW TRIAL—ERROR IN EXCLUDING TESTIMONY.

Though the court may have been guilty of abstract error in refusing to allow the defendant's counsel to ask the state's witnesses, especially the expert accountants, as to how long it would have taken the defendant to have ascertained the bank's condition by an examina-

tion of the bank's books, still, under all the facts of the case, the error was immaterial and not of sufficient importance to justify the granting of a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2209; Dec. Dig. § 921.*]

16. BANKS AND BANKING (§ 62*)—DECLARING ILLEGAL DIVIDEND—PROSECUTION—ADMISSIBILITY OF EVIDENCE.

There was no error in the court's allowing one witness to testify as to the correctness of a list of insolvent papers carried among the bank's assets (though he was ignorant of the fact of the solvency or insolvency of the papers), and in allowing another witness, who could not swear to the correctness of the list, to testify as to the solvency or insolvency of the particular papers mentioned. The testimony thus connected was admissible.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 62.*]

17. CRIMINAL LAW (§ 460*)—OPINION EVIDENCE—SOLVENCY OR INSOLVENCY.

Solvency or insolvency is a matter admitting of opinion evidence under the general rules on that subject.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 460.*]

18. CRIMINAL LAW (§ 433*)—ADMISSIBILITY OF EVIDENCE.

There was no error in admitting the correspondence referred to in the eighteenth division of the opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1022; Dec. Dig. § 433.*]

19. CRIMINAL LAW (§ 434*)—PROSECUTION—ADMISSIBILITY OF EVIDENCE.

There was no error in admitting in evidence the books of the bank.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 434.*]

20. CRIMINAL LAW (§ 918*)—NEW TRIAL—GROUNDS.

Colloquies between court and counsel as to the validity of objections to evidence do not usually afford cause for new trial. The incident complained of in the present case, as explained by the trial judge, falls within the general rule.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2182; Dec. Dig. § 918.*]

21. EVIDENCE PROPERLY ADMITTED.

The testimony as to the transactions had with the bank by an alleged partnership was admissible in connection with other testimony, which, while disputed, tended to show that the defendant was a member of that partnership.

22. CRIMINAL LAW (§ 597*)—CONTINUANCE.

The action of the trial judge in overruling defendant's motion for a continuance in the light of all the circumstances does not warrant the grant of a new trial by this court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1831, 1832; Dec. Dig. § 597.*]

23. CRIMINAL LAW (§ 283*)—PLEA IN ABATEMENT—GROUNDS.

Even if it be valid ground for plea in abatement to an indictment that a qualified grand juror was discharged from the body, the fact that he was not for some cause disqualified or otherwise entitled to be relieved from service must affirmatively appear. Especially is this true where 18 qualified grand jurors remain after the juror in question had been excused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 654; Dec. Dig. § 283.*]

24. NEW TRIAL PROPERLY DENIED.

No sufficient cause for the granting of a new trial appears.

Error from Superior Court, Bibb County; U. V. Whipple, Judge.

J. W. Cabaniss was convicted of declaring a dividend out of funds of a bank other than profits thereof, and he brings error. Affirmed.

Jos. Hill Hall, W. D. Nottingham, Roland Ellis, M. Felton Hatcher, Warren Roberts, Custis Nottingham, and Henry C. Peeples, for plaintiff in error. W. J. Grace, Sol. Gen., and T. S. Felder, for the State.

POWELL, J. It will be necessary to extend this opinion to an unusual length in order to cover the case as presented in this court. The record contains about 400 pages of typewritten matter. Nevertheless we will attempt to deal with the case as briefly as is possible with due regard to the number of points presented and their importance. The indictment (omitting the formal parts) charges: "On the thirty-first day of December in the year nineteen hundred and six, in the county aforesaid, [the defendant] did then and there unlawfully, being president of the Exchange Bank of Macon and a director of said bank and a member of the board of directors thereof, said bank being a banking corporation existing under and by virtue of the laws of the state of Georgia and having its principal office and place of business located in the city of Macon in said county, declare, in connection and conjunction with the board of directors of said Exchange Bank of Macon and a majority of said board of directors, a dividend of three per centum upon the capital stock of said Exchange Bank of Macon, and did then and there, in pursuance of said declaration of said dividend of three per centum as aforesaid, pay over said dividend to the stockholders of said Exchange Bank of Macon, said payment of said dividend as aforesaid being then and there made from the capital stock of said Exchange Bank of Macon and from other funds of said bank and not from the net profits arising from the business of said Exchange Bank of Macon, said declaration of said dividend and said payment thereof not being then and there authorized by the net profits arising from the business of said corporation. And the grand jurors aforesaid, upon their oaths aforesaid, do further say that the aforesaid offense herein alleged was unknown until the sixth day of July in the year nineteen hundred and seven."

To this indictment the defendant filed a demurrer, presenting in substance the following grounds: That the indictment fails to allege that the Exchange Bank of Macon was a bank of issue; that it does not allege the names of the person with whom this defendant acted in connection or conjunction,

or show that they were unknown to the grand jurors, the offense being one which under the public law of this state could not be committed by one person alone, and therefore being a joint offense; that the indictment fails to allege any offense under the laws of this state. While the demurrer contains other grounds, the above statement practically covers them all.

The defendant also filed a plea in abatement. The first ground sets up that nine of the grand jurors impaneled at the term of the court at which the presentment was returned were not legally qualified to act as grand jurors in the investigation of the case, because they were drawn by Judge W. H. Felton (Judge of the superior court of the county in which the prosecution was pending), together with Robert A. Nisbet, clerk of said court, and George W. Robertson, the sheriff, and these persons were disqualified to act in the drawing of the grand jurors by reason of their being depositors in the Exchange Bank, and for other disqualifying causes. The second ground of the plea in abatement sets up that the precept containing the names of the grand jurors objected to was turned over by Judge Felton to Mr. Nisbet, the clerk, and that the latter was disqualified to handle the precept. The third ground sets up that Mr. Robertson, the sheriff, was disqualified to serve the grand jurors. The fourth ground sets up that Judge Felton was disqualified in causing these jurors to be impaneled to act as grand jurors. This ground also contains a subdivision setting up that 10 other persons were held to be qualified jurors by Judge Felton, but we are unable to ascertain exactly what is meant by this objection, as these persons do not appear in the list of grand jurors which is set out in the bill of indictment in the case. The fifth ground of the plea in abatement sets up that one of the grand jurors who participated in the return of the bill of indictment was related within the prohibited degrees to a stockholder in a corporation which was a depositor in the Exchange Bank, and was for that reason disqualified. The sixth ground sets up that one of the grand jurors was a stockholder in the Union Savings Bank & Trust Company, which was a depositor in the Exchange Bank, and for that reason was disqualified. The seventh ground sets up that nine of the grand jurors who participated in the return of the bill of indictment were disqualified to act as grand jurors in the investigation of the case, for the reason that they were drawn after the opening of the term by Judge Whipple, who presided in this case in lieu of Judge Felton, and were drawn by him in connection with Mr. Nisbet, the clerk, and Mr. Robertson, the sheriff, the latter two being disqualified from participating in the drawing of the grand jurors. The eighth and ninth grounds set up the disqualification of Mr. Nisbet, the clerk, to issue summons for the grand jurors, and of Mr. Robertson,

the sheriff, to serve the precept. The tenth ground of this plea complains that the grand jurors were not properly purged by Judge Whipple, because none of them were asked as to their relationship to depositors in the Exchange Bank at the time of the failure, and that, as a result of his failure to ask this question, two who were either depositors or related to depositors served upon the grand jury returning the bill of indictment. The eleventh ground makes substantially the same complaint. If we understand the twelfth ground, the point is that when Judge Whipple purged the original grand jury so as to remove disqualified persons, for the purpose of taking up for consideration the present case, and as a result caused a number of tales jurors to be placed upon the grand jury, he caused the oath to be administered to the tales jurors only, and did not require the remaining members of the body to be resworn. The thirteenth ground complains that one of the grand jurors, after being impaneled, was excused from service improperly, for the alleged reason that no legal cause for his discharge as a grand juror was shown by the minutes of the court or known to the defendant. The fourteenth ground sets up that the present bill of indictment should be quashed because there was already pending against the defendant in court one special presentment for the same offense. The fifteenth ground sets up that the defendant had not been given sufficient time to investigate or challenge the qualifications of the grand jurors impaneled for the purpose of considering the special presentment against him—the defendant having been given one hour after the impaneling of the grand jurors in which to ascertain whether the grand jurors were qualified or not.

While the special presentment denominated the crime as "a felony," the jury recommended that the defendant be punished as for a misdemeanor, and the judge approved the recommendation and imposed sentence accordingly. After the conviction, the defendant filed a motion for new trial and a motion in arrest of judgment. The grounds of the motion for new trial will not be stated here, but the facts upon which they depend will be discussed in the course of the opinion. The motion in arrest of judgment was based upon substantially the same grounds as those set out in the demurrer, and upon the further ground that the law upon which the special presentment was returned had been repealed, and was not existing at the time of the alleged offense.

1. Taking up the points in somewhat inverse order, we will consider the question as to whether there was in existence at the time of the alleged offense any criminal statute covering the crime; for, if there was no statute covering the transaction, it would be needless to consider the other points presented. Section 210 of the Penal Code provides: "No dividends shall be made by any

bank, except from the net profits arising from the business of the corporation; and if any president and directors shall declare, or pay over any dividend from the capital stock, or any other funds of the bank, except the net profits thereof, such president and directors shall, severally, be punished by confinement and labor in the penitentiary for not less than four years nor longer than ten years." Section 691 of the Penal Code provides: "No joint-stock company, corporation, or other association, shall declare any dividend, or distribute any money among its members as profits, when such dividend, or money, is not the legitimate proceeds of its investments. Any president, director or other officer or agent of any joint-stock company, corporation, or other association, violating the provisions of this section, shall be guilty of a misdemeanor." The particular point made by counsel for plaintiff in error is that the statute codified in section 210, *supra*, was repealed by the enactment of the statute of 1887, codified in section 691, *supra*, the latter being the last legislative enunciation on the subject, except in so far as section 691 has been amended in an immaterial respect by the act of December 16, 1902. Acts 1902, p. 58. We recognize the rule that, where there are two conflicting sections of the Code and both are derived from legislative acts, that section prevails which is derived from the later act; it being considered the last expression from the lawmaking power on the subject. *Berry v. Jordan*, 121 Ga. 537 (1), 49 S. E. 607; *Lamar v. Allen*, 106 Ga. 158, 165 (top page), 33 S. E. 958. However, we deem it unnecessary to decide whether section 210 of the Penal Code is still in force, or whether it has been repealed by the act codified in section 691. If section 691 applies to banks, then so far as the present transaction is concerned its only effect was to make the crime charged against the defendant a misdemeanor instead of a felony. It would still be unlawful for the president and directors to pay dividends from the capital stock or any other funds of the bank, except its net profits legitimately derived from its investments; and the present indictment would be adequate to charge that offense. The writer may personally express the view that the argument in favor of the proposition that banks are included within the provisions of section 691, *supra*, is very strong, and that there is much in the history of the legislation on this subject tending to support counsel for the plaintiff in error in their contention that the latter act had operated to repeal the former; but, as we have said, this is immaterial for the defendant has received a misdemeanor sentence. It does not appear from the record that the defendant was in any wise prejudiced by the fact that the grand jury in returning their presentment spoke of the offense in general terms as a felony. The rule is too well recognized to require even

the citation of authority that it is immaterial by what language an indictment styles the offense charged, if it in fact charges an offense. Nor is there any complaint that at any time during the progress of the trial the defendant was in any wise prejudiced because the court may have had in mind that he was trying the defendant for a felony. Indeed, so far as the record is concerned, we are not able to say that the court treated the matter as a felony further than to allow the defendant to challenge the jurors as if he were on trial for a felony; and he does not complain of this fact and could not well complain of it. He received a misdemeanor sentence. This is the controlling fact. Practically the same point was involved in *Ayers v. State*, 3 Ga. App. 305, 59 S. E. 924, and it was held there that "where, by an erroneous conception of court and counsel, a misdemeanor case is tried as if it were a felony, but the error is discovered before sentence, so that no harm in this respect results to the defendant, the error is *prima facie* harmless to the defendant."

2. The court is of the opinion that the point raised by the demurrer that the indictment should have set forth the names of the other directors is not well taken. The indictment is substantially in the language of the statute, and the statute itself (whether section 210 or section 691 be recognized as the proper statute) seems to contemplate that the offense shall be several rather than joint in such a sense as to require that all who participated should be named in the indictment. We do not think that decisions in riot cases holding that the other participants must be named, if known, are either applicable or controlling in a case like this.

3. The point that the indictment should have alleged that the Exchange Bank was a bank of issue is not well taken, irrespective of the question as to whether the indictment was under section 210 or section 691. Certainly such an allegation would not be required under section 691; and following *Youmans v. State*, 7 Ga. App. 101, 66 S. E. 383, it would not be required under section 210. We find, therefore, no error in overruling the demurrer and the motion in arrest of judgment. The *Thornton Case*, 5 Ga. App. 397, 63 S. E. 301, did not touch this question.

4. As to the plea in abatement: It was held by this court in *Hall v. State*, 7 Ga. App. 115 (1), 66 S. E. 390, that "alleged disqualification of grand jurors propter affectum is not valid ground for plea in abatement to an indictment." Even if this did not fully cover the points made, the well-recognized rule that, where the disqualification of the grand jurors is known prior to the return of the indictment, the objection must be made at that time or it will be considered waived, would control. We think, however, that the whole question is decided in the *Hall Case*, *supra*, and the reasons there given.

5. The plea in abatement contains the ground that there was another presentment pending in court against the defendant for the same offense. It is well settled in this state that in criminal cases a former indictment or former arraignment constitutes no defense, except in cases where there has been former jeopardy. *Gray v. State*, 6 Ga. App. 428 (1), 65 S. E. 191, and cases cited.

6. The fact that Judge Whipple did not reswear the grand jurors who remained on that body after the disqualified jurors were removed affords no ground for abating the indictment. The grand jurors take the oath severally, even though they be sworn in a body. Even though Judge Felton was disqualified in the case at bar, and though it became necessary for Judge Whipple to reorganize the grand jury to a certain extent, still Judge Felton was not disqualified to administer the oath to the grand jurors who were to serve generally during the term. It would not be reasonable to hold that a judge of the superior court could not perform the usual acts incident to organizing the court if he happened to be disqualified in some case that was likely to come up during the session, or to hold that if, as happened in the present case, it became necessary during the progress of the term to present to the grand jury some matters in which he was disqualified, the grand jurors would be absolved from the oaths which he had previously caused to be administered to them.

7. Coming now to the motion for new trial: As is usual, the first ground is that the verdict is without evidence to support it. The point is not stressed in the argument, but we may take this as a suitable heading for stating certain matters which will, in a greater or less degree, be relevant in the consideration of other points presented in the motion for new trial; for there is no complaint made upon the charge of the court, and the motion for new trial relates largely to rulings upon matters depending upon the evidence. The proof is overwhelming that at the time the dividend in question was declared the Exchange Bank was hopelessly insolvent, and had been so for some time. It is likewise very clear from the testimony, and practically undisputed, that this bank had been carrying upon its books as live assets stocks, notes, and accounts which for a long period of time had been so utterly and hopelessly insolvent as to render them absolutely worthless. These items amounted to at least \$240,000. They were sufficient, if they had been charged off, to have more than consumed not only the undivided profits, but the surplus fund of the bank, and to have impaired the capital. The testimony of the expert accountant showed that as far back as June 30, 1905, the capital stock of the bank, which was \$500,000, had been impaired nearly \$140,000. But it takes no expert accountant to see that if such items as stock in defunct banks

and corporations, old notes and overdrafts on persons who had been insolvent for a long time—according to the undisputed testimony, hopelessly insolvent—had been written off the books, there would have been no profits from which to declare a dividend. It is beyond question that these items far exceeded the sums legitimately earned by the bank's investments during the dividend period immediately in point.

The Code sections in question do not contain any express provision relieving a president or director from criminal liability where he declares a dividend in good faith, believing that the bank has earned it, yet it seems to be the correct view that such an exception does exist by implication; but, if it does exist, there must run with it the corollary that, before the offending official can claim the benefit of any such exception, it should appear that he has not acted recklessly, that he has not willfully or in gross negligence shut his eyes to the situation.

The president of a bank is, of course, charged by law with knowledge of what is contained upon its books, and with a knowledge of the condition of its financial affairs, but, in a criminal trial of the character now before us, this is only a prima facie inference, and we can readily see that in a bank of the size of the Exchange Bank at Macon the president would have to rely for his information, more or less, upon the bookkeeping of his subordinates and upon reports made to him by them. And if he acted in good faith upon such reports and was really deceived as to the conditions of affairs, and if, thus honestly but ignorantly acting upon the belief that the bank had really earned a dividend, he joined in declaring it, it would be hard indeed, if not contrary to law, to hold him criminally responsible for doing what any other reasonably prudent man would have done under the circumstances. But under the facts of the present case it is hardly conceivable that the defendant, who, even according to his own statement on the trial, practically controlled the bank, so far as its general management was concerned, who had spent a long number of years in its service in the respective positions of cashier and president, who himself says, "I usually remained in the bank, engaged in the duties devolving upon the president, from 10 to 12 hours a day, going to the bank about 8 o'clock in the morning, taking only about one hour for dinner, and then remaining at the bank from after dinner until late in the afternoon, and often returning at night," who was absent from its service during the whole period of his incumbency only once, when he took a 10 days' vacation—it is hardly conceivable that he could have failed to know that the bank was carrying as live assets this large amount of paper which was long since hopelessly dead. It was not necessary for this defendant, situated as he was, to have any accurate knowledge of what was

contained upon the books of the bank, for him to have known that these dead items should have been charged off before dividends were declared. We can readily see how the defendant could have excused himself in his own conscience from the painful duty of embarrassing his bank by charging off these dead items. He doubtless conceived that it would be best in the long run not to make the bank's embarrassment public, as it would have been made through the fact that it had failed to declare a dividend. But motives of this kind, exculpatory as they are in a certain sense, do not afford any legal excuse for a plain violation of the law.

It is fair to the defendant to state (especially in the light of what we have felt it our duty to say above) that his personal interest in the matter of declaring dividends was somewhat small, for he owned no very great amount of the bank's stock. The dividends for the most part went to others. We think it is plain that he committed the crime charged against him in an effort to conceal the bank's embarrassments for the purpose of tiding over them, and to shield the directors, stockholders, depositors, and the public from the losses which usually follow when the credit of a big banking institution becomes impaired or questioned in the public mind; for it is a critical thing for a bank's credit to become questioned or for knowledge of its embarrassments to become public. Such things are so easily exaggerated in the public mind. The point is that it is wholly unnecessary to impute to the defendant corrupt or malign motives in order to say that the record before us shows plainly and practically unequivocally that he violated the law in regard to the dividend in question. His bare statement to the contrary is all that stands opposed to the overwhelming proof; and even in his statement, specific as it is to many matters, he does not attempt to deny (to any great extent at least) the things which to our minds make his guilt the plainest.

We have said this much as a basis for the proposition that it would take some error of more than minor importance to justify a reversal of the case. The fact of the long and useful life of the defendant and of the exceeding high character which the proof on both sides of the case shows that he bore has caused us to hesitate to make the statement which we have just made as to the evidence, for no court should forget that high character and good name are entitled to some consideration, when facts are being placed upon perpetual record; but, after all, it is perhaps fairer to him and to the public that the full facts should be known and understood, and that we should plainly state that what he has been convicted for is that, instead of charging off from the bank's assets notoriously bad debts and applying whatever profits there were to restoring the bank's capital, he retained these insolvent items as live assets,

and from this basis declared a dividend when the dividend should not have been declared, though not he, but others, received the chief benefit from his violation of that strict law which governs, and should govern, the officers of banks.

8. The amended motion for new trial originally contained seventy grounds, numbered from 1 to 70 consecutively. Of these the following were either stricken or withdrawn at the hearing: Grounds 17, 18, 19, 21, 23, 26, 34, 35, 42, 44, 46, 49, 51, 53. Grounds 1 and 6 were practically emasculated by explanatory notes of the trial judge. Grounds 8, 30, 66, 55, and 69 are not adequate on account of formal deficiencies to present any question for adjudication. Grounds 9, 14½, 24, 25, 37, 39, 40, 45, and 54 may be disposed of with the statement (without going into detail) that the errors complained of were, even if well founded, too slight to justify a reversal, or else were cured by what subsequently took place in the trial, or were rendered harmless by the admissions of the plaintiff in error himself. So these grounds will be eliminated in advance before we proceed to take up for discussion the other matters presented in the motion.

In the second ground of the motion, complaint is made that the court refused to put a juror named Cane on the court as prior, on the ground that said Cane was a depositor at the time of the failure of said Exchange Bank and at the time of the declaring of the dividend in question. It appears, however, that Mr. Cane did not serve upon the jury; and it does not appear that the defendant exhausted his strikes or was caused to exhaust his strikes by reason of challenging him. This exception, as well as the one contained in the fifth ground of the motion on a kindred point, are practically controlled against the plaintiff in error by the decisions in the cases of *Carter v. State*, 106 Ga. 372 (6), 32 S. E. 345, 71 Am. St. Rep. 262, and *Cochran v. State*, 113 Ga. 736 (3), 39 S. E. 337.

9. In the third and fourth grounds exception is taken to the fact that the court on objection of the state's counsel excluded from the jury a Mr. Long who had been accepted by both sides of the case, on the ground that he was over 60 years of age. It appears that the juror had been called to the box in ignorance of the fact that he was over 60 years of age. The court's attention was called to the matter before the jury was sworn, and he ordered the juror to step aside. In section 973 of the Penal Code it is made a cause for challenge that a juror is over 60 years of age. It is further provided in the same section that if the objection "be true in fact, but the fact is unknown to either party, or the counsel for such party, at the time the juror is under investigation, and is subsequently discovered, such objection may be made, and the proof heard at any time before the prosecuting counsel submits to the jury any of his evidence in the case." In the

case before us it appears that state's counsel did not know at the time the juror was first examined that he was over 60 years old. It was therefore proper for the court to remove him from the jury prior to the beginning of the introduction of the testimony. See *Doyal v. State*, 70 Ga. 142 (2); *Robinson v. State*, 109 Ga. 506 (2), 34 S. E. 1017; Cf. *Albany Phosphate Co. v. Hugger Bros.*, 4 Ga. App. 771 (5), 780, 62 S. E. 533.

10. Grounds 7, 10, 11, 32, 43, 52, 65, 68, and 69 may be considered together, as they all present substantially the same point. They except to the fact that the court allowed witnesses to testify as to the declaration of dividends and the condition of the bank and as to other transactions relating to its affairs at dates other than December 31, 1906, the time when the alleged illegal dividend in question was declared. The testimony was relevant, especially in the light of the contention of the defendant that even though the declaration of the dividend was not justified by the conditions as they existed at the time, he thought that it was, and honestly believed that it was. This testimony tended to show that the conditions which forbade the declaration of the dividend in question had been in existence or coming into force for so long a time that the defendant by reason of his actual and presumptive knowledge of the bank's affairs must have been cognizant of the conditions which did exist at the particular time in question. Further, the defendant was attempting to show as one of the reasons why he did not know the condition on December 31, 1906, that the books were kept by subordinates and that many of the transactions of the bank which led to its failure as well as to its insolvency on the particular date in question were not known to him, and much of the testimony objected to tended to show either directly or circumstantially that he did know and participated in these transactions as to which he directly or indirectly professed ignorance. To rebut this contention of the defendant, the evidence objected to had a direct relevancy.

11. The thirteenth and fourteenth grounds of the motion present exception to the fact that the court allowed one of the directors of the bank to state that Mr. Cabaniss controlled the bank, and that the other directors joined in declaring the dividend upon his statement that the affairs of the bank authorized the declaration of it. The point counsel make is that the control of the bank was determined by its charter and by-laws, and that the written statement upon which the dividend was declared was prepared by the cashier of the bank. It is plain, however, from all that the witness said upon the subject that he was speaking of who actually controlled the bank, and not upon the subject as to where the control was located by the charter and by-laws, and as to what statements Mr. Cabaniss made in addition to the written statement that had been made by

the cashier. The charter and the by-laws of the bank would be the highest evidence as to who should have controlled the bank's affairs, but not as to who did in fact control and direct them. Even if it were a violation of the charter and by-laws that the directors should have allowed one man to control absolutely the bank's affairs, yet it was competent to show by parol testimony that the charter and by-laws were violated to the extent that the defendant did in fact control them—the word "control" being used in a concrete sense.

12. The twelfth ground makes complaint that the court allowed the Solicitor General to ask a witness for the state a leading question. The decisions holding that this is a matter solely within the discretion of the trial judge are too numerous and uniform to require citation.

13. Grounds 15, 20, 22, 31, and 47 present the point that the court allowed witnesses for the state to testify as to lists of notes, overdrafts, etc., giving names, also dates and maturity, on the ground that the notes themselves were the highest and best evidence of the transaction. These witnesses were not attempting to state the contents of the notes further than to give the names and dates by which the particular papers could be identified. For instance, an expert accountant in testifying as to the condition of the bank would call off a list of the notes that had been charged off as being insolvent and worthless. This did not involve any going into the contents of the notes in such a way as to make it a violation of the rule which forbids parol evidence as to the contents of written documents. It is uniformly held that where notes and other writings are only collaterally involved, where their existence or identification rather than their substance is material, a witness may testify as to the papers and may give for the purpose of identification such things as the names of the makers, the dates, amounts, etc. See *Wigmore, Evidence*, §§ 1242, 1244, 1253. We will later in the opinion touch upon the point that these witnesses in some cases were allowed to testify that these notes were classed as worthless or insolvent, though the witness himself had no personal knowledge or information as to their value or solvency. *Central R. Co. v. Wolff*, 74 Ga. 664 (2); *Henderson v. Central R. Co.*, 73 Ga. 718 (2); *Sasser v. Sasser*, 73 Ga. 275 (5); *Kelly v. Kauffman Milling Co.*, 92 Ga. 105 (2), 18 S. E. 363; *Fisher v. Jones Co.*, 93 Ga. 717 (2), 21 S. E. 152; *Merchant's Nat. Bank v. Vandiver*, 104 Ga. 165 (1), 30 S. E. 650.

14. The sixteenth ground presents the point that the court erred in permitting the expert accountant, Mr. Lukenbill, to testify as to what were the net earnings of the bank during certain periods on the ground that the books themselves were the highest and best evidence, and for the reason that the witness was testifying as to matters of which

he had no independent knowledge. In the brief of the evidence there is an admission of counsel that the books themselves were introduced and showed the same facts that this witness had testified to. Even if it could be said that this testimony was inadmissible, the admission in the brief of the evidence prevented the plaintiff in error from complaining. Some of the other grounds which we have classed above as presenting matters of harmless error only fail for the same reason. However, the rule seems to be that, where the documentary evidence consists of books of account containing multifarious details, expert accountants may summarize their contents and testify as to the result of the examination; provided the books themselves are made accessible to the court and the parties. See Wigmore, Evidence, § 1230.

15. In grounds 27, 28, 29, 33, and 41 complaint is made that the court erred in refusing to allow the state's witness, and especially the expert accountant, to testify on cross-examination as to their opinion as to how long it would take a person situated as the defendant was to have examined into the condition of the bank and to have ascertained its exact condition at the time of the alleged illegal dividend, or at any period four years prior thereto; the stated object of the testimony being to show that it would have been physically impossible for the defendant (on account of the volume of the matter he would have had to examine) to have obtained an accurate knowledge of the bank's affairs within any reasonable length of time. As an abstract question of practice, we think that the court should have allowed these witnesses, especially the expert accountant, to have expressed an opinion on this subject, and, if the case were close and doubtful upon the salient facts involved in this inquiry, we would probably grant a new trial for this error, but, when it is remembered that the books themselves were before the jury and their volume was a matter of mere ocular inspection, it is hardly conceivable that any juror of ordinary intelligence would have believed that the defendant or any other man could have been personally informed as to the details of all of these transactions, or that he could have been cognizant in more than a general way of the ins and outs of all the bank's bookkeeping. We do not suppose that state's counsel or any one else ever insisted before the jury that the defendant personally knew every transaction that occurred in the bank, or that it was physically possible for him to have done so. But, as we have said in a previous portion of this opinion, it is also inconceivable that the defendant could have failed to know of the important fact that the bank was carrying as live assets such a large number of dead papers as to wipe out all margin of profits and to forbid the declaration of a dividend. If we believed that the defendant was harm-

ed or prejudiced before the jury by the exclusion of this testimony, we would give the error of the court a different effect, but, in light of the whole case, it would be a violation of the established rule forbidding new trials for harmless error to grant a reversal on this ground.

16. The thirty-sixth and forty-eighth grounds illustrate each other, and for that purpose will be considered together. One witness was allowed to testify that he had made a memorandum of insolvent papers listed as live assets of the bank, after admitting his ignorance as to whether the papers were in fact insolvent or not, and another witness was allowed to testify that the papers listed as insolvent on the memorandum were in fact insolvent, without knowledge as to whether the memorandum was correct or not. In other words, one witness testified as to the memorandum and the other as to insolvency. The testimony of either of the witnesses unsupported by the testimony of the other would probably have been objectionable, but, so far as we know, it has never been considered objectionable that one witness might supplement and support the testimony of another witness. Each testified as to the extent of his own knowledge, but the two taken together present a state of facts supported by the several credibility of the two witnesses.

17. In the thirty-eighth ground exception is taken to the fact that the court allowed a witness to state that in his opinion the bank was insolvent at a designated time. However, the witness had detailed to the jury the state of facts upon which he based his opinion. The testimony was admissible under section 5283 of the Civil Code. Solvency or insolvency is a matter admitting of opinion evidence under the general rules on that subject. *Crawford v. Andrews*, 6 Ga. 244 (2); *Moore v. Dozier*, 128 Ga. 90 (4), 98, 57 S. E. 110.

18. Coming to the fiftieth ground: The court admitted in evidence a letter addressed to the defendant by Mr. Orr, who had been a former cashier of the bank, containing certain language which indicated that there had been between the two certain communications which would tend to discredit the defendant's contention in the present case as to his ignorance as to certain of the bank's transactions. This letter was admitted in connection with another letter, signed by the defendant's initials, and which from its internal contents seemed to relate to the same matters, and to have been intended for Mr. Orr. The objection to this letter was that it was improperly obtained by the officers of the court, and because Mr. Orr having claimed the privilege of not testifying in the case, on the ground that his testimony would tend to criminate himself, the defendant was unable to cross-examine him upon the matter, and upon the further ground that it was not proved that Mr. Cabaniss had knowledge of the existence of this letter. This letter was

found by the receivers of the bank in a drawer labeled with the defendant's initials, in which he kept both his private papers and papers relating to the bank. As against the objection that it had been improperly obtained, there is no doubt as to its admissibility. The circumstances connected with its being found, the place where it was kept, and its being accompanied by the other letter, identified by the defendant's signature by initials, authorized the court to admit it to the jury; and it was for them to say whether the defendant had ever personally received it or not.

19. Grounds 58, 59, 60, 61, and 62 relate to the admission in evidence of the various books of the bank; the contention being that they were not properly proved. However, they were identified by different witnesses as being the bank's books, and were brought in to court by the receivers of the bank, under instructions from the court, at the request of defendant's counsel. The court did not err in admitting them. *Lowry Nat. Bank v. Fickett*, 122 Ga. 490, 50 S. E. 396.

20. The fifty-seventh ground relates to a colloquy between court and counsel. As explained in the ground itself, the transaction affords no reason for reversing the judgment.

21. Grounds 63, 64, and 67 assign error upon the court's admitting in evidence papers relating to certain transactions had with the bank under the name of C. M. Orr & Co.; the chief objection to this testimony being that the defendant was not shown to have been connected with the transaction. However, there was some evidence before the court from which the jury might have inferred that the defendant himself was a partner of this firm of C. M. Orr & Co. This being true, it was relevant for the state to go into the transaction.

22. The last ground of the motion assigns error upon the court's refusing to continue the case on account of the absence of a material witness, an expert accountant who, according to the showing, would have testified that the examination of the bank's books showed that the president and directors would have been justified from the books in declaring a dividend on the date alleged in the indictment. Taking all together the combination of circumstances presented by this motion, we would be very hesitant to say that, if we had been in the position of the trial judge, we would not have given the defendant even additional time in which to get ready for trial, though the trial judge did grant him a number of extensions; yet, as a court of review, vested with no original discretion, we are unable to say as a legal proposition that the trial judge abused his discretion. Moreover, there is one matter which seems to control this exception. In the brief of the evidence the plaintiff in error made the admission that the books introduced in evidence "fully corroborate the testimony of the witness as to the condition of the Ex-

change Bank of Macon at the different periods testified about by the several witnesses for the state. The said books also showed the correctness of all other facts testified about by various witnesses for the state as purporting to come from said books and as to information gathered from said books." It appears that counsel for movant were allowed to insert this statement into the brief of the evidence in lieu of inserting into it an abstract of the books themselves. This was a hard alternative with which counsel were confronted—either incorporate into the brief of the evidence all the volume of writing necessary to abstract the wagon load of books, or else admit by general statement that the books showed what the state's witnesses testified they showed. We are not prepared to say that counsel confronted with this proposition made an unwise choice. And yet we do not see how we can reverse a case because the court refused to allow the defendant time in which to get a witness to prove what he afterwards solemnly in *judicio* admitted not to exist, even though the admission in *judicio* was induced by circumstances almost amounting to duress. Our law, especially our criminal law, is full of technical hardships, but they present propositions that must be dealt with as they are, and not as they should be.

23. Checking up to see if we have covered the points presented in this voluminous record, we find that we have overlooked one ground of the plea in abatement. It was based on the reason "that L. B. Calhoun, after being impaneled and sworn as a [grand] juror to pass upon said special presentment, was improperly discharged, there being no legal cause for his discharge as grand juror shown by the minutes of this court or known to the defendant." We know no rule which requires the judge to record upon the minutes the grounds upon which he discharges a juror, and certainly it is no reason for quashing the indictment that the defendant did not know of any disqualification of the juror. A very similar point was overruled by this court in *Parish v. State*, 6 Ga. App. 163, 64 S. E. 489. The ground does not unequivocally allege, as it should, that the juror was not excused for any good and valid reason. We doubt that this is a matter of which the defendant could complain, as 18 men were left upon the grand jury at the time the indictment was returned, and this constituted a full and legal grand jury in this state. If Calhoun had been present and had voted against returning the presentment, it would not have affected the result.

After a close, careful, painstaking review of the whole case, we have found no sufficient reason to reverse the judgment.

Judgment affirmed.

On Rehearing.

The rehearing is denied. However, counsel insist that the judge in sentencing the

prisoner treated the case as a felony involving moral turpitude. We are not sure as to what view the judge held as to this: If the offense is a felony, it does not involve moral turpitude. It is purely statutory. Under the national banking act, for instance, the things charged against the defendant would not constitute any crime at all. There is so much doubt as to whether the acts charged constitute a felony, also whether a misdemeanor convict (not a female) can be sentenced to the state farm, that we have decided to grant the request of counsel that we give direction that the trial judge may in his discretion resentence the defendant at or before the time he makes the judgment of this court the judgment of the superior court. We are not sure that the trial judge needs the assistance of this court's direction in order that he may have the power to modify the sentence, but, to avoid any question as to this, we give the direction (as we have previously done in several similar cases) authorizing the judge to do so in his discretion.

(8 Ga. App. 158)

L. McMANUS CO. v. DREXEL FURNITURE CO. (No. 2,028.)

(Court of Appeals of Georgia. July 19, 1910.
Rehearing Denied Sept. 6, 1910.)

(Syllabus by the Court.)

1. INSTRUCTIONS—CONSTRUCTION OF CHARGE AS A WHOLE.

When the excerpts from the charge to which exceptions are taken are considered in connection with the instructions of the trial judge as a whole, the assignments of error are not meritorious, and afford no ground for reversing the judgment refusing a new trial.

2. APPEAL AND ERROR (§ 1033*)—TRIAL (§ 296*)—HARMLESS ERROR—CONSTRUCTION OF CHARGE AS A WHOLE.

While one of the instructions to which the defendant excepted in reference to latent defects was not exact in the abstract, it presented the defendant's contentions concretely more favorably than it was entitled to have them presented, and was adjusted to the undisputed evidence in the case. The specific objection made becomes immaterial and valueless in view of the explicit instruction that if the jury believed that, after the defendant received the goods, it discovered latent defects and notified the plaintiff of their existence, and insisted that the same should be remedied or taken account of, then and in that event any partial payments made by the defendant to the plaintiff would in no sense be a waiver or an estoppel as to the rights of the defendant to insist upon its plea of partial failure of consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.* Trial, Cent. Dig. §§ 705-718; Dec. Dig. § 296.*]

3. SALES (§ 359*)—ACTION FOR PRICE—EVIDENCE—SUFFICIENCY.

The evidence authorized the verdict, and there was no error in refusing a new trial.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 359.*]

(Additional Syllabus by Editorial Staff.)

4. WORDS AND PHRASES—"LATENT DEFECT."

A latent defect is one which could not have been discovered by inspection.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4013.]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by the Drexel Furniture Company against the L. McManus Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

Hardeman, Jones & Johnston, for plaintiff in error. T. E. Ryals, for defendant in error.

RUSSELL, J. The Drexel Furniture Company brought a suit upon an account for the unpaid balance of the purchase price of certain furniture sold by it to the L. McManus Company. By amendment the plaintiff asked judgment for certain extra pieces alleged to have been sent to the defendant in lieu of certain pieces which were to be returned by the defendant and which had not been so returned. The jury, however, seems not to have sustained the plaintiff's claim as set forth in the amendment. The defendant pleaded two items of freight as partial payments upon the plaintiff's account, and also pleaded partial failure of consideration, alleging that the furniture delivered was worth only 75 per cent. of the value of the furniture to be delivered under the contract. By way of further amendment to its plea of partial failure of consideration, the defendant averred that it did not accept the goods sued for, but immediately notified the plaintiff that they were not such as were purchased, and that thereafter the plaintiff changed some of the goods first shipped and supplied some pieces in place of others. In the amendment it was alleged that the defects were latent, and were not discovered when the goods were first delivered to the defendant, and could not have been discovered by reasonable diligence on its part, but since the delivery of the goods to the defendant it had discovered other defects, including deficiency in putting together the goods and in workmanship. The jury found in favor of the plaintiff for the unpaid balance of the account as originally sued for and interest thereon, and found that this amount should be reduced by the claim of the defendant for freight, and judgment was entered accordingly. The defendant's motion for a new trial was overruled and exception is taken to that judgment.

So far as the general grounds of the motion for a new trial are concerned, it is only necessary to say that, while there was conflicting evidence as to every point material to the issue, the jury were authorized to find that the defendant had failed to establish its plea of failure of consideration. All of

of believing those witnesses who had the least inducement to swear falsely or the best opportunity of knowing the facts. If the court had said that the jury must believe them, it would have been error. However, this part of the charge followed instructions which gave the jury even fuller liberty to weigh for themselves and pass upon the testimony.

Counsel for the defendant requested the court to charge the jury that, to constitute robbery, there must have been an intention on the part of the defendant to steal, and that if the \$10 was accepted by the defendant on a bona fide claim of right, in payment of a debt which he claimed the prosecutor owed him, he would not be guilty. The judge, after giving the charge requested, added the following instruction: "I charge you that provided that you do not find that he (the prosecutor) paid it over by intimidation," and followed this by saying: "The words 'with intent to steal' mean to wrongfully appropriate to their own use; and if they, by intimidation, forced him, or he, from intimidation, paid over the money and they took it, intending to use it or keep it, then they would be guilty, otherwise they would not be, as I have charged you heretofore." The court did not err in these additional instructions.

Judgment affirmed.

(8 Ga. App. 166)

CASSIDY v. MAYOR, ETC., OF MACON.
LYONS v. SAME. O'HARA v. SAME.
(Nos. 2,018, 2,019, 2,103.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

1. LIQUOR LICENSES.

This case is controlled by *Loeb v. Jennings*, 133 Ga. 796, 67 S. E. 101; *Cassidy v. Macon*, 133 Ga. 689, 66 S. E. 941; *Richardson v. Macon*, 132 Ga. 122, 63 S. E. 790.

2. MUNICIPAL CORPORATIONS (§ 643*)—BLIND TIGER ORDINANCE—PUNISHMENT FOR VIOLATION.

What is known as the "blind tiger ordinance" of the city of Macon specifies the punishment to be imposed (not directly, it is true, but by reference to the charter of the city); hence the punishment authorized by that ordinance is not limited by Code Macon City, § 118, which prescribes the penalty for the violation of such ordinances as do not themselves designate the punishment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 643.*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Hugh Cassidy, Patrick Lyons, and M. O'Hara were convicted of violating an ordinance of the city of Macon, and separately bring error. Affirmed.

C. A. Glawson and John P. Ross, for plaintiffs in error. C. H. Hall, Jr., for defendant in error.

RUSSELL, J. Judgment affirmed.

(8 Ga. App. 166)

CASSIDY v. MAYOR, ETC., OF MACON.
(No. 2,017.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

SALE OF LIQUOR.

In the main the case is controlled by *Cassidy v. Mayor, etc., of Macon* (No. 2,018) this day decided (supra), but, the punishment imposed not being in the alternative, direction is given that the sentence be reformed, as was done in *Bashinski's Case* (sub. nom. *Callaway v. Mims*, 5 Ga. App. 9 [3], 20) 62 S. E. 654.

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Edward Cassidy was convicted of a violation of the ordinance of the city of Macon, and brings error. Affirmed with directions. See, also, 133 Ga. 689, 66 S. E. 941.

C. A. Glawson and John P. Ross, for plaintiff in error. C. H. Hall, Jr., for defendant in error.

RUSSELL, J. Judgment affirmed, with direction.

(8 Ga. App. 214)

SUMMERFORD v. MEYER & CO.
(No. 2,730.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

SUFFICIENCY OF EVIDENCE.

The evidence supports the verdict.

Error from City Court of Americus; C. R. Crisp, Judge.

Action between J. M. Summerford and Meyer & Co. From the judgment, Summerford brings error. Affirmed.

L. J. Bialock, for plaintiff in error. Ellis, Webb & Ellis, for defendants in error.

POWELL, J. Judgment affirmed.

(8 Ga. App. 209)

LANDRUM v. SWANN. (No. 2,655.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

1. EVIDENCE (§ 314*)—HEARSAY EVIDENCE—ADMISSIBILITY.

Hearsay evidence is generally inadmissible. When it is inadmissible, it has no probative value. But, in exception to the general rule, hearsay may be primary evidence of value. "It is no objection to the evidence of a witness, testifying as to market value, that such evidence rests on hearsay." 1 Wharton, *Evidence*, (1), § 449.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1168-1173; Dec. Dig. § 314.*]

2. EVIDENCE (§§ 498½, 501, 601*)—OPINION EVIDENCE—MARKET PRICE.

A witness who is not an expert may, after having stated facts from which he has formed an opinion, express such opinion. The admissibility of such opinion evidence is for the court; its probative value is for the jury. The market price of an article, when expressed by a wit-

ness, is at last but the opinion of that witness, derived from his information of actual sales; and the value or market price of an article may be shown either by direct or circumstantial evidence. *Atlantic Coast Line Railroad Company v. Harris*, 1 Ga. App. 667, 57 S. E. 1030.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2290-2305; Dec. Dig. §§ 496½, 501, 601.*]

Error from Superior Court, Early County; W. C. Worrell, Judge.

Action between Sam Landrum and J. W. Swann. From the judgment, Landrum brings error. Affirmed.

B. R. Collins, for plaintiff in error. G. D. Oliver and C. D. Russell, for defendant in error.

RUSSELL, J. Judgment affirmed.

(8 Ga. App. 220)

BRYAN COUNTY BANK v. MOYD et al.
(No. 2,773.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

TRIAL (§ 169*)—DIRECTING VERDICT.

The evidence for the defendants made an undisputed case of nonliability. The court did not err in directing a verdict in their favor.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 381-380; Dec. Dig. § 169.*]

Error from Superior Court, Bryan County; P. E. Seabrook, Judge.

Action by the Bryan County Bank against J. B. Moyd and others. Judgment for defendants. Plaintiff brings error. Affirmed.

Hardeman, Jones, Callaway & Johnston, for plaintiff in error. W. F. Slater, for defendants in error.

POWELL, J. Judgment affirmed.

(8 Ga. App. 220)

MILLER v. O'NEAL (No. 2,777.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1094*)—REVIEW—SUFFICIENCY OF EVIDENCE.

The case involved such a controlling issue of fact as to make the verdict of the jury, as approved by the judge of the superior court on certiorari, final; there being no error of law complained of, and there being some evidence to support the verdict.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4322-4324; Dec. Dig. § 1094.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between C. E. Miller and Frank O'Neal. From the judgment, Miller brings error. Affirmed.

A. E. Wilson, for plaintiff in error. Lewis W. Thomas, for defendant in error.

POWELL, J. Judgment affirmed.

(8 Ga. App. 206)

WATTS v. STATE. (No. 2,488.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

1. INSTRUCTIONS.

There was no error in the instruction of the court to the jury, nor any intimation or expression of an opinion as to the defendant's guilt by the trial judge, either in the charge or in the rulings upon evidence.

2. CRIMINAL LAW (§ 829*)—INSTRUCTION.

The request to charge, so far as pertinent, was covered by the instructions given by the judge in his general charge.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. § 829.*]

3. LARCENY (§ 45*)—CRIMINAL LAW (§ 656*)—EVIDENCE.

It was not error to admit in evidence certain money taken from the possession of the accused, and other money testified to have been taken from the possession of the defendant's brother. The identity of the money with that alleged to have been stolen was a question for the jury, and the remark of the court, "Let me see the half-cent piece; this is the first half-cent piece I have ever seen in my life," was not objectionable as expressing an opinion, nor otherwise prejudicial to the accused.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 135, 136; Dec. Dig. § 45; * *Criminal Law*, Cent. Dig. §§ 1524-1533; Dec. Dig. § 656.*]

4. LARCENY (§ 19*)—LARCENY FROM THE PERSON—EVIDENCE.

The offense of larceny from the person may be committed, although the person from whom the property is taken may be, or become almost contemporaneously with the larceny, aware that the larceny has been committed; and it was not error to inform the jury to this effect.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 46; Dec. Dig. § 19.*]

5. SUFFICIENCY OF EVIDENCE.

The evidence authorized the conviction of the defendant, and there was no error in refusing a new trial.

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Martin Watts was convicted of larceny, and brings error. Affirmed.

John R. Cooper, for plaintiff in error. W. J. Grace, Sol. Gen., for the State.

RUSSELL, J. Judgment affirmed.

(8 Ga. App. 165)

WHITLEY v. STATE. (No. 1,916.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

1. DEMURRER TO PLEA.

Under the instructions of the Supreme Court in response to the certified questions, there was no error in overruling the defendant's demurrer or in striking his special plea in abatement.

2. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR.

The relevant evidence authorized the conviction of the defendant, and, though some of the testimony admitted was irrelevant, it does not appear that the irrelevant circumstances

were prejudicial, or could have affected the result.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

3. CRIMINAL LAW (§ 825*)—INSTRUCTIONS—NECESSITY OF REQUEST.

The charge of the court fairly presented the issues submitted in the case; and, if more specific instructions had been desired, they should have been properly requested. There was no error in refusing to sanction the petition for certiorari.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 825.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

F. P. Whitley was convicted of keeping intoxicants at his place of business, and brings error. Case certified to the Supreme Court, and questions answered (68 S. E. 716). Judgment affirmed.

Anderson, Felder, Rountree & Wilson, for plaintiff in error. C. D. Hill, Sol. Gen., Lowry Arnold, and D. K. Johnston, for the State.

RUSSELL, J. Judgment affirmed.

(8 Ga. App. 121)

PERRY v. STATE (No. 2,298.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

ASSAULT AND BATTERY (§ 95*)—DEFENSES—PROTECTING FELLOW OFFICERS.

In the main the trial was fair and free from error, but the court erred in limiting the defendant's right to strike the prosecutor to his own personal self-defense. It appearing that the defendant was a member of a posse attempting to arrest the prosecutor and that the prosecutor was making, or attempting to make, a general attack upon the posse, and that the defendant's superior officer ordered him to strike the prosecutor at a time when, as the jury would have been authorized to find, the prosecutor was manifesting a present purpose to do violence to one or more of the arresting parties, the defendant should have had his right to strike in defense of his fellow officers submitted to the jury.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 141; Dec. Dig. § 95.*]

Error from Superior Court, Early County; W. C. Worrill, Judge.

H. W. Perry was convicted of assault and brings error. Reversed.

Glessner & Park, for plaintiff in error. J. A. Laing, Sol. Gen., and R. R. Arnold, for the State.

HILL, C. J. Judgment reversed.

(8 Ga. App. 218).

MAULDIN v. STATE (No. 2,764.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 961*)—NEW TRIAL—DISMISSAL OF MOTION.

There was no error under the facts recited in the opinion in the order dismissing the mo-

tion for a new trial, nor in refusing thereafter to reinstate the motion.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 961.*]

Error from Superior Court, Irwin County; W. V. Whipple, Judge.

J. P. Mauldin was convicted of crime, and brings error. Affirmed.

H. J. Quincey and John R. Cooper, for plaintiff in error. W. F. George, Sol. Gen., for the State.

HILL, C. J. The only question involved in this case is made by the assignment of error that the trial judge erred in dismissing the motion for a new trial and in refusing to reinstate it. The facts are as follows: A motion for a new trial was made during the term of the trial, and by an order then passed the hearing of the motion was set for a day in vacation, and it was provided therein that the movant should have until the hearing to prepare and present for approval a brief of the evidence. On the day designated the hearing of the motion was postponed until a subsequent date in vacation, and on this latter date it was postponed until a still later date in vacation. On this last date neither the movant nor his counsel appeared, and no brief of the evidence was presented or filed in the office of the clerk. The court thereupon passed an order dismissing the motion for a new trial, and this order was entered on the minutes of the court. A few days subsequently the movant's counsel appeared and requested the court to reinstate the motion, and this the court consented to do, provided the movant would prepare a brief of the evidence and submit the same to the court for its inspection and approval on a day fixed. The movant's counsel appeared on the day fixed, but had not prepared a brief of the evidence, and then expressly assented to an order dismissing the motion, and stated to the court that he would not further press the motion. During the March adjourned term, 1910, the movant's counsel presented to the court a brief of the evidence in the case, and asked that the motion be reinstated. Several terms of the court intervened between the filing of the motion for new trial and the presentation of the brief of evidence for the approval of the court and the motion to reinstate, and no reason was shown for the laches of the movant's counsel. The court refused to reinstate the motion.

Under these facts, the judgment of the court dismissing the motion for new trial was not error, and his refusal to reinstate the motion was not an abuse of discretion. Pen. Code 1895, § 1063; Dozier v. Owen, 63 Ga. 539; Brantley v. Hass, 69 Ga. 748; Howard v. State, 115 Ga. 245, 41 S. E. 654.

Judgment affirmed.

(8 Ga. App. 211)

BROWN v. STATE. (No. 2,725.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

*(Syllabus by the Court.)***1. MASTER AND SERVANT (§ 67*)—LABOR CONTRACT ACT—FRAUDULENT PROCUREMENT OF MONEY.**

The purpose of the "labor contract act" of 1903 (Acts 1903, p. 90) is not to enforce the contract to perform services, but to punish the fraudulent procurement of money, or other thing of value, under the contract, and, in a prosecution for a violation of this act, the question as to the validity of the contract under the statute of frauds is not material, and a conviction could be had for a fraudulent procurement of money under the contract, although it might not be civilly enforceable.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 67.*]

2. MASTER AND SERVANT (§ 67*)—LABOR CONTRACT ACT—EVIDENCE.

Before one can be lawfully convicted of a violation of the labor contract act, several things essential to constitute the offense defined by that act must be proved, among which is that the laborer refused and failed to perform his contract of service without good and sufficient excuse.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 67.*]

Error from City Court of Sparta.

Glade Brown was convicted of violation of a labor contract, and brings error. Reversed.

Hines & Vinson, for plaintiff in error. R. L. Merritt, Sol., for the State.

HILL, C. J. Glade Brown was convicted of cheating and swindling under the act of 1903, commonly known as the "Labor Contract Act" (Acts 1903, p. 90), and his motion for a new trial was overruled. The evidence for the state, briefly stated, is as follows: The prosecutor testified that about ten days or two weeks before Christmas, 1909, the defendant made a verbal contract with him to work for him for the year 1910, beginning on the 1st day of January, for monthly wages of \$12; that at the time this verbal contract was made he gave the defendant an order for flour, sugar, tobacco, nuts, bananas, and oranges, aggregating the amount of \$2.10, and also advanced to him \$2.25 in money. The defendant did not pay back any of the money so advanced, nor pay for any of the articles, did not do any work for the prosecutor, and did not offer to do so. On cross-examination he testified that the defendant had worked for him 10 or 12 years previously, and had been owing him an indebtedness of \$9 or \$10 for three or four years; that before he issued the warrant against the defendant he told him he would settle the case against him for \$14. He denied that the prosecution in this case was for the purpose of collecting the old indebtedness of \$9 or \$10. The defendant made no statement to the jury, but proved by his then employer that the latter had offered the prosecutor \$5 for the defendant, which the prosecutor had refused to accept. This

offer was denied by the prosecutor, but the prosecutor admitted that he would not have prosecuted the defendant if the \$14 had been paid to him.

The plaintiff in error makes no question of law, but claims that the contract alleged to have been made with the defendant by the prosecutor was void under the statute of frauds, since it was not to be performed within a year, and no performance of it had ever taken place. Civ. Code 1895, § 2693 (5); section 2694. We do not think that this contention is sound for several reasons. In the first place, if the evidence of the prosecutor was the truth, there had been such part performance by him of the contract in the advance of the money and other articles as would take it out of the statute of frauds. In the second place, this was a criminal prosecution for a fraudulent procurement of money, and was not an effort to enforce a contract. There is a great distinction between the fraudulent procurement of money under a contract and an effort to enforce a contract. In the one case the question of the validity of the contract is not necessarily involved, but in the second case it is. It has been held by the Supreme Court that a minor whose contract was voidable could nevertheless be convicted for a fraudulent procurement of money under a contract of service made by him, although such contract was not civilly enforceable. *Vinson v. State*, 124 Ga. 19, 52 S. E. 79. And in this case Mr. Justice Lumpkin, speaking for the court, says: "The offense created by that act (referring to the act of 1903) was not merely a breach of contract, but the fraudulent procurement of money, or other thing of value, on the contract to perform services. The gist of the offense is such fraudulent procurement. The contract of a minor is voidable, but, unless he is under the age at which he is declared by statute to be incapable of committing a crime, he is subject to prosecution and conviction. A minor who has arrived at the age of criminal responsibility is as capable of committing a fraud as one of full age." We think the evidence in this case did not authorize a conviction. The act provides that "satisfactory proof of the contract, the procuring thereon of money or other thing of value, the failure to perform the services so contracted for, or failure to return the money so advanced with interest thereon at the time said labor was to be performed, without good and sufficient cause and loss or damage to the hirer, shall be deemed presumptive evidence of the" fraudulent intent. The burden is on the state to prove all of these facts before the presumption arises. In the present case it was shown by the state that the contract was made; that the money or other thing of value was procured thereon; that the defendant failed to perform the contract, and failed to return the money so advanced, with interest there-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

on but there was no evidence that he refused to carry out his contract without good and sufficient cause; and, under the express words of the statute, this fact must be shown before any presumption of guilt arises. *Johnson v. State*, 125 Ga. 243 (3), 54 S. E. 184; *Glenn v. State*, 123 Ga. 585, 51 S. E. 605.

Judgment reversed.

(8 Ga. App. 208)

LOQUE et al. v. HANCOCK COUNTY.

(No. 2,550.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

1. PREVIOUS DECISIONS.

The questions raised in this record are fully controlled by the decision of this court in *Wright v. Sheppard*, 5 Ga. App. 298, 63 S. E. 48, and the decision of the Supreme Court in *Maxwell v. Willis*, 123 Ga. 319, 51 S. E. 416.

2. APPEAL AND ERROR (§ 724*)—ASSIGNMENTS OF ERROR—CERTIFICATION OF CONSTITUTIONAL QUESTION.

An assignment of error making what purports to be a constitutional question in the following language: "Because the provisions of the statute [meaning the alternative road statute] authorizing such tax was unconstitutional"—is too general to raise a constitutional question for certification to the Supreme Court. *Tooke v. State*, 4 Ga. App. 495, 61 S. E. 917.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2997-3001; Dec. Dig. § 724.*]

Error from Superior Court, Hancock County; H. G. Lewis, Judge.

Action by Hancock County against E. C. Loque and others. Judgment for plaintiff, and defendants bring error. Affirmed.

R. H. Lewis, for plaintiffs in error. W. H. Burwell, for defendant in error.

HILL, C. J. Judgment affirmed.

(8 Ga. App. 197)

FLORENCE WAGON WORKS v. SALMON.

(No. 2,377.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

1. DAMAGES (§ 76*)—LIQUIDATED DAMAGES OR PENALTY—NATURE OF CONTRACT.

Whether a fixed sum designated in a contract to be paid in the event of a breach thereof is to be considered as penalty or as stipulated damages depends upon the nature of the agreement and upon the intent of the parties as evidenced by the agreement construed in the light of its subject-matter and of the circumstances under which it was made.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 154, 155; Dec. Dig. § 76.*]

2. DAMAGES (§ 79*)—LIQUIDATED DAMAGES OR PENALTY—PURPOSE OF AGREEMENT.

Where a designated sum is inserted into a contract for the purpose of deterring one or both of the parties from breaching it, it is penalty. Where it is inserted as the result of a bona fide effort of the parties to liquidate in advance and agree upon the sum that should represent the damages which would be actually sustained in the event of a breach, it will be upheld and en-

forced (unless unconscionable or oppressive), especially in cases where the damages cannot be readily estimated according to some legal standard or measure of damage.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 164-169; Dec. Dig. § 79.*]

3. DAMAGES (§ 76*)—LIQUIDATED DAMAGES OR PENALTY—REFERENCE TO TIME OF BREACH.

Where, to secure the performance of the terms of a contract, there is a stipulation for the payment of a fixed, unvarying sum upon the breach thereof by one of the parties, irrespective of the time of the breach, and it appears that the amount of the damages which would result from a breach would be controlled mainly by the time at which the breach occurred, the stipulation is prima facie penalty.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 154, 155; Dec. Dig. § 76.*]

Error from City Court of Floyd; Harper Hamilton, Judge.

Action by the Florence Wagon Works against J. W. Salmon. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

Lipscomb, Willingham & Wright, for plaintiff in error. G. E. Maddox, for defendant in error.

POWELL, J. On March 24, 1908, Salmon, the defendant, gave an order to the plaintiff through its traveling salesman for certain wagons at the price of \$1,247.90. The written order contained a printed condition that, "in case this order is countermanded, a payment of fifteen per cent. of the amount of the order shall be made by you [referring to the purchaser], as agreed, and as liquidated damages." The wagons were at that time made up and in the stock of the wagon works, and were to be shipped to Salmon on the 15th of the following July. On April 6th, Salmon notified the wagon works to cancel the order, and the wagons were never delivered. Plaintiff brought suit to recover the 15 per cent. referred to as liquidated damages. The evidence showed that, though the defendant signed the order and thereby subscribed to the agreement to pay 15 per cent. as liquidated damages for a countermand of the order, he was not in fact aware of such a condition in the order. After hearing the evidence, the court directed a verdict for the defendant, and the plaintiff has excepted.

The main point at issue in this case is whether the 15 per cent. stipulated as a forfeit for the cancellation of the contract is to be treated as a penalty or as liquidated damages. It is called in the contract "liquidated damages." However, "no form of words is controlling. But the fundamental rule so often announced is that the construction of these stipulations depends in each case upon the intent of the parties as evidenced by the entire agreement construed in the light of the circumstances under which it was made." *Sutherland, Damages*, 717. See, also, *Newman v. Wolfson*, 69 Ga. 764; *Allison*

v. Dunwoody, 100 Ga. 51, 28 S. E. 651; Sutton v. Howard, 33 Ga. 536; Mayor and Council of Brunswick v. Aetna Indemnity Co., 4 Ga. App. 722, 62 S. E. 475; 13 Cyc. 90. From this it is seen that there is no hard and fast rule for the determination of such cases, but that each case must be decided independently upon its own merits, and considered in the light of the circumstances surrounding it.

In determining whether a designated sum that is to be paid to one party in the event that the other breaches the contract is a penalty or not, we must look to the question as to whether it was inserted for the purpose of deterring the party from breaching his contract and of penalizing him in the event he should do so, or whether it was a sum which the parties in good faith agreed upon as representing those damages which would ensue if the contract should be breached. If A. borrows \$100 from B., agreeing that, if he does not repay it by October 1st, he will pay \$1 per day as liquidated damages for the detention thereof, this is plainly a penalty, an attempt to coerce prompt performance of the contract, rather than an attempt to estimate what the legal damage to B. will be; for the law fixes the legal damages in such a case at the lawful rate of interest. On the other hand, if A. agrees to furnish B. a particular piece of property or a commodity by a particular time for some special use, and the parties know and understand that, if the property or commodity is not furnished promptly by the date named, B. will suffer a damage which it would be difficult to estimate and which could not be reasonably measured by merely allowing him the difference between the contract price and the market price of the property, and they should in advance attempt to estimate what this damage would be and should agree upon a certain sum reasonable in amount, not for the purpose of deterring A. from breaching the contract, but for the purpose of fully compensating B. for the damage he would sustain, the contract would be upheld as an agreement for liquidated damages. Again, a person being solicited to make a contract may foresee that he may not be able to perform it, or may be unwilling to make the contract, if by so doing he would place himself in a position where, upon his failure to comply, the opposite party would be able in law to hold him to a large sum of money on account of the breach. In such cases the parties may agree that, in the event the promisor fails to comply with his promise to the opposite party, the latter shall not hold him to the payment of all ordinary damages legally estimable, but will hold him only for some stipulated, designated amount; and in such a case the amount so agreed upon would not be a penalty, but would be stipulated or liquidated damages.

Where the contract relates to a subject as to which the law has a fixed or reason-

bly definite rule for the ascertainment of damages, and the parties in advance attempt to stipulate the amount, especially where the amount is in excess of what the damages ordinarily would be when estimated according to the law's measure, the stipulated amount is generally held to be penalty. In a contract for the purchase of merchandise, the law has a reasonably definite measure of damage to apply in the event of a cancellation. Consequently, where the parties agree that, if the purchaser cancels the contract, he will pay a designated sum, the courts incline to the view that this provision is inserted into the contract for the purpose of deterring the purchaser from canceling, rather than to compensate the seller for the damages which he would sustain. We do not, however, regard the ease or certainty with which the damages in such cases may be measured as conclusive of the proposition that the stipulated sum to be paid in the event of a cancellation of the contract would be penalty.

Let us consider the nature of the present contract with a view of ascertaining whether the parties inserted this stipulation for the purpose of deterring the purchaser from cancelling, or for the purpose of compensating the seller for the damages that would ensue in the event of a cancellation. It can readily be seen that, if the purchaser had given notice of his intention to cancel on the day after the contract was made, the damage to the seller would in all probability have been less than if he had waited until the seller had gone to the trouble and expense of getting the wagons together and of packing them and preparing them for shipment, and yet the contract makes no difference between the effect of a cancellation received at one time, and the effect of the cancellation received at a time when in the nature of things the damages would have been wholly different. As a matter of fact, in the present case the notice of the cancellation was received at a time when the plaintiff had suffered no damage at all—at a time when there was no difference between the contract price and the market price of the wagons, and when the plaintiff had taken no action on the order further than to enter it upon his books; and yet the plaintiff says that he should be allowed to recover on account of the anticipatory breach thus made as if the cancellation had not been received until there had been a sharp falling off in the market price of wagons, or until after he had gone to great trouble and expense toward getting the shipment ready for delivery. The principle, therefore, which in this case declares the stipulation to be a penalty, rather than liquidated damages, is akin to that mentioned in the case of Mayor and Council of the City of Brunswick v. Aetna Indemnity Co., *supra*, that: "Where, to secure the performance of the terms of a contract, there is a stipulation for the payment of a fixed, unvarying sum, upon the breach

of any of several promises of varying degrees of importance, * * * the sum named will be construed to be a penalty." In that case the stipulation was for the payment of a fixed sum for the breach of any one of several promises of varying degrees of importance, while in the present case the fixed sum was to be paid upon the breach of a single promise, without regard to the date of the breach when in the nature of things the date of the breach would be all-important in determining the element of actual damage which would ensue. The Supreme Court of the plaintiff's own state has recognized this principle of construction in the case of *Mansur Co. v. Tessler Co.*, 136 Ala. 597, 33 South. 818, a case involving a stipulation for the payment of a fixed sum upon the purchaser's countermanding an order for vehicles.

The contention of the plaintiff that the sum designated in the contract can be regarded as an agreed compensation to be paid to them on account of the cancellation as compensating them for the expense which they incurred in procuring the order through their traveling salesman is not well taken. The expense which a seller incurs in inducing a prospective purchaser to make an offer to buy is not a part of the damage, in the event the purchaser makes the contract, and then fails to take the goods. It will readily be seen that in such cases the sums expended in inducing the contract of purchase are not a part of the damages, when we consider the fact that, if the purchaser had refused to make the contract, the seller would nevertheless have incurred the same expense.

Having held that the contract on its face apparently calls for a penalty, and there being nothing in the evidence to contradict this, the fact that the court admitted evidence on behalf of the defendant to corroborate this theory becomes immaterial. The defendant was entitled to a judgment in his favor, irrespective of the oral testimony which the court allowed him to introduce.

As an abstract proposition the plaintiff would have been entitled to recover nominal damages on account of the defendant's breach, but, as he did not sue upon any theory admitting of such recovery, the court did not err in directing the verdict against him. *Christophulos Café Co. v. Phillips*, 4 Ga. App. 819, 62 S. E. 562.

Judgment affirmed.

(8 Ga. App. 171)

ALBANY & NORTHERN RY. CO. v. DUNLAP HARDWARE CO. (No. 2201.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

1. AFFIDAVIT OF ILLEGALITY—TRAVERSE—PROCEEDINGS.

There was no error in overruling the motion for a new trial upon the issue submitted on

the traverse, nor in thereafter sustaining the demurrer to the affidavit of illegality.

(Additional Syllabus by Editorial Staff.)

2. GARNISHMENT (§ 96*)—SUMMONS—RETURN—PETITION.

A deputy sheriff's return of service of summons of garnishment on the "Albany & Northern Railway" is sufficient, though the name of the company is in fact the "Albany & Northern Railway Company."

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. §§ 189-195; Dec. Dig. § 96.*]

3. GARNISHMENT (§ 95*)—SUMMONS—SERVICE.

A justice of the peace in one county can issue a summons of garnishment, and the same may be served by a proper officer in another county.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. §§ 181-188; Dec. Dig. § 95.*]

4. GARNISHMENT (§ 194*)—VACATING—ADMISSIBILITY OF EVIDENCE.

In proceedings under an affidavit of illegality of garnishment proceedings, witness' testimony that an employé of the garnishee came to him with some papers and stated that these papers were "garnishee papers," and had been served on him, and he did not know what to do with them, was admissible.

[Ed. Note.—For other cases, see *Garnishment*, Dec. Dig. § 194.*]

5. APPEAL AND ERROR (§ 1040*)—REVIEW—HARMLESS ERROR.

In proceedings under an affidavit of illegality of garnishment proceedings, where a ground of illegality was practically disposed of by the finding of the jury upon the traverse adversely to the garnishee, the garnishee was not harmed by sustaining the demurrer thereto.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

6. GARNISHMENT (§ 194*)—VACATION—CONSTRUCTION.

Grounds of illegality of garnishment proceedings alleging that the garnishee had not been served with notice or summons of garnishment, and that the return of the deputy sheriff showed on its face that no legal summons of garnishment was served, are subject to demurrer where the affidavit does not set up that there has been a traverse of the officer's return, or that he has been made a party to the proceeding.

[Ed. Note.—For other cases, see *Garnishment*, Dec. Dig. § 194.*]

7. GARNISHMENT (§ 96*)—SUMMONS—RETURN OF SERVICE.

A return of service of summons in garnishment showing service on the garnishee by delivering a copy to one P., an agent in charge of a place of business of the garnishee in Worth county, was sufficient without more specifically designating the agent.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. §§ 189-195; Dec. Dig. § 96.*]

8. GARNISHMENT (§ 95*)—SUMMONS—SERVICE.

A summons of garnishment issued by a justice of the peace in Bibb county in a case pending in the city court of Sylvester is properly served by a deputy sheriff of Worth county.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. §§ 181-188; Dec. Dig. § 95.*]

9. GARNISHMENT (§ 194*)—VACATION—PROCEEDINGS.

Grounds set up in an affidavit of illegality of garnishment proceedings that the defendant was adjudicated a bankrupt are insufficient where there is no showing that any action was

taken by the bankruptcy court with reference to the suit brought by the plaintiff against defendant, nor as to the garnishment sued out, nor that there was any liability on the part of the garnishee to be bankrupt.

[Ed. Note.—For other cases, see Garnishment, Dec. Dig. § 194.*]

10. BANKRUPTCY (§ 195*)—ADMINISTRATION OF ESTATE—LIEN—GARNISHMENT.

Where a garnishment summons was served April 24th, and bankruptcy proceedings against the defendant were not commenced till October 12th, the bankruptcy could not relieve the garnishee from the judgment rendered against it.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 195.*]

Error from City Court of Sylvester; J. B. Williamson, Judge.

Action by the Dunlap Hardware Company against Rouse & Williams as defendant, and the Albany & Northern Railway Company as garnishee. From a judgment in favor of plaintiff, the garnishee brings error. Affirmed.

J. H. Tipton and Maynard & Hooper, for plaintiff in error. Hardeman, Jones & Johnston, for defendant in error.

RUSSELL, J. The Dunlap Hardware Company filed a suit in the city court of Sylvester against Rouse & Williams, and at the same time made affidavit and bond before a justice of the peace in Bibb county upon which summons of garnishment was issued. Return of the garnishment affidavit and bond was made by J. L. Giddens as deputy sheriff of Worth county upon April 24, 1907, to the city court of Sylvester, with the entry that he had served summons of garnishment upon an agent of the railroad company as garnishee. The entry of service of the summons of garnishment was as follows: "Georgia, Worth County. I have this day served summons and garnishment issued on within affidavit and bond, personally, on the Albany & Northern Railway by handing said summons to Pitts, its agent in charge of its office and place of business in Worth county, Georgia. This 24th day of April, 1907. J. L. Giddens, Dept. Sheriff." No answer was filed by the garnishee in the city court of Sylvester, and after the plaintiff obtained a judgment against the defendants, Rouse & Williams, judgment was duly entered against the garnishee. The judgment against Rouse & Williams was obtained at the August term, 1907, while judgment was entered by default against the garnishee at the September term, 1907, of the city court of Sylvester. Execution issued on the judgment against the garnishee which was levied on January 8, 1908, upon certain property of the plaintiff in error, and on January 27, 1908, the defendant company filed its affidavit of illegality as follows: "And now comes the defendant, garnishee, the Albany & Northern Railway Company, garnishee, in the above case, and files this, its affidavit of illegality, and says that

the execution issued in the above-stated case, at the September term, 1907, of said court, in favor of the plaintiff, the Dunlap Hardware Company, against the Albany & Northern Railway Company as garnishee for the sum of \$706.98 principal, and \$32.75 interest, \$30.80 attorney's fees, and \$13.50 costs, is a proceeding illegally against this defendant for the following reasons: (1) Because this defendant has never been served with any summons of garnishment in the above-stated case, nor has it ever acknowledged service upon any such summons, nor has it appeared and pleaded to any such summons, nor did it have knowledge or notice of any kind of a pendency of such case, or that any garnishment had been issued against it, at the time said judgment was taken; nor did it have any notice of any kind that such judgment was taken until the execution based thereon was on the 9th day of January, 1908, levied upon certain of its property in the town of Warwick, said county, consisting of its depot, roadbed, and right of way, running one-half mile each way from depot, which levy was made on the 9th day of January, 1908, by J. H. Jones, deputy sheriff of Worth county, Ga., and notice that day given by the said Jones to the agent of this defendant of said levy, and that the said property would be advertised to be sold on the first Tuesday in February, 1908. Defendant says that the service of this notice by said deputy sheriff was the first notice of any kind conveyed to it in any manner that there existed such a case or judgment, and therefore it has never had its day in court nor any opportunity to make its answer to such summons of garnishment. Defendant further says that neither at the time of this issue of said summons nor at any time since then was it indebted in any way to said Rouse & Williams, the said J. M. Rouse, or the said W. O. Williams, nor did it at any time have, nor has at any time since had, any money, goods, property, or effects at any time of either of the above parties; and, had this defendant been served or had knowledge of the issuance of any summons of garnishment directed to it, it would have made answer as required by law and set up these facts. (2) That the only entry of service of said summons of garnishment purporting to have been made upon this defendant is as follows: 'Georgia, Worth County. I have this day served summons of garnishment issued on within affidavit and bond personally on the Albany & Northern Railway by handing same summons to Pitts, its agent in charge of its office and place of business in Worth county, Georgia. This 24th day of April, 1907. J. L. Giddens, Deputy Sheriff.' Defendant says that the above entry shows upon its face that no legal summons of garnishment was served or attempted to be served upon it, because: (a) The corporate name of this defendant is the Albany & Northern

Railway Company, and by this name alone is it known and has it power to sue and to be sued. (b) Because the entry of service of said summons of garnishment does not allege upon what agent of this defendant it was served, or what office said Pitts was in charge, only alleging one ——— Pitts, and its office and place of business to be in Worth county, Georgia, not alleging that that was its only office or place of business in said county, while in truth defendant has more than one office and place of business in said county, and at different points in said county, nor does said entry with sufficient certainty identify said Pitts, either by name, description, or otherwise, nor does it allege his given name was unknown or could not be ascertained. (3) Because it does not appear from the face of the record that any garnishment was issued by any officer authorized to issue such garnishment and summons."

On November 18, 1908, the issue raised by the first ground of the affidavit of illegality was submitted by way of a traverse of the sheriff's entry of service of summons of garnishment. The finding of the jury was against the traverse, the garnishee's motion for a new trial was overruled, and the judgment of the court in this regard was brought to this court for review. *Albany & Northern Ry. Co. v. Dunlap Hardware Company*, 6 Ga. App. 17, 63 S. E. 1124. This court at that time dismissed the writ of error as being prematurely brought, for the reason that the traverse was really a part of the first ground of the illegality; but we gave the plaintiff in error permission to file the bill of exceptions as exceptions pendente lite. A considerable portion of the brief of the counsel for the defendant in error in the present case is addressed to the right of this court to order the bill of exceptions to be filed as exceptions pendente lite. We pretermit any discussion of this question at this time because it is immaterial to the conclusion in the case. If the exceptions pendente lite were not filed in time, the judgment of the city court of Sylvester is final, and cannot be reversed. If the former writ of error was properly filed as exceptions pendente lite, then we find no error in the judgment of the trial judge in overruling the motion for a new trial upon the traverse.

Upon an examination of the exceptions pendente lite, we find that the motion for a new trial which was overruled assigns error upon five grounds in addition to the general grounds that the verdict is contrary to the evidence, etc. The first of these grounds is that the court erred in sustaining the objection of the plaintiff's counsel to the introduction of the charter of the defendant company, because the entry of the deputy sheriff as to the service of summons of garnishment designated the party served as "Albany & Northern Railway," when, in fact, the name of the company is Albany & Northern Railway Company, and the charter would show

this fact. We are of the opinion that the two names are idem sonans, and, even if a plea of misnomer had been filed and the evidence then excluded, the error would not be so material as to warrant a new trial.

In the second special ground of the motion for a new trial, it is complained that the court erred in overruling the movant's objections to introduction of the affidavit and bond for garnishment; that the affidavit and bond appear to have been made before a justice of the peace in Bibb county, Ga., and that, under the act creating the city court of Sylvester, "the justice of the peace in Bibb county, nor any other county, has the right to return a summons of garnishment or a process to the city court of Sylvester." Perhaps the statement of this ground of the motion, as made, is true, but if the point sought to be raised, as we apprehend, is that the justice of the peace in Bibb county could not issue a summons of garnishment as was done in this case, and the same be served and returned by a proper officer in Worth county, then the contention of the movant is without merit. The act creating the city court of Sylvester expressly provides that the court may have jurisdiction of the summons of garnishment.

The third ground of the motion for a new trial complains of the admission of the evidence of a witness, Harris, to the effect that Pitts, an employé of the Albany & Northern Railway Company, came to him with some papers, and stated that these papers which he called "garnishee papers" had been served on him, and he did not know what to do with them. We think this evidence was properly admitted by the court. If the witness saw the papers in Pitts' possession, as he testified he did, this was a substantive fact. Pitts' own evidence in the case demonstrates that he was an agent of the company in Worth county upon whom service upon the company might be perfected and the statement made by him seems to us admissible, not only as a part of the res gestæ of the physical fact of showing the papers to Harris, but also upon the ground that the admission was made dum fervet opus, because they were still in his hands and the duty was still upon Pitts of taking some action in regard to them in behalf of his principal.

Upon the return of the case to the city court of Sylvester, the trial judge finally disposed of the case sustaining demurrers to the affidavit of illegality and exception is taken to this judgment. Having approved of the judgment overruling the motion for a new trial upon the traverse, we come to consider whether the judge erred in dismissing the affidavit of illegality as insufficient. In addition to the grounds of illegality, which we have quoted above, the garnishee amended by setting up the fact that Rouse & Williams were adjudicated bankrupts on November 1, 1907, and insisted that by reason of that fact

the judgment entered against the garnishee on October 12, 1907, was void; also that the summons of garnishment was void because the justice of the peace in Bibb county has no right to issue a summons of garnishment, and make the same returnable to the city court of Sylvester. The latter ground of the affidavit of illegality is but a clearer statement of one of the original grounds to which we have already adverted. The first ground of illegality was practically disposed of by the finding of the jury upon the traverse adversely to the garnishee, and for that reason the garnishee was not harmed by sustaining the demurrer thereto, which was of itself good because the affidavit did not set up that there had been a traverse of the officer's return, or that he had been made a party to the proceeding. The same reason applies to the second ground of the original affidavit of illegality in so far as the entry of service is concerned. As to that portion of the affidavit which related to the corporate name of the garnishee, the omission of the word "company" was at best but a misnomer and amendable. The entry of service showing that Pitts was an agent in charge of a place of business in Worth county rendered worthless that portion in the affidavit in which it was insisted that he should be more specifically designated. The service was good if it was effected on any agent of the garnishee within the jurisdiction of the city court of Sylvester; that is, one agent who was the proper person to be served in Worth county was just as good as any other through whom service might be properly effected. As we have already stated, there can be no question that a justice of the peace in Bibb county could take the affidavit and bond and issue the summons of garnishment which might thereafter be served by any proper officer in the county of Worth. As the case was pending in the city court of Sylvester, the deputy sheriff of Worth county was such a proper officer.

There is no merit in the ground of the affidavit of illegality which attempts to set up the adjudication of Rouse & Williams as bankrupts. In the first place, there is no statement of illegality to show any action taken by the bankruptcy court with reference to the suit brought by the Dunlap Hardware Company against Rouse & Williams or as to the garnishment sued out or that there was in fact any liability at all on the part of the Albany & Northern Railway Company to bankrupt Rouse & Williams. But, even if the affidavit had contained statements to this effect, the garnishment was served April 24, 1907, and from that time the Dunlap Hardware Company had an inchoate lien on whatever amount the Albany & Northern Railway Company might be indebted to Rouse & Williams or on any property of Rouse & Williams that might be in possession of the rail-

way company. The petition in bankruptcy was not filed until October 12, 1907, and the adjudication was had on November 1, 1907. The bankruptcy could not relieve the garnishee from the judgment rendered against it. In *Re Maher* (D. C.) 169 Fed. 997, Judge Newman says: "More than four months prior to the filing of a bankrupt's petition, claimant sued the bankrupt on open account and garnished certain debtors of the bankrupt, who held sufficient funds to cover any judgment that might be rendered in the main suit. The bankrupt gave a bond dissolving the garnishment depositing with the sureties one thousand dollars to secure them against loss. Held, that claimant acquired a lien as against the garnishees, under the express provision of the Laws of Georgia 1901, p. 55." The trustee in bankruptcy, if any one, could alone raise the point which the affidavit of illegality in this case seeks to prevent, or, as we held in *National Surety Co. v. Medlock*, 2 Ga. App. 665, 58 S. E. 1131, the effect of section 67(f) of the national bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450)), is not to avoid the levies and liens therein referred to against all the world, but only as against the trustee in bankruptcy and those claiming under him in order that the property may pass to and be distributed among the creditors of the bankrupt. *McKenney v. Cheney*, 118 Ga. 337, 45 S. E. 433.

In our judgment, the demurrer to the affidavit of illegality was properly sustained. Judgment affirmed.

(8 Ga. App. 177)

CENTRAL OF GEORGIA RY. CO. v.
DUNCAN. (No. 2,227.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 205*)—REVIEW—CERTIORARI—RECORD.

The exception which assigns error on the refusal of the justice of the peace to allow the defendant in the court below to amend its plea by adding an affidavit to the same could not be considered by the judge of the superior court because the untraversed answer of the magistrate contradicted the averments of the petition for certiorari as to this point.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 798, 799; Dec. Dig. § 205.*]

2. JUSTICES OF THE PEACE (§§ 96, 183*)—REVIEW—CERTIORARI—HARMLESS ERROR.

The judgment is controlled by the rulings in *Seaboard Air Line Ry. Co. v. Coursey*, 1 Ga. App. 662, 57 S. E. 968, and *Coffee v. McCaskey Register Co.*, 7 Ga. App. 425, 66 S. E. 1032, and there was no error in overruling the certiorari. Where the plaintiff's account is proved by affidavit as provided in Civ. Code 1895, § 4130, and the defendant has filed a general denial, not sworn to, the case, so far as the defendant is concerned, is in default, and the direction of a verdict by the magistrate is harmless error. If an offer to amend the defendant's plea by adding the required affidavit had been made be-

fore any testimony was offered, the amendment should have been allowed and the right of supporting the defense by testimony would have followed. *Coffee v. McCaskey Register Co.*, supra. But in response to a suit on account verified by an affidavit as provided by Civ. Code 1895, § 4130, the defendant must likewise swear to his answer; and, failing thus to answer, the defendant is not entitled to introduce any evidence for the reason that he has no plea.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 328-332; Dec. Dig. §§ 96, 183.*]

3. JUSTICES OF THE PEACE (§ 100*)—PROCEDURE—PLEADING—VERIFICATION.

Unless the defendant in response to a suit on account which has been verified by affidavit as prescribed in Civ. Code 1895, § 4130, swears to his defense, he is not entitled to introduce any testimony for the reason that he has no plea. *Brierton v. Smith*, 7 Ga. App. 69, 66 S. E. 375.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 337-340; Dec. Dig. § 100.*]

Error from Superior Court, Houston County; W. H. Felton, Judge.

Action by C. C. Duncan against the Central of Georgia Railway Company. From a judgment of the superior court overruling a certiorari to the justices of the peace, defendant brings error. Affirmed.

R. N. Holtzclaw, for plaintiff in error. O. O. Duncan and H. A. Mathews, for defendant in error.

RUSSELL, J. Judgment affirmed.

(8 Ga. App. 209)

WOOD, Treasurer, v. VIENNA TELEPHONE CO. (No. 2,721.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

COUNTIES (§ 113*)—POWERS OF COUNTY BOARD—INSTALLATION OF TELEPHONES.

The county authorities in this state have the power to install telephones or to cause them to be installed in the courthouses, jails, pauper farms, and other places where they may be needed in the conduct of such matters and things as the counties are authorized to support and maintain by taxation.

[Ed. Note.—For other cases, see *Counties*, Dec. Dig. § 113.*]

Error from Superior Court, Dooly County; U. V. Whipple, Judge.

Action by the Vienna Telephone Company against B. M. Wood, treasurer. Judgment for plaintiff, and defendant brings error. Affirmed.

Busbee & Busbee, for plaintiff in error. W. F. George, for defendant in error.

POWELL, J. The question is whether telephone service for the courthouse, jail, and pauper farm of a county is a legitimate and constitutional charge for which the county authorities may appropriate money from the county treasury. We think that it is. It is true that he who asserts a county's power

to contract for anything or to pay for it from county tax money must be able to show the authority, either expressly given or arising by necessary implication. By the Constitution (article 7, par. 2 [Civ. Code 1895, § 5892]) the taxing power, and consequently the contracting power, of counties, is limited as follows: "The General Assembly shall not have power to delegate to any county the right to levy a tax for any purpose, except for educational purposes in instructing children in the elementary branches of an English education only; to build and repair the public buildings and bridges; to maintain and support prisoners; to pay jurors and coroners, and for litigation, quarantine, roads, and expenses of courts; to support paupers and pay debts heretofore existing." So far as the courthouse itself is concerned, only the power to "build and repair" is given; and yet who would say that the county authorities had exhausted their power in this respect when they had erected a building with floors, walls, ceilings and roof? There must be necessary tables, chairs, and other legitimate furnishings. Will it be insisted that a county cannot buy handcuffs? Yet, in a strict and literal sense, this would not be "to support and maintain prisoners." As the Supreme Court pointed out in the case of *Pennington v. Gammon*, 67 Ga. 456, 459, there is no law expressly authorizing the county authorities to purchase spades, shovels, hoes, axes, and other things needed in working the county chain gang; yet it was held that not only these things, but also expensive improved machinery, might lawfully be bought. Cf. *Wright v. Floyd County*, 1 Ga. App. 582, 58 S. E. 72. Telephone service is no longer a luxury. It is a modern business necessity. When it is needed in connection with the matters and things which the county authorities are authorized to maintain and to tax for, they may lawfully contract for it. It then becomes a part of the maintenance and equipment of the public buildings, a part of the expense of courts, of prisoners, of paupers, etc. It becomes a part of the machinery by which the county authorities carry on the legitimate county business; and the authorities may lawfully pay for it out of the county funds.

Judgment affirmed.

(8 Ga. App. 182)

FIRST NAT. BANK OF MOULTRIE v. SAVANNAH BANK & TRUST CO.

(No. 2,331.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§§ 292, 443, 447*)—INDORSEMENT OF CHECK—RIGHTS OF INDORSEER.

The payee of a negotiable instrument, in the absence of anything appearing to the contrary, is presumed to be the first indorser; and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

indorsement "to the order of any bank or banker" carried to the plaintiff, as a bank, the right to collect the amount due on the check, and to bring suit either on the check or for the proceeds thereof.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 660, 1307, 1308, 1406; Dec. Dig. §§ 292, 443, 447.*]

2. BILLS AND NOTES (§ 462*)—ACTION ON CHECK—PLEADING.

A petition containing an allegation that the payee indorsed the check to the plaintiff bank for collection, and that the drawee stamped the check "Paid," and charged its customer, the drawer, with the amount the check called for, but has never paid the amount of the check to the plaintiff bank, or to any bank or banker for it, sets forth a good cause of action. *Smith Roofing & Contracting Co. v. Mitchell*, 117 Ga. 772, 45 S. E. 47, 91 Am. St. Rep. 217.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1444; Dec. Dig. § 462.*]

3. PLEADING (§ 354*)—STRIKING OUT.

A plea of payment, setting up that the proceeds of a check had been paid to a third person, but without any allegation that such person was authorized to receive payment, was properly stricken on motion. The direction of the verdict in favor of the plaintiff was not harmful to the defendant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1092-1095; Dec. Dig. § 354.*]

Error from City Court of Moultrie; J. D. McKenzie, Judge.

Action by the Savannah Bank & Trust Company against the First National Bank of Moultrie. Judgment for plaintiff, and defendant brings error. Affirmed.

J. A. Wilkes, for plaintiff in error. W. L. Clay and Shipp & Kline, for defendant in error.

RUSSELL, J. Judgment affirmed.

(8 Ga. App. 214)

WALKER v. STATE. (No. 2,786.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 260*)—CERTIORARI—WHEN LIES.

The superior courts of this state have jurisdiction conferred by the Constitution to correct errors in all inferior judicatories by writ of certiorari. A judgment of the city court overruling a motion for a new trial in a criminal case is a final judgment, from which certiorari will lie to the superior court; and this is true, although the act creating the city court provides that a writ of error may be sued out directly from that court to the Supreme Court.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 260.*]

2. CRIMINAL LAW (§ 804*)—INSTRUCTIONS—CHARGING STATUTE.

Where there is a timely request to the judge to charge the jury in writing, he must copy into his charge any statute which he submits to the jury, or he must read to the jury the statute verbatim, "noting accurately in his written charge the statute so read." If the notations made in the written charge leave in doubt what statute the judge did read to the jury, or what portion of the statute was so read, the mandatory requirements of the law are not

complied with, and if the evidence does not demand the verdict a new trial will be granted.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 804.*]

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Jack Walker was convicted of selling whisky, and brings error. Reversed.

Doyle Campbell, for plaintiff in error. Jos. E. Pottle, Sol. Gen., for the State.

HILL, C. J. Jack Walker was convicted in the city court of Monticello of selling whisky. He filed a motion for a new trial, which was overruled. He then petitioned the superior court for a writ of certiorari, the judge of the superior court refused to sanction the petition, and he brings error. Two questions are made in the record: First, did certiorari lie from the judgment of the city court overruling the motion for a new trial? And, second, did the judge of the city court comply with the statute requiring him on a written request by defendant's counsel to reduce his charge to writing?

1. Counsel for the state insists that, as the plaintiff in error had filed a motion for a new trial in the city court, he could not also sue for a writ of certiorari in the case; that the right of having the judgment of an inferior court reviewed on certiorari does not give the right to review a judgment refusing a new trial, and especially so where the act creating the city court, as in this case, provides for a writ of error from the city court directly to the Supreme Court; and he contends that the contrary view will greatly delay the final adjudication of criminal cases. The right of certiorari is a constitutional right. The Constitution expressly confers upon the superior court the power "to correct errors in inferior judicatories, by writ of certiorari." Article 6, § 4, par. 5, codified as section 5846 of the Civil Code of 1895. See, also, section 4634 of the Civil Code. In the case of *Archie v. State*, 99 Ga. 23, 25 S. E. 612, the defendant filed a motion for a new trial in the city court, where he was convicted, and subsequently dismissed his motion for a new trial, and petitioned for the writ of certiorari; and the question in that case was whether the remedy of certiorari could be invoked without first moving for a new trial in the city court. The Supreme Court held that, "the right of certiorari being a constitutional one, the privilege of moving for a new trial is merely cumulative; and a complaining party could avail himself of that in the first instance, or not, as he chose." See, also, *Harvey v. Jewell*, 84 Ga. 234, 10 S. E. 631; *Winn v. State*, 126 Ga. 419, 55 S. E. 178.

It cannot be questioned that the judgment of the city court in overruling the defendant's motion for a new trial in that court was a final judgment, and it seems to be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

equally clear that any final judgment of an inferior judicatory, such as the city court, may be reviewed by the superior court upon certiorari. We think, therefore, that under the act creating the city court the defendant in this case could have brought the decision of the judge of the city court, overruling his motion for a new trial, directly to this court by bill of exceptions, or he had the right, under the Constitution and the law and the decisions of the Supreme Court, to have the judgment of the city court first reviewed by the superior court upon certiorari, and, if his petition for the writ of certiorari was denied, a writ of error would lie from the judgment of the superior court to this court. It is true that this construction of the law may result in some delay in final adjudications in criminal cases; but, if any remedy is needed for this result, the Legislature, and not the courts, is the proper source from which it must come.

2. The trial judge, complying with the request of counsel, reduced his charge to writing. In noting the law under which the indictment is framed, he made the following statement: "The defendant has been charged and indicted with the offense named in the indictment under provisions of Georgia Laws, 1907, which read as follows: Acts 1907, page —, through words 'in section 1089,' p. 82." In other words, instead of writing out the statute under which the indictment was framed, he read it from the Acts of 1907. The charge as written out was not sent up with the record, and the judge says, in his verification of the grounds of the amended motion for a new trial, that the annotations set up in the motion are correct. These annotations are: "Acts 1907, page —, through words 'in section 1089,' p. 82." It is contended by plaintiff in error that this was not a compliance with the statute; that the notations contained in the record as to what the judge read are not accurate, in that it is not distinctly stated what "provisions of the Georgia Laws of 1907" the court read, or, even assuming that he read the prohibition law, under which the indictment was framed, it does not appear what part of the law he read to the jury, in that it is not stated where he commenced to read; that, although it is stated where the quotation concluded, it is not stated where the quotation commenced.

We think the charge is subject to the criticism. While it is probable that the judge did read the prohibition act from the beginning, and through the words "in section 1089," as contained in Acts 1907, p. 82, yet he does not clearly so state, nor does it clearly appear from the notations that he did so. In *Burns v. State*, 89 Ga. 527, 15 S. E. 748, the Supreme Court holds that "it is no failure to comply with a request to charge the jury in writing for the judge, instead of copying into his charge sections of the Code which he submits to the jury, to read these sections verbatim from the Code itself,

noting accurately in his written charge the sections so read." We are not willing to give to the imperative statute requiring the judge to reduce his charge to writing any more liberal or extended construction than was given by the Supreme Court in that case. Not only the Supreme Court, but this court, has repeatedly held that the trial judges are required to obey both in letter and spirit the statute which declares that they must write out in full, when a timely request is made, the charge to the jury. *Fry v. Shehee*, 55 Ga. 208; *Wheatley v. West*, 61 Ga. 401; *Forrester v. Cocke*, 6 Ga. App. 829, 65 S. E. 1063. When we consider that the reason for this requirement, as announced by the Supreme Court and this court, is to remove all possibility of dispute between the court and counsel as to what in fact was charged, we think that any interpretation of the statute which permits a substantial compliance with its terms cannot be upheld. The statute demands literal compliance. We hold that the annotations are not sufficiently accurate or definite to show what was in fact read by the court in the charge to the jury in the present case.

The evidence in the record, while sufficient to support the verdict, does not demand it, and, following the decision of this court in the *Forrester Case*, supra, we are constrained to grant another trial because of the failure of the trial judge to comply with the statute requiring him to reduce his charge to writing. We think that for this reason the judge of the superior court should have sustained the certiorari.

Judgment reversed.

(8 Ga. App. 217)

STEVENS v. STATE. (No. 2,759.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 757*)—TRIAL—INSTRUCTIONS—OPINION AS TO EVIDENCE.

After instructing the jury that it was their duty to reconcile the evidence of the different witnesses, if it could be done without imputing perjury to any, the court charged that, "when witnesses agree as to important facts testified to, slight discrepancies as to the collateral attendant facts afford no ground to discredit either of them." *Held*, this was not an intimation of an opinion by the court that any discrepancies existed, or that the discrepancies, if any, were slight, and therefore not sufficient to discredit.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 757.*]

2. CRIMINAL LAW (§ 758*)—TRIAL—INSTRUCTIONS—EFFECT OF EVIDENCE—STATEMENT OF DEFENDANT.

After instructing the jury in the language of the statute that they were authorized to believe the defendant's statement in preference to the evidence in the case, the judge added: "But you are not under any obligation to do so, or not to do so. The law simply gives you the power to do so, if you believe it is the truth." *Held* not error, because "it was a disparagement of the statement, and impressed the jury with the idea that they were under no obliga-

tion to believe the defendant's statement." The addition to the language of the statute, while not material, was entirely superfluous, and against the repeated rulings of this court and of the Supreme Court that trial judges, in their instructions on the effect or weight of the statement, should confine themselves to the language of the statute. The statute is full enough and clear enough, and any effort to make it more explicit is apt to lead to error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1786-1789; Dec. Dig. § 758.*]

3. CONSPIRACY (§§ 23, 47*)—CRIMINAL RESPONSIBILITY—ELEMENTS OF OFFENSE.

The court, in charging the jury, properly defined a conspiracy as "a combination or agreement between two or more persons to do an unlawful act," and properly charged that "the existence of a conspiracy may be established by proof of acts and conduct, as well as by proof of an express agreement." The charge on the subject of a conspiracy was based on the evidence in the case, and was well adjusted to the issues.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 30-39, 105-107; Dec. Dig. §§ 23, 47.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1454-1461; vol. 8, p. 7613.]

4. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE—APPLICABILITY TO ISSUES.

Where, on a trial for murder, the sole defense relied upon is that the defendant did not kill the deceased or participate in the homicide, the law of justifiable homicide in self-defense is not applicable, and there is no error in not instructing the jury on that subject, unless the evidence otherwise presents the issue of justifiable homicide in self-defense. In this case no such issue was presented.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

5. HOMICIDE (§ 309*)—INSTRUCTIONS—MUTUAL COMBAT.

The evidence demanded a charge on the law of homicide as the result of mutual combat, and the court did not err in giving in charge section 73 of the Penal Code.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 309.*]

6. INSTRUCTIONS—EVIDENCE—SUFFICIENCY.

The charge as a whole was a clear and accurate submission of the issues made by the evidence. No error of law was committed, and the evidence fully supports the verdict.

Error from Superior Court, Worth County; Frank Park, Judge.

Clarence Stevens was convicted of murder, and brings error. Affirmed.

Perry & Foy, for plaintiff in error. W. B. Wooten, Sol. Gen., and J. H. Tipton, for the State.

HILL, C. J. Judgment affirmed.

(3 Ga. App. 186)

ATLANTIC COAST LINE R. CO. v. MOORE. (No. 2,376.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

1. RAILROADS (§ 348*)—ACCIDENTS AT CROSSINGS—EVIDENCE—SUFFICIENCY.

The verdict is not without evidence to support it.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 348.*]

2. NEGLIGENCE (§ 136*)—RAILROADS (§ 348*)—QUESTIONS FOR JURY—ACCIDENTS AT CROSSINGS—RES IPSA LOQUITUR.

The charge construed as a whole was fair, lucid, and correct, and was not misleading.

(a) The existence of negligence is essentially a fact for solution by the jury.

(b) Proof that the injury was received by the plaintiff through the operation of the defendant's train is prima facie proof of every act of negligence alleged in the petition.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-306; Dec. Dig. § 136; Railroads, Dec. Dig. § 348.*]

3. DAMAGES (§ 185*)—INJURIES TO THE PERSON—EXPECTANCY OF LIFE.

Where the age of the person in question is shown, expectancy of life may be determined by the jury without having the mortality tables before them or without any other direct evidence on the subject.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 185.*]

4. NO ERROR.

No material error appears.

(Additional Syllabus by Editorial Staff.)

5. NEGLIGENCE (§ 3*)—"DILIGENCE."

"Diligence" is a relative term, and what is "due diligence" in a case where negligence would be wrongful must be determined from all the surrounding circumstances, for a degree of diligence which might suffice under one set of circumstances might be wholly inadequate under different conditions.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 5; Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2065-2067.]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Willie Moore, by next friend, against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Willie Moore, by his next friend, brought suit against the railroad company for damages for personal injuries. He claimed that while he was crossing Henry street, in the city of Savannah, late at night, some freight cars were standing on the tracks of the railroad just on the edge of the crossing without any light on them, and that, when he was opposite the end of one of the cars, an engine or train of the defendant struck the other end without any warning or signals, and knocked the car suddenly on the crossing, whereby the car ran over his foot and mashed and permanently injured it. He alleged that the injury was due to the following acts of negligence on the part of the defendant: (a) Failure to lower the railway gates or guards so as to warn plaintiff of the danger incident to the operation of its cars. (b) Failure to keep a watchman stationed at the intersection of the defendant's tracks with Henry street so as to warn pedestrians of the movements of its cars. (c) Failure to provide a light so as to illuminate the northern end of the car and so as to enable the plaintiff to see those in charge of the movement of the car. (d) Failure to

provide a light or signal on the rear end of the car. (e) Failure to station a flagman or brakeman in charge of the car and at the rear end thereof before moving it so as to warn the petitioner of the intention to shift the car. (f) Failure to blow a whistle or sound a gong, or give any other warning that the car was to be moved. (g) Negligence in suddenly starting the car upon the public crossing violently and without warning.

Plaintiff testified that between 11 and 12 o'clock on the night of October 7, 1908, he was struck by a train of cars while he was upon the crossing made by the intersection of Henry street and the defendant's tracks; that he was knocked down and his foot seriously and permanently injured; that he was not aware of the presence of the train, or that it was going to start; that there was no gate down, no flagman at the end of the cars, no watchman stationed at the street crossing, no bell rung or whistle blown. He testified he was 19 years old, and he showed his earning capacity.

The railroad company denied that the plaintiff was injured in the manner he alleged, and introduced testimony to show that he was not injured on the crossing at all, but was hurt by reason of his endeavoring to board a passing freight train and falling therefrom. The evidence was conflicting, and the jury returned a verdict for the plaintiff for \$1,500. The defendant excepts to the overruling of its motion for a new trial. In addition to the usual general grounds of the motion, the defendant complained of certain instructions contained in the charge of the court to the jury and of the admission of certain testimony. The special grounds of the motion for a new trial were as follows:

1. Because the court erred in charging the jury as follows: "Applying the law to the facts in the case now before you, should you find from the evidence that the plaintiff has sustained by proof satisfactory to you by a preponderance of the evidence, the alleged facts in his declaration, and that the defendant's servants in charge of the car or cars were negligent in the manner alleged, that they did or failed to do what is alleged in the declaration, and that doing or failing to do that amounted to the lack of ordinary care and diligence, and that the plaintiff could not have avoided such negligence by the exercise of ordinary care for his own safety, and that at the time he was injured he was in the exercise of ordinary and reasonable care and diligence, then the plaintiff would be entitled to recover for the injury sustained"—the error in said charge being (a) that it submits to the jury as issues on the question of negligence three statements set forth in the declaration and declared to be negligence which did not constitute negligence either as a matter of law or under the facts proved, and such state-

ments in the declaration should have been eliminated by the charge, to wit, that it failed to provide a watchman stationed at the intersection of Henry street with the tracks of the railroad company so as to warn passing pedestrians of the movements of defendant's cars; that the defendant failed to provide an electric light or other light at said intersection so as to enable plaintiff to see those in charge of the movement of the car; that the defendant was negligent in failing to lower the guard rails or railroad gates that he alleges were located at that point to warn passing pedestrians of the danger incident to crossing the track while the car was in motion. (b) Said charge is misleading and confusing, in that it thus submits to the jury statements in the declaration which could not possibly be negligence. (c) Said charge is further confusing and misleading, in that it stated to the jury in one portion thereof that the defendant would be liable if the plaintiff proved by a preponderance of evidence that "the defendant's servants in charge of the car or cars were negligent in the manner alleged," and in another portion states to the jury that the defendant would be liable if the plaintiff proved by a preponderance of evidence that "they did or failed to do what is alleged in the declaration"; there being several acts of negligence alleged in addition to those of the servants of the defendant in charge of the train. (d) The court should not have left it to the jury to say whether the omission of the defendant to do the acts set out in the declaration, to wit, to have a watchman, an electric light, and to lower the gates, amounted to a lack of ordinary care and diligence.

(2) Because the court erred in charging the jury as follows: "In other words, it must be shown to you that the injury occurred as described in the declaration, and that the injury so done amounted to or was caused by the lack of ordinary care and diligence, either in the acts alleged or in the omission of acts alleged in the declaration"—the error in said charge being: (a) That it submits to the jury as issues on the question of negligence three statements set forth in the declaration and declared to be negligence which do not constitute negligence either as a matter of law or under the facts proved, and such statements should have been eliminated by the charge, to wit, that the defendant failed to provide a watchman; that the defendant failed to provide an electric light; that the defendant failed to lower the gates. (b) Neither of the three said acts being negligence as a matter of law or as a matter of fact, the court should not have left it to the jury to determine whether the alleged omission of the defendant to provide a watchman, to provide an electric light at said crossing, and to lower the gates at said crossing amounted to a lack of ordinary care and diligence. (c) Said charge authorized the jury to find for the plaintiff in the

event the jury found that the defendant omitted to do any one of the three acts hereinbefore set out, to wit, to provide a watchman, to provide an electric light, and to lower the gates, and that such omission amounted to a lack of ordinary care on the part of the defendant, although the jury may have found that the defendant was not negligent in other particulars alleged in the declaration, it appearing that no one of the three acts of alleged negligence as above set forth was negligence as a matter of law or as a matter of fact. (d) Said charge authorized the jury to find for the plaintiff in the event the jury found that the defendant omitted to do any one of the acts alleged in the declaration, and that such omission amounted to a lack of ordinary care and diligence, although the jury may have found that such omission was not the proximate cause of the injury and did not contribute thereto.

3. Because the court erred in charging the jury as follows: "I charge you that it is a question for you to determine from all the facts and circumstances of the case whether or not ordinary care and prudence required that the defendant railroad company should have done what it is alleged in this declaration it failed to do, if you find that it failed to do it, or if it amounted to a want of ordinary care and diligence for it to do what it is alleged in this declaration it did, if you find that it did such a thing. That applies to all of the allegations of negligence set out in the declaration"—the error in said charge being the same as set out heretofore in the second ground of the amended motion for new trial in paragraphs "a," "b," "c," and "d."

4. Because the court erred in charging the jury as follows: "If you find from the evidence that ordinary care and prudence required that the defendant should have done what it is alleged it should have done to avoid the alleged danger set out in the petition, and that the defendant failed to provide persons, servants, or means as therein alleged to be necessary in the exercise of ordinary care to avoid the alleged danger, and that such failure was negligence and was the cause of the injuries received by the plaintiff, if you find that such injuries were received by him, and that at the time the injuries were received by the exercise of ordinary care and prudence on his part he could not have prevented the same, then that would make such a case as would authorize a recovery on the part of the plaintiff"—the error in said charge being the same as set out heretofore in the second ground of the amended motion for new trial in paragraphs "a," "b," "c," and "d."

5. Because the court erred in charging the jury as follows: "Now, gentlemen, if you find that it has been shown by the preponderance of the evidence that the plaintiff in this case has been injured in the manner he described, and because of something alleged

to have been done or omitted in this declaration, and that the doing or omission to do this something alleged in the declaration caused the injury, and amounted to the lack of the exercise of ordinary care and diligence on the part of the defendant company, he may recover, provided he himself was in the exercise of ordinary care and diligence for his own safety"—the error in said charge being the same as set out heretofore in the second ground of the amended motion for new trial in paragraphs "a," "b," "c," and "d."

6. Because the court erred in charging the jury as follows: "Having arrived at the yearly loss, as indicated above, you can multiply the amount so ascertained by the expectancy of life of the plaintiff, and the result would be the gross amount of the loss he will have sustained during his life expectancy"—the error in said charge being that there was no evidence on which to base such charge, it not having been proved what the life expectancy of the plaintiff was at the time he was injured.

7. Because the court erred in charging the jury as follows: "This cash value may be arrived at by dividing the gross amount by \$1, plus the interest on \$1 at 7 per cent. for the plaintiff's expectancy of life." The error in said charge being: (a) Said charge lays down an incorrect rule for determining the cash value, the true rule being that the gross earnings are not taken as a basis for arriving at the cash value of such loss as that claimed by the plaintiff in this case, but the total amount after allowance has been made for increasing years, feebleness of health, actual sickness, the loss of employment, voluntarily abstaining from work, dullness in business, reduction in wages, the increasing infirmities of age, with a corresponding diminution of earning capacity. (b) There was no evidence on which to base such a charge, the plaintiff's expectancy of life not having been proved. (c) The rule for determining the cash value of the loss in such a case as this as set out in said charge is not the true rule. The correct amount will not be reached by dividing the gross amount by \$1 plus the interest on \$1 at 7 per cent.

8. It is insisted that the court erred in admitting the following testimony of West Murray, over the defendant's objections: "He (Martin Fifer) made a report to me that he believed some one got hurt at Henry street crossing; that he heard the cars run back, and he heard some one holler." The objections to the testimony were that the evidence was hearsay, and that the witness was seeking to bind this defendant by the statement of a party who bore no relation to the defendant, and whose statements could under no circumstances bind or affect the defendant. The admission of this evidence is insisted to be erroneous for three reasons: (a) That the court permitted hear-

say evidence on the most material issue in the case to reach the jury. (b) The court permitted hearsay evidence to go before the jury without warning or instructing them not to consider it. (c) The court permitted the hearsay statement of a party to go to the jury, which statement had the effect of binding the defendant, when it was not shown that the party making the statement bore any relation whatever to the defendant.

Garrard & Meldrim and Shelby Myrick, for plaintiff in error. Osborne & Lawrence, for defendant in error.

RUSSELL, J. (after stating the facts as above). So far as the general grounds of the motion are concerned, it cannot be said that the verdict is without evidence to support it. A consideration of each of the exceptions to the charge of the court in connection with the charge as a whole, as it appears in the record, and a careful examination of the brief of evidence, convinces us that there is no error in the charge which requires a grant of a new trial. The several exceptions to the charge which we have quoted furnish an illustration of the fact that, when only segregated excerpts of a charge are considered, a minor error may be seemingly aggravated and error appear to exist, where in fact there is none. As appears in the context of the charge (following the portion which is made the subject of the first exception, and also in other portions of the charge), the jury were several times told by the court that the plaintiff could not recover for any negligence of the defendant, if any had been shown, other than that specifically charged in the petition. The questions which arise, then, are whether the portions of the charge excepted to were misleading and confusing, whether the court should have specifically eliminated certain allegations of negligence because of lack of evidence to support them, and the inquiry as to whether the charge of the court authorized the plaintiff to recover even though some of the grounds of negligence relied upon may not have been the proximate cause of the injury or have contributed thereto. It is insisted that the court erred in leaving to the determination of the jury whether certain acts or omissions of the defendant were in fact negligence. We would only say in regard to this last insistence that we heartily approve the charge of the court in this respect because negligence is purely a question of fact, and its absence or existence should always be submitted to the jury for their determination. As to the insistence of the plaintiff in error that the charge of the court submits to the jury as issues of fact on the question of the defendant's negligence three of the allegations of negligence as to which no evidence was introduced, it is only necessary to say that, when the plaintiff proved his injury and proved that it was caused by the defendant's train, all

of the distinct allegations of negligence in the petition were presumptively proved, and the burden was cast upon the defendant railroad company of rebutting that presumption. If the defendant failed to rebut this presumptive proof (and in this case no evidence to that effect was offered), the plaintiff had established prima facie that his injury was due to each and all of the negligent acts or omissions charged in his declaration; so we do not think the insistence can be maintained that the court's charge was without evidence to authorize it. As to the failure to furnish gates or guards, the failure to furnish a watchman, and to provide electric or other lights, it was not for the court, but for the jury, to say whether these omissions on the part of the defendant company or either of them constitute negligence. See *Columbus Railway Co. v. Asbell*, 133 Ga. 573, 68 S. E. 902.

The plaintiff in error insists that a plaintiff cannot detail in a petition a number of absurd allegations of negligence, and then have the court submit them to the jury without reasonable evidence to prove them. In regard to this, it is only necessary to say that if the allegations of a petition are absurd or unreasonable, and it palpably appears that the statement of facts in the petition would not constitute actionable negligence, a timely demurrer would serve to raise the issue of law, and to cause the elimination of those allegations which should not properly be submitted to the jury.

It is held in *Savannah, Thunderbolt & Isle of Hope Railway v. Beasley*, 94 Ga. 142, 21 S. E. 285, that "in charging the jury upon negligence the court should not enumerate acts or omissions which are wholly outside of any degree of diligence which the law requires." Assuming, then, that the plaintiff had proved the allegations contained in his petition by the presumption arising from proof of the injury, did the court err in submitting to the jury the failure to furnish a watchman to lower the gates or to provide electric lights for the reason that they were outside of any degree of diligence required by law? We think not. Of course, "diligence," like "negligence," is a relative term. In determining whether due diligence is used in any particular case where negligence would be wrongful, all of the surrounding circumstances are to be considered. A degree of diligence which might suffice under one set of circumstances might be wholly inadequate under different conditions. This is a matter which the law recognizes, and in every case the jury in determining the fact of negligence or no negligence must be governed by the circumstances and conditions surrounding the act or omission under consideration. In our view that all questions of negligence are primarily questions of fact, there could certainly be no error in submitting to the jury whether the failure to provide lights or to lower the rails or to place

a watchman at this street crossing should have been submitted to the jury, in connection with the other circumstances of the case, to allow the jury to say whether these omissions were under the existing circumstances negligence. But inasmuch as it appears undisputed in the evidence that the point where the plaintiff claimed to have been hurt was upon a much traveled street of a populous city, and that, in addition, the tracks of the defendant at this particular point were almost constantly used, we think the court would have been safe in assuming that the omissions which were charged as negligence were not outside of that degree of diligence which the law would require at such a locality, and that, therefore, the charge of the court was not in conflict with anything held in the *Beasley Case*, supra.

It is insisted that the instructions of which complaint is made in the first three special grounds of the motion for a new trial are in conflict with the ruling of the Supreme Court in *Alabama Midland Railroad v. Guilford*, 114 Ga. 631, 40 S. E. 796, in which case the court charged that, "if the defendant was negligent in any of the particulars set out in the declaration and contended for by the plaintiff, you should find this defendant company liable, provided that you find that the plaintiff has sustained an injury." It is true that this charge was disapproved by the Supreme Court, but it was expressly upon the ground that some of the allegations, even if proved, would not have authorized a recovery against the defendant, and the court says further: "The charge left the jury free to find for the plaintiff because of any such act of negligence, although such act may not have in any wise contributed to the plaintiff's injury." The facts in the *Guilford Case* were very dissimilar to those in the case at bar, because in our judgment any one of the acts of negligence alleged in the present case, if the plaintiff was himself free from fault, might have caused or contributed to the injury and authorized a recovery. It is to be noted, too, that in *Kelly v. Strouse*, 116 Ga. 890, 43 S. E. 280, the method of reviewing the pleadings sanctioned in the *Guilford Case*, supra, is expressly disapproved. For the reason, then, that we think that the allegations of negligence were within that degree of diligence which the law requires, and because all or any of them could have been considered to be the proximate cause of the plaintiff's injury, we hold that there was no error in the charge of the court as given, and that the judge was not required to eliminate any of the acts or omissions alleged to be negligence. Of course, the court was required to charge the jury that they must find the specific acts of negligence to have been the proximate cause of the injury, but the judge was not required to needlessly repeat the instruction in totidem verbis that the negligence charged must be

the proximate cause of the injury. In the first instruction of which complaint is made the court charged this principle by exclusion when he instructed the jury after telling them that the plaintiff could not recover for any negligence not specifically charged that if the defendant was negligent in the respects charged and the plaintiff could not have avoided the negligence alleged by the exercise of ordinary care for his own safety, and that, if he was in the exercise of ordinary and reasonable care, then he would be entitled to recover, then proceeded as follows: "I charge you that the plaintiff, if he is entitled to recover, is entitled to recover only upon the allegations set forth in his declaration and none other. In other words, it must be shown to you that the injury occurred as described in the declaration and that that injury, so done, was caused by the lack of ordinary care and diligence either in the acts alleged or in the omission of acts alleged in the declaration." Further on in the charge, the court repeats the instruction to the effect that the jury must find that the negligence alleged was the cause of the plaintiff's injuries in the following language: "If you find from the evidence that ordinary care and prudence require that the defendant should have done what it is alleged it should have done to avoid the alleged danger set out in the petition, and that the defendant failed so to provide persons, servants, or means as therein alleged to be necessary, etc., * * * and that such failure was negligence and was the cause of the injury received, etc., then that would make such a case as would authorize a recovery on the part of the plaintiff." In the charge excepted to in the fifth special ground of the motion for a new trial the jury is again instructed that the plaintiff can only recover if he was injured in the manner described, and because of something alleged to have been done or omitted. We do not think that the jury could have failed to understand that the plaintiff could only recover on account of such negligence as was the proximate cause of the injury, even though the term "proximate cause" was not used. In actions for damages for personal injuries, the jury should, of course, be informed that an act of negligence which is not the proximate cause of the injury should not be considered, but, in the absence of a request for specific instructions upon that point, the fact that the idea is conveyed indirectly, and otherwise than by a pointed statement to that effect, though plainly, does not afford ground for a new trial.

We find no error in the instructions upon the measure of damages. The age of the plaintiff was in evidence, and, although the mortality tables were not introduced, the plaintiff appeared before the jury, and there is nothing in the evidence to show that his health or habits were either better or worse

than the average. With these facts before them, the jury could as well determine the expectancy of the plaintiff from their observation and experience as from the tables of mortality. The court having fully instructed the jury that they were to take into consideration lost time and irregularity of income, feebleness of health, actual sickness, loss of employment, voluntarily abstaining from work, dullness in business, reduction in wages, and increasing infirmities of age, there was no error in charging the jury as follows: "Having arrived at the yearly loss as indicated above, you can multiply the amount so ascertained by the expectancy of life of the plaintiff, and the result will be the gross amount of the loss he will have sustained during his life expectancy." *Merchants' & Miners' Transportation Co. v. Corcoran*, 4 Ga. App. 654, 669, 62 S. E. 130; *Savannah, Florida & Western Railway Company v. Stewart*, 71 Ga. 446. In the case last cited Judge Jackson says: "I know of no law which requires tables of the probable length of life and its probable worth to be introduced. They may be a useful circumstance, but are not conclusive or absolutely essential."

There is no merit in the exception to the charge that the cash value may be arrived at by dividing the gross amount by \$1 plus interest on \$1 at 7 per cent. for plaintiff's expectancy of life. The complaint is that the instruction lays down an incorrect rule for determining the cash value especially because allowance must be made for increasing years, feebleness of health, sickness, loss of employment, etc. As we have already pointed out, the judge had already instructed the jury to make deductions and allowances for these matters. In the extract excepted to, the court referred to a gross sum, but this sum was to be arrived at by considering all of the contingencies and reductions which had been referred to by the court in connection with the expectancy of life. The instruction, properly construed, means the annual income and the average expectancy both diminished by the various contingencies pointed out in the charge. The same instruction of which complaint is here made was given in the case of *Savannah Electric Company v. Bell*, 124 Ga. 668, 53 S. E. 109, and was approved as a correct rule for estimating the present value of a sum payable in the future, the court citing *Kinney v.*

Folkerts, 84 Mich. 616, 48 N. W. 283. But, even if the instruction complained of is not technically correct, it would afford no ground for a reversal for the reasons stated in the *Corcoran Case*, supra.

The error complained of in the eighth ground, if an error at all, appears harmless when the assignment is considered in connection with the note of the presiding judge, and when the excerpt from Murray's testimony is read with its context. In approving this ground the judge says that the eighth ground is approved with the qualification that the plaintiff expressly disclaimed that the statement narrated by the witness as having been made to him by Martin Fifer was introduced for the purpose of establishing the truth of the hearsay statement of Fifer to the witness, West Murray. This testimony was admitted for the sole purpose of fixing the time of day of the original report made by Fifer to Murray; it being contended that this was a circumstance to aid in fixing the time the injury was inflicted, and was introduced and used for this and no other purpose. Said statement was not urged before the jury in argument save for the purpose aforesaid. One of the issues in the case was the time of the occurrence in which the plaintiff claimed to have been injured. The plaintiff contended that he was injured between 11 and 12 o'clock. The defendant's witnesses testified that he was injured between 12 and 1 o'clock. The fact that Martin Fifer reported the circumstances to West Murray at 11 o'clock was certainly relevant, and what he said in making the report could very properly be considered as part of the *res gestæ* of the report. Granting that what Martin Fifer said to West Murray was hearsay, it would nevertheless be admissible as explanatory of Fifer's conduct. Hearsay is admissible to explain motive or conduct, and, as the court properly restricted the purpose for which this evidence was used, the assignment of error complaining of its introduction is not meritorious.

Upon a review of the whole case, we are satisfied that the trial was without error, and that the result of the case turned solely upon the credibility of the witnesses.

There was therefore no error in refusing a new trial.

Judgment affirmed.

(8 Ga. App. 188)

WESTERN UNION TELEGRAPH CO. v.
GLENN.GLENN v. WESTERN UNION TELEGRAPH
CO. (Nos. 2,119, 2,120.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

*(Syllabus by the Court.)*1. DAMAGES (§ 14*)—"NOMINAL DAMAGES"—
AMOUNT—"EXEMPLARY DAMAGES."

"The term 'nominal damages,' like 'exemplary damages,' is purely relative, and carries with it no suggestion of certainty as to amount," while it generally refers to a trivial sum awarded. Where a mere breach of duty or infraction of right is shown, with no serious loss sustained, it is apparent that this trivial sum might, according to the circumstances of each particular case, vary almost indefinitely. In some cases a very small amount might constitute nominal damages; in others a much larger amount might measure down to the same standard of triviality. It would depend largely upon the vastness of the amount involved what sum would be considered trivial. A recovery may be classified as coming under the definition of nominal damages where the violation of a right is shown, substantial damages claimed, and some actual loss proven, and yet the damages are not susceptible of reasonable certainty of proof as to their extent.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 356; Dec. Dig. § 14.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2577-2579; vol. 5, pp. 4815, 4816; vol. 8, p. 7732.]

2. DAMAGES (§ 14*)—FAILURE TO TRANSMIT.

In an action brought to recover \$3,000 damages from a telegraph company for failure to transmit a message, where the undisputed evidence shows a gross violation of the company's duty to transmit the message, a verdict for \$250 approved by the trial judge will not, in the absence of anything to justify the suspicion of prejudice or bias, be set aside by this court as excessive, even though the finding was treated in the lower court as one of nominal damages only.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 14.*]

Powell, J., dissenting.

Error from City Court of Macon; Robt. Hodges, Judge.

Action by M. J. Glenn against the Western Union Telegraph Company. From the judgment, both parties bring error. Affirmed.

Du Pont Guerrey, Jos. H. Hall, and Warren Roberts, for plaintiff in error. Nottingham & McClellan and W. D. & Custis Nottingham, for defendant in error.

RUSSELL, J. This case has previously been before this court, and is reported 1 Ga. App. 821, 58 S. E. 83. At that time the judgment of the lower court sustaining a general demurrer to the plaintiff's petition was reversed, and the case remanded for trial. Upon the trial the jury returned a verdict in favor of the plaintiff for \$250. The defendant's motion for a new trial was overruled, and it excepts to that judgment. The plaintiff in the court below offered certain amendments which the court refused to allow,

and certain testimony which was repelled; and, by a cross-bill of exceptions, she complains of these rulings. It is not necessary for us to rule upon the cross-bill of exceptions, but we will say in passing that we thought the amendment should have been allowed and some of the excluded testimony should have been admitted.

The controlling question is raised by the main bill of exceptions. There are various grounds in the motion for a new trial, but the only real point raised is that the verdict for \$250 in favor of the plaintiff cannot be sustained, because the court restricted the plaintiff to the recovery of nominal damages only, and because \$250 is too excessive an amount to be included within the term "nominal damages." We held in the case of *Batson v. Higginbotham*, 7 Ga. App. 835, 68 S. E. 455, that \$380 was too large an amount to be denominated as "nominal damages"; but the circumstances of that case were materially different from those in the case at bar. In *Milledgeville Water Co. v. Fowler*, 129 Ga. 111, 58 S. E. 643, a verdict in favor of the plaintiff for \$150 was set aside; but, as pointed out by Judge Beck in that case, there is a wide difference between the mere breach of a contract and a tort in the commission of which a public duty or a private obligation arising from the duty is violated. We are aware that the general definition of nominal damages, as given by Bouvier, Angell, and Black, is that it is such a trivial sum as is awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved. It is defined in our own Code, however, as such a sum as "will carry the costs." Civ. Code 1895, § 3801. Thus a minimum is fixed, but no maximum. We think the proper rule for determining what is a recovery of nominal damages when application is made to the court to set aside a verdict on the ground that the amount is too excessive to be called nominal damages is to be found in the case of *Sellers v. Mann*, 113 Ga. 643, 39 S. E. 11, where Judge Lewis says: "The term 'nominal damages,' like 'exemplary damages,' is purely relative, and carries with it no suggestion of certainty as to amount. This is shown by the definition given the expression in the recognized authorities. In 2 Bouvier's L. Dict. 504, it is defined as 'a trifling sum awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained.' Nominal damages have also been described as a 'trivial sum awarded where a mere breach of duty or infraction of right is shown, with no serious loss sustained.' Anderson's L. Dict. 307. It is apparent that this 'trivial sum' might, according to the circumstances of each particular case, vary almost indefinitely. In some cases a very small amount might con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

stitute the trivial sum contemplated by the term 'nominal damages'; in others, a much larger amount might measure down to the same standard of triviality. It would depend largely upon the vastness of the amount involved what sum would be considered trivial."

It must also be remembered that the verdicts of juries are not to be interfered with in any case, unless there is something to justify the suspicion of prejudice or bias as affecting the verdict rendered. And, while nominal damages are not strictly compensatory, they are always included under general damages, and it is recognized that there is a class of cases in which the damages cannot be adequately and definitely estimated, and yet, for the infraction of the plaintiff's right or the violation of a duty by the defendant, there is a right of recovery on the principle that wherever there is a right there is a remedy. This principle is recognized by the text-writers, and in support of the proposition the case of *Greensboro v. McGibbony*, 93 Ga. 672, 20 S. E. 37, is cited. In that case the court held that the plaintiff was entitled to recover nominal damages in the absence of any proof as to the value of the lost time for which he sued, and even though such time was worth nothing. We have taken the pains to examine the original record in the *McGibbony* Case, and we find that the amount thus referred to by the court as "nominal damages" was exactly the same as that returned by the jury in this case, to wit, the sum of \$250.

Judgment affirmed.

POWELL, J. (dissenting). I cannot get my mind to the point of agreeing that in a case like the one before us a recovery of \$250 can be held to be nominal in amount.

(8 Ga. App. 206)

LAMBERT v. STATE. (No. 2,525.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1156*)—WRIT OF ERROR—REVIEW—DISCRETION OF TRIAL COURT—NEW TRIAL.

As no error of law is assigned, and as the evidence authorized the conviction of the defendant, the exercise of the trial judge's discretion in refusing a new trial will not be disturbed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.*]

2. CRIMINAL LAW (§ 938*)—NEW TRIAL—GROUNDS—NEWLY DISCOVERED EVIDENCE.

Prermitting other considerations the testimony adduced in support of the ground of the motion for a new trial which presented alleged newly discovered evidence in support of an alibi was not sufficient to have required a different result upon another trial, if a new trial had been ordered, and consequently it was not error to overrule this ground of the motion. Furthermore, some of the affiants who testified in support of this ground were witnesses at the trial, and the facts within their knowledge were also within the knowledge of the defendant, and the

facts known by them might, by the exercise of ordinary diligence on the part of the defendant, have been brought to the attention of the court at the time of the original investigation.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2306-2317; Dec. Dig. § 938.*]

Error from City Court of Franklin; Frank S. Loftin, Judge.

J. T. Lambert was convicted of assault and battery, and brings error. Affirmed.

Leon Hood, for plaintiff in error. D. B. Whitaker, Sol., for defendant in error.

RUSSELL, J. The defendant was adjudged guilty of assault and battery. According to the testimony of the prosecutrix, the judgment against him was authorized. The point is made that, after identifying the defendant, the prosecutrix did not thereafter testify that he was the person who assaulted her, because as she was stooping down she heard somebody behind her say: "What are you doing?" We think it quite evident from the context that, though the prosecutrix did not know while her back was turned who it was that spoke (and therefore in the effort to represent her mental state or her thought at that time, she used the word "somebody," instead of naming the defendant), yet after she saw who it was she knew it was the defendant, and in using the words "he" and "him" thereafter she plainly referred to the defendant. It is clear from the evidence that the parties were well acquainted with each other, and no effort was made by cross-examination or otherwise to show that the prosecutrix had any doubt about who the person was after the time when she stated that she was stooping down and after that individual was no longer behind her.

Such a large number of witnesses testified to the bad character of the prosecutrix and that they would not believe her on oath that the trial judge would have been authorized to disregard her testimony entirely. But he was not required to do so even if there had been no testimony (as there was in this case) tending to sustain her by proof of good character. The credibility of the witnesses addressed itself solely to the trial judge, and the exercise of this right of selection is not reviewable. There is a vast difference between attempting to impeach a witness and actually destroying his testimony by successful impeachment. In the present case it is evident from the result that the witness was not impeached.

In support of one of the grounds of the motion for a new trial, Lambert presented the affidavits of several witnesses, who were properly vouched for, to the effect that he was one of the judges at a turkey shooting at Simpson from about 1 o'clock until after 4 o'clock on the afternoon of December 31st (which was the afternoon on which the alleged assault was committed), and that he was not out of their presence during that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

time. Aside from the fact that the prosecutrix only stated the time of the occurrence approximately as being about 3 o'clock, and therefore might have been mistaken about the time, and the further fact that so far as appears from this record the scene of the alleged offense may be near the point where the turkey shooting was had, we cannot say that the court erred in overruling this ground of the motion for a new trial if the court reached the conclusion that the movant by the exercise of ordinary diligence could have adduced upon the trial the facts to which they bore witness by affidavits upon the hearing of the motion. It is significant that two of the witnesses who testified by affidavit upon the hearing of the motion for a new trial that the defendant was with them at the turkey shooting testified as witnesses at the trial. As they were with the defendant and he was in their presence at the turkey shooting, it seems to us that by merely asking the witnesses while they were on the stand the question as to the defendant's whereabouts at the time of the alleged offense the facts which are now alleged to be newly discovered could have been elicited. So far as appears, the defendant's counsel did not know anything about the turkey shooting, and therefore the showing as to diligence was sufficient as to counsel, but in exercising even a slight degree of diligence the defendant should have asked his counsel to question the witnesses Henry J. Hardy and T. A. Lipham and perhaps other witnesses who were at the turkey shooting, if the defendant was not with them at the time that the prosecutrix testified that he was with her. The defendant must have known this fact then as well as he did when the motion for a new trial was filed. It is not necessary to refer to other points which apparently sustain the ruling of the trial judge in refusing a new trial. No error of law is complained of. The evidence was sufficient to authorize the finding reached, and, under these circumstances, this court has no power to alter the result.

Judgment affirmed.

(8 Ga. App. 178)

ROPER WHOLESALE GROCERY CO. v.
FAVOR. (No. 2,267.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

(Syllabus by the Court.)

1. TRIAL (§ 171*)—TAKING QUESTION FROM JURY—DIRECTION OF VERDICT.

The refusal to direct a verdict is not error in any case.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 171.*]

2. SALES (§ 481*)—TROVER AND CONVERSION (§§ 13, 16*)—CONDITIONAL SALES—RECOVERY OF POSSESSION BY PURCHASER—FORM OF REMEDY.

When a vendee is entitled to the possession of chattels, he may maintain trover for their

conversion against either the vendor or third persons; and this is true, even though under the terms of a conditional sale the legal title to the chattels is reserved by the vendor. As against a vendor who has reserved the title, the vendee may maintain trover by showing that his right of possession is wrongfully withheld from him by the defendant. The gist of the action of trover is the injury to the right of possession. The action of trover being founded on a concurrent right of property and possession, any act of the defendant which negatives or is inconsistent with such right amounts in law to a conversion. Wherever there is a conversion, trover is the remedy; and, as against a wrongdoer, possession will be held to be conclusive evidence of such general or special property in the personalty as is essential to maintain trover.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1453; Dec. Dig. § 481.* Trover and Conversion, Cent. Dig. §§ 103-112, 121; Dec. Dig. §§ 13, 16.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1562-1570; vol. 8, p. 7618.]

3. TROVER AND CONVERSION (§§ 1, 42*)—DAMAGES—MEASURE.

Where, in an action of trover, the plaintiff elects to take a money verdict, the suit resolves itself into one for damages; and if the proof shows that the interest of the plaintiff in the property is less than that of absolute ownership, the measure of damages will be the value of the plaintiff's interest therein, whatever that may be.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 1, 2, 248; Dec. Dig. §§ 1, 42.*]

4. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict, and there was no error in refusing a new trial.

Error from City Court of La Grange; Frank Harwell, Judge.

Action by J. D. Favor, as trustee, against the Roper Wholesale Grocery Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

E. R. Bradfield, Jr., for plaintiff in error.
E. A. Jones and Hatton Lovejoy, for defendant in error.

RUSSELL, J. Favor, as trustee for R. L. Carter, bankrupt, brought a suit against the Roper Wholesale Grocery Company, by which he sought to recover certain personal property described in the petition, which it was alleged had been taken from the assets of the bankrupt by the defendant. Upon the call of the case the plaintiff abandoned that portion of the petition which sought to recover the property on the idea that by the delivery of the property the bankrupt had made a preference in violation of the bankrupt law, and the case proceeded to trial upon that portion of the petition which can very well be treated as an ordinary action of trover. The jury returned a verdict in favor of the plaintiff for \$125.87, as the difference between the actual value of the property converted and the interest of the defendant therein under its reservation of title. The court refused a new trial, and exception is taken to this judgment.

There is conflict in the evidence; but, in view of the verdict, we must assume that

the testimony for the plaintiff represents the truth of the transaction. According to this testimony, a representative of the Roper Wholesale Grocery Company took the property from the bankrupt without his consent. The goods and fixtures which were the subject-matter of the present suit were assigned to one Heard to pay a debt of \$250, and the title to the personalty was passed by the writing, with a provision that any payments on it would reduce the debt evidenced thereby. This contract and assignment of title was transferred by Heard to the Roper Wholesale Grocery Company for a consideration of \$245. The agreed valuation of the articles, title to which was conveyed to Heard, and by him transferred to the Grocery company, as evidenced by the writing, was \$363. The conversion was shown to have occurred on January 28, 1908, which was the date upon which Mr. Carter testified that Roper took the property from his possession.

1. By exceptions pendente lite the plaintiff in error complained that the judge refused to direct a verdict in favor of the defendant at the close of the testimony. No valid exception can ever be based upon the refusal of a trial judge to direct a verdict in favor of either party. The judge may direct a verdict, at his peril; and if the verdict directed is the only finding that could properly and legally have been reached under any view of the case, he has effected an economy of time, and his judgment will not be reversed, because the error is harmless. Inasmuch, however, as the only ground upon which the direction of a verdict is sanctioned is that it is such a harmless error that it will not be regarded, there is no case in which a judge can be required to direct a verdict, or in which it can be said that he errs if he refuses to do so.

2. The real question in the case is presented by the exception of the plaintiff in error to the following charge of the court. There being evidence that the property was of a value greater in amount than the amount of the plaintiff's indebtedness to the defendant, the court charged the jury as follows: "If you find, from the evidence in this case, that R. L. Carter & Co. did execute and deliver this instrument, to which I have called your attention, to G. B. Heard, to secure a debt due by Carter & Co. to Heard, and that thereafter Heard, as set out here on the back of this paper, transferred it to Roper Wholesale Grocery Company, and defendant paid to Heard the debt owed to Heard by R. L. Carter & Co., and to secure which this paper was given, and if you find that Carter & Co. have never paid to the Roper Wholesale Grocery Company this Heard debt, and that the property enumerated in the writing includes the property in controversy, and if you further find that Mr.

Roper, in behalf of the Roper Wholesale Grocery Company, the defendant, took possession of this property in controversy, without the consent of Carter, forcibly took possession of it, and if you further find that at that time R. L. Carter & Co. had the right of possession to this property, notwithstanding that Roper Wholesale Grocery Company, as transferees of G. B. Heard, had title to it, if the firm of R. L. Carter & Co. had the right of possession, then I charge you that the plaintiff in this case would be entitled to recover, and the measure of his recovery would be thus: In the event that you find that the value of the property was greater than the amount of the debt, if any, which was secured by this instrument of writing, then the plaintiff would be entitled to recover the difference, with interest on the difference, whatever you find it to be, at 7 per cent., from the date of conversion. If you find that the value of the property is equal to or less than the amount of the debt, then there could be no recovery for the plaintiff."

The exception to this charge is that it is error, because it would have been necessary for the plaintiff to show title in himself before he would be authorized to recover at all. Of course, we understand this to mean that the plaintiff makes the contention that, as there was evidence that the bankrupt had conveyed title to the property to the Grocery Company, as the assignee of Heard, he could not maintain the action, and it is understood, in the second place, that the measure of damages is improperly stated, and the case as submitted to the jury was an entirely different one from that brought by the plaintiff in its petition. It is not necessary, in order to maintain an action of trover, that the plaintiff have title. If he have either such a title or property as to confer right of possession, he may maintain trover as against one who wrongfully deprives him of his right. "To maintain an action of trover, the plaintiff must show title in himself, or the right of possession wrongfully withheld from him by the defendant." Without going at any length into the subject, it may be said that in this case the plaintiff had merely given to the defendant's assignor a conditional bill of sale; and the authorities are abundant that when, by the terms of a conditional sale, the buyer is entitled to possession, he may maintain trover for a conversion of the chattel which was sold to him against third persons, and even against the seller himself. *Mitchell v. Georgia & Alabama Ry.*, 111 Ga. 762, 36 S. E. 971, 51 L. R. A. 622; *Aldrich v. Hodges*, 164 Mass. 570, 42 N. E. 107; *Burt v. Dutcher*, 34 N. Y. 493. A wrongful sale by a conditional vendor is a conversion against the vendee. *Smith v. Wood*, 63 Vt. 534, 22 Atl. 575.

Judgment affirmed.

(67 W. Va. 629)

FISHER et al. v. HARMAN et al.

(Supreme Court of Appeals of West Virginia.
April 26, 1910. Rehearing Denied
Sept. 15, 1910.)

*(Syllabus by the Court.)***1. FORCIBLE ENTRY AND DETAINER (§ 28*)—PLEADING—EVIDENCE.**

The statute, section 1, c. 89, Code 1906, provides for but one form of summons (declaration), and evidence of forcible entry by defendant, which is unlawful, is admissible thereunder, without specific allegation thereof.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. § 129; Dec. Dig. § 28.*]

2. FORCIBLE ENTRY AND DETAINER (§ 4*)—UNLAWFUL ENTRY—RIGHT TO POSSESSION.

Where in such action the defendant's entry was forcible it is unlawful regardless of the question of right.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. § 12; Dec. Dig. § 4.*]

3. FORCIBLE ENTRY AND DETAINER (§ 29*)—EVIDENCE—UNLAWFUL ENTRY.

A case in which the acts and conduct of defendant in making an entry on land, as proven on the trial, were held to constitute a forcible and unlawful entry entitling the plaintiff to recover.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. § 140; Dec. Dig. § 29.*]

Error to Circuit Court, McDowell County.

Action by Thomas Fisher and others against Thomas Harman and others. Judgment for plaintiffs, and defendants bring error. Affirmed and remanded.

D. J. F. Strother, W. L. Taylor, Jas. A. Strother, and E. C. Marshall, for plaintiffs in error. A. S. Higginbotham and Chapman & Gillespie, for defendants in error.

MILLER, J. In unlawful entry and detainer the court below set aside the verdict for defendant and awarded plaintiff a new trial, to which judgment we awarded a writ of error.

In disposing of this case we have had in mind the general rule that a stronger case is required to justify an appellate court in disturbing an order granting a new trial, than when one has been refused, and that the judgment below will not be reversed, unless plainly erroneous. 10 Ency. Dig. Va. & W. Va. Rep. 471; *Coalmer v. Barrett*, 61 W. Va. 237, 244, 56 S. E. 335.

The first point is that plaintiffs' evidence was so variant from the facts alleged that the verdict could not have been otherwise than for defendants. It is argued that section 1, chapter 89, Code 1906, gives three separate and distinct causes of action, each requiring specific allegation and proof, namely, forcible entry, unlawful entry, and unlawful detainer. The statute, however, prescribes but one form of summons (declaration), namely, that it summon "defendant to answer the complaint of the plaintiff, that

the defendant is in the possession and unlawfully withholds from the plaintiff the premises in question." The form of summons in this case is the same as that prescribed by Mr. Minor, 4 Minor, 629; and by Mr. Hogg, Hogg's Pl. and Forms, 412. It is contended that plaintiffs' evidence of forcible entry by defendants, not alleged in the summons, was not admissible. The point is without merit. Such evidence is admissible in an action of unlawful entry and detainer. Every forcible entry is unlawful, regardless of the right to the possession, and evidence thereof will support the action. *Duff v. Good*, 24 W. Va. 632; *Olinger v. Shepherd*, 12 Grat. (Va.) 462; *Feder v. Hager*, 64 W. Va. 452, 63 S. E. 235. Evidence of good title and right to the possession is also admissible whether defendants' possession was obtained peaceably or forcibly. *Olinger v. Shepherd* and *Feder v. Hager*, supra. Plaintiffs relied not only on their evidence of forcible entry by defendants, but also upon good and paramount title. They offered title papers which they claim took them back by an unbroken chain to the Commonwealth.

On the theory of forcible entry by them defendants claim plaintiffs' evidence was insufficient to support a verdict for them. The evidence in chief mainly relied on by plaintiffs was that of their tenant W. G. Beavers, and Crockett Beavers, his brother. And as corroborating them they also relied on the testimony of Thomas Harman and Frank Harman, two of the defendants, not controverted they say by the evidence of John Estill Harman, the other defendant, who also testified, but who said nothing on the subject; also on the fact that William Brewster, son-in-law of John Estill Harman, present at the time, was not called or examined by defendants. Defendants contend, however, that the evidence being conflicting plaintiffs are concluded by the adverse verdict of the jury. They also claim that being themselves in possession of the land, of which the 107½ acres is a part, the entry thereon by plaintiffs constituted a mere trespass, against which they had the right to protect themselves, by force if necessary. Plaintiffs claim that the witnesses on both sides substantially agree on what occurred after their entry on the land, and that the facts established by the decided weight and preponderance of the evidence present a question of law for the court. In such cases the court does not invade the province of the jury in pronouncing judgment on these facts. *Shoe Co. v. Prince*, 51 W. Va. 510, 515, 41 S. E. 907.

It is not controverted that the Beavers under a lease in writing from plaintiffs to W. G. Beavers, about March, 1903, entered upon the 107½ acres of land in controversy, pitched their tent, and remained there for

several days felling trees and clearing away the brush, preparatory to building a cabin on the land; that while they were so engaged defendant John Estill Harman, with his two sons, Thomas and Frank, and his son-in-law, William Brewster, the sons and son-in-law being armed either with a shot gun or rifle, went upon the land where the Beavers were at work, and that John Estill Harman, after inquiring of the Beavers, what they were doing there, and who had put them there, and by what right, and being told, and probably shown the contract of lease, he endeavored to serve written notice on W. G. Beavers, which Beavers says he didn't notice, dropped it. Beavers also says that Harman also warned him verbally that if he did not get out by the next day "there would be shooting going on"; that Harman did not distinctly say that he would shoot, and that the boys did not say they would shoot, but that because of what they did say he was afraid they would shoot him, and that he pulled out that same night, about 8 o'clock, and went to Cane Break to see Taylor, plaintiffs' agent, and to report to him what had occurred. He also says that his brother, who had gone for a saw before the Harmans arrived on the land, had not returned before he left. On the following Monday morning Beaver and his brother went back, found Harman, his sons, son-in-law and Tom Lambert and others on the land; that they had torn down his tent, and were engaged in building fence and hauling the logs which he and his brother had cut for the cabin, and that John Estill Harman had a shotgun. In the conversation between the Beavers and Harman that morning they say Harman tried to get W. G. Beavers to surrender his lease, and to take employment under him, which, Beavers says, he declined, and that in about a half hour they went away fearing to attempt to regain possession of the land. Defendants completed the cabin begun by the Beavers, out of the logs prepared by them and put in it one of their own men to hold possession. It is admitted by the Harmans that J. E. Harman ordered the Beavers to get off the land and notified them that they would have to get off. They admit also that they went on the grounds with their guns. But in explanation, Thomas Harman says he had been sick and that he used his gun as a cane. Frank Harman says on cross-examination that he had his gun because his father was going to serve notice on the Beavers to vacate.

Moreover, J. E. Harman claims he had the right to defend his alleged possession by force if necessary. His title consists: First, of a deed from H. M. Harman to John Estill Harman, August 24, 1876, by rather indefinite boundaries calling for 100 acres more or less, but surveyed in this suit, according to directions given by him, covering a boundary of 634 acres, including most of the 107 $\frac{1}{2}$ acres in controversy; second, continued pos-

session under Rebecca Brewster, his mother-in-law, his wife being her only heir, and the said Rebecca Brewster being also a daughter and one of the devisees of Mathias Harman, who had owned, or claimed and resided on a tract of 250 acres, of which the 107 $\frac{1}{2}$ acres in controversy is a part, for about 45 years, and the improvements on which are from 75 to 100 years old. The evidence shows that notwithstanding his claim by the deed from his brother in 1876, J. E. Harman, October 30, 1889, purchased and procured from D. G. Sayers and wife a deed for a tract described as containing 200 acres more or less, and within the boundary of the 634 acres as claimed by him, and on which his dwelling house and other improvements were located. This tract of 200 acres, March 23, 1899, he sold and conveyed to W. M. Ritter, describing it by metes and bounds as the Harman home place, and as containing 164.05 acres more or less, and as being the same land, or a portion thereof, conveyed to him by D. G. Sayers and wife, October 30, 1889, and as beginning at a corner to Patterson and McMillin's 380 acre tract, and Mathias Harman's 250 acre tract, making no reference therein to his deed of 1876. It also appears that the 200 acre tract and the 250 acre tract are both within a 50,000 acre tract, part of a 300,000 acre tract patented to Wilson Cary Nicholas in 1795; and that Mathias Harman, though claiming his land by prior patents, on April 10, 1884, five years before J. E. Harman procured his deed for the 200 acres, also procured a deed from said Sayers for 250 acres. So that if J. E. Harman claimed under his prior deed of 1876, Mathias Harman, his father-in-law and neighbor was also in possession claiming under prior patents, and after getting his deed from Sayers in 1884 he and his heirs and assigns, as for many years before, continued in possession of his 250 acre tract. Mathias Harman devised his land in part, at least, to children and grand children, the tract in controversy, which plaintiffs claim, going to his grand daughter Josephine Harman, and twenty-nine acres thereof, perhaps a part of the tract on which defendant, J. E. Harman moved after selling his land, going to his mother-in-law, Rebecca Brewster, for life, remainder to Mathias Harman, son of Daniel Harman, and two other parts going to other children. A deed in evidence, dated July 26, 1884, purporting to be "between the undersigned heirs at law of Mathias Harman, deceased, and signed by William Harman, Christena Harman, Rebecca Brewster, Daniel Harman and Nancy Wallace, purports to convey to Christena Harman a certain boundary of land on John's Branch, and bounded on one side by the division line between J. E. Harman and Mathias Harman; and to said Rebecca Brewster a tract described as: "Beginning on said Christena Harman's line, on John's Branch, at the

forks of said branch, running to Estell Harman's lines, Patterson, McMillins and others, and so as to include all the land on John's Branch owned by said Mathias Harman, deceased, at the time of his death, and not heretofore conveyed by deed or will, and also all the lands on the south or west side of Dry Fork, not heretofore conveyed by deed or will, by said Harman, deceased, to Daniel Harman." Bailey, surveyor, says, this description covers 147 acres, part of the 250 acres, and designated on the official map as Hannah Harman's 147 acres, and the same on which J. E. Harman, under Rebecca Brewster, resided at the time of his death. He further says he never knew of J. E. Harman having possession of any part of the 250 acre tract, except the 147 acres owned by his wife and on which he moved after he sold to Ritter. One witness, W. P. Payne, thought Mathias Harman had been dead since 1883. And it is argued from this that Mathias Harman could not have been living in April, 1884, the date of the deed from D. G. Sayer to him for the 250 acres, rendering that deed void. It is very certain, however, that the witness Payne is at fault in his recollection, for Mathias Harman's will, dated May 10, 1883, was not probated until April 26, 1886, and J. E. Harman himself substantially admits knowledge of Mathias Harman's purchase and deed from Sayers, and that he claimed it as his old patent land, and says that if the 250 acre tract was not covered by his old patents, it was covered by the land he bought of Sayers. He further admits that he himself bought from Sayers for the reason that if the Sayers land ran as he claimed, Sayers' title was better than his. He pretended to think and expressed the opinion that Sayers was mistaken, and that his deed did not take in as much as he claimed. He does not attempt to show, however, how much of the land claimed by him was outside of the Sayers claim, nor where located.

Though J. E. Harman claimed that his deed of 1876 covered the 250 acres belonging to Mathias Harman, he never had any actual possession of any part of this tract until he went in under Rebecca Brewster. He and Mathias Harman lived neighbors for years, and it is not shown, and is most improbable, that during the life of Mathias Harman, or after his death, J. E. Harman acquired any title by possession as against Mathias Harman, his heirs or devisees. Mathias Harman's title was older than J. E. Harman's deed of 1876, and the latter had nothing to stand on. Sayers title was conceded by J. E. Harman to be older and better than his deed of 1876. Mathias Harman's deed from Sayers is older than J. E. Harman's by five years. His possession within the interlock appears from the evidence to have been actual, open, continuous and adverse to all others, including J. E. Harman. We do not see from the record how J. E. Harman now actually oc-

cupying part of the land so acquired by Mathias Harman, under Rebecca Brewster, his mother in law, ever acquired any title to the land claimed by plaintiffs, either under his deed of 1876, or his deed from Sayers of 1889. He could with as much show of right have claimed title by possession under his deed of 1876 to the land of his mother in law Rebecca Brewster on which at the time of this suit and at the time of his death he was living, not in hostility, but in subordination to the title of Mathias Harman, for it was a part of the 250 acres covered by the deed to Mathias Harman of 1884. There is no appreciable evidence showing that he at any time during the life of the latter, except by the mere recording of his blanket deed of 1876, claimed any part of the 250 acres, or in hostility to the title of Mathias Harman. He is shown by his acts in assisting in the making of surveys of this and adjoining lands, and by the recitals in his deed to Ritter, to have recognized the superior right and title of Mathias Harman, his heirs and devisees, and there is no room to doubt that at the time of his death he was living upon that portion of this land so acquired by his mother in law in subordination to that title. Having thus obtained possession of so much he, or those claiming under him, now seek to hold the portion devised to Josephine Harman, the land in controversy, under his blanket deed of 1876, and alleged possession under it. There is nothing in the record as now presented to justify the claim. We can say, therefore, unhesitatingly, that J. E. Harman never had or acquired any such right to or possession of the land in controversy as at the time he entered and took possession from plaintiffs he had the right to maintain by force.

Are plaintiffs then entitled to maintain this action against defendants? If defendants' entry was forcible, it was unlawful, regardless of the question of right. If they were strangers, or without right or title, their entry was unlawful whether forcible or not. *Duff v. Good*, supra; *Franklin v. Geho*, 30 W. Va. 27, 3 S. E. 168; *Davis v. Mayo*, 82 Va. 97; *Fore v. Campbell*, 82 Va. 808, 1 S. E. 180; *Olinger v. Shepherd*, supra.

In *Franklin v. Geho* it is said: "A forcible entry, for which under our statute, as under the statute of other states, the party dispossessed is given civil redress by this summary proceeding, is precisely the same as the forcible entry, for which at common law an indictment would lie." And adopting the rule for determining what constitutes such forcible entry, stated in *State v. Pollak*, 28 N. C. 305, 42 Am. Dec. 140, one of the cases cited, it is held, point 2 of the syllabus: "Where a party, entering on land in possession of another, either by his behavior or speech, gives those, who are in possession, just cause to fear, that he will do them some bodily harm if they do not give way to him, his entry is esteemed forcible, whether he caused the

terror, by carrying with him such unusual number of attendants, or by arming himself in such a manner, as plainly to indicate a design to back his pretensions by force, or by actually threatening to kill, maim or beat those, who continue in possession, or by making use of expressions, plainly implying a purpose of using force against those who make resistance." See also 19 Cyc. 1112-1117. The difficulty we encounter here, like that encountered by the Court in *Franklin v. Geho*, is in applying this law to the facts. The facts here are not unlike the facts in that case. In that case the hostile demonstrations consisted mainly in the tearing down by defendant, in the absence of plaintiff, of a line fence recently rebuilt by the latter, and moving it over on the land, which plaintiffs had had in actual use and possession for more than twenty years; the rebuilding thereof by plaintiff on the old line; the tearing down and removing of the fence again by defendant; a second rebuilding thereof by plaintiff on the old line; tearing it down again and removing it to the new location by defendant; and lastly in threats by defendant to whip the plaintiff and his whole family if they should further interfere with the fence as relocated by him. There was some conflict in the evidence as to what was the exact language of the defendant's threats. The plaintiff desisted, however, and brought his suit of unlawful entry and detainer. The Court, by Judge Green, in that case says: "The evidence is certainly to some extent unsatisfactory, and contradictory; but giving it a most benign interpretation, as the court must have done on this motion to exclude the evidence of the plaintiff, and more especially as he never did again pull down this fence, as he had done twice before in a month's time, but instead of doing so brought this suit, we must conclude, that the plaintiff was driven from the possession of this land by the threats of the defendant, that he would beat him; and this constituted the entry on this land by the defendant a forcible entry." In that case no deadly weapons were exhibited. In this there were. The defendant went upon the ground with numbers all armed except himself, made his demands, and was at least prepared to enforce them. When he went back on the following Monday morning he took with him unusual numbers and his gun, entered, tore down the tent of plaintiffs' tenants, fenced in the land occupied by them, and was prepared to maintain his position. What did these demonstrations all mean? Some of the authorities cited say: "This terror may be caused by the party carrying with him such an unusual number of attendants or by arming himself in such a manner as plainly to intimate his design to back his pretensions by force." The same authority says: "There may be a forcible detainer, although the entry is peaceable; but whoever retains a

wrongful possession by keeping an unusual number of people or unusual weapons or threatening to do some bodily hurt to the former possessor if he dares to return is guilty of a forcible detainer, although no attempt is made to re-enter." 19 Cyc. 1116. These authorities with others that might be cited, we think, upon the undisputed facts, and upon defendants' admissions, pronounce them guilty not only of forcible and unlawful entry, but of forcible and unlawful detainer, justifying the judgment of the court below in setting aside the verdict for defendants and awarding plaintiffs a new trial.

The conclusion reached on the question of the forcible entry and detainer calls for affirmation of the judgment below; and seeing, as we do from the facts proven, that defendants, on the new trial awarded, will be unable to make a different case on the question of unlawful entry and detainer, it becomes unnecessary for us to go into the question of the relative strength of the conflicting claims of title, or the many questions raised upon the admission and rejection of title papers and oral evidence in relation thereto.

We therefore affirm the judgment and remand the case for a new trial in accordance therewith.

(37 S. C. 47)

GAINNEY v. ANDERSON et al.

(Supreme Court of South Carolina. Sept. 13, 1910.)

1. DOWER (§ 44*)—BAR—MORTGAGE—CONVEYANCE TO MORTGAGEE—EFFECT.

While a sale under a judgment in foreclosure vests the purchaser with the estate passed by the mortgage, including the wife's dower when she joined in the mortgage, discharged of the right to redeem, yet where the mortgagor, without his wife, conveys the land to the mortgagee to extinguish the mortgage, the wife's right of dower is not barred.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. §§ 130-143; Dec. Dig. § 44.*]

2. DOWER (§ 53*)—REVERSION TO THE WIFE—WHEN.

A release of dower on an instrument is merely an incident to the conveyance, which, if the conveyance never takes effect or is extinguished by act of the parties or by operation of law, reverts eo instanti to the wife.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. §§ 108-110; Dec. Dig. § 53.*]

3. ESTATES (§ 10*)—MERGER.

When two estates in the same property unite in the same person in the same capacity, the lesser is merged in the greater, unless a contrary intention appears, either express or implied.

[Ed. Note.—For other cases, see *Estates*, Cent. Dig. §§ 9-13; Dec. Dig. § 10.*]

4. ESTATES (§ 10*)—MERGER—WHEN.

The merger of two estates or interests will not take place if opposed to the intention of the parties affirmatively proved or to be implied from the fact that merger would be opposed to the interest of the person in whom the different estates or interests became united.

[Ed. Note.—For other cases, see *Estates*, Cent. Dig. §§ 9-13; Dec. Dig. § 10.*]

5. MORTGAGES (§ 295*) — CONVEYANCE TO MORTGAGEE—MERGER—BURDEN OF PROOF.

Where property was mortgaged and subsequently deeded to the mortgagee to satisfy it, the burden was on the mortgagee to prove that there was no merger according to the intention of the parties; he having alleged it.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 815-831; Dec. Dig. § 295.*]

6. MORTGAGES (§ 295*)—DEED TO MORTGAGEE—MERGER—INTENTION—EVIDENCE.

Evidence held insufficient to show that, at the time of a deed by a mortgagor to the mortgagee of the premises, the mortgagor's wife not joining in the deed, there was an intention on the part of the mortgagee to keep the mortgage alive as against the wife's dower, so as to prevent a merger.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 295.*]

7. LIMITATION OF ACTIONS (§ 19*) — MORTGAGES—LIMITATION APPLICABLE.

When property is conveyed to satisfy a mortgage by husband and wife, but without a release by the wife after the lapse of more than 20 years from the date of the mortgage, it is presumed paid, and is barred by the 20-year statute of limitations. Civ. Code 1902, § 2449.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 73-85; Dec. Dig. § 19.*]

8. ACKNOWLEDGMENT (§ 25*)—MARRIED WOMAN—DOWER—STATUTES—CONSTRUCTION.

The act of 1793, providing how a married woman shall renounce her dower, and the act of 1870, giving her unlimited power to contract, having both been re-enacted in the general statutes, must be construed together so as to make both effectual, and therefore the privy examination of the wife, as required by the act of 1793, is a condition precedent to an effectual renunciation of her dower in a deed executed prior to the Constitution of 1895.

[Ed. Note.—For other cases, see *Acknowledgment*, Cent. Dig. §§ 133-148; Dec. Dig. § 25.*]

9. APPEAL AND ERROR (§ 1123*) — DIVIDED COURT—EFFECT.

Where the Supreme Court is divided on a proposition, the decision of the circuit court on the point is affirmed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4421-4427; Dec. Dig. § 1123.*]

10. DOWER (§ 50*) — ESTOPPEL TO CLAIM — WARRANTY IN HUSBAND'S DEED.

A husband and wife joined in a bond and mortgage, and subsequently the husband alone conveyed the premises to the mortgagee, in extinguishment of the debt and lien, by a deed containing a general warranty, not mentioning the wife's dower. Held, that the fact that the wife received a benefit from the deed by the extinguishing of her liability on the bond did not render the warranty an estoppel against her subsequent claim of dower.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. § 99; Dec. Dig. § 50.*]

Appeal from Common Pleas Circuit Court of Darlington County; Thos. S. Sease, Judge.

Action by Rebecca B. Gainney against Sarah M. Anderson and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Burke, Rivers & Erckmann, for appellants. McLauchlin & Tatum, for respondent.

HYDRICK, J. In 1881 J. W. Gainney and his wife, the plaintiff herein, gave McKinnon and McNair their joint and several bond,

conditioned to pay a debt which Gainney had contracted. At the same time Gainney gave them a mortgage of a tract of land, owned by him, to secure the debt, and his wife duly renounced her dower thereon. This bond and mortgage were assigned to Carrigan and Silcox. In 1894, the debt being still unpaid, Gainney and wife, by their joint deed, containing the usual covenant of general warranty, conveyed the land to Carrigan and Silcox in satisfaction of the mortgage, though the consideration expressed in the deed is \$450—the amount then due on the mortgage. On this deed Mrs. Gainney did not renounce dower. In 1895 Carrigan conveyed his interest to Silcox, from whom the defendants derive title by descent. Gainney died, and in January, 1908, this action was brought by Mrs. Gainney to recover her dower in the land. The decree below was for the plaintiff.

The appellants contend that because the deed was taken in satisfaction of the mortgage—somewhat in the nature of a voluntary foreclosure, by act of the parties—and as dower had been renounced on the mortgage, it should be made to inure to the benefit of the grantees in the deed and cure the failure of Mrs. Gainney to renounce dower on the deed, just as if the mortgage had been foreclosed in court. The argument is that the parties ought to be allowed to do for themselves voluntarily, and without expense, and with the same result what the court would have compelled at great expense. When the wife of a mortgagor renounces her dower on his mortgage by her own act, she places herself in privity of estate with him; and, when the mortgage is foreclosed, the court acts upon and conveys the legal title by virtue of the complete lien of the mortgage—the contract made by the parties—and the purchaser at a sale under judgment of foreclosure of such a mortgage takes the legal title and the dower. *Miller v. Bank*, 49 S. C. 427, 27 S. E. 514, 61 Am. St. Rep. 821. But, when the parties deal with the situation themselves by a new contract, the court can give to their contract no greater force or effect than its terms import under the rules of law. A release of dower on an instrument—whether a lease, mortgage, or deed of conveyance—attends upon and is incident to the principal conveyance, and endures with it, and no longer. If the principal conveyance never takes effect, or if it is satisfied or extinguished by act of the parties or by operation of law, the dower reverts, eo instanti, to the wife. *Rickard v. Talbird, Rice*, Eq. 158. The general rule is that when two estates or interests in the same property unite in the same person, in the same capacity, the lesser is merged in the greater, unless a contrary intention appears; for the intention, express or presumed, of the person whose interests are so af-

fect, determines whether merger takes place or not. In *McCreary v. Coggeshall*, 74 S. C. 42-55, 53 S. E. 978, 982, 7 L. R. A. (N. S.) 433, Mr. Justice Woods, speaking for the court, after an able and elaborate review of the authorities in this state and in other jurisdictions, reaches the conclusion that "merger will not take place, if opposed to the intention of the parties affirmatively proved or to be implied from the fact that merger would be opposed to the interest of the person in whom the different estates or interests became united." Under this rule, the question arises whether the preponderance of the evidence showed an intention to keep the mortgage open, or, in the absence of evidence of such intention, whether it will be presumed from the circumstances; it being to the interest of the mortgagees to preserve the lien of their mortgage to protect the legal title against the plaintiff's claim of dower. Upon this question, the burden was upon appellants; for, when the circumstances under which merger ordinarily takes place are shown, the burden rests upon him who alleges that there was no merger to prove a contrary intention, or to prove facts and circumstances from which such an intention will be presumed.

The only direct evidence upon that point is that of Mrs. Gainey, whose testimony is uncontradicted. She testified that the deed was executed in satisfaction of the mortgage, and that the amount then due on the mortgage was \$450. The fact that the consideration expressed in the deed is \$450, the amount then due on the mortgage, tends to corroborate her testimony upon this point. It does not even appear that the bond and mortgage were retained by the mortgagees. They were put in evidence, but the record fails to show by whom they were introduced, or from whose possession they came. The fact that Mrs. Gainey was asked to sign the deed with her husband tends to support the theory of merger, because it tends to show that the mortgagees thought that her signature to the deed was sufficient to convey all her interest in the land, including her inchoate right of dower. If they so thought, there would have been no reason to want to keep the mortgage alive. If she had regularly renounced her dower on the deed, no reason could have been assigned for an intention on the part of the mortgagees to keep the mortgage open. Moreover, it does not appear that Carrigan's interest in the land was conveyed subject to the mortgage, or that the conveyance was accompanied by an assignment of his interest in the mortgage, either of which would have been some evidence of intention to keep the mortgage alive, and the absence of which, of course, tends to prove the contrary. As there is no direct or circumstantial evidence of such intention, the only thing upon which a finding of its existence can be predicated

is the presumption which arises from the fact that it would have been to the interest of the mortgagees, which is overthrown by the facts and circumstances above mentioned. There is another reason why the mortgage cannot avail appellants. More than 20 years had elapsed after the date of the mortgage before this action was brought. The mortgage was therefore presumed paid, and it was barred by the statute of limitations. Section 2449, Civ. Code 1902; *Jennings v. Peay*, 51 S. C. 327, 28 S. E. 949.

The next contention of the appellants is that plaintiff is estopped by the covenant of general warranty contained in the deed, for the execution of which there was a valuable consideration moving to her, to wit, the satisfaction of the bond which she had signed with her husband. As the deed was executed prior to the Constitution of 1895, the question must be determined by the powers conferred on married women by the Constitution of 1868, and the laws enacted thereunder; and no opinion is expressed as to the effect of such a covenant by a married woman since the adoption of the Constitution of 1895. In *Townsend v. Brown*, 16 S. C. 91, it was held that a married woman who executed with her husband in 1872 a quitclaim deed to a tract of land "in token of her renunciation and release of all right of dower in the premises" was not thereby barred of her dower; that the provisions of the Constitution of 1868 (article 14, § 8) that the property of a married woman should not be subject to her husband's debts, but should be held as her separate property, and might be bequeathed, devised, or alienated by her the same as if she were unmarried, did not apply to the wife's inchoate right of dower, that not being the kind of property referred to in the Constitution and act of 1870; that, if she had been made *sui juris* in all respects by the Constitution, the Legislature might nevertheless have required her privy examination as evidence of her signature to a deed; that the act of 1795, providing the manner in which a married woman shall renounce her dower, and the act of 1870, giving her unlimited power to contract, having both been re-enacted in the general statutes, must be construed together so as to make both effectual, and, therefore, that a privy examination of the wife, as required by the act of 1795, is a condition precedent to an effectual renunciation of her dower. The principles upon which that case was decided are conclusive of this question. And the matter would require no further consideration, but for the fact that by some later decisions of the court an exception seems to have been ingrafted upon the principles decided in that case, and the contention of appellants that the facts of this case bring it within the exception.

In *Shelton v. Shelton*, 20 S. C. 560, the husband and wife had entered into an agree-

ment with the view of separation. The husband conveyed certain property to the wife, which she agreed to accept "in lieu and in consideration of all claims or demands upon the said Marshall Shelton (the husband) or his estate, and hereby relinquish all further claims upon him for support or otherwise." It was intimated, though not decided, that a wife might since the Constitution of 1868 and the laws passed thereunder, giving a married woman the right to contract as if she were a feme sole, so covenant not to claim dower, as to make it binding upon her by way of estoppel; but, to do so, the covenant "should be entirely free from doubt, clear, positive and express in its terms." But it was held that, as the covenant in question did not in express terms exclude her right to dower, she was not barred.

In *Smith v. Oglesby*, 33 S. C. 194, 11 S. E. 687, the agreement on the part of Mrs. Smith, made during coverture, was express in its terms to release all her right and title to dower in said land, and was based upon a valuable consideration, to wit, \$575, which was paid to her daughter, according to the agreement. Held, that as her power to contract was without limit, except such as applied to all other persons, and as she was in contemplation of law, so far as the power of contracting was concerned, a feme sole, in the absence of an offer to return the money, she was estopped.

In *McKenzie v. Sifford*, 48 S. C. 458, 26 S. E. 706, the wife had covenanted with her husband, from whom she was separated, "to renounce and release unto my said husband, his heirs and assigns, all my right or claim of dower to and in any and all lands now or hereafter owned by him." After the death of the husband, she brought suit to set aside the covenant on the ground that it was without consideration. Held, that it was upon the consideration of \$1,000 paid to her, and that, unless she refunded the consideration, she was not entitled to have the covenant set aside. In the same case, on a subsequent appeal (52 S. C. 104, 29 S. E. 388), it was held that the question of her liability to refund the consideration before she could have the covenant annulled (the circuit judge had held that she was not liable to refund it) was res judicata under the judgment on the first appeal. The first proposition presented by the appellants in that case is thus stated by Mr. Justice Pope, who delivered the opinion: "That the plaintiff could, and did in 1891, make a valid and binding contract to release her right of dower set forth in the covenant." In disposing of that proposition he said: "Under the act of 1795, which is still retained in our statute books, a wife was compelled to renounce dower before a particular set of officers in a specified form in order to debar herself of dower. All these matters are now settled in this state by the case of *Townsend v. Brown*, 16 S. C. 95-99." Chief Justice McIver concurred in the result, and

Mr. Justice Gary dissented as to the holding that she was bound to refund the consideration as a condition of having the covenant annulled, and concurred in the result on the other propositions. But, two of the justices having concurred in affirming the decision of the circuit court on the proposition stated, the decision upon that point is the established law. *Florence v. Berry*, 62 S. C. 469, 40 S. E. 871.

It is unnecessary in this case to decide whether the dictum in *Shelton v. Shelton* and the decision in *Smith v. Oglesby* are to be any longer adhered to, if, indeed, they have not by necessary implication, already been overruled by the decision of *McKenzie v. Sifford*, supra. At any rate, the principle announced in those cases should be extended no further; for the practical effect of holding that a married woman may during coverture estop herself by covenant from claiming dower in the lands of her husband would be to annul the statute which requires that her dower shall be renounced in a specified manner after her examination separate and apart from her husband before certain officers designated.

In *Moon v. Bruce*, 63 S. C. 128, 40 S. E. 1031, the court said: "If it be true, under the authority of the cases of *Shelton v. Shelton*, 20 S. C. 566, and *Smith v. Oglesby*, 33 S. C. 197 [11 S. E. 687], that a married woman, without the private examination and formalities required by the statute in relation to the renunciation of dower, could upon valuable consideration execute such a contract as would estop her from claiming dower, it is also true that under the same authorities that, to have such effect, the contract 'should be entirely free from doubt, clear, positive and express in its terms.'" It was held that the covenant relied on in that case did not clearly express an intention to release dower, and in concluding the opinion the court said: "Having reached the conclusion that the intention to covenant to release dower is not clearly manifest from the terms of the instrument, it becomes unnecessary to consider whether the plaintiff had power to make such a contract to release dower as would estop her except by compliance with the statute, which prescribes the mode by which the favored right of dower shall be renounced. But see *Townsend v. Brown*, 16 S. C. 91; *McKenzie v. Sifford*, 52 S. C. 108 [29 S. E. 388], and also *Brown v. Pechman*, 53 S. C. 2 [30 S. E. 586], which last-mentioned case is in reference to the renunciation of inheritance of a married woman." From what was said in *Shelton v. Shelton* and *Moon v. Bruce*, it is clear that the general warranty contained in the deed which plaintiff signed is not such a covenant as would estop her from claiming dower. True, the general warranty is held by implication to warrant against the claim of dower, for it warrants against all incumbrances; but

it is certainly not "express in its terms" against such a claim.

The other points presented are involved in the foregoing considerations, in which we have assumed that the execution of the deed was voluntary, and that it was for valuable consideration.

Judgment affirmed.

GARY, A. J., concurs in the result.

(153 N. C. 23)

SWINDELL v. SWINDELL.

(Supreme Court of North Carolina. Sept. 14, 1910.)

1. GIFTS (§ 18*)—INTER VIVOS—DELIVERY.

To constitute a valid gift inter vivos, there must be an actual or symbolical delivery by the donor.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 29-33; Dec. Dig. § 18.*]

2. HUSBAND AND WIFE (§ 49½*)—GIFTS—INTER VIVOS—DELIVERY.

A gift by a husband to his wife is completed by a delivery of the property by him to her, and the property is then vested in her, so that the subsequent possession and use thereof by the husband does not impair her title.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 249-252; Dec. Dig. § 49½.*]

Appeal from Superior Court, Beaufort County; O. H. Allen, Judge.

Action by G. L. Swindell, administrator of F. R. Swindell, against Eureka Swindell. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Small, MacLean & McMullan, for appellant. W. O. Rodman, for appellee.

WALKER, J. This action was brought to recover the possession of a horse alleged to be unlawfully detained by the defendant. The plaintiff is the administrator of F. R. Swindell, and the defendant is his widow. There was evidence tending to show that F. R. Swindell had given the horse to his wife. The plaintiff contended that there had been no actual or symbolical delivery of the horse to the defendant, which was necessary to complete the gift. *Gross v. Smith*, 132 N. C. 604, 44 S. E. 111. The evidence tended to show that there had been an actual delivery of the horse to the defendant, and an admission by the husband afterwards that it belonged to his wife.

With reference to this dispute between the parties, the court charged the jury as follows: "In order to constitute a gift by F. R. Swindell to his wife of the horse in question, she must satisfy you by the greater weight of the evidence that there was an actual delivery and transfer of possession by him to her at the time, and that she thereafter alone had the control and possession of the horse." To this instruction defendant excepted. If there had been a delivery

of the horse to the defendant by her husband, the gift was complete and the property in the horse vested in her. It was not required, in order to complete the gift, that she should continue in the sole possession of the horse. If it was her property, the mere possession and use of the horse afterwards by her husband did not divest or even impair her title, no more than such a possession and use of property, which she had acquired by purchase or which she owned at the time of the marriage, would affect her title to such property. In *Hollday v. McMillan*, 83 N. C. 271, the court, when considering the competency of a declaration of the wife, while in possession of a buggy, that it belonged to her, and deciding in favor of its competency, said that: The "case stands on peculiar grounds. With separate estates held by married persons, and the husband's use of that belonging to the wife, the actual possession can seldom be ascertained except under the rule of law that it follows and attaches to the title. It would therefore seem almost unavoidable to admit such declarations made ante litem to explain the quality and nature of the possession. They are received, not as proof of ownership, but as an assertion and claim of ownership, and to repel the inference of holding for another, or of a recognition of property in any one else than the declarant." The instruction of the court was erroneous.

New trial.

(153 N. C. 4)

BERRY v. McPHERSON.

(Supreme Court of North Carolina. Sept. 14, 1910.)

1. ADVERSE POSSESSION (§ 27*)—ACTUAL POSSESSION—EVIDENCE.

On the issue of adverse possession, testimony that lands were in the "possession" of certain persons must be taken to mean actual, and not mere constructive, possession; it being a statement of fact subject to overthrow on cross-examination.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 27.*]

2. ADVERSE POSSESSION (§ 57*)—CONTINUITY OF POSSESSION—EVIDENCE—SUFFICIENCY.

In an action for trespass upon land where in plaintiff relied on adverse possession, evidence held to warrant a finding that his and his father's acts of dominion were those of ownership, and not of occasional trespassers, and that they were repeated and continuous for a considerable period of time.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 277, 278; Dec. Dig. § 57.*]

3. ADVERSE POSSESSION (§ 57*)—PROOF REQUIRED.

In proving continuous adverse possession under color of title, nothing must be left to mere conjecture, it being necessary that the testimony tend to prove continuity of possession for the statutory period, either in plain terms or by necessary implication, and the possession need not be unceasing, though the evidence should warrant an inference that the actual use and

occupation have extended over the required period, and that during the time the claimant has from time to time continuously subjected some portion of the disputed land to the use to which it was susceptible.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 277, 278; Dec. Dig. § 57.*]

4. ADVERSE POSSESSION (§ 115*)—FACT OF POSSESSION—JURY QUESTION.

In an action for trespass upon land wherein plaintiff relied on adverse possession under color of title, evidence held sufficient to go to the jury on the question as to the fact of the possession claimed by plaintiff.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 691, 692; Dec. Dig. § 115.*]

5. ADVERSE POSSESSION (§ 112*)—FACT OF POSSESSION—BURDEN OF PROOF.

The burden is on one claiming land by adverse possession to establish the fact of possession for the statutory period by a preponderance of the proof.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 651, 655; Dec. Dig. § 112.*]

Appeal from Superior Court, Camden County; Ferguson, Judge.

Action by W. S. Berry against A. B. McPherson. From a judgment of nonsuit, plaintiff appeals. Nonsuit set aside, and new trial ordered.

E. F. Aydlett and J. C. B. Ehringhaus, for appellant. H. S. Ward and W. A. Worth, for appellee.

BROWN, J. The plaintiff introduced deeds. (1) O. G. Pritchard, administrator of T. S. Berry, to the plaintiff, W. S. Berry, December, 1897. (2) Deed of trust of W. S. Berry and wife, who are the parents of the plaintiff, to T. S. Berry, dated December, 1890. (3) W. M. Lindsey to W. S. Berry, August 12, 1859. These deeds cover the lands in controversy, according to plaintiff's testimony.

Failing to show title out of the state by grant, plaintiff relied upon possession under color, and testified that his father, W. S. Berry, was in possession of the lands covered by the deeds, and claiming them for 25 years prior to 1897, and that he had been in possession of them ever since, constituting a possession of over 30 years. This language of the witness, unexplained and uncontradicted by cross-examination, must be taken in the ordinary sense, as understood by laymen, to mean an actual, and not a mere constructive, possession. It is to be treated as the statement of a fact, which, however, upon cross-examination may be shown to be without substantial basis, in which event it will be disregarded. "A witness may testify directly in the first instance to the fact of possession if he can do so positively, subject, of course, to cross-examination." *Abbott, Trial Ev.* 622, 590; *Rand v. Freeman*, 1 Allen (Mass.) 517; *Bryan v. Spivey*, 109 N. C. 68, 13 S. E. 766, where this question is learnedly

discussed by Mr. Justice Shepherd. The further examination of the witness does not in our opinion weaken or destroy the effect and significance of his first statement. He testifies that there is an island about midway of his possession and a road leading across the swamp to the island; that he and his father kept up this road; that there was a road leading across the woods to the island for a third of the way from which he and his father regularly got firewood; that his father sold timber off the land in controversy, and that six years ago defendant cut timber on this land and promised to pay plaintiff for it; that on one occasion defendant in presence of plaintiff and his brother recognized plaintiff's possession by admitting the cedar corner claimed by plaintiff to be the true division corner. Plaintiff further testifies that tenants on his farm cut wood on this land whenever they needed it, and that he had cut and sold shingles off it frequently, and his father had cut and sold railroad ties. Plaintiff further stated that he sold pine timber off the land, and allowed the neighbors to get wood off it whenever they desired. The land in controversy appears to be swamp land, uninclosed and with no habitation upon it.

The evidence indicates that plaintiff and his father for more than 30 years exercised acts of dominion over the land and made from it the only profits and use of which it is susceptible. From the evidence of the witness the jury may well infer that these acts were those of ownership, and not those of an occasional trespasser, and that they were repeated and continuous for a considerable period of time. The possession was as decided and notorious as the nature of the land would permit and offered unequivocal indication that plaintiff and his father were exercising the dominion of owners, and were not pillaging as trespassers. *Williams v. Buchanan*, 23 N. C. 535, 35 Am. Dec. 760; *Tredwell v. Reddick*, 23 N. C. 56; *Hamilton v. Icard*, 114 N. C. 538, 19 S. E. 607; *Simpson v. Blount*, 14 N. C. 34; *Baum v. Shooting Club*, 96 N. C. 310, 2 S. E. 673. It is true that in proving continuous adverse possession under color of title nothing must be left to mere conjecture. The testimony must tend to prove the continuity of possession for the statutory period either in plain terms or by "necessary implication." *Ruffin v. Overby*, 105 N. C. 83, 11 S. E. 251. This possession need not be unceasing, but the evidence should be such as to warrant the inference that the actual use and occupation have extended over the required period, and that during it the claimant has from time to time continuously subjected some portion of the disputed land to the only use of which it was susceptible. *Ruffin v. Overby*, supra; *McLean v. Smith*, 106 N. C. 172, 11 S. E. 184; *Hamilton v. Icard*, supra.

While the evidence offered is not necessa-

rily conclusive, if taken to be true, as to the fact of possession, we think it sufficient to be submitted to the jury under appropriate instructions that they may draw such inferences as they see proper, bearing in mind that the burden of proof is on the plaintiff to establish the fact of possession for the statutory period by a preponderance in the proof.

The nonsuit is set aside.

New trial.

(153 N. C. 19)

HOLLOWELL v. NORFOLK & S. RY. CO.
et al.

(Supreme Court of North Carolina. Sept. 14, 1910.)

1. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action against a railway company and its receivers, appointed by a federal court, it was not reversible error to permit plaintiff to show an order of the federal court permitting plaintiff to sue the company, though it was not certified by the clerk of the federal court and the seal of that court was not attached, where the answer raised no jurisdictional question; the evidence being thus immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

2. RECEIVERS (§ 178*)—TORTS COMMITTED BEFORE APPOINTMENT—PARTIES.

It was proper to sue the receivers of a railway company alone, or to join them as defendants with the company in an action for injuries, though the cause of action arose before their appointment.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 346-351; Dec. Dig. § 178.*]

3. APPEAL AND ERROR (§ 901*)—EXISTENCE OF ERROR—BURDEN OF PROOF.

The burden is on appellant to show error in an instruction depending on consideration of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3670; Dec. Dig. § 901.*]

4. APPEAL AND ERROR (§ 928*)—REVIEW—INSTRUCTIONS.

An instruction that, if the jury believed the evidence, they should answer an issue affirmatively, will not be held erroneous, where the evidence on that issue is not sent up, and the statement of the case recites that there was evidence tending to support a finding for appellee.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749-3754; Dec. Dig. § 928.*]

Appeal from Superior Court, Chowan County; Ferguson, Judge.

Action by W. J. Hollowell against the Norfolk & Southern Railway Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

The plaintiff complained that his horse was injured by a defective crossing of the defendant railway's roadbed, negligently constructed and maintained by the defendants. The jury so found, and assessed plaintiff's damages at \$102.

Pruden & Pruden and Brown Shepherd, for appellants. Ward & Grimes, for appellee.

MANNING, J. The defendants are the railway company and its receivers. It was admitted that plaintiff's cause of action arose prior to the appointment of the receivers by the federal court. The plaintiff filed a single complaint against the railway company and its receivers, and a joint answer was filed by the defendants, admitting the appointment of the receivers, but denying the alleged acts of negligence and the damages sustained thereby. There was no plea that the defendant receivers were not liable because the injury complained of was not received while the receivers were operating the railroad under appointment of the federal court, and that the corporation was not suable in the state courts, because such actions against the corporation had been enjoined by the federal court. After offering evidence tending to show the negligence complained of and the date of the injury, and the damages sustained by plaintiff, the plaintiff offered in evidence an order of Judge Purnell, judge of the federal court, permitting the plaintiff, upon his petition therefor, to sue the railway company. The defendants objected to the introduction of this order, upon the ground that the order was not certified by the clerk of the federal court, nor was the seal of the court attached thereto. We do not think the evidence material, and that its reception by the court constituted reversible error. The complaint alleged that the defendant corporation was operating a railroad in the state, and that its business and property had been placed under the management and control of the other defendants as receivers appointed by the federal court. The answer, filed jointly by all the defendants, admitted the truth of these allegations. It became, therefore, unnecessary to offer evidence of a preliminary jurisdictional fact admitted in the pleadings. The defendant railway company had by its answer to the merits without raising any jurisdictional question submitted itself and its defense on the merits to the jurisdiction of the court. The court having jurisdiction of the parties and the cause of action, it remained only to hear and determine the cause upon the merits.

This court held in *Kessenger v. Fitzgerald*, 152 N. C. 247, 67 S. E. 583, that, under the provisions of section 1224, Revisal 1905, the receivers were properly named as defendants to an action instituted upon a cause of action arising prior to their appointment, because the action against the receivers was, in effect, an action against the insolvent corporation. *Grady v. Railroad*, 116 N. C. 952, 21 S. E. 304; *Farris v. Receivers R. & D. R. R.*, 115 N. C. 600, 20 S. E. 167. In the *Kessenger* case, supra, this court said: "We think the failure to formally name the company in the summons is not of the substance, and should be cured now by amendment,

even if required." In the present action, however, the corporation was formally named as a defendant, as well as the receivers. It follows from these authorities that it was proper to sue the receivers alone or to join as defendants the corporation and the receivers, though the cause of action arose prior to the appointment of the receivers. What effect or what priority of payment the federal court will give to the judgment in plaintiff's favor in administering the assets of the insolvent corporation is not before us, and we refrain from expressing or intimating any opinion thereon. The defendants object to his honor's charge to the jury "that, if they believed the evidence in this cause, they should answer the first issue, 'Yes.'" The evidence offered by the plaintiff upon the first issue is not sent up. In the statement of the case it is stated that on the trial there was evidence tending to show the facts necessary to support a finding for the plaintiff, and that the defendants offered no evidence. In *State v. Railroad*, 149 N. C. 508, 62 S. E. 1088, this court has so recently considered the question presented by this exception that we deem it now only necessary to refer to that decision, and to say that, the defendants being appellants, the burden is upon them to convince us that there was error in the ruling of his honor excepted to. Upon the facts appearing in the record, we cannot hold that the charge of his honor constitutes reversible error. We cannot see that a contrary inference was permissible from the evidence.

We have examined the other exceptions taken by the defendants, and we do not think they can be sustained. Finding no error, the judgment is affirmed.

No error.

(153 N. C. 14)

WHITE v. LANE et al.

(Supreme Court of North Carolina. Sept. 14, 1910.)

1. DRAINS (§ 17*)—DRAINAGE DISTRICTS—APPOINTMENT OF COMMISSIONERS — APPEAL — STATUTES.

Under Pub. Laws 1909, c. 442, providing for the establishment of a drainage district, and declaring in sections 33, and 37 thereof that one who fails to appeal from his assessment or fails to pay it is deemed as consenting to the issuance of drainage bonds, and declaring that all parties who have had their day in court are deemed to have waived all objections where there was no exception and appeal, etc., one who was a party to drainage proceedings may not collaterally attack the judgment of the clerk of court appointing the drainage commissioners after their election by the corporation on the ground that the clerk had an interest in the land subject to assessment, but the remedy, if any, was by appeal.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 17.*]

2. DRAINS (§ 17*)—ESTABLISHMENT OF DISTRICTS.

The interest of the clerk of court in a tract of land in a drainage district does not disqualify

him from appointing the drainage commissioners after their election by the corporation, and bonds voted and issued by the drainage commissioners under their corporate seal cannot be attacked on the ground of the interest of the clerk.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 17.*]

3. JUDGES (§ 39*)—DISQUALIFICATION—INTEREST.

The interest of a judge rendering a judgment void must be a direct interest in the subject-matter, and not a remote one, or which he has in common with many others in a public matter.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 184, 186; Dec. Dig. § 39.*]

4. APPEAL AND ERROR (§ 1078*)—EXCEPTIONS — ABANDONMENT.

An exception not briefed in appellant's brief is under Supreme Court Rule 34 (86 S. E. ix) deemed abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Appeal from Superior Court, Chowan County; Ward, Judge.

Action by E. B. White against W. H. Lane and others. From an order vacating a restraining order, plaintiff appeals. Affirmed.

This is an action for the purpose of enjoining the issuance of bonds in the sum of \$25,000 by the defendants as the board of drainage commissioners of the "Bear Swamp-Drainage District," which had been formed under authority of chapter 442, Laws 1909. The plaintiff is a landowner in the said district, and on his own behalf and behalf of others in like manner interested brought this suit to enjoin said bond issue, contending that the proceeding in which the said commissioners were appointed was void because the clerk of the court before whom the same was instituted was a landowner in the district, and therefore directly interested in the result of the matter he was to hear and determine. A restraining order which had been granted was vacated, and the plaintiff appealed.

Small, McLean & McMullan, for appellant. W. S. Privott, for appellees.

CLARK, C. J. The sole exception presented by appellant's brief is whether the issuance of the bonds by the drainage commissioners is invalid because the clerk of the superior court who appointed them had an interest in a tract of land within the drainage district. We think his honor correctly held that the interest which disqualifies one to act as judge must be a direct interest in the subject-matter of the litigation. In this case the judgment of the clerk in no wise affected his title or interest in the said tract, but the proceeding was simply to create a drainage district and for the assessment of the lands therein for the purpose of paying for such drainage, either in cash or by issuance of bonds. If in such proceeding the clerk should have committed any error (and none

is alleged), the remedy was by an appeal in that cause. If any question had arisen upon exception to the report of the board of viewers as to the proper classification and assessment of the tract in which the clerk had an interest, the question might then arise whether the clerk could pass upon such exception, or should certify the exception to the judge for decision. But, as the owners of land within the district are not incompetent to sit on the board of viewers to pass upon the classification and assessment of the several tracts in the first instance, it would not seem that the clerk would be disqualified to pass on their report, seeing that the judge can review his action upon appeal. But, however that may be, such question is not here presented. Here, all the landowners in the district having been petitioners or been served with summons as defendants and final judgment rendered, the drainage commissioners issued bonds for the drainage district, and it is sought to restrain such issuance of bonds by them. The drainage commissioners were elected by the new corporation, the "Drainage District." Section 19, ch. 442, Laws 1909.

This is a collateral attack upon the judgment of the clerk who appointed the commissioners after their election by the corporation on the ground that the clerk had an interest in one of the tracts subject to assessment. The bond issue here called in question is not authorized by any judgment of the clerk, but the bonds are issued by the board of drainage commissioners by virtue of section 34 of said chapter 442, Laws 1909, and section 33 provides that any one who has failed to appeal from his assessment or failed to pay it is "deemed as consenting to the issuing of said drainage bonds." Section 37 further reiterates that all parties, like the plaintiff for instance, who have had their day in court, are deemed and held to have waived all objections if there was no exception and appeal taken in the cause "and the remedies provided for in this act shall exclude all other rem-

edies." The object of the act is to encourage drainage, and to cut off all vexatious, technical, and dilatory litigation where a party has had his day in court and has failed to appeal. "Not having spoken when he could have been heard, the plaintiff cannot now be heard when he should be silent."

Irrespective of the express provisions of this statute, and that the bonds are voted and to be issued by the drainage commissioners, a corporation, under their corporate seal, and not by virtue of any decree of the clerk, the interest of the latter in a tract of land in the drainage district "would not be such interest (even if it had been excepted to) which would have disqualified him to appoint Drainage Commissioners." In *re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88. Also 23 Cyc. 579, which recites sundry instances of remote or contingent interests which will not disqualify a judge. The interest of the judge which renders a judgment void must be a direct interest in the subject-matter, and not a remote or minute one, or which he has in common with many others in a public matter. Otherwise no citizen of a town or county or of the state would be competent either as judge or juror in actions for or against the town, county, or state or in cases involving the validity of bonds issued by them. *Eastman v. Com'rs*, 119 N. C. 505, 26 S. E. 39; *Johnston v. Rankin*, 70 N. C. 550. Cases in which the clerk would be disqualified to act are cited in *Land Co. v. Jennett*, 128 N. C. 4, 37 S. E. 954.

The plaintiff also excepted below that the statute was unconstitutional. But this is abandoned by not being in his brief here, Rule 34 of this court, 140 N. C. 666, 66 S. E. ix. This, we presume, was the real ground of appeal originally, and was abandoned because the statute has been held constitutional, in a well-considered opinion by Hoke, J., *Sanderlin v. Luken*, 152 N. C. 738, 68 S. E. 225.

The judgment dissolving the restraining order is affirmed.

(153 N. C. 587)

STATE v. WEDDELL.

(Supreme Court of North Carolina. Sept. 21, 1910.)

MUNICIPAL CORPORATIONS (§ 174*)—OFFICERS—ALDERMEN—INTEREST IN CONTRACTS—OFFENSES.

Revisal 1905, § 3572, provides that if any person appointed or elected a commissioner or director to discharge any trust wherein the city may be in any manner interested shall become an undertaker, or make any contract for his own benefit under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, or singly or jointly with another, he shall be guilty of a misdemeanor. Held, that where, prior to defendant's election as alderman of a city, he was employed by a firm of contractors at a weekly salary as timekeeper and office man, at which time the contractors were executing a contract with the city, and after such election defendant voted to accept the contractors' bid for a sidewalk contract, it being the lowest submitted, his employment by the contractors in such capacity did not constitute a violation of the statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 410-414; Dec. Dig. § 174.*]

Appeal from Superior Court, Craven County; Ferguson, Judge.

J. H. Weddell was indicted for becoming interested in the making of a contract with a city of which he was an alderman, and from a judgment finding him not guilty the State appeals. Affirmed.

The defendant was indicted under section 3572 of the Revisal of 1905, which reads as follows: "If any person appointed or elected a commissioner or director to discharge any trust wherein the state or any county, city or town, may be in any manner interested shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another, he shall be guilty of a misdemeanor." The jury returned a special verdict as follows:

"(1) That Bowe & Page, a copartnership of Charleston, S. C., on about January 29, 1909, by competitive bidding, were awarded a contract for laying brick pavement on the streets of the city of New Bern, to an amount of about \$50,000.

"(2) That on about March 1, 1909, said Bowe & Page, through their agent, one Finch, employed the defendant, J. H. Weddell, as timekeeper and office man in the performance of the said contract.

"(3) That at the regular election, the Tuesday after the first Monday in May, 1909, being May 4th, the defendant, J. H. Weddell, was elected an alderman of the city of New Bern from the Second ward. That pursuant to the charter, on Friday, May 7, 1909, the said vote was canvassed, and the said J. H. Weddell was declared elected and entered

upon the discharge of his duties as an alderman of the city of New Bern, and has been a member of the board up to the present time.

"(4) That during the month of May, 1909 (Alsop & Pierce, contractors to lay sidewalks in the city of New Bern, having refused to complete the same), by order of the board of aldermen, advertisement was made for sealed bids for the making of one thousand (1,000) square yards, more or less, of concrete sidewalk, which consisted of a few short pavements on the sidewalks, and the balance consisting of short ends leading from the corners of the regular sidewalks to the curbing at corners of the various streets.

"(5) That pursuant to the said advertisement, at the meeting of the board of aldermen in June, 1909, bids were offered by three parties being sealed and delivered to the clerk of the board, and not being opened until the board was in session, and that, when opened, the bid of Bowe & Page was at the rate of \$1 per square yard, and the next lowest bid was \$1.12½ per square yard.

"(6) That during said meeting the defendant, J. H. Weddell, as alderman, made a motion that the lowest bid be accepted, the said Bowe & Page being the lowest bidders, and said motion was adopted by the board.

"(7) That, pursuant to the said contract, Bowe & Page proceeded to do the work as advertised and were paid therefor by the city.

"(8) That, while Bowe & Page were performing the said contract, the defendant J. H. Weddell continued as officeman and timekeeper for said Bowe & Page, without any new contract after March, 1909, having been paid a regular wage of \$20 per week from the beginning of his employment to its close. That in said employment the said J. H. Weddell had no supervision of the work being done, the material used, or the manner in which it was done. That the said J. H. Weddell, as alderman, was not a member of the committee of the board of aldermen whose duty it was to supervise the said work.

"(9) That the said J. H. Weddell had no interest in the profit or losses of Bowe & Page on the said contract, but he received his wages of \$20 per week as set out in paragraph 8, and his employment was not limited to their work in the city of New Bern, but at their directions he was sent elsewhere to perform same duties as those for which he was employed in the city of New Bern."

The Attorney General and George L. Jones, for the State. D. E. Henderson, W. D. McIver, and Simmons, Ward & Allen, for appellee.

BROWN, J. Upon the special verdict we concur with the court below that the defendant is not guilty, and with the candid admis-

sion of the Attorney General at the close of his brief that "the conduct of the defendant does not come within the terms of the statute, and there is no suggestion that it comes within its spirit."

Affirmed.

CLARK, C. J. (concurring). The defendant was an alderman of the city, and at the same time was holding an important post as employé in the service of a party making a contract with the city. While this does not fall within the terms of the statute, it is not altogether seemly, nor to be commended, that one who holds employment in the service of a contractor with the city should, as an alderman, sit on the board, when passing upon a contract between his employer and the city.

(153 N. C. 48)

WOOTEN v. HARRIS.

(Supreme Court of North Carolina. Sept. 21, 1910.)

1. PARTNERSHIP (§ 230*)—SALE OF GOOD WILL—AGREEMENT TO PROTECT.

An agreement by an outgoing partner not to re-engage in business in or adjacent to the same town in support of a contract for the sale of his interest need not be in writing.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 270.*]

2. PARTNERSHIP (§ 230*)—GOOD WILL—AGREEMENT NOT TO RE-ENGAGE IN BUSINESS—DEFINITENESS.

An out-going partner's agreement not to re-engage in a competing business in F. or near enough thereto to interfere with plaintiff's business was not too indefinite, at least so far as to prevent his re-engaging in business in F.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 477½; Dec. Dig. § 230.*]

3. CONTRACTS (§ 117*)—GOOD WILL—AGREEMENT NOT TO RE-ENGAGE IN BUSINESS—TIME—LIMITATION.

An agreement by an outgoing partner not to re-engage in business in F., or near enough thereto to interfere with plaintiff's business, without limitation as to time, was valid for the time during which plaintiff was engaged in business at that place during his life.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554-569; Dec. Dig. § 117.*]

4. MONOPOLIES (§ 12*)—SALE OF GOOD WILL—AGREEMENT NOT TO RE-ENGAGE IN BUSINESS—STATUTES.

A provision of an agreement for the sale of a partner's interest that he would not again engage in the mercantile business in F. or near enough thereto to interfere with plaintiff's business was not in violation of Pub. Laws 1907, c. 218, § 1, subd. "e," prohibiting any person, firm, corporation, or association engaged in buying or selling anything of value in North Carolina to make an agreement, express or implied, with any other person, firm, corporation, or association not to buy or sell such things of value within certain territorial limits within the state with the intention of preventing competition in selling, or to fix the price, or prevent competition in buying.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

5. CONTRACTS (§ 117*)—SALE OF GOOD WILL—CONTRACT NOT TO RE-ENGAGE IN BUSINESS.

Where an out-going partner sold his interest in a general village store to plaintiff, and agreed not to re-engage in mercantile business in the same town, or near enough thereto to interfere with plaintiff's business, and such contract was reasonable in its scope and as to duration and territory and was not shown to be one of many similar contracts tending to engross that particular business in the territory, it was not invalid as tending to create a monopoly.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554-569; Dec. Dig. § 117.*]

Appeal from Superior Court, Pitt County; Guion, Judge.

Action by K. B. Wooten against R. E. Harris. Judgment for defendant, and plaintiff appeals. Reversed.

Moore & Long, for appellant. Harry Skinner, for appellee.

CLARK, C. J. The complaint alleges that the plaintiff bought out the defendant, who was his partner in general mercantile business in the town of Falkland, including the defendant's interest in the "good will" of the business, and, to secure the latter whose purchase was an inducement to the contract, the defendant contracted verbally with plaintiff that he would not again engage in the mercantile business in the town of Falkland, or near enough thereto to interfere with plaintiff's business. The defendant denied the agreement, but, before the jury had decided the issue, his honor announced that he would nonsuit the plaintiff.

This action the defendant contends should be sustained: (1) Because the alleged agreement was not in writing. We know of no authority requiring this. (2) Because the territory "in the town of Falkland or near enough thereto to interfere with plaintiff's business" is too indefinite. If this were true as to any place outside of the town, the expression "in the town of Falkland" is definite enough, and the averment is that the defendant had started his new business within the town and in a few feet of the store in whose business he had sold his interest and his share in the "good will." In *Kramer v. Old*, 119 N. C. 1, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep. 650, the expression "in the vicinity of Elizabeth City" was held good at least as to Elizabeth City. In *Hauser v. Harding*, 126 N. C. 295, 35 S. E. 593, the territory was "the town of Yadkinville and the territory surrounding." This was held an agreement valid within the town limits of Yadkinville. (3) The defendant further contends that the agreement is invalid because not limited in duration. But by its very terms, "not to interfere with the plaintiff's business," it is limited to the plaintiff's lifetime and even to such time as he may be engaged in the same business at that place. In *Hauser v. Harding*, supra, it was held

that, if no time was named or indicated, the limitation would be held valid for the grantor's lifetime. And for the last ground of defense the defendant relies upon Laws 1907, c. 218, § 1, subsec. "e" which makes it unlawful "for any person, firm, corporation or association engaged in buying or selling anything of value in North Carolina to make or have an agreement or understanding, express or implied, with any other person, firm, corporation or association not to buy or sell said things of value within certain territorial limits within the state, with the intention of preventing competition in selling or to fix the price or prevent competition in buying of said things of value within said limits."

This last is the real point in this case. But, in construing such statute, we must consider its object and the evil to be remedied. The history of this legislation is known to all. It is an attempt to make unlawful the formation and operation of great trusts and monopolies which may buy out or crush out all competition in certain articles or business with a view to exercise the power of fixing the prices of the raw material and of the manufactured article, that enormous profits may be extorted thereby at the expense of the public. Neither the language, the known purpose of this enactment, nor the history of this legislation will justify its application to the purchase, as here, by one partner of the other's interest in a general store in a village or town; nor to a similar purchase between other individuals. Such contract when reasonable in its scope and as to duration and territory cannot possibly lend itself to the formation of trusts or monopolies, unless shown to be one of many similar contracts, tending to engross that particular business in a given territory. There is here not shown in evidence any "intention of preventing competition in selling, or to fix the price or prevent competition in buying, of said things of value within said limits." This contract is therefore not within the terms of the statute. It might be different if it were shown that this was one of many similar contracts tending to engross or monopolize any given business, or the sale of any article, within the territory named.

Such contracts as herein have been held not to be "illegal restraint of trade" in many cases in this court from *Baker v. Cordon*, 86 N. C. 116, 41 Am. Rep. 448, down to *Anders v. Gardner*, 151 N. C. 604, 66 S. E. 665. To hold such contracts invalid would have no possible effect toward preventing trusts and monopolies, but would merely destroy the "good will" which one has built up in his business for it would become valueless and unsalable, if the seller cannot guarantee its possession to the vendee by an agreement not to again engage in the same business at the same place in competition with his vendee.

The judgment of nonsuit is reversed.

ROBERTSON v. CONKLIN et al.

(153 N. C. 13)
(Supreme Court of North Carolina. Sept. 14, 1910.)

1. DAMAGES (§ 171*) — MALICIOUS TORTS — PUNITIVE DAMAGES—EVIDENCE.

In cases of malicious torts, where punitive damages may be awarded, evidence of plaintiff's pecuniary condition is inadmissible for the purpose of securing punitive damages, and is admissible only on the ground that his pecuniary circumstances are directly involved in estimating the actual damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 498; Dec. Dig. § 171.*]

2. MALICIOUS PROSECUTION (§ 62*)—DAMAGES—EVIDENCE—ADMISSIBILITY.

Where, in an action for malicious prosecution based on defendant procuring the arrest of plaintiff for larceny, the evidence showed that plaintiff did not suffer because of his poverty, and that he was not discharged from defendant's service, but was transferred to other work without a decrease in compensation, and that he continued in the service until after the commencement of the action when he was discharged, evidence that plaintiff had no property and was dependent on his labor for a living was inadmissible on the question of actual or punitive damages.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 148; Dec. Dig. § 62.*]

3. MALICIOUS PROSECUTION (§ 72*)—ACTUAL AND PUNITIVE DAMAGES—SUBMISSION OF ISSUE TO JURY.

The court in an action for malicious prosecution could submit only one issue as to damages, and under it the court should charge as to actual damages, and also on punitive damages, and when the latter may or may not be allowed.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Dec. Dig. § 72.*]

Appeal from Superior Court, Washington County; Ferguson, Judge.

Action by Samuel Robertson against E. J. Conklin and another. From a judgment for plaintiff, defendants appeal. Reversed, and new trial granted.

There were three distinct counts or causes of action set out in the complaint—malicious prosecution, abuse of process with false arrest, and slander. The following issues were submitted:

"(1) Did the defendant wrongfully and without probable cause cause the warrant for searching the plaintiff to be issued? A. Yes.

"(2) If so, was the defendant actuated by malice in causing such warrant to issue? A. Yes.

"(3) Did the defendant wrongfully and without probable cause cause the plaintiff to be arrested? A. Yes.

"(4) If so, was the defendant actuated by malice in causing such arrest? A. Yes.

"(5) Did the defendant wrongfully and maliciously charge the plaintiff with the larceny of the money? A. Yes.

"(6) What actual damage, if any, is the plaintiff entitled to recover? A. \$1,000.

"(7) What punitive damage, if any, is the plaintiff entitled to recover? A. None."

By consent of plaintiff the court reduced the verdict to \$500, and gave judgment for plaintiff. The defendant appealed.

Asa O. Gaylord, for appellants. Wm. M. Bond and Wm. M. Bond, Jr., for appellee.

BROWN, J. The evidence tended to show that the plaintiff was employed by the Plymouth Lumber Company as night watchman at the time of the alleged wrongs committed against him, and that E. J. Conklin was secretary and treasurer of the lumber company; that on a Saturday night \$40.80 was left in a desk drawer in the office of the lumber company in the mill grounds, which the plaintiff was employed to watch; that the money was taken, and defendants charged plaintiff with the larceny, and also had him arrested under a search warrant, or without warrant, and had his home searched by an officer.

Over the objection of the defendants plaintiff was permitted to testify that he had no property at the time, and was entirely dependent on "his two hands" for a living. The rule that in cases of malicious torts, where punitive damages are claimed and may be awarded, evidence of the defendant's pecuniary condition is admissible, is very generally recognized by the authorities, but evidence of the pecuniary condition of the plaintiff as a general rule is inadmissible. It is admitted only on the ground that the pecuniary circumstances of the plaintiff are directly involved in estimating the actual damages caused by the tortious act; the poverty of the plaintiff making the injury the greater. Such evidence is never admitted for the purpose of securing vindictive damages. *Rowe v. Moss*, 9 Rich. Law (S. C.) 423, 67 Am. Dec. 566, and cases cited. It is generally allowed in actions for the wrongful infliction of personal injuries by an assault upon the theory that the consequences of a severe personal injury are more disastrous to a person destitute of pecuniary resources and dependent wholly upon his manual exertions for the support of himself and family than to one of ample means. We think this is the rule recognized by this court in *Reeves v. Winn*, 97 N. C. 248, 1 S. E. 448, 2 Am. St. Rep. 287. There is nothing in this case which justifies a consideration of the plaintiff's pecuniary condition in assessing the damages. There is no foundation for the claim that whatever actual damage he suffered was increased by plaintiff's poverty. The evidence shows that he did not suffer the pangs of hunger or listen to the cry of his children for bread by reason of defendant's conduct. In fact, he was not even discharged from defendant's service, but transferred to the day force at no decrease in pay so far as the record discloses, and continued in defendant's service for some time after the occurrence, and only

discharged after the commencement of this action. It is evident from reading the evidence as to actual damage that the jury undertook to allow punitive damages under the sixth issue, which probably induced his honor to reduce the verdict and plaintiff to accept it.

Upon the next trial, we think it better to follow the usual practice, and submit only one issue as to damage, and under it the judge should carefully instruct the jury as to actual damage and also upon punitive damage, and when the latter may or may not be allowed.

New trial.

(153 N. C. 595)

STATE v. WILLIAMS.

(Supreme Court of North Carolina. Sept. 21, 1910.)

1. MUNICIPAL CORPORATIONS (§ 174*)—ALDERMAN—INTEREST IN CONTRACTS—LIABILITY.

Revisal 1905, § 3572, providing that, if a public commissioner be in any manner interested in the making of a contract which should be of profit to him, he shall be guilty of a misdemeanor, applies to an alderman who was president of the corporation with which a contract was made by the board of aldermen, and also head of the mechanical department of the corporation, although he may have been wholly innocent of the transaction, as the law would hold him to a knowledge of it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 411; Dec. Dig. § 174.*]

2. MUNICIPAL CORPORATIONS (§ 174*)—ALDERMAN—INTEREST IN CONTRACTS—LIABILITY.

Under such statute, an alderman is not exculpated by his retiring from the meeting when the board of aldermen audited and paid the bill.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 411; Dec. Dig. § 174.*]

3. MUNICIPAL CORPORATIONS (§ 174*)—ALDERMAN—INTEREST IN CONTRACTS—LIABILITY.

Under such statute, it is not necessary to show that an alderman directly profited by the contract, but that he was in some degree financially interested is sufficient.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 411; Dec. Dig. § 174.*]

Appeal from Superior Court, Craven County; Ferguson, Judge.

Eugene Williams was convicted of a misdemeanor, and he appeals. Affirmed.

This is an indictment under section 3572, Revisal 1905, as follows: "If any person, appointed or elected a commissioner or director to discharge any trust wherein the state or any county, city or town may be in any manner interested, shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another, he shall be guilty of a misdemeanor." There was a special verdict at March

term, 1910, of the Superior Court of Craven county, his honor, Judge Ferguson, presiding, as follows:

"The jurors being duly sworn and impaneled to try the issue between the state and defendant, Eugene Williams, finds the following special verdict, to wit:

"(1) At the times hereinafter named, the defendant, Eugene Williams, was a member of the board of aldermen of the city of New Bern.

"(2) At said times H. P. Willis was the practical engineer in charge of the machinery supplying electric light and water to the city of New Bern, which plant was owned by the city of New Bern.

"(3) That Thomas F. McCarthy was at said times the chairman of the committee of the board of aldermen of the city of New Bern having supervision of said electric light and water plant.

"(4) That during the month of July said H. P. Willis, by authority of said Thomas F. McCarthy, sent an order to the New Bern Iron Works, Inc., for supplies necessary for the operation of said plant amounting to \$75.63, a portion of which manufactured to order and could be manufactured and supplied by no other concern in or near the city of New Bern except by the New Bern Iron Works, Inc.

"(5) That at the times hereinafter mentioned said Eugene Williams had purchased of W. A. McIntosh stock in the New Bern Iron Works, Inc., on credit and had hypothecated said stock to W. A. McIntosh for the purchase money thereof, but received profits whenever any were declared, and that in said bill furnished the city a profit was charged.

"(6) That said Eugene Williams was a director and president of the company, but his duties in connection with the company were simply to act as head of the mechanical department of the shop.

"(7) That W. A. McIntosh owned part of the stock of said corporation and held all the balance of the stock as collateral security and was the general manager of the company, and had full control and direction of its business, and C. M. Kehoe was bookkeeper of said company, and was under the direction and control of W. A. McIntosh.

"(8) That at the August meeting, 1909, of the board of aldermen of the city of New Bern, C. M. Kehoe, said bookkeeper, by the direction of W. A. McIntosh, presented said bill for supplies to the clerk of the board, who past the same, which had already been approved by Thomas F. McCarthy, chairman of the water and light committee, to H. M. Groves, chairman of the finance committee, and said H. M. Groves approved the same.

"(9) That said bill so approved was presented to the board of aldermen, and said Eugene Williams, being present at the meeting, requested the board to excuse him from

voting and he was excused by the board, and the remaining members of the board approved the bill and issued an order therefore which has not yet been paid.

"(10) That said Eugene Williams has had nothing else to do with the transaction except as hereinbefore set out, neither as an officer or stockholder of the New Bern Iron Works, Inc., nor as an alderman of the city of New Bern, and he has had no corrupt intention in connection with the matter.

"If upon the foregoing facts the court is of the opinion that the defendant is guilty, the jury finds him guilty; and, if upon said facts the court is of the opinion that the defendant is not guilty, the jury finds him not guilty."

From judgment of guilty the defendant appealed.

W. D. McIver and Simmons, Ward & Allen, for appellant. The Attorney General and Geo. L. Jones, for the State.

BROWN, J. This section of the Revisal is substantially the same as the act of 1825 (Pub. Laws 1825, c. 1269), which has been in force since that time, but, so far as we have been able to learn, this court has never been called upon to construe its provisions. Whether the law has been scrupulously obeyed or has gone into "innocuous desuetude" is a matter of conjecture. The defendant contends that the proper construction of the act requires that the defendant must have been appointed or elected a commissioner or director to discharge a public trust, and then, in the course of such public authority, have made a contract for his own benefit that according to the verdict the defendant took no part in the making of the contract, either as alderman, in behalf of the city, or in paying for the work done, nor did he take any part in the making of the contract in behalf of the New Bern Iron Works & Supply Company of which company he was a stockholder and president, that the defendant could not control the business of the corporation, and that his entire duty in the management of the corporation was to act as head of the mechanical department of the shops.

While we are glad to concede that there is no evidence of moral turpitude upon the part of the defendant, we cannot concur with his counsel that a finding to that effect is necessary to conviction, and that the act does not extend to an officer of a corporation, when the dealing is between the corporation and the municipality. It is true that in *People v. Mayer*, 41 Misc. Rep. 368, 84 N. Y. Supp. 817, the Supreme Court of New York City sustained the last contention, in consequence of which decision the General Assembly of New York amended the law of that state so as to include dealings between corporations whose officers, directors, or stockholders were municipal officers. The judgment was rendered at Special Term of the

Supreme Court, a nisi prius court, by Judge Bischoff, and not by the Appellate Division or by a court of last resort. We are not impressed with the reasoning of the opinion, and do not regard it as a very persuasive authority.

This law was enacted to enforce a well-recognized and salutary principle, both of the mortal law and of public policy, that he who is intrusted with the business of others cannot be allowed to make such business an object of pecuniary profit to himself. This rule has its foundation in Scriptural teaching that no man can serve two masters, and is recognized and enforced in nearly all well-governed countries. As is said by Judge Dillon: "The application of the rule may in some instances appear to bear hard upon individuals who have committed no moral wrong; but it is essential to the keeping of all parties filling a fiduciary character to their duty to preserve the rule in its integrity, and to apply it to every case which justly falls within its principle." 1 Dillon's Municipal Corporations (4th Ed.) § 444. We are not prepared now to hold, nor is it necessary to decide, that the statute would cover the case of a mere stockholder in a corporation that sold goods or did work for a municipality, of which he was an officer, when the stockholder had no knowledge whatever of the transaction and possibly could not prevent it, but we are of opinion that it is broad enough to include within its scope this defendant under the facts found. He was more than a mere stockholder who had no part in the management of the corporation. He was its president and director, and acted as the head and manager of the "mechanical department of the shop." It was this department that must have manufactured that portion of the articles which could be manufactured and supplied by no other concern in New Bern. Whether the defendant had actual knowledge of the transaction is immaterial. Occupying the official positions he held in the corporate body and in its working department, the law will hold him to a knowledge of its transactions with the city of which he was an alderman. The fact that he retired from the meeting when the board of aldermen audited and paid the bill does not change the character of the transaction.

Nor is it necessary to show that defendant directly profited by the contract. In *Doll v. State*, 45 Ohio St. 445, 15 N. E. 293, it is held that: "To become so interested in the contract, it is not necessary that he make profits on the same. But it is sufficient if, while acting as such officer, he sell the property to the city for its use, or is personally interested in the proceeds of the contract of sale, and received the same, or part thereof, or has some pecuniary interest or share in the contract." A case directly in point is *Commonwealth v. De Camp*, 177 Pa. 112, 35

Atl. 601, where it is held: "The secretary who is a stockholder of a corporation having a contract for the lighting of a city is within the prohibition of Crimes Act 1860 (P. L. 400) § 63, prohibiting any councilman from being interested in any contract with the city, though he was elected councilman after the execution of the contract." Upon the special verdict the defendant was properly adjudged guilty.

Affirmed.

(153 N. C. 7)

WILLIAMS et al. v. BRANNING MFG. CO.
(Supreme Court of North Carolina. Sept. 14, 1910.)

1. ARBITRATION AND AWARD (§ 82*)—AWARD—EFFECT.

A valid award by arbitrators operates as a final judgment as between the parties to the submission or within the jurisdiction of the arbitrators as to all matters determined and disposed of by it.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 440-450; Dec. Dig. § 82.*]

2. ARBITRATION AND AWARD (§ 16*)—SUBMISSION—REVOCATION.

The common-law rule that a submission to arbitration may be revoked by any party thereto at any time before the rendition of the award is in force in North Carolina.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 64, 65; Dec. Dig. § 16.*]

3. ARBITRATION AND AWARD (§ 16*)—SUBMISSION—REVOCATION.

The revocation of a submission to arbitration must be express, unless there is a revocation by implication of law, and, in case of an express revocation, notice must be given to the arbitrators.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 69-72; Dec. Dig. § 16.*]

4. ADVERSE POSSESSION (§ 115*)—REVOCATION—IMPLICATION OF LAW.

A revocation by legal implication of a submission to arbitration arises from the legal effect of some intervening event happening after submission, either by act of God or by a party, and which necessarily puts an end to the submission.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 64-76; Dec. Dig. § 115.*]

5. ARBITRATION AND AWARD (§ 16*)—REVOCATION—IMPLICATION OF LAW.

A submission to arbitration is not revoked by the commencement of an action, unless the action covers the subject-matter submitted, and, until a complaint is filed by a party to the submission, the adverse party has no legal notice of the cause of action, and the arbitrators may proceed with the arbitration and render their award though a summons has been issued.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 69, 70, 72; Dec. Dig. § 16.*]

Appeal from Superior Court, Hertford County; Ward, Judge.

Action by J. T. Williams and others against the Branning Manufacturing Company. From a judgment for plaintiffs, defendant appeals. Reversed.

The following is the judgment of the superior court:

"This cause coming on for hearing before his honor, George W. Ward, judge presiding, and a jury being impaneled, the following facts were admitted in open court by the parties, plaintiffs and defendant:

"(1) That the copies of the contracts between the plaintiffs and defendant are true copies of said contracts.

"(2) That on the 20th day of February, 1906, the plaintiffs and defendant entered into a written agreement, submitting several matters of differences between them, growing out of their old contract, to arbitrators, selected as provided in the contract of October 1, 1904, and said several matters of differences are included in the matters complained of by the plaintiffs in this action.

"(3) That a copy of agreement of submission is annexed to the answer in this cause.

"(4) That this suit was commenced on the 1st day of January, 1907, as shown by the summons.

"(5) That said arbitrators, thereafter, on the 25th day of January, 1907, rendered their award, passing on the matters submitted to them, and shortly thereafter the same was sent to plaintiffs and defendant, and which the plaintiffs ignored.

"(6) It was then agreed by counsel for plaintiffs and defendant in open court that a jury trial would be waived, and that his honor might upon the above facts and upon the record and pleadings in this action pass upon the pleas in bar set up in the answer to an accounting and the question of jurisdiction of this court in this action, and render such judgment as in law he thought proper.

"Now, after hearing the arguments on both sides, and after giving the matters full consideration, his honor being of the opinion that the provision in said contracts of 1901 and October 1, 1904, aforesaid, providing for the submission to arbitration the matters of differences between the parties thereto, was no bar to the right of the plaintiffs to enter and prosecute this suit, and that said agreement of submission of February 20, 1906, of the matters therein set forth was no bar to the prosecution of this suit, which was begun before any award was rendered by said arbitrators, and that the court has full jurisdiction of this action, wherefore, on motion of Winborne & Winborne, attorneys for plaintiffs, it is adjudged and decreed that the defendant's pleas in bar are overruled, and are no bar to a reference to state an account between the parties under said contract of October 1, 1904.

"It is further adjudged that the contract of October 1, 1904, is a bar to all matters of differences between the parties prior to that date. Defendant does not object to refusing the statute of limitations by the court, but reserves the right to object to his findings of fact and conclusions of law thereon.

"It is further ordered, upon plaintiffs' mo-

tion, defendant objecting thereto, that the action be and it is referred to —, as referee, to state all matters of differences growing out of the contract of October 1, 1904, not barred by the statute of limitations, the question of the statute of limitations being likewise referred to him. He shall hear the said matters, after due notice to the parties, and make his report to court.

"Defendant has the right to except to the referee's findings of fact and conclusions of law, and to raise such issues of fact, to be heard by a jury, as he may be advised are necessary and proper."

Civil action for damages for breach of contract in writing in which plaintiffs obligated for certain consideration to operate defendant's lumber plant at Ahoskie, in Hertford county, and to cut into logs the standing timber of defendant and manufacture them into lumber at said plant. In October, 1904, these parties entered into another contract, modifying and changing some of the provisions of the contract of 1901. In the contract of 1904 the following provision is incorporated: "Sec. 9. It is further understood and agreed, in the event of any future misunderstanding or disagreement between the parties hereto as to the contract of March 1, 1901, or as to any modifications of the same herein contained, that the matter shall be settled by arbitrators, to be selected, one by the Branning Manufacturing Company and one by the said J. T. Williams & Bro., and the third by the two, who shall hear and determine the same, and whose award shall be accepted as final between the parties and faithfully performed by each." Disagreements having arisen the matters in controversy were submitted to arbitrators on February 20, 1906, in accordance with the agreements. After the controversy had been heard by the arbitrators, but before they rendered their award, to wit, January 1, 1907, this action was commenced to recover the damages for the breach of the aforesaid contract. It is admitted in the "facts agreed" that the several matters of difference submitted to arbitration are those set out in the complaint in this action, which complaint was not filed until January 18, 1908. It is admitted in the case agreed "(5) that said arbitrators thereafter, on the 25th day of January, 1907, rendered their award, passing on the matters submitted to them, and shortly thereafter the same was sent to plaintiffs and defendant, and which the plaintiffs ignored." The cause was submitted at spring term, 1910, superior court of Hertford county to his honor, Judge Ward, who rendered judgment for plaintiffs. The defendant appealed.

Pruden & Pruden, Wm. M. Bond, and S. B. Shepherd, for appellant. Winborne & Winborne, for appellees.

BROWN, J. It is unnecessary to review the conclusion of the superior court that the

provision in the contract agreeing to submit all matters of difference to arbitration is no bar to this action, for the reason that the plaintiffs and defendant did voluntarily submit such matters to arbitration in manner and form as provided in the contract and the arbitrators in due time rendered their award. It is common learning that a valid award operates as a final and conclusive judgment as between the parties to the submission, or within the jurisdiction of the arbitrators, respecting all matters determined and disposed of by it.

But it is contended that the fact that a summons in this action was issued some days before the rendering of the award revoked the submission, and deprived the arbitrators of the right to make an award. No other form of revocation is contended for. At common law a submission might be revoked by any party thereto at any time before the award was rendered. Bacon, Abridgement, Arb. B; Comyns, Dig. Arb. D, 5; Vinyors' Case, 8 Coke, 82. Some courts of this country have held to the contrary (Berry v. Carter, 19 Kan. 135, and cases cited), but this court has followed the doctrine of the common law (Tyson v. Robinson, 25 N. C. 333; Carpenter v. Tucker, 98 N. C. 316, 3 S. E. 831). The revocation, to be effective, must be express, unless there is a revocation by implication of law, and, in case of express revocation, in order to make it complete, notice must be given to the arbitrators. It is ineffective until this has been done. Allen v. Watson, 16 Johns. (N. Y.) 205; Brown v. Leavitt, 26 Me. 251; Morse on Arb. & Award, p. 231; Vin. Ab. Authority, E. 3, 4; Vinyors' Case, supra; 2 Am. & Eng. 600.

It is contended that commencing an action is a revocation by legal implication. Such revocations arise from the legal effect of some intervening event happening after submission, either by act of God, or caused by the party, and which necessarily puts an end to the business. The death of a party or arbitrator, marriage of a feme sole, lunacy of a party, or the utter destruction and final end of the subject-matter are of this description. But whether the bringing of an action for the subject-matter of an arbitration after submission and before award is an implied revocation is a matter about which the courts differ. In New York it is held that it is no revocation in law. Lumber Co. v. Schneider (Com. Pl.) 1 N. Y. Supp. 441; Smith v. Compton, 20 Barb. 262. To same effect are the decisions in New Jersey and Vermont. Knaus v. Jenkins, 40 N. J. Law, 288, 29 Am. Rep. 237; Sutton v. Tyrrell, 10 Vt. 91. The courts of Kentucky, Illinois, Georgia, and New Hampshire hold the contrary. Peters v.

Craig, 6 Dana, 307; Paulsen v. Manske, 24 Ill. App. 95; Leonard v. House, 15 Ga. 473; Kimball v. Gilman, 60 N. H. 54. The conclusion of Judge Collamer in the Vermont case is that "the entry and continuance of an action was obviously not an express revocation, nor was it such an act as put an end to the subject-matter of the submission, nor did it prevent the arbitration from proceeding with effect. It occasioned the defendant no cost, and, indeed, it was no more than an ordinary act of caution to keep the action in existence, should the opposite party revoke or decline to attend. This, then, was not a revocation in law." Nevertheless, it is plainly deducible from all the cases that the action when commenced must cover the subject-matter submitted to arbitration; otherwise, it cannot be construed as a revocation or notice to the other party or to the arbitrators. In the case at bar the summons was issued some days before the award was made, but the complaint was not filed until a year after. The summons gave no indication as to the character of the action except that it was a civil action. Until a complaint is filed, the defendant has no legal notice of the cause of action, and the arbitrators had a right to proceed with the pending arbitration and to render their award. Assuming that the bill of particulars furnished upon defendant's demand is notice of the character of the action, that was not furnished until after August 1, 1908, several months after the award had been rendered.

It is further contended that the award is not warranted by the terms of submission. According to the written contract and the terms of the submission, the purpose of the award was to ascertain the damages accruing by reason of: "(1) The percentage of mis-cuts and stained lumber. (2) As to excess cost of railroading. (3) As to excess cost of handling lumber on the yard. (4) Are J. T. Williams & Bro. responsible for fire which occurred last fall, supposedly originating from sparks from locomotive No. 7? The above items cover all disputes and contentions under said contract to date." In their written award the arbitrators appear to have carefully confined themselves to the questions submitted, and to have confined their findings to the four matters in dispute. But it is unnecessary to discuss that contention further as it is expressly admitted in the case agreed that the arbitrators on January 25, 1907, rendered their award, "passing on the matters submitted to them."

In view of this admission in the record, it is not now open to plaintiff to attack the award.

The judgment of the superior court upon the "case agreed" is reversed.

(153 N. C. 26)

PAUL et al. v. CARTER.

(Supreme Court of North Carolina. Sept. 14, 1910.)

1. STATUTES (§ 225*)—CONSTRUCTION.

Statutes adopted at the same time must be construed together, where they relate to the same subject-matter.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 302, 303; Dec. Dig. § 225.*]

2. DESCENT AND DISTRIBUTION (§ 14*)—STATUTES—CONSTRUCTION.

Under Revisal, § 1556, rule 4, providing that on the failure of lineal descendants, where land has been transmitted by descent from an ancestor, the inheritance shall descend to the next collateral relations capable of inheriting of the person last seised who are of the blood of such ancestor, and rule 6, declaring that collateral relations of the half blood shall inherit equally with those of the whole blood, etc., the children of a man by his first marriage cannot inherit land inherited by the second wife from her father, where the man and his second wife died leaving a child of the second marriage which died in infancy, for the children of the first marriage were not of the blood of the second wife or of any blood of her father.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 45; Dec. Dig. § 14.*]

Appeal from Superior Court, Beaufort County; Ferguson, Judge.

Action by Fenner Paul and another against S. Lloyd Carter. From a judgment for defendant, plaintiffs appeal. Affirmed.

The plaintiffs brought this action to recover the possession of a tract of land. They claim title to the land as the children of J. B. Paul by his first marriage. J. B. Paul, after the death of his first wife, married Bettie Carter, who inherited a one-third interest in the land from her father, Stephen Carter; the other heirs of Stephen Carter being his two sons, Lawrence Carter, and the defendant. The latter has purchased the interest of Lawrence Carter, and is owner of the entire interest in the land, if the disputed question is decided in his favor. J. B. Paul had one child by his second marriage. He died, and then his wife, Bettie Paul, formerly Bettie Carter, died intestate; their child surviving them. The child died in infancy, and the plaintiffs now assert title to a one-third interest in the land as the heirs of the deceased child of J. B. and Bettie Paul, while the defendant claims that he and his brothers are the heirs of the child, and that he by purchase from them of two-thirds of that interest and inheritance in his own right of the other third is the sole owner of the land. The court so decided, and the plaintiffs appealed.

Ward & Grimes, for appellants. W. M. Bond and N. L. Simmons for appellee.

WALKER, J. (after stating the facts as above). The solution of the question in this case depends upon the construction of rules 4 and 6 of the canons of descent. Revisal, c. 30, § 1556. Rule 4 provides that, on failure

of lineal descendants where land has been transmitted by descent from an ancestor, the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seised, who are of the blood of such ancestor. Rule 6 provides that collateral relations of the half blood shall inherit equally with those of the whole blood, the degrees of relationship to be computed according to the rules of the common law, but this rule is subject to the proviso that if "the person last seised shall have left no issue capable of inheriting, nor brother, nor sister, nor issue of such, the inheritance shall vest in the father, if living, and if not, then in the mother, if living." These two rules were adopted at the same time (Acts 1808, c. 739), and, as they relate to the same subject or are in pari materia, should be construed together, and it was clearly intended that they should be. There is no conflict between them, as suggested by counsel of plaintiffs. They can easily be harmonized, and each be allowed its full scope and effect. Collateral relations of the half blood derive their right of descent from the provisions of rule 6. It surely was not the intention to confer upon them a greater right than upon collateral relations of the whole blood. Rule 6 was adopted, therefore, to prevent the term "collateral relations," as used in rule 4, from being confined to those of the whole blood. That term, therefore, embraces all collateral relations—that is, of the whole or of the half blood—who are capable of inheriting, and those of the half blood are as much subject to the restrictions of rule 4 as those of the whole blood, which require, not only that they should be capable of inheriting, but that they should be of the blood of the ancestor from whom came the descent or inheritance. But it is useless to further consider or discuss the rules for the purpose of ascertaining their meaning, as this court has already construed them adversely to the plaintiffs' contention in several cases. The plaintiffs are not of the blood of Bettie Paul (or Bettie Carter) the ancestor of the person last seised, nor have they any of the blood of Stephen Carter in their veins, if we are permitted to go back to him. In *McMichael v. Moore*, 56 N. C. 471, the very question presented by this appeal was considered and decided by the court, the position of the parties being reversed, but the point and the principle involved being common to both cases. In that case it was said by Judge Pearson, for the court, that "the petitioners are of the blood of the ancestor from whom the land descended. The defendants, who are the children of the defendant Harvey Moore, and the half brothers and sisters of the person last seised, are nearer in degree than the petitioners; but they are not of the blood of the ancestor. Consequently, as

against them, the petitioners would be entitled to the land." See, also, *Bell v. Dozler*, 12 N. C. 383; *Dozler v. Grandy*, 66 N. C. 484. The case of *Little v. Bule*, 58 N. C. 10, fully answers the plaintiffs' contention, and shows conclusively that rule 6 excludes from the inheritance collateral relations of the half blood, who are not of the blood of the transmitting ancestor. Judge Manly said in *Little v. Bule*: "It is clear that the father, upon the death of his son, took the entire interest in the land in question, and half-sisters, not being of the blood of the transmitting ancestor, took nothing."

There was no error in the ruling and judgment of the court upon the case agreed.

Affirmed.

(153 N. C. 12)

CHAUNCEY v. CHAUNCEY.

(Supreme Court of North Carolina. Sept. 14, 1910.)

1. APPEAL AND ERROR (§ 568*)—CASE ON APPEAL—SETTLEMENT.

Though Revisal, § 591, was amended to allow an appellant 15 days, instead of 5, to serve his case on appeal, and to allow appellee 10 days, instead of 3, to serve exceptions or a counter case, the provision requiring appellant on receiving appellee's exceptions or counter case to "immediately" request the judge to fix a time and place for settling the case remained in Revisal 1905. Laws 1907, c. 312, provides that, if appellant delays more than 15 days after appellee serves his counter case or exceptions to request the judge to settle the case, such counter case or exceptions shall be taken as correct. Held, that the effect of chapter 312 is to substitute 15 days in lieu of "immediately" as the time in which appellant can make such request.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 568.*]

2. APPEAL AND ERROR (§ 571*)—SUBJECTS OF RELIEF—SETTLEMENT OF CASE ON APPEAL.

Appellant's timely request under Revisal, § 591, and Laws 1907, c. 312, for settlement of his case on appeal, having been denied, he is entitled to certiorari to procure settlement.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 571.*]

Action by J. S. H. Chauncey against W. W. Chauncey. From a judgment for plaintiff, defendant appeals. On appellant's motion for certiorari. Motion sustained.

W. M. Bond, for plaintiff. W. C. Rodman, for defendant.

PER CURIAM. Under the original C. C. P., the appellant was allowed five days after entry of appeal to serve his case on appeal, and the appellee was allowed three days after such service to serve his exceptions or counter case. By successive amendments this was changed to 15 days for appellant and 10 days to appellee. Revisal 1905, § 591.

The further provision that the appellant upon receipt of appellee's exceptions or counter case should "immediately" request the judge to fix a time and place for settling the case on appeal remained unaltered in Revisal

1905, § 591. But chapter 312, Laws 1907, provides that, "if the appellant shall delay longer than 15 days after the appellee serves his counter case, or exceptions, to request the judge to settle the case," the appellee's counter case or exceptions shall be taken as correct. The effect of this is to substitute "15 days" in lieu of "immediately" as the time in which the appellant, after receipt of appellee's exceptions can make his request to the judge, though it is not expressly so stated.

The appellant in this case, having made such request to the judge within 11 days after receipt of the appellee's exceptions, was entitled to have his request granted. This not having been done, he is entitled to his certiorari, to the end that the judge may now "settle the case."

Motion allowed.

(153 N. C. 23)

HUGHES v. PRITCHARD.

(Supreme Court of North Carolina. Sept. 14, 1910.)

1. EVIDENCE (§ 178*)—PROOF OF CONTENTS OF LOST RECORDS.

In a proceeding to establish a division line between defendant's homestead and a tract of land sold under execution against him, plaintiff could show by oral evidence and by a copy the contents of the original report of the appraisers who set apart the homestead on proof of loss of the original report.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 580-594; Dec. Dig. § 178.*]

2. EVIDENCE (§ 186*)—PROOF OF CONTENTS OF LOST INSTRUMENT.

Revisal 1905, §§ 827-845, authorizing proceedings to establish a lost or destroyed record, is an enabling act, and does not exclude oral evidence, which was admissible at common law, to prove the contents of a lost instrument, whether a deed or a record of the court.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 661-673; Dec. Dig. § 186.*]

3. HOMESTEAD (§ 52*)—SETTING APART—REPORT—SIGNATURE.

The failure of appraisers appointed to set apart defendant's homestead to sign their report in the presence of the sheriff did not render it void so as to permit defendant to impeach it collaterally in a proceeding to establish a division line between the homestead and the tract sold under execution against defendant.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 71, 72; Dec. Dig. § 52.*]

4. HOMESTEAD (§ 52*)—SETTING APART—REPORT—OBJECTIONS.

If failure of appraisers appointed to set apart a homestead to sign their report in the presence of the sheriff affected the report, objection should have been taken by motion to set it aside when it was filed with the clerk of the superior court.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 52.*]

Appeal from Superior Court, Camden County; Ferguson, Judge.

Proceedings by M. E. Hughes, Sr., against D. T. Pritchard to establish a division line. From a judgment for plaintiff, defendant appeals. Affirmed.

W. A. Worth and H. S. Ward, for appellant. E. F. Aydtlett, J. C. B. Ehringhaus, and Pruden & Pruden, for appellee.

WALKER, J. This is a proceeding which was instituted for the purpose of establishing the dividing line between a tract of land alleged by the plaintiff to be the homestead of the defendant, and an adjoining tract, which was purchased by the plaintiff at a sale under an execution issued against the defendant. In his deed the sheriff conveyed to the plaintiff the tract of land upon which he had levied under the execution, but excepted therefrom the homestead of the defendant.

It appeared that the report of the appraisers, who set apart the homestead to the defendant, could not after diligent search be found in the clerk's office. There was evidence tending to show that an allotment of the homestead had been made by three appraisers, at the request of the sheriff, and that their report was prepared and signed by them. This report was seen in the clerk's office among the papers in the judgment roll of the case in which the execution had been issued. A copy of the report was made, and, after proving the loss of the original report, the plaintiff proposed to prove by oral evidence and by the copy the contents of the original report for the purpose of showing the boundaries of the homestead and the proper location of the disputed line. This testimony was objected to by the defendant, but admitted by the court. It was clearly competent. The defendant's objection was based upon the ground that oral evidence cannot be received to prove the contents of a judicial record, unless in a proceeding brought to establish the lost or destroyed record, under chapter 11 of the Revisal, and that the record thus restored by proof and the judgment of the court is the only evidence admissible to show the contents of the lost record. This is a misapprehension of the meaning and scope of that enactment. It is an enabling act, and it was not intended to exclude oral evidence, which was admissible at common law to prove the contents of a lost instrument, whether a deed or the record of a court. This has been well settled by the decisions of this court. *Mobley v. Watts*, 98 N. C. 284, 3 S. E. 677, and cases cited in the annotated edition; *Cox v. Lumber Co.*, 124 N. C. 80, 32 S. E. 381; *Alken v. Lyon*, 127 N. C. 175, 37 S. E. 199; *Jones v. Ballou*, 139 N. C. 526, 52 S. E. 254; *Wells v. Harrell*, 152 N. C. 218, 67 S. E. 584. In this case the plaintiff did not depend altogether upon the memory of a witness as to the contents of the report, but introduced an examined copy, or one which had been compared with the original and found to be correct. This is the principal exception of the defendant, and in passing upon it we must sustain the

ruling of the court below. The failure of the appraisers to sign the report in the presence of the sheriff did not render it void, so that the defendant could impeach it in this collateral proceeding. It was at most an irregularity, and, if compliance with the statute in this respect is so essential to the sufficiency of the report and the allotment of the homestead, as to constitute the omission to sign the report in the presence of the sheriff a valid objection to it, the remedy of the defendant was by a motion to set aside the report after it had been filed in the office of the clerk of the superior court. *Oates v. Munday*, 127 N. C. 439, 37 S. E. 457; *Formeyduval v. Rockwell*, 117 N. C. 320, 23 S. E. 488; *Burton v. Splers*, 87 N. C. 91. The other exceptions of the defendant are without merit, if they are not sufficiently considered and disposed of by what we have already said.

No error.

(153 N. C. 29)

WHITE v. TAYLOE et al.

(Supreme Court of North Carolina. Sept. 14, 1910.)

1. JUDGMENT (§ 743*) — CONCLUSIVENESS — IDENTITY OF SUBJECT-MATTER.

A former judgment establishing the division line between plaintiff's land and an adjoining tract estops him from claiming any interest in land on the other side; his remedy having been an appeal from the judgment for any error in the trial, or motion to set aside the verdict, if it was against the evidence.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 743.*]

2. APPEAL AND ERROR (§ 662*) — RECORD — CONCLUSIVENESS.

A verdict must be considered on appeal as it appears in the record, in the absence of any correction or amendment of the record.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 662.*]

3. JUDGMENT (§ 533*) — REFERENCE TO FORMER JUDGMENT — EFFECT.

Reference in a judgment fixing a boundary of dower land to a former judgment which merely adjudged that plaintiff was the owner of such land, without locating it, did not change the legal effect of the subsequent judgment.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 533.*]

Appeal from Superior Court, Hertford County; Geo. W. Ward, Judge.

Action by T. J. White against M. L. Tayloe and others. From a judgment for defendants, plaintiff appeals. Affirmed.

This action was brought to recover possession of a tract of land known as the "Britton Moore place," which plaintiff claims is a part of the dower of Ann E. Tayloe, widow of James E. Tayloe. In his complaint the plaintiff alleges that Ann E. Tayloe conveyed her dower to M. L. Tayloe, and the latter conveyed the tract of land which was allotted to him in the division of the lands of James E. Tayloe, together with the said

dower, to W. D. Pruden and D. B. Winbourne, as trustees, and that, in accordance with the terms of the deed to them, the trustees sold and conveyed the said land to him. He further alleges that the plaintiffs are in possession of the land, claiming the Britton Moore tract under a deed from Ada F. Parker, the daughter of James E. Tayloe, to the feme defendant, Carrie W. Tayloe. The defendants in their answer deny that the dower of Ann E. Tayloe was ever allotted to her, and therefore that no particular tract of land was conveyed to M. L. Tayloe by the deed to Ann E. Tayloe, but only her right of dower. They aver in their answer, as a special defense to the action of the plaintiff, that on the 5th day of January, 1908, the plaintiff commenced an action in the superior court of Hertford county against these defendants to recover the land conveyed to him by the said trustees, and that at Spring term, 1908, he recovered judgment for that part of the land which was allotted to M. L. Tayloe in the division of the James Tayloe lands, and for such rights as were acquired by M. L. Tayloe in said land under the deed to him by Ann E. Tayloe. It was adjudged in the former suit that the plaintiff is the owner of the dower right and interest of Ann E. Tayloe in the land of her husband, James Tayloe, which was conveyed by her to M. L. Tayloe, and that, if the said dower had been allotted by metes and bounds, the plaintiff is entitled to the possession thereof, but that, if the said dower had not been so allotted, then the plaintiff should proceed to ascertain the same in the manner provided by law. The foregoing judgment was rendered at April term, 1908, of the superior court, when Judge O. H. Allen presided. At April term, 1909, when Judge O. H. Gulon presided, an issue was submitted to the jury in the same action for the purpose of ascertaining the dividing line between the lands claimed by the plaintiff and those claimed by the defendant, the plaintiff having alleged that he is the owner of the Britton Moore tract as a part of the dower of Ann E. Tayloe, and the defendant denying the allegation. The issues and answers thereto were as follows: "(1) Is the line (of division) the one indicated on the plat by the letters A and B? Answer, Yes. (2) If not, is the line the one indicated on the plat by the letters C, D, and E?" This issue was not answered.

If the true line of division is the one indicated by the letters A and B, the Britton Moore tract would not be included within the boundaries of the lands owned by the plaintiff. If the true line is the one indicated by the letters C, D, and E, then a large part of the Britton Moore tract would be so included. Upon the verdict in that case, it was adjudged that the plaintiff owned the land lying west of the line indicated by the letters A, B, and the defendant Carrie W. Tayloe owned all of the land lying east of said line, the issue made by the pleadings be-

ing as to the ownership of the respective parties. In September, 1910, the plaintiff brought another action against the defendants to recover damages for a trespass on the Britton Moore tract, which he claimed was a part of the dower of Ann E. Tayloe, the title to which he alleged had been acquired by him under the deed from the trustees. In that action he prayed for a receiver, and the receiver was appointed to take charge of the lands and to collect rents and profits. The defendants moved to vacate the order appointing the receiver and to dismiss the action, which motion, upon consideration of the same, was granted by the court and a judgment in the case entered accordingly.

The defendants in their answer to the plaintiff's complaint in this action set up as a defense in bar thereto the judgments in the former suits between the same parties. Issues were submitted to the jury which with the answers thereto are as follows: "(1) Was dower allotted to Ann E. Tayloe in the lands of her husband, James Tayloe, as alleged? Answer: Yes. (2) If so, did said dower cover the lands known as the Britton Moore land? Answer: Yes. (3) Is said Britton Moore land and the land on the west side of A, B, in plat referred to in the judgment which was rendered at April term, 1909, the same land? Answer: Yes. (4) Has the Britton Moore land been heretofore adjudged to be the land of defendant Carrie Tayloe in a suit between the same parties? Answer: Yes." Upon this verdict the court adjudged that the plaintiff take nothing by his action, and that the defendants recover their costs of him. The plaintiff excepted and appealed.

L. L. Smith, for appellant. Winborne & Winborne, for appellees.

WALKER, J. The plaintiff alleged in his complaint filed in this action that the dower of Ann E. Tayloe had been allotted many years ago, and that the record of the said allotment had been lost. He sought to restore the record, and to recover the Britton Moore tract of land as a part of the dower. In the action tried at April term, 1909, of the superior court, when Judge Gulon presided, the defendant denied that they were in possession of any land owned by the plaintiff, or that the plaintiff acquired, by the deed from the trustees, an interest in any such land. A survey was made to establish the dividing line between the land owned by the plaintiff and that owned by the defendant Carrie W. Tayloe. The jury by their verdict found that the line indicated by the letters A, B, is the dividing line, and the court so adjudged. The effect of the verdict and judgment in that case is to estop the plaintiff from now asserting any title to the land lying on the east side of the line, or to any interest therein, as the court adjudged the feme defendant to be the owner of all the land on that side. There

was no exception to the judgment or appeal therefrom. If the Britton Moore tract or any part of the dower land is in fact on the east side of that line, the plaintiff should have made it appear, so that the verdict would have been according to the truth of the matter. If he failed to do so by reason of any error of the court at the trial of the case, he should have excepted and appealed. If the verdict was contrary to the weight of the evidence, he should have moved to set it aside. Having failed to impeach the verdict and judgment in any proper way, the plaintiff is bound by them, and will not be heard in this action to contradict anything which was decided in the former suit upon the issues joined between the parties. The jury have found in this case, it is true, that the Britton Moore tract was a part of the dower land as allotted to the widow, but they also find that it is on the west side of the line. If "west" should be "east," as suggested on the argument, the plaintiff is still estopped by the former verdict and judgment from claiming the land, as the jury further find that the feme defendant had theretofore been adjudged to be the owner of the Britton Moore tract of land. The issues were raised by the pleadings and the verdict was in accordance with instructions given by the court as to the legal effect of the records in the prior suits. We find no error in the charge of the court. We have shown that the identical question involved in this action has heretofore been decided against the plaintiff in a suit between the same parties. If we accept and consider the verdict as it appears in the record, and we must do so in the absence of any correction or amendment, it is perfectly consistent with the verdict and judgment as rendered at April term, 1909, before Judge Gulon. The reference in that judgment to the judgment rendered at April term, 1903, when Judge Allen presided, does not change its legal effect, for the latter judgment merely declared that the plaintiff is the owner of the dower land, without locating it, while the other judgment clearly ascertains that it is no part of the land on the east side of the line, as the feme defendant owns all the land on that side. The plaintiff may have lost a part of his land in the litigation, though it does not so appear, but, if he has, we cannot restore it to him without disregarding a well-settled rule of law which protects the feme defendant in the ownership of the land once adjudged to be hers. We need not enter upon any lengthy discussion of the principle underlying the doctrine of estoppel by record or *res judicata*. We simply refer to what is said by the court in *Bunker v. Bunker*, 140 N. C. 18, 52 S. E. 237, when considering a question similar to the one presented by this appeal: "It being a final judgment, the plaintiffs cannot be heard upon any matter which was litigated in the action and

which was necessarily determined by it. In such a case, the matter in dispute having passed in *rem judicatum*, the former decision is conclusive between the parties, if either attempts, by commencing another action or proceeding, to reopen the question. This doctrine is but an outgrowth of the familiar maxim that a man shall not be twice vexed for the same cause, and the other wholesome rule of the law that it is the interest of the state that there be an end of litigation and consequently a matter of public concern that solemn adjudications of the courts should not be disturbed. *Broom's Legal Maxims* (8th Ed.) 330, 331. 'If,' says Lord Kenyon, 'an action be brought and the merits of the question be discussed between the parties and a final judgment obtained by either, the parties are concluded and cannot canvass the same question in another action, although, perhaps, some objection or argument might have been urged upon the first trial, which would have led to a different judgment.' *Greathead v. Bromley*, 7 Duff. & East. (7 T. R.) 546. And again, in another case, he says: 'After a recovery by process of law, there must be an end of litigation. If it were otherwise, there would be no security for any person, and great oppression might be done under the color and pretense of law.' *Marriott v. Hampton*, 7 Duff. & East. 269. 'Good matter must be pleaded (or brought forward) in good form, in apt time, and in due order, otherwise great advantage may be lost.' *Coke*, 303b. If there be any one principle of law settled beyond all dispute, it is this, that whensoever a cause of action, in the language of the law, transit in *rem judicatum*, and the judgment thereupon remains in full force and unreversed, the original cause of action is merged and gone forever, and so it is also that if the plaintiff had an opportunity of recovering something in litigation formerly between him and his adversary, and but for the failure to bring it forward or to press it to a conclusion before the court, he might have recovered it in the original suit. Whatever does not for that reason pass into and become a part of the adjudication of the court is forever lost to him. *U. S. v. Leffler*, 11 Pet. 101 [9 L. Ed. 642]. Judge Willes thus states the rule: 'Where the cause of action is the same and the plaintiff has had an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter action.' *Nelson v. Couch*, 15 C. B. (N. S.) 108; s. c., 109 E. C. L. R. 106. These principles have been fully adopted by us, as will appear in the case of *Tyler v. Capeheart*, 125 N. C. 64 [34 S. E. 108], where the doctrine as to the plea of former judgment is concisely and accurately stated." In *Tyler v. Capeheart* it was held that "the judgment is decisive of the point raised by the pleadings, or which might properly be predicated upon them." See, al-

so, *Turnage v. Joyner*, 145 N. C. 81, 58 S. E. 757. The plaintiff is estopped by the judgment rendered at April term, 1909, to allege that he is the owner of any land on the east side of the line A, B, or of any interest therein. Being concluded by the former judgment, he cannot recover upon the cause of action stated in his complaint.

The fourth issue was properly submitted to the jury, as it involved a question of law and fact.

No error.

(153 N. C. 28)

PRUDEN et al. v. WHITE et al.

(Supreme Court of North Carolina. Sept. 14, 1910.)

Appeal from Superior Court, Hertford County; Ward, Judge.

Action by Pruden and Winborne, as trustees, against T. J. White and others. From the judgment, defendants White and Tayloe appeal. Affirmed.

L. L. Smith, for appellant White. Geo. Cowper, for appellant Tayloe. Stanley Winborne, for appellees.

PER CURIAM. We have carefully examined and considered the records in both of these appeals, and are of the opinion that substantial justice has been done and that no reversible error appears. The judgment of the court is therefore affirmed.

Affirmed in both appeals.

(153 N. C. 17)

YEATES v. FORREST.

(Supreme Court of North Carolina. Sept. 14, 1910.)

1. APPEAL AND ERROR (§ 1203*)—REMAND ON AFFIRMANCE OF JUDGMENT—POWER OF TRIAL COURT.

Where a judgment defining a boundary according to a plat was affirmed on appeal, the trial court properly entered judgment directing a surveyor appointed by it to run and mark the line on the ground.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1203.*]

2. INJUNCTION (§ 3*)—TRESPASS ON REAL ESTATE.

The court, on determining that a party was trespassing on the land of the adverse party, who asked for a restraining order, properly enjoined the party from a continuance or resumption of the trespass.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 3; Dec. Dig. § 3.*]

3. APPEAL AND ERROR (§ 1203*)—REMAND—DOCKETS—RETENTION OF CASE—POWER OF COURT.

An action should not be ordered discontinued from the docket of the court until every act commanded to be done has been done, and its performance passed on by the court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1203.*]

4. APPEAL AND ERROR (§ 1203*)—REMAND—DOCKETS—RETAINING CASE FOR COMPLETE DETERMINATION—POWER OF COURT.

Where judgment defining the boundary line between the lands of the parties was affirmed on appeal, the trial court, directing a surveyor appointed by it to run and mark the line on

the ground in accordance with the judgment, should not discontinue the case from the docket before the report of the surveyor was received and passed on.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1203.*]

Appeal from Superior Court, Beaufort County; O. H. Allen, Judge.

Action by J. N. Yeates against R. F. Forrest. From a judgment for plaintiff, defendant appeals. Reversed in part, and affirmed in part.

Small, MacLean & McMullan, for appellant. Ward & Grimes, for appellee.

MANNING, J. This case is reported in 152 N. C. 752, 67 S. E. 171. The judgment of this court having been certified to the superior court of Beaufort county, Judge Allen, at May term, 1910, rendered, on motion of plaintiff's attorney, the following judgment: "This cause coming on for hearing upon the return of the certificate of the Supreme Court, affirming the former judgment in said cause, it is ordered and adjudged that the former judgment of this court be declared the final judgment in this cause, and that the surveyor of the court run and mark a line on the land in accordance with the judgment heretofore rendered, and the defendant be and he is hereby enjoined from trespassing across said line, and that this cause go off the docket, at the cost of the defendant."

The judgment, from which the former appeal in this case was taken by the defendant, clearly and distinctly defined the dividing line between plaintiff's and defendant's lands, as fixed by the verdict of the jury. This judgment was affirmed by the court. We can, therefore, see no objection to that part of his honor's judgment directing the surveyor appointed by the court to run and mark a line on the land in accordance with the former judgment. This line had been defined on a plat and in the judgment, and we do not see that any right of the defendant could be invaded by having it marked on the land itself by either artificial or natural objects. The verdict and judgment conclusively determined, not only plaintiff's title, but his right of possession. The plaintiff, as a part of the relief prayed by him in his original complaint, had asked for a restraining order, and, the judgment having conclusively determined that defendant was trespassing upon land belonging to plaintiff, we can see no objection to that part of his honor's judgment enjoining the defendant from a continuance or resumption of his acts of trespass. The power to protect its judgment from violation by the defendant was within the power of the court. No right of the defendant was invaded, and this was in aid of plaintiff's rights.

But that part of the judgment which di-

rected the case to be discontinued from the docket before the surveyor had made his report that he had run and marked the exact line of division, we think, is properly subject to defendant's objection. The reason is clear to us. The surveyor might not run and mark the proper line, and the action should have been retained to receive the surveyor's report, and for an opportunity to either party to file exceptions to the running and marking of the line as not the exact and actual line of division. In view of this possible disagreement, the case should not have been finally disposed of, but should have been retained. We do not think any action should be ordered discontinued from the docket of the court until every act commanded to be done has been performed, and its performance passed upon by the court.

In directing this action to be discontinued from the docket, before the report of the surveyor was received and passed upon, there is error. The defendant appellant is entitled to recover the costs of the appeal.

We notice the appellant has had printed the entire record in the former appeal. We think this clearly unnecessary, and the costs of this part of the transcript and of its printing must be taxed against the appellant.

Error.

(153 N. C. 46)

SPRUILL et al. v. TOWN OF COLUMBIA et al.

(Supreme Court of North Carolina. Sept. 21, 1910.)

1. MUNICIPAL CORPORATIONS (§ 1000*)—CONTRACTS FOR PUBLIC IMPROVEMENT—SUIT TO SET ASIDE—EVIDENCE.

In a suit to declare void a contract to pave sidewalks of a town on the ground that it was obtained by fraud, a town ordinance providing that no appropriation should be made except at a regular meeting of the board of commissioners was admissible; the contract having been made at a called meeting.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 1000.*]

2. MUNICIPAL CORPORATIONS (§ 1000*)—CONTRACTS FOR PUBLIC IMPROVEMENT—SUIT TO SET ASIDE—EVIDENCE.

Proof that through the efforts of the contractor the ordinance requiring four commissioners to constitute a quorum was changed so as to make three commissioners a quorum, and that three constituted the meeting when the contract was made, was competent.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 1000.*]

3. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

In a suit to declare void a contract of a town for street work on the ground that it was procured by fraud, the error, if any, in admitting evidence that the current expenses of the town took all the money raised by the tax levy, over the objection that it was immaterial, was not reversible.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1050.*]

4. MUNICIPAL CORPORATIONS (§ 1000*)—CONTRACTS FOR PUBLIC IMPROVEMENT—FRAUD—EVIDENCE.

Whether a contract to pave the sidewalks of a town was fraudulent and obtained by the contractor through collusion with the board of commissioners *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 1000.*]

Appeal from Superior Court, Tyrrell County; Ferguson, Judge.

Action by J. L. Spruill and others against the Town of Columbia and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Gaylord & Gaylord and W. M. Bond, for appellants. E. F. Aydtlett, H. S. Ward, and J. B. C. Ehringhaus, for appellees.

CLARK, C. J. This was an action to declare void a contract for paving the sidewalks of the town of Columbia upon the ground that it was obtained by fraud, and to enjoin the defendants, commissioners, from issuing bonds to the defendant Newberry for the same. The work has not been performed.

The first exception was to the introduction of an ordinance of the town which provided that no appropriation of money should be made except at a regular meeting of the board of commissioners. This was competent because the contract of the defendant Newberry was made at a called meeting. The evidence that the ordinance required four to constitute a quorum, and that through the efforts of Newberry this was changed to three who constituted the meeting when this contract was made, was also competent. The defendants also excepted to the testimony that the current expenses of the town took all the money raised by the tax levy because it was immaterial. If so, it is not reversible error. *Collins v. Collins*, 125 N. C. 98, 34 S. E. 195.

The chief exception is to the refusal of the motion to nonsuit. There was evidence tending to show that the defendant Newberry, through his personal influence with the board, had obtained the contract for paving the sidewalk at a price between \$5,000 and \$8,000 without competitive bidding; that he was instrumental in causing the board to change the town ordinance which required that four should constitute a quorum, so that three members gave him the contract at an exorbitant price, and one of the three who voted the contract was related to Newberry, and declared himself in favor of paying 25 cents per square yard more to Newberry for the work than to any other person; that at the meeting, though there was another bid in, the majority of the board declined to receive bids and returned them unopened; that afterwards the defendant Newberry carried his proposition to the board, already written, and procured the three members to pass it;

that the contract was excessive in price, and was made without any investigation as to price, or as to the best material; that it was indefinite and uncertain so that the contractor might put down a first-class pavement, or an inferior one, and still comply with the contract; that it called for a bonded indebtedness largely in excess of what the town was able to meet; that the defendant Newberry helped to elect the board in order to get the contract; that he had suggested to some members of the board that certain personal advantages and profit would come to them by giving him the contract; that he also requested one member of the board who opposed his having the contract to resign and take part in the paving, and intimated that he (Newberry) would make it profitable to him.

There was other evidence tending to show that the contract was fraudulent, and obtained by Newberry through collusion with the board. His honor properly overruled the motion to nonsuit. It was a question for the jury. *Jones v. Insurance Co.*, 151 N. C. 56, 65 S. E. 602, and cases cited; *Tuttle v. Tuttle*, 146 N. C. 484, 59 S. E. 1008, 125 Am. St. Rep. 481.

The jury found that the defendants, commissioners, acted fraudulently in making the contract with their codefendant Newberry, and that he colluded with the commissioners in obtaining the contract. The other exceptions require no discussion.

No error.

(153 N. C. 60)

FRAZELL v. LIFE INS. CO. OF VIRGINIA.

(Supreme Court of North Carolina. Sept. 21, 1910.)

INSURANCE (§ 198*)—LIFE—FALSE REPRESENTATIONS BY AGENT—EFFECT.

Where the fraudulent representations made by a life insurance agent as to the terms of the policy were not believed by the purchaser, he could not recover the premium paid on the strength of such misrepresentations.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 457, 459; Dec. Dig. § 198.*]

Appeal from Superior Court, Craven County; Lyon, Judge.

Action by M. D. Frazell against the Life Insurance Company of Virginia. Judgment for defendant, and plaintiff appeals. No error.

Simmons, Ward & Allen, for appellant. Gulon & Gulon, for appellee.

WALKER, J. This action was brought by the plaintiff to recover \$192, the amount of premiums paid by him on an insurance policy for \$500, which it is alleged he was induced to pay to the defendant by false and fraudulent representations of its agent as to the terms and conditions of the policy. The plaintiff testified substantially that the agent of

the company stated to him, before he agreed to take the policy, that it would contain provisions by which the full amount, or \$500, would be paid at his death, and, if he continued the policy for 10 years, the company would pay to him the amount of all premiums it had received to that time, with interest, upon the surrender of the policy, and, if he paid the premiums regularly for 20 years, it would become a paid-up policy. There were no such provisions, except the first one, in the policy. Plaintiff paid the premiums for nearly 10 years, when he discovered, or was told by the agent of another company, that the policy did not contain the provisions as represented to him. He further testified that he did not believe what the defendant's agent had told him, but sought the advice of his attorney as to the meaning of the contract and believed him and acted on his advice. At the close of the testimony, the court sustained a motion to nonsuit, and the plaintiff appealed.

If the testimony of the plaintiff is sufficient to sustain the allegation of false and fraudulent representations, within the principles stated by this court in *Caldwell v. Insurance Co.*, 140 N. C. 100, 52 S. E. 252, *Sykes v. Insurance Co.*, 148 N. C. 18, 61 S. E. 610, *Stroud v. Insurance Co.*, 148 N. C. 54, 61 S. E. 626, and *Whitehurst v. Insurance Co.*, 149 N. C. 273, 62 S. E. 1067, he admitted that he did not believe the agent who made them, and therefore he neither relied upon them nor was induced by them to accept the policy and pay the premiums. While he can read and write, and we must assume is a person of ordinary intelligence, he did not read his policy when it was sent to him (*Floars v. Insurance Co.*, 144 N. C. 232, 56 S. E. 915), nor was its language, as well as we can gather from the record what it is, calculated to mislead him. He has not presented a case for reformation of the policy, nor does he seek that equitable remedy. *Floars v. Insurance Co.*, supra. When we consider his testimony in the most favorable light for him, we find that he has not sustained the allegation of fraud. In *Whitehurst v. Insurance Co.*, supra, we held that the false representation must have induced the plaintiff to accept the policy and to part with his money by the payment of premiums before he can recover the amount thus paid, with interest. If he falls in this respect, no actionable fraud is shown. The plaintiff did not believe the agent, and therefore could not have been induced by his alleged representations to take the policy and pay the premiums. He was advised by his attorney and acted upon what he said. We do not mean to imply that the plaintiff might recover, under the circumstances of this case, if he had relied on the statements of the agent. It is not necessary to consider that question.

No error.

(153 N. C. 76)

WHITEHURST v. KERR et al.

(Supreme Court of North Carolina. Sept. 21, 1910.)

1. CORPORATIONS (§ 668*)—FOREIGN CORPORATIONS—SERVICE OF PROCESS.

The Legislature may provide for service of process on foreign corporations doing business within the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603, 2604; Dec. Dig. § 668.*]

2. CORPORATIONS (§ 668*)—FOREIGN CORPORATIONS—CONDITION UPON WHICH THEY MAY DO BUSINESS—STATUTES—SERVICE OF PROCESS.

Statutes providing for the service of process on foreign corporations doing business in the state are considered a condition upon which they may do such business, and which they are deemed to have assented to.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603, 2604; Dec. Dig. § 668.*]

3. CORPORATIONS (§ 668*)—FOREIGN CORPORATIONS—SERVICE OF PROCESS—RULES—REASONABLENESS.

The rules regarding service of process on foreign corporations must be reasonable, providing for service only on its proper representatives, who it could be reasonably presumed would inform the corporation of the service.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2610; Dec. Dig. § 668.*]

4. CORPORATIONS (§ 668*)—FOREIGN CORPORATIONS—SERVICE OF PROCESS.

Revisal 1905, § 440, providing that service of process may be had on a foreign corporation by service on a local agent, and that any person receiving money in the state for the corporation will be deemed such a local agent, does not restrict service to such an agent, but extends the rule to include him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2610, 2611; Dec. Dig. § 668.*]

5. CORPORATIONS (§ 668*)—FOREIGN CORPORATIONS—SERVICE OF PROCESS ON BOOKKEEPER—SUFFICIENCY.

Service of process on the bookkeeper of a foreign corporation engaged in bridge building, who was apparently the only financial agent connected with the construction of a bridge in the state by reading and leaving a copy of the service with him, was sufficient under Revisal 1905, § 440, providing that service of process may be had on foreign corporations doing business within the state by service on a general or local agent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2610, 2611; Dec. Dig. § 668.*]

6. EVIDENCE (§ 10*)—JUDICIAL NOTICE.

The width of Albermarle Sound, being a physical fact, may be taken judicial notice of.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 9-14; Dec. Dig. § 10.*]

Appeal from Superior Court, Pasquotank County; Ferguson, Judge.

Action by G. W. Whitehurst against Kerr and Wolcott, receivers of the Norfolk & Southern Railway Company, and others. From the order dismissing the service of process, plaintiff appeals. Order set aside.

Return of service on the McLean Contracting Company as follows: "Received February 26, 1910. Served February 26, 1910. By reading to and leaving a copy with Mr. F. H. Cameron, bookkeeper and acting

agent for the above defendant company the McLean Contracting Company." At spring term, 1910. The defendant, the McLean Contracting Company, a special appearance having been entered for the purpose, moved to dismiss the action as to said company for want of proper service. Motion allowed and plaintiff excepted and appealed.

J. C. B. Ehringhaus and E. F. Aydlott, for appellant. S. Brown Shepherd and Pruden & Pruden, for appellees.

HOKK, J. The power of a state Legislature to provide for service of process on foreign corporations doing business within the state is no longer questioned. Speaking to the subject in the case of *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222, Associate Justice Fields said: "The state may therefore impose as a condition upon which a foreign corporation shall be permitted to do business within her limits that it shall stipulate that in any litigation arising out of its transactions in the state it will accept as sufficient the service of process on its agents or persons specially designated, and the condition would be eminently fit and just. And the condition and stipulation may be implied as well as expressed. If a state permits a foreign corporation to do business within her limits, and at the same time provides that, in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission, and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. Such condition must not, however, encroach upon those principles of natural justice which require notice of a suit to a party before he can be bound by it. It must be reasonable and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. The decision of this court in *Lafayette Insurance Co. v. French* [18 How. 404, 15 L. Ed. 451], to which we have already referred, sustains these views." And the doctrine so stated is universally recognized and acted on.

Our state statute applicable to and controlling the question presented on this appeal (Revisal 1905, § 440) is, in terms, as follows: "If the action be against a corporation to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent thereof: Provided, that any person receiving or collecting moneys within this state for, or on behalf of, any corporation of this or any other state or government, shall be deemed a local agent for the purpose of this section; but such service can be made in respect to a foreign corporation only when it has prop-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

erty within this state, or the cause of action arose therein, or when the plaintiff resides in the state, or when such service can be made within the state, personally upon the president, treasurer, or secretary thereof." Construing a statute of similar import, it has been held that the first clause enumerates the persons on whom service of process can be made, to wit, on the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent thereof, and in that respect applies to all corporations both domestic and foreign. Then follows the proviso as to who shall be considered local agents for the purpose of the section, and the last clause establishes certain conditions, restrictive in their nature, which are required and necessary to a proper and valid service on foreign corporations. That is, service on the persons designated in the first clause shall only be good as to foreign corporations: (1) When they have property in the state, or (2) when the cause of action arose therein, or (3) when plaintiff resides in the state. And then a fourth method is established: (4) "When service can be made within this state personally on the president, treasurer or secretary thereof." This construction will be found approved and sustained in *Foster v. Chas. Betcher Lumber Co.*, 5 S. D. 57, 58 N. W. 9, 23 L. R. A. 490, 49 Am. St. Rep. 859; and authoritative decisions here and elsewhere are in accord with the general principles of that well-considered case. *Higgs v. Sperry*, 139 N. C. 299, 51 S. E. 1020; *Clinard v. White & Co.*, 129 N. C. 251, 39 S. E. 960; *Jones v. Insurance Co.*, 88 N. C. 499; *In re Hohorst Petitioner*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211; *Société Foncière v. Millikin*, 135 U. S. 304, 10 Sup. Ct. 823, 34 L. Ed. 208; *Tuchband v. C. & A. R. Co.*, 115 N. Y. 437, 22 N. E. 360; *Express Co. v. Johnson*, 17 Ohio, 641; *Porter v. Railroad*, 1 Neb. 14.

In *Jones v. Insurance Co.*, supra, it was expressly held that service on a foreign corporation could be made either on a general agent or local agent; and, construing the terms of the proviso in the statute to the effect "that any person receiving or collecting moneys within the state for or on behalf of any corporation of this or any other state or government, shall be deemed a local agent for the purpose of this section," it has been further held that this "authority to receive money is not the exclusive test of a local agent upon whom service of process could be made," and that these words of the proviso were not intended to "limit service to such class of agents but to extend the meaning of the word agent to embrace them." *Copland v. Telegraph Co.*, 136 N. C. 12, 48 S. E. 501. While there is some apparent conflict of decision in construing these statutes providing for service of process on corporations arising chiefly from the difference in the terms used in the various statutes on

the subject, the cases will be found in general agreement on the position that in defining the term "agent" it is not the descriptive name employed, but the nature of the business and the extent of the authority given and exercised which is determinative, and the word does not properly extend to a subordinate employé without discretion, but must be one regularly employed having some charge or measure of control over the business intrusted to him or of some features of it, and of sufficient character and rank as to afford reasonable assurance that he will communicate to his company the fact that process has been served upon him (19 Enc. Pl. & Pr. pp. 665-676, 677; *Simmons v. Box Co.*, 148 N. C. 334, 62 S. E. 435; *Jones v. Insurance Co.*, 88 N. C. 499, supra; *Angerhoefer, Jr., v. Bradstreet Co.* [C. C.] 22 Fed. 306; *Hill v. St. Louis Ore & Steel Co.*, 90 Mo. 108, 2 S. W. 289), and by express provision of our statute as stated including "any person receiving or collecting moneys within this state for or on behalf of any corporation of this or any other state or government."

Applying the principles established by these decisions and on the facts appearing in the record, we are of opinion: That F. H. Cameron was an agent of defendant corporation appellee upon whom process could be lawfully served. That conditions existed authorizing service on him as such agent and that service of process upon said F. H. Cameron as shown by the sheriff's return "by reading and leaving a copy with F. H. Cameron, bookkeeper and acting agent," was a valid service, and said company is thereby properly in court. Although the parties were so intent on the question of the kind of agency required to a proper service, that they have failed to state the nature of the action or that the plaintiff resides in the state, or, in express terms, that it had property therein, and, although there is evidence to the effect that F. H. Cameron was styled only a bookkeeper of the defendant company "merely that and nothing more," it does appear from a perusal of the record that at the time this summons was issued and before and after that time defendant company was engaged in building a railroad bridge across Albemarle Sound in the state at a point where it is from three to five miles wide, the width suggested being a physical fact of which the court may take judicial notice; that it was an enterprise of unusual proportions requiring an extensive equipment, and necessarily involving the employment of large numbers of hands and the expenditure of large sums of money; that the agent, F. H. Cameron, had charge and control of the money of the company appropriated for the purpose, and kept it on deposit in a local bank, the bank entries showing that this continued in one bank from May 5, 1909, to March 18, 1910; that he had the company's pay rolls and disbursed this money in payment of the hands

and other claims against the company. Thus an affidavit of the sheriff filed at the instance of defendant and in explanation of a prior affidavit made by that officer states "that he, the sheriff, does not know that F. H. Cameron received money in any way for the company; that his only information upon the subject is that said F. H. Cameron upon one occasion paid to him for the McLean Contracting Company certain costs that he (the sheriff) held against said company in an attachment proceeding on behalf of the Edenton Ice & Cold Storage Company and others amounting to \$64, and, in addition, was informed that the said Cameron for the said contracting company paid to the plaintiff in that action the amount of these claims," etc. This former affidavit was as follows: "That he knows F. H. Cameron, who was acting as agent for the McLean Contracting Company in building a bridge across the Albemarle Sound for the Norfolk and Southern Railway Company, near Edenton. That he knows the said F. H. Cameron received money and paid out money for the said McLean Contracting Company." The affidavit of Chas. H. Wood, the cashier of the Citizens' Bank of Edenton, N. C., is as follows: "That he knows F. H. Cameron, employed by the McLean Contracting Company in building a bridge across the Albemarle Sound near this place (Edenton, N. C.) for the Norfolk and Southern Railway Company. That he knows that the said F. H. Cameron deposited moneys from the McLean Contracting Company, after handling the pay roll to his credit as agent, and drew on same for payment of sundry accounts. The pay rolls were not deposited, but the moneys deposited by F. H. Cameron, agent, was received from said McLean Contracting Company. According to our books, his first deposit as F. H. Cameron, agent, was May 5, 1909; his last deposit was March 18, 1910." And, while the affidavit of F. H. Cameron himself and several other officers of the company state that he is only a bookkeeper and without authority to receive or collect money for the company, he also states "that his sole duties are to keep the books of the company wherever it is engaged in contracting work and to settle with and pay off its mechanics and laborers." So far as appears, this agent was the only representative of the company on the ground having any charge or control of the financial features of this transaction, and we are of the opinion, as stated, that from the facts in evidence it is clear that his authority and occupation went far beyond the duties of an ordinary bookkeeper, and, if not a managing agent as defined in some of the decisions, that he came well within the meaning of the term "local agent," on whom process could be properly served, and that at the time of action commenced the company was doing

business in the state and had property therein.

There is nothing either in *Moore v. Bank*, 92 N. C. 590, or in *Kelly v. Lefalver*, 144 N. C. 4, 56 S. E. 510, cases cited and relied on by defendants, which militates in any way against the disposition we make of this appeal. In *Moore's Case* it was held that an attorney at law who had certain claims to collect for a foreign corporation was not in the regular employment of the company so as to become a local agent within the true meaning of our statute on the service of process. And in *Lefalver's Case*, supra, the court, in stating the essential facts, said: "It will be noted that the person in question was not an agent in the course of the company's business while it was being operated, nor in closing out said business, nor in making general disposition of the company's property after it had ceased to do business. In fact, he was not an agent of the company at all, nor even an employé in the ordinary acceptance of the term, but simply a caretaker—acting, as found by the court, out of friendship and without salary or any pecuniary recompense"—showing that neither decision is applicable to the facts presented here. For the reasons stated, the order of the court below dismissing the action as to appellee company will be set aside and the cause proceeded with according to law, and the course and practice of the court.

Reversed.

(158 N. C. 63)

NEWBERN BANKING & TRUST CO.
v. DUFFY et al.

(Supreme Court of North Carolina. Sept. 21, 1910.)

1. CONTRACTS (§ 147*)—CONSTRUCTION — INTENTION OF PARTIES.

A contract should receive the construction which will best effectuate the intention of the parties, collected from the whole agreement; greater regard being had to the clear intent of the parties than to any particular words used in expressing it.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 780, 743; Dec. Dig. § 147.*]

2. CONTRACTS (§ 157*)—CONSTRUCTION—CORRECTION OF MISTAKES.

The court for the purpose of executing the intention of the parties to a contract as collected from the whole agreement will disregard or correct obvious mistakes in the writing.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 739; Dec. Dig. § 157.*]

3. BILLS AND NOTES (§ 129*)—MATURITY OF NOTE—STIPULATIONS—CONSTRUCTION.

The principal of a note providing that, if any "installment of interest is not paid when due or within ten days after demand," the principal of the note shall become due, and declaring that the makers and indorsers waive notice of dishonor and protest, is due when interest is not paid at maturity nor within 10 days after demand; the word, "or" in the quoted phrase being used for "nor."

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 283-292; Dec. Dig. § 129.*]

4. BILLS AND NOTES (§ 109*)—STIPULATIONS—VALIDITY.

A stipulation in a note that it shall become due where there is a default in the payment of interest for 10 days after demand is valid.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 109.*]

5. EVIDENCE (§ 226*)—LIABILITY OF PARTIES—ADMISSIONS—EFFECT.

The admission by the maker of a note of a demand on him for payment of interest is not binding on the payee who has indorsed the note, but he may deny that any demand has been made.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 815-821; Dec. Dig. § 226.*]

Appeal from Superior Court, Craven County; Lyon, Judge.

Action by the Newbern Banking & Trust Company against R. N. Duffy and others. From a judgment for plaintiff, defendant D. H. Green appeals. Modified.

Simmons, Ward & Allen, for appellant. Moore & Dunn and Loftin, Varner & Dawson, for appellee.

WALKER, J. This action was brought to recover the amount of a note, which is in the following words and figures: "Newbern, N. C. March 3, 1909. \$5,000.00. On or before three years after date, we promise to pay to the order of D. H. Green, Five Thousand Dollars (\$5,000.00) with interest from date at six per cent (6 per cent) per annum, payable at the National Bank of Newbern, N. C. Value received. Interest is payable one year after date and annually thereafter. If any instalment of interest is not paid when due or within ten days after demand, then the principal of said note shall become due and payable. The makers and endorsers of this note hereby waive notice of dishonor and notice of protest and protest itself, and agree to become bound, notwithstanding any extension or extensions. Witness our hands and seals. [Signed] R. N. Duffy. [Seal.] A. C. Burnett. [Seal.]" The note was indorsed and transferred for value by D. H. Green, the payee, to the plaintiff, who is now the owner thereof.

It is alleged in the complaint that, the first instalment of interest not having been paid when it was due, demand was made for the payment of the same, and no part thereof has been paid. The defendant A. C. Burnett was not served with process, and the defendant R. N. Duffy failed to appear and answer. The defendant D. H. Green answered, and denied that any demand had been made for the payment of interest, as alleged in the complaint. Plaintiff moved for judgment against the defendants R. N. Duffy and D. H. Green "upon the answer of Green; no other answers having been filed." The defendant resisted the motion upon the ground, among others, that no judgment could be given upon the pleadings, as the allegation of a demand for the payment of interest had been denied, which

raised an issue as to the truth of the allegation, and therefore, for the purposes of the motion, it must be assumed that the principal of the note was not due when the action was commenced. The court refused to render judgment, and the plaintiff appealed. The contention of the plaintiff is that a demand was not necessary, as it had been waived by the very terms of the note, and, besides, that by a proper construction of the note the principal became due when there was a default in the payment of the first installment of interest; the words "or within ten days after demand" being immaterial or surplusage. The clause by which the makers and indorsers of this note waive notice of dishonor and protest and agree to remain liable, notwithstanding any extension of the time of payment, does not refer to the next preceding clause as to nonpayment of interest and the maturity of the principal, but to the notice required to prevent a discharge of the indorser under the law of commercial paper. It can hardly be supposed that the parties would make an agreement as to a demand for the payment of interest in one clause, and then waive it in the next clause.

As to the other question, it is well settled that a contract should receive that construction which will best effectuate the intention of the parties, which must be collected from the whole of the agreement, greater regard being had to their clear intent than to any particular words which they may have used in the expression of it, and, for the purpose of executing the intent, courts will disregard or correct obvious mistakes in writing and grammar. Clark on Contracts (2d Ed.) §§ 218-219. We cannot reject the words "or within ten days after demand," as we think they were intended to be of the essence of the contract, and therefore to be considered in construing it. There is no rule of law authorizing us to ignore those words. Why insert them if they were deemed to be not material? The true meaning of the clause is that if the interest is not paid when due, and there shall be a further default in its payment for 10 days after demand, the principal of the note shall become due and payable. The two defaults must concur before the maturity of the note is accelerated. The word "or" was used for "nor." The context shows it. As we must assume, at this stage of the case, that no demand for the payment of interest had been made, the right of action against D. H. Green for the recovery of principal and interest had not accrued when this action was commenced. Kinsel v. Ballou, 151 Cal. 754. 91 Pac. 620. The stipulation that the note shall become due and payable if there is a default in the payment of interest for 10 days after a demand is valid. 7 Cyc. 599, 859; 1 Daniel, Neg. Inst. (5th Ed.) § 48; Whitehead v. Morrill, 108 N. C. 65. 12 S. E. 894.

The plaintiff is entitled to a judgment

against R. N. Duffy, as he did not answer, but his failure to answer cannot prejudice D. H. Green. The admission by Duffy of a demand upon him for the payment of the interest cannot be taken as any admission by Green of such a demand. The latter still has the right to deny that any demand was made, which he has done, and to have the issue thus joined submitted to a jury. Judgment will be entered in the court below against R. N. Duffy. Plaintiff moved in the superior court that judgment be rendered against D. H. Green for the principal and interest of the note. The court properly refused to grant the motion. Until it is found that a demand was made and the interest was not paid within ten days thereafter, the plaintiff will not be entitled to judgment for the principal of the note, as by its terms the note will not be due, so that an action can be brought upon it, until the expiration of the definite time fixed for payment—that is, three years from its date—unless there has been or hereafter is, a default in the payment of interest for 10 days after demand. Kinsel v. Ballou, *supra*.

The costs of this court incurred by D. H. Green will be paid by the plaintiff, who will recover of the defendant R. N. Duffy all other costs.

Modified.

(153 N. C. 591)

STATE v. NORMAN.

(Supreme Court of North Carolina. Sept. 21, 1910.)

1. CRIMINAL LAW (§ 386*)—TRAILING OF BLOODHOUNDS—EVIDENCE—ADMISSIBILITY.

To make the testimony of trailing by bloodhounds admissible, it must be shown by the testimony of persons having knowledge thereof that the dog has acuteness of scent and power of discrimination, and has been trained or tested in the exercise of tracking human beings, and it must also be proved that the dog was laid on the trail, whether visible or not, at a point where the circumstances showed that the guilty party had been, or on a track which such circumstances indicated to have been made by him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 768; Dec. Dig. § 386.*]

2. CRIMINAL LAW (§ 386*)—TRAILING OF BLOODHOUNDS—EVIDENCE—ADMISSIBILITY.

Where there were no tracks at nor anything about the premises connecting accused with a crime committed thereon, and there were no tracks between the premises and a railroad crossing, and in a field between a public road and the house where accused was found, evidence that a bloodhound left the premises, ran down the track of the railroad to a highway crossing, then down the highway, and thence across the field to the house of accused, and that the dog did not recognize accused, though he stood near him, was inadmissible, especially where other persons had been in the house with accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 768; Dec. Dig. § 386.*]

3. CRIMINAL LAW (§ 741*)—EVIDENCE—SUBMISSION OF ISSUE TO JURY.

Where there is no evidence of the guilt of accused, or where it is so slight as not rea-

sonably to warrant an inference of guilt, or where it furnishes no more than material for mere conjecture, the court will not submit the case to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1713-1728; Dec. Dig. § 741.*]

4. BURGLARY (§ 45*)—EVIDENCE—SUFFICIENCY.

Evidence on a trial for burglary held not to justify the submission of the case to the jury.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 110; Dec. Dig. § 45.*]

Appeal from Superior Court, Camden County; Ferguson, Judge.

Will Norman was convicted of burglary, and he appeals. Reversed.

The defendant was indicted in the court below for breaking and entering the storehouse of W. S. Berry with the unlawful and felonious intent of stealing, taking, and carrying away the goods and chattels of the said Berry. The evidence tended to show that there were several persons in the store on Saturday night, the 5th day of March, 1910. W. S. Berry went to his store Monday morning, March 7th, by 8:30, and found that it had been entered, and that a few articles were lying on the counter and floor. They had been taken from the showcase and the shelves. The money drawer had been tampered with. He left a pistol in the drawer on Saturday night which belonged to the defendant, and was pawned by him to secure a loan of \$2. The pistol was the only thing that was taken from the store. He telephoned to Mr. J. W. Shores, and requested him to bring his bloodhound with him to the store, so that they could trail the thief. Shores came with the bloodhound. The dog scented several articles, and started the trail just as he scented the money drawer. He left the store and ran down the track of the railroad to a public crossing, and then down the public road for some distance, and thence across a field to the house of a widow, where Berry and Shores saw the defendant and the woman standing in the door. The dog did not recognize the defendant, although he stood near him. Several other persons had stayed in the house the night before with the defendant. The defendant lived about a mile from the house, at his father's home. There were no tracks around the store, and, as stated by the prosecuting witness, there was "nothing to identify the defendant as the person who had entered the house." The tracks of several persons were found on the public road near the railroad crossing, some of which seemed to correspond with the shoes worn by the defendant, though afterwards a comparison was made, and it was found that, while the track was made by a blunt-toed shoe, the defendant did not wear such a shoe. There were no tracks for the dog to follow. The only tracks found were those near the crossing.

The owner of the hound testified that he was a young dog, and had been on but three trails, the results of which were not stated. He further testified that he was not regularly in the business of training bloodhounds and trailing criminals, but was by trade a painter. The dog was a bloodhound of good strain. The defendant's counsel requested the court to charge the jury that there was no evidence of the defendant's guilt, which the court refused to do, and charged the jury that they must consider all the circumstances, and, while they could not convict upon the evidence alone as to the actions or conduct of the dog, if they found beyond a reasonable doubt from all of the evidence that the defendant was guilty, they should return a verdict accordingly, and, if not, they should return a verdict of not guilty. The defendant excepted. The jury returned a verdict of guilty, and, judgment being rendered thereon, the defendant appealed.

Thos. J. Markham and W. L. Cohoon, for appellant. Attorney General Bickett, for the State.

WALKER, J. (after stating the facts as above). We think the court should have given the instruction requested by the defendant. We have decided in several cases that the action and conduct of a bloodhound in trailing a person from the place where a crime has been committed is competent evidence under certain circumstances. The conditions which must exist in order to render such evidence competent are stated in the case of *Pedigo v. Commonwealth*, 103 Ky. 41, 44 S. W. 143, 42 L. R. A. 432, 82 Am. St. Rep. 566. It is there said: "That in order to make such testimony (the trailing of a track by a dog) competent, even where it is shown that the dog is of pure blood, and of a stock characterized by acuteness of scent and power of discrimination, it must also be established that the dog in question is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and that these facts must appear from the testimony of some person who has personal knowledge thereof. We think it must also appear that the dog so trained and tested was laid on the trail, whether visible or not, concerning which testimony has been admitted at a point where the circumstances tend clearly to show that the guilty party has been, or upon a track which such circumstances indicated to have been made by him. When so indicated, testimony as to trailing by the bloodhound may be permitted to go to the jury for what it is worth, as one of the circumstances which may tend to connect the defendant with the crime of which he is accused. When not so indicated, the trial court should exclude the entire testimony in that regard from the jury." This court in the case of *State v. Moore*, 129 N. C. 494, 39 S. E. 626, 55 L. R. A. 96, adopted the rule of

evidence as stated in that case, and, when applying it to the facts of the *Moore Case*, said: "In this case there is no evidence to connect the circumstance of the baying of the two defendants, or either of them, with the making of the tracks at the time the larceny was committed; nor is there any evidence that the dog scented any that were then made by either of the defendants; nor is there any way to ascertain that fact. The evidence admitted failing to become a circumstance to connect the defendants with the crime, and, failing to become a circumstance in corroboration of Rountree's testimony, there was error in admitting it." Evidence as to the conduct of the bloodhound in pursuing the track of a human being was admitted in the case of *State v. Hunter*, 143 N. C. 607, 56 S. E. 547, 118 Am. St. Rep. 830, and *State v. Freeman*, 146 N. C. 615, 60 S. E. 986, but it will be found on an examination of those two cases that there were facts and circumstances which made the evidence reliable and therefore competent. Where such facts and circumstances do not exist, as in our case, the evidence is conjectural in its nature, and barely raises a well-grounded suspicion as to the guilt of the party. In this case there were no tracks at the store, and, as stated by the prosecutor in his testimony, there was nothing about the premises which tended to connect the prisoner with the commission of the crime. There were no tracks between the store and the railroad crossing, and there were none in the field between the public road and the house where the defendant was found. How can it be said, with any degree of certainty, that he committed the offense? It is true that the pistol was missing from the money drawer, but it was not found in the possession of the defendant, and the mere fact that he owned the pistol was not evidence of his guilt, as any other person who may have entered the store could have taken it as well as he. While the dog ran from the store to the house where the defendant was found, it is stated in the case that he did not "recognize" the defendant, nor did he give any indication by his conduct, which is usual in such cases, that the defendant was the man whose trail he had been pursuing. The rule is that if there be no evidence, or if it be so slight as not reasonably to warrant an inference of the fact in issue, or if it furnish no more than material for mere conjecture, the court will not submit the issue to the jury. *Brown v. Kinsey*, 81 N. C. 245. In *State v. Vinson*, 63 N. C. 335, it was held that evidence which "merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it is so, is an insufficient foundation for a verdict and should not be left to the jury." So in *Byrd v. Southern Express Company*, 139 N. C. 273, 51 S. E. 851, it was said: "It all comes to this, that there must be legal evidence of the fact in issue and not merely such as raises a sus-

picion or conjecture in regard to it. The plaintiff must do more than show the possible liability of the defendant for the injury. He must go further and offer, at least, some evidence which reasonably tends to prove every fact essential to his success." There is nothing in this case to indicate that the defendant committed the crime of breaking and entering the storehouse, except the conduct of the dog, and what he did is so uncertain and unreliable in its character as to be insufficient of itself to legally establish the defendant's guilt. It was not shown that the defendant was at the store on Saturday night, or that his tracks were seen at or near the store, or that he was in possession of any property which was stolen, or, as we have said, that the dog indicated by his conduct that he was the thief. It is impossible to understand how the dog could have trailed the defendant across the field when it appears that no tracks were found there. A careful analysis and consideration of the evidence convinces us that there was no proof of the defendant's guilt, and he was, therefore, entitled to the instruction which was requested by his counsel.

In his argument before us, the Attorney General, with his usual frankness, stated that the evidence in the case does not "create a just suspicion against the defendant and the jury should have been instructed to return a verdict of not guilty." In this view of the facts, we have concurred with him.

New trial.

(153 N. C. 72)

FIRST NAT. BANK OF KANSAS CITY v. GRIFFIN et al.

(Supreme Court of North Carolina. Sept. 21, 1910.)

TRIAL (§ 234*) — INSTRUCTIONS — ASSUMPTION OF FACT.

Where the testimony of all the officers of a bank conversant with the facts that the bank was an indorsee for value before maturity and a holder in due course of the note sued on was not contradicted, and the maker relied solely on the fraud of the payee in procuring the note, the court properly charged that if the jury believed the evidence, or if they found the facts to be as testified, the verdict should be for the bank.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 535; Dec. Dig. § 234.*]

Appeal from Superior Court, Bertie County; Ward, Judge.

Action by the First National Bank of Kansas City against one Griffin and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Plaintiff's indorsees, and claiming to be holders in due course, sued upon the following instrument: "Windsor, N. C. Dec. 18, 1907. July 1, 1909, after date, for value received, we jointly and severally promise to pay McLaughlin Bros., or order, fifteen hundred dollars, at the Bank of Windsor, N. C.,

with interest at six per cent per annum, payable annually. [Signed] Griffin Bros."—and 14 others. Upon this note was indorsed a payment of \$100, and which said note was indorsed by "McLaughlin Bros." There was allegation with evidence on part of defendants tending to show that the note was procured from defendants by false and fraudulent representations on the part of the payees. In reply, plaintiffs offered evidence on the part of the officers of the bank tending to show that said bank was an indorsee for value and a holder in due course of the instrument sued on. The exception presented, with the attendant facts and relevant evidence, is stated in the case on appeal as follows: "The plaintiff then introduced the depositions of the president, the cashier, and discount teller of the plaintiff bank, who testified as follows: 'That the plaintiff bank is a corporation, doing a banking business in Kansas City, Mo., and that the said bank purchased the note sued on in this action of McLaughlin Bros., the payees of the said note, before its maturity, to wit, in February, 1909, and for value; that the said note was purchased and taken by the plaintiff bank in due course, and the said bank and none of its officers or agents had any knowledge of the said McLaughlin Bros., or any agent of theirs, if any were made, or any equities whatever in favor of the defendants, or any other defenses set up by the defendants in their answer.' They further testified that the plaintiff bank purchased said note in regular course of business, in good faith, without any notice of any defects in its execution or of any equities in favor of the defendants, and that it paid full value for said note, less the usual discount; that on the date of its purchase by plaintiff the amount due on said note was \$1,529.02, and that plaintiff paid for same \$1,488, which was the full amount due thereon, less the regular discount of 6 per cent., which discount amounted to \$41.02; that said McLaughlin Bros. indorsed said note to the plaintiff bank, and the amount of the purchase, to wit, \$1,488, was placed to the credit of said McLaughlin Bros. upon the books of the bank, and by them checked out in the regular course of their business; that McLaughlin Bros. are, and have been for several years, regular customers of the bank, and Mr. William McLaughlin, of the firm of McLaughlin Bros., resides in Kansas City. Upon cross-examination the witnesses stated that they knew McLaughlin Bros.; that they were solvent, and had been for many years customers of the bank, but they did not know any one of the makers of the said note, and knew nothing of their financial standing. Here the plaintiff rested. Whereupon the defendant offered evidence tending to show that the agent of McLaughlin Bros. who took the note made the representations to the defendants set out in the answer, and that these repre-

sentations were false, and they were induced to sign the said note on account of the said representations. Here the defendants' counsel stated that the defendants had no evidence to offer upon the question of plaintiff's being a holder in due course. The court charged the jury, if they should find all the facts to be as testified by the witnesses in this case, they should answer the issue 'Yes.' There was verdict for plaintiff for amount due on note. Judgment on the verdict, and defendants excepted and appealed.

Pruden & Pruden, Gillam & Davenport, and S. B. Shepherd, for appellants. Winston & Matthews, for appellee.

Hoke, J. This case is governed by the decision of the court in *Bank v. Fountain*, 148 N. C. 590, 62 S. E. 738, and affords a good illustration of the principles declared and approved in that opinion. A new trial was granted in *Fountain's Case* for the reason that after evidence had been offered tending to show fraud in the procurement of the note and the President of the Bank in reply had testified, in substance, that the bank had purchased the note in due course, and was an endorsee for value before maturity and without notice, the judge below charged the jury, among other things, that the prima facie case of plaintiff, the holder of the note, had been restored by the uncontradicted evidence of the president of the bank that it had acquired the note in the usual course of business before maturity and without notice of any vice in it, thereby erroneously invading the province of the jury by assuming that the evidence of the bank president was true, and should be so accepted by them. After holding that this was reversible error in the trial below, the court in the opinion speaking further to the subject said: "It may be that when fraud is established in procuring the instrument or there has been evidence offered tending to establish it, if the plaintiff, as he is then required to do, should lay before the jury all the evidence available as to the transaction, and it should thereby appear, with no evidence to the contrary and no other fair or reasonable inference permissible, that plaintiff was the purchaser of the instrument in good faith, for value, before maturity and without notice, the court could properly charge the jury if they 'believed the evidence' or if they 'found the facts to be as testified'—a more approved form of expression—they would render a verdict for plaintiff. But there the fraud having been established or having been alleged, and evidence offered to sustain it, the circumstances and bona fides of plaintiff's purchase were the material questions in the controversy, and both the issue and the credibility of the evidence offered tending to establish the position of either party in reference to it was for the jury, and not for the court. *State v. Hill*,

141 N. C. 771 [53 S. E. 811]; *Riley's Case*, 113 N. C. 651 [18 S. E. 168]." And in concluding the opinion the court again stated the position as follows: "If, when all the facts attendant upon the transaction are shown, there is no fair or reasonable inference to the contrary permissible, the judge could charge the jury, if they believed the evidence, to find for plaintiff, the burden in such case having been clearly rebutted. But the issue itself and the credibility of material evidence relevant to the inquiry is for the jury, and it constitutes reversible error for the court to decide the question and withdraw its consideration from the jury."

The facts presented bring the present case clearly within the principles stated. All the officers of the bank who were conversant with the matter testified in effect that the bank was an indorsee for value before maturity and holder in due course of the instrument sued on. There was no evidence which contradicted or tended to contradict their testimony, and the judge below properly charged the jury, "if they believed the evidence or if they found the facts to be as testified they would render a verdict for plaintiff." There is no error, and the judgment below is affirmed.

No error.

(153 N. C. 35)

HIGSON et ux. v. NORTH RIVER INS. CO.
(Supreme Court of North Carolina. Sept. 21, 1910.)

1. REMOVAL OF CAUSES (§ 95*)—DIVERSE CITIZENSHIP—JURISDICTION OF STATE COURT.

The jurisdiction of a state court over a cause removable to the federal court on the ground of diverse citizenship terminates on the timely filing in the state court of a proper petition and bond for removal to the federal court.

[Ed. Note.—For other cases, see *Removal of Causes*, Cent. Dig. §§ 204, 205; Dec. Dig. § 95.*]

2. REMOVAL OF CAUSES (§§ 86, 89*)—DIVERSE CITIZENSHIP — JURISDICTION OF STATE COURT.

A state court having jurisdiction of a cause removable to the federal court on the ground of diverse citizenship need not surrender its jurisdiction unless the petition for removal shows on its face a removable cause founded on diverse citizenship, and unless the petition and accompanying bond are filed in the state court within the time required by Acts Cong. March 3, 1887, c. 373, § 1, 24 Stat. 553 and Act Cong. Aug. 13, 1888, c. 866, § 1, 25 Stat. 435 (U. S. Comp. St. 1901, p. 510).

[Ed. Note.—For other cases, see *Removal of Causes*, Cent. Dig. §§ 166-172, 189, 195; Dec. Dig. §§ 86, 89.*]

3. REMOVAL OF CAUSES (§ 79*)—APPLICATION — TIME TO FILE.

An application by a defendant to remove a cause from a state court to the federal court on the ground of diversity of citizenship must be made to the state court when the answer is due, though plaintiff does not then move for judgment by default, and the fact that the original summons and complaint were destroyed by

fire subsequent to the time for answering does not affect the rights of defendant.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 141-146; Dec. Dig. § 79.*]

4. REMOVAL OF CAUSES (§ 89*)—APPLICATION—FILING—EFFECT.

A filing with the clerk of court of a petition and bond for the removal of a cause to the federal court is not a presentation to the judge in term as required by statute.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 189; Dec. Dig. § 89.*]

5. REMOVAL OF CAUSES (§ 89*)—APPLICATION—JURISDICTION OF COURT.

A proceeding to remove a cause from a state court to the federal court on the ground of diverse citizenship must be commenced in the state court, and the filing of a petition in the federal court does not authorize the federal court to order a removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 189; Dec. Dig. § 89.*]

6. REMOVAL OF CAUSES (§ 107*)—APPLICATION—WAIVER.

The act of plaintiff's counsel in appearing in the federal court erroneously ordering the removal to it of an action commenced in a state court, and in moving to remand the cause to the state court, does not confer jurisdiction on the federal court, but the motion to remand is a challenge to the jurisdiction of the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 107.*]

7. JUDGMENT (§ 17*)—DEFAULT.

Where a defendant admits the due service of summons, a judgment by default may be rendered in the absence of a summons substituted in place of the original summons served on defendant and destroyed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 25; Dec. Dig. § 17.*]

Appeal from Superior Court, Pitt County; Peebles, Judge.

Action by W. B. Higson and wife against the North River Insurance Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

See, also, 67 S. E. 509.

No answer has been filed, but on the 23d of April, 1910, defendant filed a petition and bond for removal to the Circuit Court of the United States, which at the hearing before Judge Peebles was urged in bar of the judgment by default. Upon the hearing his honor rendered the following judgment: "This cause coming on to be heard before Hon. R. B. Peebles, judge presiding at the May term of Pitt county superior court, 1910, upon the motion of attorneys for plaintiff for judgment by default and inquiry for want of an answer on the part of defendant, and the same having been argued fully by Messrs. Skinner & Whedbee, attorneys for plaintiff, and it appearing to the court that summons in this action was issued September 11, 1909, and served September 14, 1909, and that thereafter complaint was filed December 9, 1909, and that since the issuance of the summons in this cause there have been civil terms of Pitt county superior court as follows, to wit: December 13, 1909; January

24, 1910; March 21, 1910; and May 2, 1910—and that no answer has been filed to the complaint filed in this cause, and at none of the terms of said court, nor at any other time has the defendant in the above-entitled cause made any motion or obtained any leave of record to file answer, and that the defendant up to the 23d day of April, 1910, never filed any bond or made any motion for the removal of this cause from this court; the May 2d term only held for one day, and the petition was not called to the attention of the court, and the judge announced that he would remain as long as there was anything he could do: It is therefore ordered, adjudged, and decreed by the court that the plaintiff W. B. Higson is entitled to recover of the defendant in this action on account of the matters and things alleged in the complaint; and it is further ordered that a jury come at a subsequent term of this court to assess the amount of the damages that the plaintiff is entitled to recover of the defendant company by reason of the matters and things alleged in the complaint. And this cause is retained for further orders. R. B. Peebles, Judge Presiding." From the judgment rendered, the defendant appealed.

Moore & Long, Tillett & Guthrie, for appellant. Harry Skinner, for appellees.

BROWN, J. It appears to be settled by both the federal and state courts in numerous decisions based upon petitions to remove causes pending in state courts upon the ground of diverse citizenship that the jurisdiction of a state court over a removable case terminates upon the timely filing therein of a proper petition and bond for its removal to a Circuit Court of the United States. Nat. S. S. Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87; Stone v. State of South Carolina, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; Winslow v. Collins, 110 N. C. 121, 14 S. E. 512. It is equally well settled that the state court is not bound to surrender its jurisdiction unless the petition shows upon its face a removable cause founded upon diverse citizenship, and unless such petition and an accompanying bond are filed in the state court within the time required by the act of Congress of 1887 and 1888 (Act March 3, 1887, c. 373, § 1, 24 Stat. 553, and Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 435 [U. S. Comp. St. 1901, p. 510]). Railroad v. Daughtry, 138 U. S. 298, 11 Sup. Ct. 306, 34 L. Ed. 9; Stone v. State, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; Howard v. Railroad, 122 N. C. 944, 29 S. E. 778; Corp. Commission v. Railroad, 151 N. C. 447, 66 S. E. 427; Moon on Rem. § 156. The statute is imperative that the application to remove must be made to the state court when the answer is due, and, although the plaintiff does not then move for judgment by default, it cannot be held that he thereby

extends the time for removal. *Railroad v. Daughtry*, supra; *Moon*, § 158. Mr. Moon says: "A plaintiff may even stipulate that defendant shall have further time to answer without plaintiff thereby consenting that a petition for removal may be filed after the time limited therefor has expired." Again, the same author says: "The better reason, if not the weight of authority, sustains the theory that the state court in which a suit is pending cannot by an order extending the time for the defendant to answer, or otherwise enlarge the time within which a petition for removal may be filed." In support of the text the author cites a great array of decided cases from the federal courts. Page 446. Referring to this construction of the act, Judge Sanborn says: "It secures uniformity in the practice, prevents delays, and, I think, is in accord with the evident intention of Congress. It was not within any time that a defendant might procure to be given him by the court or his opponent, but within the time fixed by the statute, that Congress intended the petition should be filed." *Gold Mining Co. v. Hunter* (C. C.) 60 Fed. 305; *Howard v. Railroad*, 122 N. C. 944, 29 S. E. 778, and cases cited.

The fact that the courthouse of Pitt county was burned on February 24, 1910, when the original summons and complaint in this cause were destroyed, cannot help the defendant. The complaint was filed December 9, 1909. Civil terms of the superior court convened on December 13, 1909, and January 24, 1910. At neither of those terms did the defendant offer to file the petition and bond for removal, but waited until April 23d long after the time for answering had expired. It is true the defendant filed with the clerk of the superior court of Pitt county on January 24, 1910, a copy of a petition and bond for removal of this cause, but it was a copy of a petition addressed to the judge of the United States Circuit Court for the Eastern District of North Carolina, and filed in that court, praying the federal judge to order a removal of this cause to that court. This copy was attached to a copy of an order of said judge directing the clerk of the Circuit Court to cause a copy of such petition and his order to be forwarded to the superior court of Pitt county, to the end that said record may be certified to the Circuit Court of the United States. It was not an original petition for removal addressed, as it should be, to the judge of the superior court of Pitt county (as the petition filed April 23d was addressed), but only a copy of a proceeding commenced originally in the Circuit Court of the United States, and delivered to the clerk of the superior court of Pitt county. Nevertheless, treating it as an original petition for the sake of argument, it was not filed within the time required by law nor presented to the superior court in term.

The time for answering according to our

statute expired with the term convening December 13, 1909, and a filing with the clerk of a petition and bond for removal is not a presentation to the judge in term as is required. *Railway Co. v. Roberts*, 141 U. S. 690, 12 Sup. Ct. 123, 35 L. Ed. 905; *Howard v. Railroad*, supra; *Shedd v. Fuller* (C. C.) 36 Fed. 609; *Roberts v. Railway Co.* (C. C.) 45 Fed. 433. It is further contended that the order of the district judge had the effect to remove the cause into the Circuit Court of the United States, and to oust the jurisdiction of the state court. We cannot concede this, and with entire respect for the learned judge must hold that his order cannot have the effect to terminate the jurisdiction of the state court. If the removal proceeding were founded in the local prejudice act of Congress, we should willingly concede that his order lawfully transferred the cause to the Circuit Court. But where the ground of removal is solely that of diverse citizenship, as we understand the law, the Circuit Court has no authority to order a transfer of the cause, especially when at the time no petition and bond has been presented to the state court, as was the case here. The right of removal for diverse citizenship is purely statutory, and, before the jurisdiction of the state court can be disturbed, it must appear affirmatively that a proper petition and bond has been in due time presented to the state court, when as said by Chief Justice Waite, in *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 982: "The state court is at liberty to determine for itself whether on the face of the record a removal had been effected." The learned Chief Justice then proceeds to say: "If it decides against removal and proceeds with the cause, notwithstanding the petition, its ruling on that question will be reviewable here after final judgment under section 709 of the Revised Statutes (U. S. Comp. St. 1901, p. 575)—citing several cases. If the state court proceeds after a petition for removal, it does so at the risk of having its final judgment reversed, if the record on its face shows that when the petition was filed that court ought to have given up its jurisdiction." The act of Congress does not confer upon the lower federal courts the power to order removal of causes on account of diverse citizenship, as it does in the local prejudice act, but the removal proceeding must commence in the state court by filing the petition and bond there. At the time Judge Connor's order was made, January 10, 1910, no petition or bond had ever been filed in the superior court of Pitt county, either presented to the judge, or filed with the clerk, and that court had not been asked to surrender its jurisdiction.

We fail to find any authority, state or federal, which sustains the action of the Circuit Court under such circumstances, and its order cannot have the effect to oust the jurisdiction of the superior court of Pitt county. "A state court is not ousted of its jurisdic-

tion of a case by unauthorized proceedings taken for removal of the same case to a federal court." *Johnson v. Wells Fargo Co.* (C. C.) 91 Fed. 1; *Tavis v. Pallentine Insurance Co.* (C. C.) 149 Fed. 560. It is contended that the plaintiff's counsel appeared in the Circuit Court and moved to remand to the state court, and that such action is a recognition of the Circuit Court's jurisdiction and power to make the original order. We are unable to see how any action of plaintiff's counsel can confer on a court a jurisdiction not conferred by law, but we would regard a motion to remand as rather in the nature of a challenge to the jurisdiction of the Circuit Court to make the order of removal rather than a submission to or recognition of it. The motion was doubtless made to prevent an unseemly conflict between the state and federal courts. Had the defendant pursued the usual and orderly procedure, the petition and bond would have been presented to the superior court in term, and, if the judge determined that on the face of the record a removal had not been effected, the defendant could have appealed to this court, and, if necessary, had its judgment reviewed by the Supreme Court of the United States, and thus preserved its right to answer until the right of removal had been finally adjudicated. On the contrary, the defendant chose to commence his removal proceedings originally in the Circuit Court and declined to file its answer to the complaint in the state court. There was nothing left for the state court to do but grant the plaintiff's motion for judgment by default and inquiry.

The point is made that a judgment by default cannot be lawfully rendered in the absence of a summons substituted in place of the original served on defendant September 14, 1909, and destroyed by fire. This is not necessary as the defendant admits, when it filed its petition for removal on April 23d, that it had been made a party defendant to this action. This is not only admitted by the act of filing itself, but it is expressly stated in the petition that the summons has been duly served on defendant. Nevertheless the substituted summons has been filed in the record by leave of this court since the argument.

The cause is remanded to the superior court of Pitt county with instructions to execute the inquiry, and otherwise proceed as the law directs.

Affirmed.

CLARK, C. J. (concurring). The great bulk of court business under our system of government is necessarily in the state courts. The federal courts have a restricted jurisdiction which is limited to matters marked out by the United States Constitution. So true is this that in all actions in a federal court it

is presumed that the court is without jurisdiction until the contrary affirmatively appears. *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; 11 Cyc. 855. In those instances of concurring jurisdiction in which notwithstanding a state court has first taken jurisdiction the federal judiciary act permits a removal into the federal, such removal is permissible only when the motion is made in apt time, and in all respects complies with the requirements of the act of Congress. Whether it does so comply is a matter of which the state court is competent to judge, as well as the United States Court; the federal Supreme Court being the final arbiter. *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962.

A writ of error lies from a state Supreme Court to the United States Supreme Court though even this was strenuously denied in the early history of the court. But there is no superiority or inferiority between the state superior court and the federal District and Circuit Courts. They are co-ordinate courts, just as the state superior courts are between themselves. The right to remove cases from the state court to the federal court argues no superiority in the latter over the former, but only indicates that, in the purview of the federal Constitution and laws, the nature of the case is such that the defendant is entitled to have it tried in the federal court, but only when the defendant has made his motion within the time and in the manner prescribed by the statute. It is not inappropriate to say this much, as the learned counsel for the defendant, in his argument here, spoke of the writ going "down" from the federal Circuit Court to the state superior court. "Words" said the great orator Mirabeau, "are things," and in matters touching the jurisdiction of courts there should be entire accuracy of thought and speech. The jurisdiction of the federal courts below the Supreme Court, as well as their existence, is entirely statutory, created originally by the judiciary act of 1789 and modified by statutes since, and subject to further modifications, but not to exceed the limits marked out by the United States Constitution. *U. S. v. Railroad*, 98 U. S. 569, 25 L. Ed. 143. The United States Supreme Court alone is not a legislative creation, and therefore it cannot be abolished by act of Congress (as has been the case with Circuit and District Courts), but even that high court is dependent upon Congress for the exercise of its jurisdiction, which as prescribed by Const. U. S. art. 3, § 2, cl. 2, is "with such exceptions, and under such regulations, as the Congress shall make." The federal courts therefore have no inherent jurisdiction, and their limited jurisdiction extends only to the cases, and can be exercised only in the instances marked out by the statute.

(153 N. C. 88)

In re EVERETT'S WILL.

(Supreme Court of North Carolina. Sept. 21, 1910.)

1. WILLS (§ 163*)—PROBATE—UNDUE INFLUENCE—BURDEN OF PROOF.

Where a will was executed through the intervention of a person occupying a fiduciary relation to testator, whereby such person was made executor and a large beneficiary, there was a suspicion of undue influence, and such person had the burden of removing the suspicion by proving that the will was the voluntary act of testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 390-395; Dec. Dig. § 163.*]

2. WILLS (§ 163*)—PROBATE—UNDUE INFLUENCE—BURDEN OF PROOF.

Where a feeble or dying person was brought under a strong and exclusive influence to make an unfair will, the burden of proving good faith was on those setting up the will, and claiming its benefits.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 398; Dec. Dig. § 163.*]

3. WILLS (§ 166*)—UNDUE INFLUENCE—EVIDENCE.

The undue influence invalidating a will may be proved by a number of facts, each one of which standing alone may be of little weight, but, taken collectively, may satisfy a rational mind of its existence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

4. WILLS (§ 166*)—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.

Evidence held to justify a finding that a will was procured by undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

Appeal from Superior Court, Washington County; Ferguson, Judge.

Proceedings for the probate of the will of Amelia Everett, deceased, instituted by the executor of the will and legatees, in which Harry Wheelock appeared as caveator. From a judgment denying probate, propounders appeal. Affirmed.

This is an issue of *devisavit vel non* tried at January special term, 1910. The propounders of the will are Addison Everett, the brother of testatrix, the executor to the will, and certain other legatees. The caveator is Harry Wheelock, the only son of testatrix. This issue was submitted: "Is the paper writing propounded and every part thereof the last will and testament of Amelia Everett? Answer: No." From the judgment rendered, the propounders appeal. The facts are fully stated in the opinion of the court.

A. O. Gaylord and S. B. Spruill, for propounders. Ward & Grimes and Wm. M. Bond, for caveator.

BROWN, J. The only assignment of error presented here is the refusal of the judge to charge the jury that there is no sufficient evidence of undue influence.

The testimony tends strongly to prove that Addison Everett, the executor, was the business adviser of his sister, the testatrix; that

a few days before her death, at a time when she was very sick in bed, he procured from her a check for about \$900, all the money she had in bank; that Addison stated he was getting the money for testatrix's mother, but, in fact, he gave it to his own daughter, who afterwards left for New York and has not returned. Said daughter was in the room when the will was signed, and had the will when the witness entered the room. When Addison went in the room with the witnesses he said: "Here are parties to witness will." All the witnesses agreed that from the time the parties entered the room up to the time they left the sick woman did not speak a word to anybody about the will or anything else; she being in bed in desperate condition at the time. Addison was appointed executor. He got a large part of the dead woman's property. His wife, his daughters, and his brother got all the balance of her property, except \$10, which by the terms of the will were given to her son. It appears that when the son sent some squirrels to his mother, who was sick, when Addison saw the son, he offered to pay him for the squirrels. It appears that the daughter of Addison offered to pay the sick woman's son for something he had sent her to drink. It appears from the testimony that the only person from whom the sick woman had been in the habit of getting advice about her business affairs was Addison Everett. She was sick in Addison's house at the time referred to. It further appears that Addison, when the witnesses went in the room, after saying "Here are the witnesses to sign the paper," himself got the pen for D. Lee, one of the witnesses, to sign. It further appears that, after the woman was dead, Addison refused to let her son go in the room to see her body until one of his daughters was there to go in with him, and that Addison himself took sole charge of the funeral arrangements; that he has always been against the caveator, to use the language of Wheelock, and that in arranging for the funeral he put himself and family to follow the corpse, then allowing a lot of people who were not related in any way to the dead woman to come immediately behind his family, and that the caveator, the only son of the dead woman, was assigned to a place at the back end of the procession; that after said will had been offered for probate before the clerk Addison remarked to said son that his mother had given him more than she ought to have given him. It appears from Wheelock's testimony that Addison, his wife, and daughter would give him no opportunity at any time to talk to his mother without one or more of them being in the room with her; that he and his mother were friendly, and he went to see her each day. It appears that the will was written by one Johnson, who says the deceased never spoke to him about it; that he wrote

it at the instance of an attorney, in the attorney's office, testatrix not being present, and said attorney was in the courtroom during the entire trial, and propounder did not put him on the stand as a witness; that the woman for years before her death had been friendly with her son, and had said she intended to properly provide for him. Under the will the executor, Addison Everett, and his daughters get practically the testatrix's entire estate.

Experience has shown that direct proof of undue or fraudulent influence is rarely attainable, but inference from circumstances must determine it. Therefore it seems to be generally held that when a will is executed through the intervention of a person occupying a confidential relation towards the testatrix, whereby such person is the executor and a large beneficiary under the will, such circumstances create a strong suspicion that an undue or fraudulent influence has been exerted, and then the law casts upon him the burden of removing the suspicion by offering proof showing that the will was the free and voluntary act of the testator. Pritchard on Wills, § 133, and cases cited; Watterson v. Watterson, 1 Head (Tenn.) 1; Gardner on Wills; Maxwell v. Hill, 89 Tenn. 584, 15 S. W. 253; section 62, Schouler; section 240. In such condition of the proof, as said by Gardner, "the proponent must then go on with the evidence, and cause the scales to at least balance." Wills, § 62; Coghill v. Kennedy, 119 Ala. 641, 24 South. 459.

The decided cases are numerous wherein some feeble, decrepit, or dying person appears, as in this instance, to have been brought under a strong and exclusive influence to make an unfair will such as the testator was not likely to have made at his own instance. Then combined circumstances, less suspicious than those in evidence here, become of great consequence, and easily shift the burden of proof of bona fides upon those who set up the instrument and claim its benefits. Marx v. McGlynn, 88 N. Y. 357; Harvey v. Sullens, 46 Mo. 147, 2 Am. Rep. 491; Ray v. Ray, 98 N. C. 566, 4 S. E. 526; Schouler, § 240, and cases cited. By the Roman law *qui se scripsit hæredem* could take no benefit under the will. While such is not the rule of the common law, yet that law requires proof which must free the paper from suspicion. It was long ago laid down by Sir John Nichol in Parke v. Ollatt, 2 Phillim, 323, and approved by Baron Parke in Barry v. Butlin, 12 Eng. Reports, that, where a party prepares or procures the execution of a will under which he takes a benefit, that of itself is a circumstance that ought generally to excite suspicion and calls upon the court to be vigilant in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is satisfied that the paper propounded does express the true will of the deceased. General evidence

of power over a testator, especially of weak mind, or suffering from age and bodily infirmity, though not to such an extent as to destroy testamentary capacity, has been held in this country to be enough to raise a presumption that ought to be met and overcome before a will is allowed to be established. Robinson v. Robinson, 203 Pa. 403, 53 Atl. 253; Miller v. Miller, 187 Pa. 572, 41 Atl. 277; Boyd v. Boyd, 66 Pa. 283. In this last case, referring to above rule, the court says: "Particularly ought this to be the rule when the party benefited stands in a confidential relation with the testator." Judge Redfield says: "Where the party to be benefited by the will has a controlling agency in procuring its execution, it is universally regarded as a very suspicious circumstance and one requiring the fullest explanation." Wills, 515. This text has been adopted and approved generally by the courts of this country. 27 Am. & Eng. Ency. 488; Gardner on Wills, p. 189. Prof. Wigmore says: "Where the grantee or other beneficiary of a deed or will is a person who has maintained intimate relations with the grantor or testator, or has drafted, or advised the terms of the instrument, a presumption of undue influence or of fraud on the part of the beneficiary has often been applied." Section 2503, and cases cited in note. The courts of appeals of Virginia declare: "When a will is executed by an old man, differs from his previously expressed intentions and is made in favor of those who stand in relations of confidence or dependence towards him, it raises a violent presumption of undue influence, which should be overcome by satisfactory testimony." Hartman v. Strickler, 82 Va. 238; Whitelaw v. Sims, 90 Va. 588, 19 S. E. 113; 1 Jarman, Wills, 71-72. Undue influence is generally proved by a number of facts, each one of which, standing alone, may be of little weight, but taken collectively may satisfy a rational mind of its existence.

From the several facts offered in evidence by the caveator the inference is strong that the will in question was the result of a controlling and improper influence upon the part of the propounders and especially the executor. The making and execution of the paper was surrounded by all the indicia of undue influence. The testatrix was an old and feeble woman in her last illness in the house of propounders. She could not read or write, and had to make her mark. There is no evidence that the paper was explained to her or that she fully understood its contents. The inference is strong that the executor and chief beneficiary had the paper written at a lawyer's office and kept possession of it, and that he was "master of ceremonies" at its execution. He and his daughters take the entire estate except \$10, which is the sole legacy to testator's only child, for whom she had only a short time before expressed a purpose to properly provide. Shortly before the execution of the will, the executor

had procured from testator a check for her entire bank funds, and given them to his own daughter. The son was carefully excluded from any private conversation or intercourse with his mother, and not permitted to see her except in presence of propounder's wife and daughters. The executor was for years her confidential adviser and business agent as well as brother.

In view of such facts in evidence, under the rulings of many courts, as well as the teachings of text-writers, the doctrine of presumptions would be applied, and the burden be cast upon the propounders to rebut a presumption of fraud and undue influence. But it is not necessary that we pass on that question now, as the court below, so far as the record discloses, did not apply the doctrine or place such burden upon the propounders. His honor appears to have submitted the question of undue influence to the consideration of the jury without instruction as to the burden of proof, and to the charge as given no exception seems to have been taken.

No error.

(153 N. C. 52)

POWELL BROS. v. McMULLAN LUMBER CO. et al.

(Supreme Court of North Carolina. Sept. 21, 1910.)

1. CORPORATIONS (§§ 16, 24*)—ORGANIZATION—REQUISITES—ISSUANCE OF STOCK—BY-LAWS.

Where incorporators complied with the requirements of the law as to the form of the articles, and, after execution, caused them to be properly recorded as required by Code, §§ 678, 679, they thereby became a corporation, though no stock was ever issued or by-laws adopted.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 23, 24, 27, 48-69; Dec. Dig. §§ 16, 24.*]

2. CORPORATIONS (§ 94*)—STOCKHOLDERS—ISSUANCE OF CERTIFICATE.

Subscribing or registry of a stockholder's name on the stock book opposite the number of shares for which he has subscribed confers title thereto, and makes him a stockholder without the issuance of certificates.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 435; Dec. Dig. § 94.*]

3. CORPORATIONS (§ 309*)—DIRECTORS—LOANING MONEY TO CORPORATION.

A director of a going solvent corporation may aid it with loans of money and take security therefor, notwithstanding the rule that a director of an insolvent corporation who is also a creditor cannot take advantage of the information he has obtained of the corporation's affairs to protect himself to the injury of other creditors, or secure an advantage over them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1366-1373; Dec. Dig. § 309.*]

4. CORPORATIONS (§ 309*)—TRUST DEED TO DIRECTORS—VALIDITY—STATUTES.

Where a corporation was not insolvent at the time it executed a trust deed to two of its directors of substantially all its property to secure indebtedness to them, partly pre-existent and partly for a present consideration of nearly equal amount, and all its other creditors exist-

ing at the time were paid, with one exception, holding a small claim and he was not complaining, the conveyance was not invalid because no schedule of the preferred debts was filed under oath by the corporation and no inventory was filed by the trustee as required by Revisal 1905, §§ 967, 968; such sections being limited to conveyances by insolvents to secure pre-existing debts in preference to other existing creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1366-1373; Dec. Dig. § 309.*]

5. CORPORATIONS (§ 538*)—INSOLVENCY—TRUST DEED.

The mere giving of a trust deed by a corporation of substantially all its property to secure past and present indebtedness in nearly equal amounts, the corporation having subsequently paid nearly all of its then existing indebtedness, did not establish a prima facie case of insolvency in favor of subsequent creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2151; Dec. Dig. § 538.*]

Appeal from Superior Court, Chowan County; Ferguson, Judge.

Suit by Powell Bros. against the McMullan Lumber Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Civil action tried at Spring term, 1910. The plaintiffs, as partners, sued the McMullan Lumber Company, a corporation, M. H. White, E. V. Perry, and White & White Company, corporation. The facts alleged are substantially as follows: In August, 1905, the McMullan Lumber Company was chartered under the general corporation law of the state, with three stockholders, S. W. McMullan, subscriber for 97 shares of the capital stock, E. V. Perry for 2 shares, and M. H. White for 1 share. There were no other stockholders. On September 16, 1905, the stockholders met and elected three directors—White, Perry, and McMullan. McMullan was elected president and he was also elected general manager. Perry was elected secretary and treasurer. In November, 1905, the directors met, being also all the stockholders, to consider the affairs of the corporation. It was then indebted for cash advanced to White and Perry in sums aggregating \$3,475. The corporation bought and took deed from Perry for real estate necessary for its business to the value of \$2,500, and White and Perry advanced then the further sum of \$125, making a total indebtedness to them of \$3,600—\$3,000 to each. The corporation duly authorized the execution of two notes to be executed of \$3,000, \$3,000 to each, and to secure their payment authorized a mortgage to be executed on substantially all its property—real estate, buildings, and machinery. The approximate value of this property was \$12,500. The corporation owed other debts than to White and Perry, but all of these have been paid except a debt of \$40, and were paid before this suit was brought. The holder of this small debt seems, according to the record, to manifest no concern about it. A deed of trust, instead of a mortgage.

securing the two, was duly executed and promptly recorded. Some six months thereafter the plaintiffs, being lumbermen, began to deal with the corporation, selling it lumber and taking its notes and acceptances, so the aggregate amount, as established by the verdict, of \$1,510. After the meeting in November, 1905, there was no other meeting of the directors or stockholders, the business having been left to the sole management of McMullan, the president and general manager, who was regarded as a competent and reliable business man. No certificates of stock were issued, and no by-laws were adopted. In December, 1906, there was a sale by the trustee, named in the deed of trust, pursuant to its terms, to satisfy the two notes secured therein, both of them at that time being owned by White. White purchased for the amount of the two notes, \$8,000 and subject to taxes \$126, and a prior lien in favor of the American Wood-working Company, for the sum of \$1,336. White subsequently sold to the White & White Company for \$7,500. Upon the foregoing facts and the further fact that White said to McMullan before the sale by the trustee that he, White, would buy the property at the sale if it did not bring more than his debt, and that he and McMullan would then run the business, the plaintiffs contended that the mortgage or deed of trust to secure the notes to White and Perry was void because (1) made to secure largely pre-existing debts and covering substantially all the property of the corporation, and the requirements of section 967, Revisal 1905, were not observed by the assignor; (2) made by the corporation to two directors, necessarily by their own votes, and that the deed was fraudulent, as the evidence sustaining the above facts tended to prove. At the conclusion of the evidence of the plaintiff, the defendants White, Perry, and White & White Company moved for judgment as of nonsuit. The motion was allowed, and plaintiff appealed. Judgment was rendered against the McMullan Lumber Company for the debt and interest and costs, and of nonsuit against the plaintiffs in favor of the other defendants.

W. M. Bond and W. M. Bond, Jr., for appellant. Pruden & Pruden, Chas. Whedbee, J. C. B. Ehringhaus, and E. F. Aydlott, for appellees.

MANNING, J. The contention that the McMullan Lumber Company was not a corporation is settled by the decision of this court in *Benbow v. Cook*, 115 N. C. 324, 20 S. E. 453, 44 Am. St. Rep. 454, where it is said: "Having complied with the requirements as to the form of the articles of agreement and caused the proper record to be made, the three persons named as sole corporators become a body politic for the purposes set forth in the agreement. Code, §§ 678, 679. When corporate powers are grant-

ed by a special, instead of a general, act of the Legislature, there must be evidence of acceptance by the corporators and compliance with all the conditions precedent prescribed by law in order to show affirmatively that the corporation is lawfully organized. But in our case every corporator affixed his hand and seal to the articles of agreement recorded, and by such signature and the recording of the instrument became invested with all the powers which it was contemplated by law to confer in such cases. Code, § 679. Private corporations are formed when the necessary contractual relations are created between the persons clothed by law with the powers of a body politic. 1 Morawetz, 24." In addition to the conclusive effect of this authority, the plaintiffs allege in the first paragraph of their complaint "that the McMullan Lumber Company is a corporation, having become such on or about August 25, 1905," and that plaintiffs, beginning in June, 1906, had many dealings with the corporation. The fact that the McMullan Lumber Company was a corporation and its continued existence as such would seem to be placed beyond controversy in this action. The fact that the corporation did not issue certificates of stock did not affect its creation or existence as a corporation. "It is the act of subscribing, or the registry of the stockholder's name upon the stock book of the company opposite the number of shares for which he has subscribed, which gives him his title thereto, and that the certificate neither constitutes his title nor is necessary to it, but only a memorial of it." 10 Cyc. 390; *Womack's The Law of Private Corporations*, § 267. If certificates are not necessary to membership in a corporation, it would seem certainly clear that they would not be necessary for the existence of the corporation itself, nor does section 1187, Revisal 1905, prescribing the requirements for the formation of a corporation, prescribe that certificates of stock shall be issued. Nor did the failure of the corporation to adopt by-laws destroy or impair its existence as a corporation. In 10 Cyc. 353, Judge Thompson says: "Where the governing statute in express terms confers upon the corporation the power to adopt by-laws, the failure to exercise the power will be ascribed to mere nonaction, which will not render void any acts of the corporation which would otherwise be valid." What the by-laws of a corporation may determine and contain are set forth in section 1146, Revisal 1905. The question most stressed in the brief and oral argument before us is the invalidity of the deed of trust to secure the notes of White and Perry, growing out of their relationship to the corporation; that the larger part of the amount secured was a pre-existing debt; that there were other creditors at that time; that the corporation conveyed in the deed of trust substantially all of its property, and the assignor failed to file the schedule re-

quired by section 967, Revisal 1905, and the trustee failed to file the inventory required by section 968, Revisal 1905. The plaintiff's evidence showed that the corporation was not insolvent at the time the deed of trust was executed; that at that date the property of the corporation was worth approximately \$12,000; that all its other debts existent at that date except a small debt of \$40 had been paid; and nearly half the amount of the notes secured was not a pre-existing debt, but a present consideration of equal value; that the stockholders and directors authorized both the note and the security to be given. These facts clearly distinguish this case from *Edwards v. Supply Co.*, 150 N. C. 171, 63 S. E. 742; *Hill v. Lumber Co.*, 113 N. C. 173, 18 S. E. 107, 21 L. R. A. 560, 37 Am. St. Rep. 621; *Electric Light Co. v. Electric Light Co.*, 116 N. C. 112, 21 S. E. 951; *Graham v. Carr*, 130 N. C. 274, 41 S. E. 379; *Holshouser v. Copper Co.*, 138 N. C. 251, 50 S. E. 650, 70 L. R. A. 183; *Bank v. Cotton Mills*, 115 N. C. 507, 20 S. E. 765. That these facts are determinative of the validity of the mortgage or deed of trust is stated with great clearness by Chief Justice Clark in *Edwards v. Supply Co.*, supra: "It would have been otherwise if, at the time the money was authorized to be borrowed, the company had authorized the mortgage to be executed to secure its officers, who agreed to sign the note as indorsers. In such case the money received would have balanced the debt secured, and would have paid off that amount of prior debts to others, or would otherwise have aided the business of the company. Such arrangements are often necessary, and, when bona fide, are valid. *Banking Co. v. Lumber Co.*, 91 Ga. 624 [17 S. E. 968] cited and approved; *Hill v. Lumber Co.*, 113 N. C. 179 [18 S. E. 107], 21 L. R. A. 560, 37 Am. St. Rep. 621." The wholesome and just doctrine which the above cases clearly settle is that the director of an insolvent corporation who is also a creditor cannot take advantage of the information which he has obtained of the affairs of the corporation to protect himself to the injury of the other creditors, or secure an advantage over them; but it has not been decided that the officers of a going, solvent corporation cannot aid it with loans of money and take security therefor. Such a doctrine would destroy corporate growth and seriously impair business activity. It is also insisted by plaintiff that the deed of trust is invalid because, conveying substantially all the property of the corporation and securing only two of its creditors, no schedule of the preferred debts was filed under oath by the corporation, and no inventory filed by the trustee, as required by sections 967, 968, Revisal 1905. These statutes have been considered by this court in the cases of *Bank v. Gilmer*, 116 N. C. 684, 22 S. E. 2; *Id.* (on rehearing) 117 N. C. 416, 28 S. E. 833; *Gilanton v. Jacobs*, 117 N. C.

427, 23 S. E. 335; *Cooper v. McKinnon*, 122 N. C. 447, 29 S. E. 417; *Pearre v. Folb*, 123 N. C. 239, 31 S. E. 475; *Brown v. Nimocks*, 124 N. C. 417, 32 S. E. 743; *Taylor v. Lauer*, 127 N. C. 157, 37 S. E. 197; *Odom v. Clark*, 146 N. C. 544, 60 S. E. 513. And it has been held "that, where an insolvent man makes a mortgage of practically all of his property to secure one or more pre-existing debts, such an instrument will be considered an assignment, subject to the regulations of the statutes addressed to that question, and the result will not be changed because some small portion of his property shall have been omitted, or because the instrument may have been drawn in the form of a mortgage having a defeasance clause. In the first of these cases (*Bank v. Gilmer*, supra) it is held: 'While the act of 1893 (chapter 453) does not prohibit bona fide mortgages to secure one or more pre-existing debts, yet, where a mortgage is made of the entirety of a large estate for a pre-existing debt (omitting only an insignificant remnant of property), the mortgage is, in effect, an assignment for the benefit of creditors secured therein, and is subject to the regulations prescribed in said act of 1893.'"

It seems necessary from these decisions, and essential for the application of the act of 1893 (sections 967, 968, Revisal 1905), that the grantor should be insolvent, and the debts secured should be pre-existent to the mortgage or assignment, and that there should be other existing creditors. If these essential conditions do not concur, then the mortgage or deed of trust could not be regarded as subject to the requirements of the sections of the Revisal above referred to, though the property conveyed may constitute substantially all of the grantor's estate. In the present case the plaintiff's evidence showed, and there was no evidence offered for the defendants, that the corporation was not insolvent; that the debts secured were partly pre-existent, and partly for a present consideration of nearly equal amount; and that, while there were other creditors existing at the time, they were all paid except one whose debt amounted to \$40, and this creditor seems to manifest no interest in that small amount. He is wholly inactive. The plaintiffs, however, contend that the fact of the existence at the date of the deed of trust of other debts than the secured debts, though they may have been subsequently paid, and especially the existence of the unpaid \$40 debt, enables them to have the deed of trust declared void, and to bring the property therein conveyed within their reach under the doctrine declared by this court in *Clement v. Cozart*, 112 N. C. 412, 422, 17 S. E. 486, 489. The doctrine of that case is thus stated: "The law is that a voluntary conveyance, where the grantor did not, at the time of the grant, retain property fully sufficient and available for the satisfaction of his then creditors, is fraudulent in law as to existing

creditors. And, if such conveyance shall be declared void at the suit of an existing creditor, all creditors, those existing at the execution of the conveyance, and also subsequent creditors, will be entitled to come in and participate in the fund arising from a sale of the property, subject to priorities and to the maxim, 'Vigilantibus non dormientibus leges subveniunt.' In that case the conveyances were impeached, not only because they were voluntary, the grantor not retaining property fully sufficient and available for the satisfaction of his then creditors, but also because the grantor had the actual fraudulent intent to hinder and delay his creditors. The deed of trust in the present case was not a voluntary deed, nor is there any evidence of any actual fraudulent intent and purpose. But if the conveyance under consideration fell under the condemnation of section 967 or section 968, Revisal 1905, as construed by this court in the cases above cited, no more would be needed, for as expressly determined in *Cooper v. McKinnon*, supra, such a deed would be void and invalid, not only as to creditors, but also inter partes. In that case the court said: "The distinction suggested by the plaintiffs that the assignment may be valid between the parties—that is, the assignor and assignee—and yet void as to creditors, cannot be maintained. This doctrine applies only to cases where the grantee takes the property for his own benefit exclusively, as a mortgage, or grantee in an absolute conveyance. * * * If such a conveyance is in fraud of creditors, either actually or by construction of law, it may be set aside as to them; but, until so set aside, it is valid between the parties. But a deed of assignment for the benefit of creditors is essentially different, and, if such a deed becomes void as to creditors, its primary and essential purpose is defeated, and it is totally invalid. * * * In the case at bar, the first deed of assignment being void, the title of the property was still in the assignor, and was by him conveyed to his codefendant, Patterson, by the second deed of assignment, which is admittedly valid if not affected by the prior deed." In the case now at bar, the plaintiff's evidence negatives the insolvency of the lumber company—a fact essential to the application of sections 967, 968, Revisal 1905, unless we hold that the mere giving of a mortgage upon substantially all the mortgagor's property to secure a past and present indebtedness nearly equal in amount raised under the evidence in this case a presumption of insolvency in fact at the date of the deed of trust, or made out such a prima facie case as required it to be submitted to the jury. Upon the evidence presented in this case, we cannot so hold. A different conclusion might be reached upon evidence presenting additional facts. The hardship upon the plaintiffs

of losing their debt may be somewhat obviated by an inquiry in a proper proceeding as to the payment of the subscribed capital stock of the corporation. If the subscribers have not paid in full their subscriptions, the unpaid subscriptions constitute assets for the payment of the debts of the corporation.

After a careful examination of the authorities cited by the learned counsel of the plaintiffs, and the exceptions to the rulings of his honor, we find no error and the judgment is affirmed.

(153 N. C. 49)

GOLDSBORO LUMBER CO. v. HINES BROS. LUMBER CO.

(Supreme Court of North Carolina. Sept. 21. 1910.)

1. WILLS (§ 630*)—DEVISE—VESTING—CONDITIONS.

In a devise to testator's wife for life for her support and the support of her children, the clause "for her support and the support of her children," was neither a condition precedent nor subsequent to the vesting of the estate, but merely the reason for its devise.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1475; Dec. Dig. § 630.*]

2. WILLS (§ 601*)—DEVISE—ESTATE CREATED—PROVISIONS INCONSISTENT WITH FEE.

A devise of timber land to A. and B. in fee, but "if my wife should survive me she shall have her life right to the premises for her support," created a life estate in the wife with a remainder to A. and B., under which the timber could not be cut for sale.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1340-1350; Dec. Dig. § 601.*]

3. WILLS (§ 614*)—DEVISE—LIFE ESTATE—WHAT CREATES.

The devise of a "life right" creates a "life estate"; so also do the phrases "dower of use," "benefit and profits."

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1393-1416; Dec. Dig. § 614.*]

4. LIFE ESTATES (§ 13*)—TIMBER LAND—RIGHT TO SELL TIMBER.

Under a devise of timber land to A. for life to use the profits thereof for her support, remainder to B. and C., the timber could not be cut for sale without the consent of both the life tenant and remainderman.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. §§ 21, 32; Dec. Dig. § 13.*]

Appeal from Superior Court, Jones County; Gulon, Judge.

Action by the Goldsboro Lumber Company against the Hines Brothers Lumber Company. From the judgment, defendant appeals. Affirmed.

Loftin, Varser & Dawson and Rouse & Land, for appellant. Warren & Warren and Simmons, Ward & Allen, for appellee.

CLARK, C. J. The item of the will of Felix E. King (who died in 1885) to be construed is as follows: "I give and bequeath to my granddaughters, Effie A. King and Katie E. King, all of my home tract of land known as the Moses Saunders tract of land,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

containing 450 acres, more or less, to have and to hold in fee simple forever. And if my present wife should survive me she shall have her life right to and in said premises and lands for her support and for the support of said minor heirs." The defendant has acquired the interest of Effie A. King in the timber on said tract. The plaintiff has acquired the interest of Katie E. King in said timber, and also the interest, if any, of Mary King, the widow of the testator.

The defendant contends that the widow, Mary King, did not acquire any estate or interest in the land, but merely the right to her support out of the said land, and that this is only a charge upon the rents and profits from the land, and that no interest whatever in the timber was conveyed to the plaintiff by her deed; that, therefore, the defendant is entitled to one-half interest in the timber rights on said land under its deed from Effie A. Taylor. In *Wellons v. Jordan*, 83 N. C. 371, the testator devised certain lands to his grandson, he to take care of his father and mother during their lives, and to hold the aforesaid property his lifetime, and if he should take care of his parents, etc., and have issue, said property to be theirs in fee at his death; but, if he should die without issue, then it was to descend to the testator's daughters in fee. Held, (1) that a due support of the parents of the devisee was not a condition precedent to the vesting of the remainder in fee in his issue; (2) that, even if such were a proper construction of the will, only the heirs of the testator could take advantage of the breach of the condition. The court said (page 375 of 83 N. C.): "At most, it would be a charge on the estate, a personal obligation on the devisee, as was held in *Taylor v. Lanier*, 7 N. C. 98." In *McNeely v. McNeely*, 82 N. C. 183, there was a devise to a son "by him seeing to her," his mother, and it was contended that these words fettered and controlled the estate devised. The court says: "In the will now under consideration the words which give rise to the controversy, 'by him seeing to her,' are in themselves vague and indeterminate, and if an essential and defeating condition of the gift, would be very difficult of application. What is meant by seeing to the widow, and what neglect falls short of that duty? How much of personal care and attention in the son to the mother is requisite, and how is the dividing line to be run between such omissions as are, and such as are not, fatal to the devise?" In the case at bar the above reasoning ap-

plies with greater force. Here the widow, Mary E. King, takes a life right or estate in the land in controversy "for her support and the support of said minor heirs," presumably referring to the devisees, Effie A. King and Katie E. King, both of whom attained their majority years ago. The widow took a life estate, and during the minority of the minor heirs there was "at most a personal obligation" on the devisee Mary E. King, "present wife" referred to in the will under consideration. The words "for her support and the support of the minor heirs" do not constitute a condition precedent to the vesting of the life right or estate in Mary E. King, or a condition subsequent by which the estate could be defeated, but were intended by the testator as his reason for the devise, and, as said before, could at the most impose a personal obligation upon the devisee Mary E. King to support the devisees Effie A. King and Katie E. King during their minority. The devisees Effie A. King and Katie E. King have the remainder of the estate after the determination of the life estate.

The "life right" is synonymous with "life estate." Dower of use, benefit, and profits passes a life estate. *Perry v. Hackney*, 142 N. C. 368, 55 S. E. 289, 115 Am. St. Rep. 741. The devise to the widow was in lieu of dower, and might be styled "testamentary dower." Her interest in the land is an estate for life. This case is clearly distinguishable from *Whitaker v. Jenkins*, 138 N. C. 480, 51 S. E. 104, where Walker, J., says: "The provision is that the lands shall belong to her during her life, or until the sons shall be of full age, at which time it shall belong to them, his wife to have her maintenance out of the land if she survived that event. The intention of the deviser is most clearly expressed. We cannot infer that he intended his wife to have an estate, or even an interest in the land, when he had expressly said that it should belong to his sons, and that she should only have a maintenance." The widow, a life tenant, had no power to cut the timber for sale or to sell any right to do so, but neither could the tenants in reversion or remainder do so. As, however, they wish to receive the value of their interest in the timber at this time in anticipation, this could only be done by the concurrence of the life tenant. It is set out in the case agreed that the value of the life estate, if the widow is entitled to any, is \$1,361.40.

The judgment of the court below is in accordance with these views, and is affirmed.

(37 S. C. 71)

LORICK & LOWRANCE, Inc., v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Sept. 26, 1910.)

1. RAILROADS (§ 82*)—RIGHT OF WAY—ABANDONMENT—NONUSER.

Abandonment by a railroad of a right of way may not be inferred from mere nonuser for 20 years, unless the circumstances indicate an intention not to make any further use thereof.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 213-219; Dec. Dig. § 82.*]

2. EMINENT DOMAIN (§ 324*)—RIGHT OF WAY—ABANDONMENT—NONUSER.

Civ. Code 1902, § 2194, providing that a right of way shall vest in the corporation so long as the same may be used for the purposes of the railroad and no longer, prohibits a railroad company on pain of forfeiture from using for private gain land which it acquired under the right of eminent domain for a public use, but, to destroy the right, there must be either a use separate or distinct from railroad purposes or nonuser for railroad purposes, under circumstances indicating an intention to abandon the right of way.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 857, 858; Dec. Dig. § 824.*]

Appeal from Common Pleas Circuit Court of Richland County; R. W. Memminger, Judge.

Action by Lorick & Lowrance, Inc., against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Lyles & Lyles, for appellant. Thomas & Lumpkin, for respondent.

WOODS, J. The plaintiff being the owner of a square of land in the city of Columbia containing four acres, bounded by Rice, Bull, Marion, and Tobacco streets, brought this action to enjoin the Southern Railway Company from using an old right of way across the land on the ground that the right to the easement had been abandoned and lost by nonuser. The issue submitted to the jury was "whether at the time of the commencement of this action the Southern Railway Company was entitled to a right of way over the four acres of land described in the complaint along the line of the old Charlotte & South Carolina Railway track, and, if so, of what width." The evidence showed beyond dispute that the Charlotte & South Carolina Railway Company owned a right of way over the land 130 feet wide acquired in 1850, and that the defendant is successor to the right and title of the Charlotte & South Carolina Railway Company. There was evidence tending to show that, owing to change in track arrangement, the right of way over this lot of land had not been used for 20 years; but there was no evidence of adverse use by any owner of the servient estate of land embraced in the right of way for the statutory period of 10 years. The verdict on

the issue submitted was in favor of the defendant. The circuit judge by his decree approved this finding, and, in refusing the injunction and dismissing the complaint, adjudged the Southern Railway Company to be entitled to a right of way over the land 120 feet in width.

The exceptions assign error in the instructions to the jury on the issue whether the right of way had been abandoned by the railroad company. The charge, in substance, was that abandonment of the right of way could not be inferred from mere nonuser for 20 years, unless the circumstances indicated an intention not to make any further use of the easement. This instruction was in accordance with the law thus laid down in *Polson v. Ingram*, 22 S. C. 541: "It will be observed that the question of abandonment is a very different question from having the easement defeated and divested by the adverse use of another. This last question is to be determined by the character of the adverse use and how long continued, while the former depends upon the intention of the party in possession, without regard to the claims of others. Such being the law, it would have been error for the judge to have charged, as a direct and positive proposition, 'that 20 years' nonuser will presume the abandonment of an easement.'" The rule thus stated is one of general recognition except when altered by statute. 33 Cyc. 221; *Orr v. O'Brien*, 77 Iowa, 253, 42 N. W. 183, 14 Am. St. Rep. 282, and note; *Trimble v. King*, 131 Ky. 1, 114 S. W. 317, 22 L. R. A. (N. S.) 881, and note.

The plaintiff insists, however, that the charter statute under which the Charlotte & South Carolina Railway Company acquired this right of way alters the rule, in that it enacts with respect to the right of way, "The said company shall have good right and title thereto and shall have hold and enjoy the same as long as the same may be used only for the purposes of the said road and no longer," etc. The same provision is found in section 2194 of the Civil Code of 1902, relating to rights of way acquired under the general condemnation statute. The design and meaning of these enactments is that the railroad company should be prohibited on pain of forfeiture from using for private gain land which it was permitted to acquire under the state's right of eminent domain for a use in which the public is concerned. The statutes cannot be tortured into meaning so unreasonable a thing as that any temporary nonuser of the right of way without purpose of abandonment shall destroy the easement. To destroy the right under these statutes, there must be shown either a use separate and distinct from railroad purposes or nonuse for railroad purposes under such circumstances as to indicate an intention to abandon the right of

way. *Southern Railway v. Beaudrot*, 63 S. C. 286, 41 S. E. 299.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(135 Ga. 80)

COX v. HARDEE.

(Supreme Court of Georgia. Aug. 12, 1910.
Rehearing Denied Sept. 20, 1910.)

(*Syllabus by the Court.*)

1. APPEAL AND ERROR (§ 327*)—DISMISSAL—SEPARATE DEMURRERS AND EXCEPTIONS.

Suit was brought by a receiver of a corporation against stockholders thereof to recover against each the amount alleged to be still due upon his subscription; it appearing from the petition that the debts due by the corporation and which it was unable to pay were more than the sum of the separate amounts alleged to be due by the defendants respectively, so as to necessitate the recovery against each defendant of the whole amount alleged to be due by him. Several of the defendants separately demurred to the petition, each demurrer being overruled; and each of the demurrants separately excepted. *Held*, that it furnished no ground for a motion to dismiss the several writs of error that each demurrant separately excepted, and did not join the other defendants in the case in his bill of exceptions, or serve them therewith.

(a) In such a case, no question of contribution between the defendants appeared from the face of the petition to exist, nor any reason requiring that all of the defendants be made parties to each bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1817; Dec. Dig. § 327.*]

2. CORPORATIONS (§ 78*)—SUBSCRIPTIONS TO STOCK—VALIDITY.

The fact that it appeared from the petition that another corporation subscribed for a number of shares of stock in the corporation of which the plaintiff is receiver, and that without this subscription the amount of capital stock necessary, under the subscription agreement, to make the subscriptions binding upon the subscribers would not be complete, did not render the other subscriptions invalid.

(a) There was nothing in the petition which even indicated that the subscribing corporation was not authorized by its charter to make the subscription, and, moreover, there was nothing to show that it had not paid for the stock for which it subscribed.

(b) One who subscribed for stock in a proposed corporation, with knowledge that a portion of the capital stock thereof had already been subscribed for by another corporation, was not, when sued for the amount of his subscription, in a position to question the validity of the subscription made by the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 219, 229; Dec. Dig. § 78.*]

3. CORPORATIONS (§ 81*)—SUBSCRIPTION TO STOCK—LIABILITY OF SUBSCRIBERS.

Certain persons became subscribers to the stock of a proposed corporation by signing a written agreement which provided that its capital stock should be a given sum, that the subscriptions thereto should be payable in four equal installments at designated times, and that they were made upon the express condition that the first installment should not be called for until the entire amount of the capital stock had been subscribed. The capital stock, as provided for in the agreement, was fully subscribed. The corporation was organized and became insolvent, and its assets were placed in the hands of a receiver, who, under authority

conferred upon him by the court, brought suit against a number of the subscribers to recover against each the amount alleged to be due upon his subscription: *Held* that, although a subscriber had paid no part of his subscription, no notice to him that the full amount of the capital stock had been subscribed was necessary in order to render him liable for the amount of his subscription, nor was such notice required before the receiver could lawfully institute suit against him to recover the same.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 81.*]

4. CORPORATIONS (§ 87*)—SUBSCRIPTION TO STOCK—OVERSUBSCRIPTIONS—VALIDITY.

No provision having been made for an apportionment of the stock among the subscribers in the event of oversubscription, subscriptions made after the full amount thereof had been subscribed were void.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 196; Dec. Dig. § 87.*]

5. APPEAL AND ERROR (§ 874*)—EXCEPTIONS.

While a decision overruling a demurrer to a petition may be brought to this court for review, without waiting for the final termination of the case in the court below, when the "judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the cause," the plaintiff in error in such a case cannot in his bill of exceptions properly also except to a decision striking his answer or a portion thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3537-3540; Dec. Dig. § 874.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by W. P. Hardee, receiver of the Savannah Sand Lime Brick Company, against Charles A. Cox, A. H. Entelman, J. N. Knight, W. E. Norton, and nine other persons. Judgment for plaintiff, and defendants named prosecuted separate writs of error. Affirmed as to Cox and Entelman, and reversed as to Knight and Norton.

Jacob Gazan, O'Byrne, Hartridge & Wright, Hitch & Denmark, Osborne & Lawrence, and Edmund H. Abrahams, for plaintiffs in error. Edward S. Elliott, for defendant in error.

FISH, C. J. W. P. Hardee, as receiver of the Savannah Sand Lime Brick Company, brought an equitable petition against Charles A. Cox, A. H. Entelman, W. E. Norton, J. N. Knight, and nine other persons to recover against each of the defendants, severally and separately, the amount alleged to be due by him as a subscriber to the capital stock of the company. The substance of the petition, after certain amendments thereto were allowed, so far as now material, was as follows: The Savannah Sand Lime Brick Company was duly incorporated by the superior court of Chatham county on July 22, 1905, a copy of the charter being attached to plaintiff's petition and made a part thereof. The incorporators of the company were Charles A. Cox, A. H. Entelman, and other named persons. The minimum amount of

the capital stock authorized by the charter was \$30,000, each share of stock being of the par value of \$100. On or about July 22, 1905, the defendants severally subscribed for various amounts of the capital stock; the amount subscribed for and the sum still due upon the subscription by each defendant being stated. Charles A. Cox and J. N. Knight each subscribed for five shares of the capital stock of the company, and A. H. Entelman for two shares, and neither of these defendants has paid anything upon his subscription. W. E. Norton subscribed for 10 shares for \$1,000 and paid only \$500. There were also allegations as to the number of shares subscribed for by each of the other defendants, and as to amounts paid by some of them upon their respective subscriptions. The corporation is insolvent, the debts which it is unable to pay amounting to not less than \$20,000 or other large sum. It owes the Commercial Bank of Savannah \$20,935, and the American Sand Lime Brick Company \$3,615.64. On November 24, 1908, petitioner, as receiver, was directed to collect any amount that might be due to the company, and to bring suit therefor if necessary; a copy of the order of the court in this respect being attached to the petition. Petitioner has demanded of each of the defendants the sum due by him, and each of them has failed and refused to pay such sum or any part thereof. The company accepted the charter and organized on August 1, 1905. Petitioner is without an adequate remedy at law, and brings this petition to avoid a multiplicity of suits, and in order that complete equity may be done. Attached to the petition and made a part thereof was a copy of the subscription agreement, which was as follows: "We, the undersigned, hereby subscribe our names as members and shareholders of the Savannah Sand Lime Brick Company, with a capital stock of \$30,000, divided into shares of \$100 each, setting opposite our respective names the number of shares to be taken and paid for by each subscriber thereto, the same to be paid as follows: 25 per cent. on signing the contract, after charter has been obtained about July 15, 1905; 25 per cent. on August 1, 1905; 25 per cent. on October 1, 1905; and 25 per cent. on December 1, 1905. This subscription is made on the following express conditions: (1) That the first installment of 25 per cent. shall not be called for until the whole of the entire amount of \$30,000 shall have been subscribed, and then the remaining installments shall be paid as above specified. (2) That a majority of the stockholders representing a majority of the capital stock of this company shall be satisfied, with all reasonable tests made, with the quality of the brick made by this process, to their entire satisfaction." Then followed the names of the subscribers, with the number of shares subscribed for by each placed opposite his name. It appeared from this copy

of the subscription agreement that Charles A. Cox and J. N. Knight each subscribed for 5 shares, W. E. Norton for 10 shares, and A. H. Entelman for 2 shares, and that the "Empire Investment Company" subscribed for 50 shares. It was alleged that the conditions set forth in this agreement were fulfilled as follows: "The sum of \$30,000 was subscribed for stock as set forth in said contract on or about the 22d of July, 1905. A majority of the stockholders representing a majority of the capital stock of said company were satisfied with all reasonable tests made on or about September 7, 1905, with the quality of brick made by the process intended by the words 'this process' in said subscription contract, meaning the said sand lime brick process, to their entire satisfaction; the process adopted being the American Sand Lime Brick system."

The prayers were that petitioner have judgment against the several defendants for the amount due by each, with interest, that the corporation be made a party defendant to the suit, that process issue, etc., and for such other and further relief as might be meet and proper in the premises.

Cox demurred to the petition upon various general and special grounds, and, subject to the demurrer, filed his answer. The plaintiff demurred to this answer, and moved to strike it, specially demurring to certain paragraphs thereof. The court overruled the demurrer to the petition, and sustained the plaintiff's demurrer as to certain paragraphs of defendant's answer, and struck these paragraphs. Defendant Cox excepted to the judgment overruling his demurrer to the petition, and in his bill of exceptions also assigns error upon the ruling striking given portions or paragraphs of his answer. In the Supreme Court Cox abandoned his exception to the judgment overruling his demurrer to the petition, except as to the overruling of the grounds of the demurrer numbered 1, 5, and 6, which were as follows:

(1) The petition does not set forth any cause of action against this defendant. "(5) It is nowhere alleged in said petition that the Savannah Sand Lime Brick Company, or any of its officers or agents, notified this defendant, * * * that the amount of \$30,000 capital stock had been subscribed, it appearing from said alleged copy of subscription list that the subscriptions were not binding until the said sum of \$30,000 had been subscribed. (6) It is not alleged in said petition that any of the conditions of said alleged subscription list were complied with." Defendant Entelman demurred to the petition both generally and specially. His demurrer was also overruled, and he too sued out a bill of exceptions, wherein he complains of this ruling. The only grounds of demurrer which he insists upon in this court are the same as those above set forth from the demurrer of the defendant Cox, other grounds being expressly abandoned. We will

state here, however, that it does not appear from the record in the case made by the Entelman bill of exceptions that he demurred upon the ground that the corporation never notified him that the capital stock of \$30,000 had been subscribed. Defendants Norton and Knight each separately demurred to the petition upon various grounds, and both of the demurrers were overruled; and each of these defendants sued out a bill of exceptions, complaining of the overruling of his demurrer. Each of them demurred upon the ground that it appeared from the subscription agreement set forth by the petition that the total amount of the capital stock of the corporation, as provided for by the agreement, had been subscribed before he signed such agreement, and therefore his subscription was not binding upon the corporation or himself. In the view which we have taken of this ground of demurrer, it is unnecessary to deal with or to mention any other urged by either of these parties.

1. In each of these four cases, there is a motion to dismiss the writ of error, because the plaintiff in error, who it appears was one of a number of defendants in the trial court, has brought the case to this court by a separate writ of error, and because he has not made the other defendants in the court below parties to the cause in this court. This motion must be overruled. Each of the respective plaintiffs in error separately demurred to the petition in the trial court, his demurrer was overruled, and he thereupon sued out a bill of exceptions wherein he complained of such ruling. So the question here raised is controlled by the decision in *Jones v. Hurst*, 91 Ga. 338, 17 S. E. 635, where it was held: "Where a petition is filed against several defendants, and a separate demurrer thereto by one or more of them is overruled, the remaining defendants need not be made parties to, or be served with a copy of, a bill of exceptions assigning as error the overruling of the demurrer mentioned." It is contended by counsel for defendant in error that under the right of contribution which exists between subscribers to the capital stock of a corporation, who, upon its insolvency, are, for the purpose of paying the corporate debts, sued for the amounts respectively due by them upon their subscriptions, all those who were defendants in the trial court were by reason of interest in the ruling complained of necessary parties to the cause in this court. It is unnecessary to discuss this contention further than to say that it appears from the allegations of the petition that no question of contribution can arise in the case, as the amount of the indebtedness of the corporation which it cannot pay is far in excess of the aggregate amount of the unpaid subscriptions to its capital stock.

2. It will be seen from the preceding statement of facts that the fifth and sixth grounds of the demurrer of the defendant Cox are

simply amplifications of the general grounds that no cause of action against him is stated in the petition, and merely serve to point out alleged defects in the petition upon which this main contention is based. This seems to be the view taken by counsel for the plaintiff in error in his argument and brief in this court, the three grounds being argued together, and the contention being that no cause of action is set forth in the petition, because the subscription agreement which was signed by Cox and others was, as shown by the copy thereof attached to the petition, predicated upon certain conditions which the petition does not show were fulfilled, and that notice to the defendant of the performance of the condition as to the amount of capital stock which should be subscribed, in order to make the subscriptions binding, was necessary before he would be bound by his subscription. The first condition was "that the first installment of 25 per cent. shall not be called for until the whole of the entire amount of \$30,000 shall have been subscribed, as above specified." It is contended that the petition shows that this condition was not complied with, because it appears from the subscription list or contract that the "Empire Investment Company" subscribed for 50 shares of the capital stock of the Savannah Sand Lime Brick Company, and that the name "Empire Investment Company" imports a corporation, and a corporation, unless expressly authorized by its charter so to do, has no power to purchase and hold stock in another corporation, and therefore the subscription by the "Empire Investment Company" was invalid and unenforceable; and that as the subscription list shows that, unless the subscription of the Empire Investment Company is included in the computation as to the amount of stock subscribed, less than \$30,000 was subscribed, and hence the first subscription condition was not complied with. We think it does appear from the subscription list that the Empire Investment Company is a corporation, as its name tends to indicate this, and the signature of the company purports to have been made "by John F. Tietjen, President, and Allen Sweat, Treasurer." It is also true that the subscriptions other than that of this company aggregate only \$29,800, and so fall short of the sum of \$30,000 required by the first condition. But, so far as the petition shows, the Empire Investment Company paid the full amount of its subscription. Indeed, the petition rather tends to indicate that it did, for it is not sued by the receiver, who presumably sued all the delinquent subscribers. If it paid for the stock for which it subscribed, or even for two or more shares of the same, the amount necessary to make up the sum of \$30,000 would be complete, without counting the unpaid balance, if any, of its subscription. The Empire Investment Company could not itself sue to cancel its agreement to take and pay for this stock, up-

on the ground that the contract was ultra vires on its part, if the contract had been fully executed. 10 Cyc. 379; Cincinnati, etc., R. Co. v. McKeen, 64 Fed. 36, 12 C. C. A. 14; Peterborough R. Co. v. Nashua, etc., R. Co., 59 N. H. 385. Certainly another subscriber to the stock of the Sand Lime Brick Company will not be heard to question the validity of the subscription of the Empire Investment Company, when it does not appear that the last-mentioned company is itself in a position to repudiate this subscription. The Supreme Court of Illinois has held that the fact that corporations without authority subscribed for the capital stock of another corporation, and against which they could make a defense, does not enable an individual subscriber to evade his own subscription, where he during the whole proceedings to effect the incorporation made no objection to any subscription by such corporations, or effort to repudiate his own on that account, and where there is no evidence that the contracts of subscription by the corporations were not performed, or that they had availed themselves of their privilege to deny or repudiate their obligations. McCoy v. World's Columbian Exposition, 186 Ill. 356, 57 N. E. 1043, 78 Am. St. Rep. 288. We know of no law in this state, however, which prohibits granting to a private corporation power to purchase and hold stock in other corporations, except that embraced in article 4, § 1, par. 4, of the Constitution (Civ. Code 1895, § 5800), which simply prohibits the grant of power to a corporation to purchase stock in another corporation, when the purchase may have or be intended to have the effect of defeating or lessening competition or encouraging monopoly. So it cannot be determined, upon general demurrer, from the face of the petition that the Empire Investment Company had no power to subscribe for and take stock in the Savannah Sand Lime Brick Company. The name "Empire Investment Company" seems to indicate that the corporation bearing it was created for investment purposes, and, so far as the petition demurred to shows, it might have been authorized by its charter to invest in the stock of other noncompetitive corporations.

Again, from the copy of the subscription agreement attached to the petition, it appears that Cox and Entelman subscribed for stock in the Savannah Sand Lime Brick Company after the Empire Investment Company had subscribed for stock therein; and, as they are presumed to have read the subscription agreement before signing it, they must have seen the name of that company in the list of subscribers when they, respectively, made their subscriptions, it being the second name signed under the subscription agreement. In Cornell's Appeal, 114 Pa. 153, 6 Atl. 258, it was held that where subscriptions to the capital stock of a corporation were made upon condition that a certain

amount should be subscribed, and that amount was nominally subscribed, but really not subscribed by reason of the invalidity of some of the subscriptions, those subscribers who became such subsequently to the invalid subscriptions and with knowledge of their character could not set up a failure of the condition in an action to enforce their liability as stockholders. In Cole v. Satsop R. Co., 9 Wash. 487, 37 Pac. 700, 43 Am. St. Rep. 858, it was held that where subscribers to the stock of a corporation, with knowledge that some of the stock had been subscribed for by another corporation, paid their subscription on some of the stock, they could not, as against creditors, defend an action against them on their subscriptions on the ground that, the subscription of the corporation being invalid, the whole stock was not subscribed for, and therefore they were not liable on their subscriptions. On the same line it was held in Pacific Mill Co. v. Inman, 46 Or. 352, 80 Pac. 421, that where the defendant and the plaintiff corporation entered into a contract which, among other things, required plaintiff to increase its stock, and to obtain subscriptions to part of it, failure of the defendant, on receiving a list of the subscribers, to object to a subscription purporting to have been made by a corporation, was an implied admission that the subscription was genuine. In United States Vinegar Company v. Foehrenbach, 148 N. Y. 58, 42 N. E. 403, the court went even further than this, and held that, in an action to recover unpaid subscriptions to the capital stock of a corporation the defendants cannot raise the objection that the capital stock was subscribed for in part by other corporations, and that such subscriptions were therefore invalid. Gray, J., who delivered the opinion, said: "The argument that it appears that the capital stock was subscribed for in part by corporations, and that such subscriptions were invalid under the law, is of no avail. That is a question for the people to raise through their proper officers and in appropriate proceedings. The defendants cannot raise it. At furtherest, it might be available in proceedings to vacate the charter—a point, however, we do not consider." There the action was by a corporation to recover unpaid subscriptions to its capital stock.

3. The contention that the petition failed to set forth a cause of action, because it did not allege that the defendant had been notified by the corporation to whose capital stock he had subscribed, or by any of its officers or agents, that the full amount of \$30,000 had been subscribed to its capital stock, as was required in order to render the subscriptions binding, is without merit. It has been held in some jurisdictions that where one subscribes to the capital stock of a corporation upon a given condition, which is subsequently performed, it is necessary, before the corporation can make a "call"

upon him for the payment of a part or the whole of the amount embraced in his subscription, that he should be notified of the performance of the condition; and Cook says that while there is some doubt as to whether, upon the performance of the condition, the subscriber is entitled to notice of such performance, the better rule seems to be that he is entitled to such notice. 1 Cook on Stock and Stockholders, § 89. The rule is thus stated in 10 Cyc. 419: "The subscriber is entitled to notice of the condition before an action can be sustained against him on his contract, unless the act be one that carries notice of itself. He will, however, be affected by a general notice to the shareholders." The rule is so stated in 2 Thompson on Corporations (1st Ed.) § 1333. Notice of the performance of the condition is, however, not necessary in order to render the subscription binding upon the subscriber. The rule is well established that performance of the condition on the part of the corporation makes the subscription absolute. 1 Thomp. Corp. (2d Ed.) § 609; 10 Cyc. 419; Chase v. Sycamore, etc., R. Co., 88 Ill. 215. Whatever may be the rule in regard to giving notice as a preliminary step to making a call as between a corporation which is a going concern and a subscriber to its stock, it is clear that after the company has failed and its assets have been placed in the hands of a receiver, who has been directed by order of court to bring suit for the purpose of collecting any amount due by any person, thus including unpaid stock subscriptions, a petition in a suit so brought by the receiver to recover the entire amount of unpaid subscriptions is not subject to demurrer on the ground that it does not allege that notice had been given to the subscriber of the compliance by the corporation with the condition of the subscription. The contention that the stipulation that the first installment of 25 per cent. upon the stock subscribed for was to be paid "on signing of the contract, after charter has been obtained about July 15, 1905," shows "that the parties contemplated the signing of a contract other than the one sued on, before being bound to take and pay for any stock in said corporation," and therefore cannot be held liable upon this subscription agreement, is so obviously without merit as to require no discussion.

4. The demurrers of Norton and Knight should have been sustained upon the ground, taken in each, that the subscription agreement set forth by the petition shows that the full amount of the capital stock of the corporation, as prescribed in the agreement, had been subscribed by others before the

demurrant subscribed for stock in the same, and hence he was not bound by his subscription. The general rule is that after the full amount of the capital stock of a corporation provided for in the charter has been subscribed any further subscriptions are void. 1 Cook, Stock and Stockholders, § 58. And where, under statutory provisions, commissioners are appointed for the purpose of receiving subscriptions to the capital stock of a corporation, and they receive subscriptions in excess of the amount authorized by the charter or act of incorporation, they cannot, in the absence of statutory authority, reduce proportionally all the subscriptions and apportion the stock among the subscribers. Their only duty is to receive subscriptions to the full amount of the prescribed capital, and to refuse anything beyond that. *Ib.*; 1 Thomp. Corp. (2d Ed.) § 578. It is obvious that none of the subscribers in the present case would have been bound to take stock in the corporation if the amount of its capital stock had been made greater than that which was provided in the subscription agreement. In the petition for incorporation which was granted, it was expressly provided that the amount of the capital stock should be \$30,000, the amount fixed in the subscription agreement. We have no statute in this state which provides for the apportionment of the stock of a corporation among the subscribers thereto in the event the prescribed amount of the capital stock has been oversubscribed; and there is nothing in the subscription agreement under consideration which authorized this to be done. Hence, so far as Norton and Knight were concerned, the subscription agreement could not be enforced, either in whole or in part, by the corporation or by the subscriber.

5. Under the ruling in *Turner v. Camp*, 110 Ga. 631, 36 S. E. 76 (1), this court has no jurisdiction now to determine whether the court below erred in striking certain paragraphs of the answer of the defendant Cox. In that case it was held: "While the defendant in an action may before its final termination bring to this court for review a decision overruling a demurrer to the plaintiff's petition because the 'judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the cause,' such defendant cannot, in a bill of exceptions sued out in such a case, properly except also to a decision striking his answer or a part thereof."

Judgment affirmed in the Cox and Entelman cases, and reversed in the Knight and Norton cases. All the Justices concur, except BECK, J., absent.

(134 Ga. 873)

AIKEN et al. v. WALLACE et al.

(Supreme Court of Georgia. Aug. 9, 1910.
On Motion for Rehearing. Sept. 20, 1910.)*(Syllabus by the Court.)***1. EVIDENCE (§ 353*)—DOCUMENTARY EVIDENCE—DEEDS.**

Where a deed sufficiently described land intended to be conveyed, but for more particular description referred to a plat recorded on the general records of the county, the deed was not inadmissible in evidence because the plat was not produced or its absence accounted for.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1427; Dec. Dig. § 353.*]

2. BOUNDARIES (§ 10*)—MAPS—CONSTRUCTION.

A deed recites that it conveys "all that lot of land known as the 'Hotel Reservation' in King City on the Island of St. Simons, in said county of Glynn, and more particularly and perfectly described on the map and plan of said King City shown in Record Book 'KK,' page 593, of the General Records of said county, and being bounded on the north by Floyd street; on the south by Mallory street; on the east by lots 'G' and 'K' and twenty feet of a short alley; and on the west by high-water mark. Said above-described property conveying a portion of Page avenue as shown on the plan of said King City. To have and to hold the said described lot known as the Hotel Reservation unto her, the said party of the second part, her heirs and assigns, as aforesaid, in fee simple." The map referred to indicates a rectangular lot between defined lines, marked "Hotel Reservation," bounded on two sides by parallel streets, marked "Floyd street," and "Mallory street," and on another by certain lots and the end of a 20-foot alley, and fronting on another street marked "Page avenue," which runs at right angles to the two parallel streets, which also shows beyond Page avenue another line parallel to it, along which are written the words "High-water Mark—Beach Line." Such deed is to be construed as conveying land extending to high-water mark, and to include that portion of Page avenue which lies between the parallel streets above mentioned, when projected across Page avenue to the high-water mark.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 90, 91; Dec. Dig. § 10.*]

3. INJUNCTION (§ 50*)—GROUNDS—ERECTING OBSTRUCTIONS ON LAND.

The uncontradicted evidence showed title in the plaintiffs to that part of the land in dispute between high-water and low-water mark; and, injunction being an appropriate remedy in order to afford adequate relief, it was erroneous to refuse to enjoin the defendants from erecting obstructions on that part of the land between high-water and low-water marks, as prayed.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 103; Dec. Dig. § 50.*]

4. MUNICIPAL CORPORATIONS (§ 697*)—INJUNCTION—RIGHT TO REMEDY—ADEQUATE REMEDY AT LAW.

There being an adequate remedy at law, injunction will not lie to compel the removal of an existing permanent structure in a street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1502-1505; Dec. Dig. § 697.*]

*(Additional Syllabus by Editorial Staff.)***5. DEEDS (§ 112*)—CONSTRUCTION.**

A deed including the descriptive elements in the body of the instrument, as well as those in a plat referred to as an additional descrip-

tion of the land conveyed, should be construed as a whole, and effect given to every part thereof if practicable under the express provisions of Civ. Code 1895, § 3607.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 324; Dec. Dig. § 112.*]

On Motion for Rehearing.

6. APPEAL AND ERROR (§ 835*)—REHEARING—SCOPE—CONTENTIONS NOT MADE ON HEARING.

Where a case was apparently determined in the lower court and argued in the Supreme Court as if the only question to be determined was whether or not the title to a strip of land in question lying between high and low water marks was in plaintiff when the bill was filed, the question of an easement or right of access to the water will not be considered on rehearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3242; Dec. Dig. § 835.*]

Error from Superior Court, Glynn County:

T. A. Parker, Judge.

Action by F. D. Aiken and others against Mrs. Bena Wallace and others. There was a decree granting certain relief, and plaintiffs bring error. Reversed.

The owners of "Retreat Plantation," a tract of land on the Island of St. Simons in the county of Glynn, carved out of it a smaller tract which was laid off in separate lots, streets, and alleys, and called "King City." A map of it was executed on October 30, 1886, filed for record in the office of the clerk of the superior court on November 17, 1891, and recorded March 24, 1893. Mrs. Bena Wallace purchased a part of the property and received a deed from the owners, dated September 12, 1896, and immediately entered possession and made valuable improvements, consisting of houses and out-houses, used as a hotel and its appurtenances. Lots in King City were sold both before and after the deed to Mrs. Wallace, but none to such of the plaintiffs as became purchasers of such lots until after the deed to Mrs. Wallace. After having been in possession for a number of years, Mrs. Wallace extended her buildings in such manner as to encroach five feet on one of the streets called Mallory street, and all the way across another street called Page avenue, and undertook to construct a wharf extending from high-water mark of St. Simons Sound, opposite her improvements, across the beach, and over the low-water mark to a place suitable for the landing of boats. The plaintiffs, including the grantors of Mrs. Wallace, and F. D. Aiken and others, as owners of "Retreat Plantation" and certain lots in "King City," filed suit for injunction to prevent the construction of the wharf and the maintenance of the obstructions in the street. On the interlocutory hearing the judge granted an order "that the injunction prayed for be and the same hereby is denied, except that said defendants are hereby temporarily restrained and enjoined from constructing or

maintaining the wharf-run, or pier complained of, over or upon any part of Page avenue as shown on the map of 'King City.' The plaintiffs excepted.

Harry F. Dunwoody and D. W. Krauss, for plaintiffs in error. Crovatt & Whitfield and A. D. Gale, for defendants in error.

ATKINSON, J. 1. The deed under which Mrs. Wallace claimed title from the proprietors of King City contained the following: "All that lot of land known as the 'Hotel Reservation' in King City on the Island of St. Simons, in said county of Glynn, and more particularly and perfectly described on the map and plan of said King City shown in Record Book 'KK,' page 593, of the General Records of said county, and being bounded on the north by Floyd street; on the south by Mallory street; on the east by lots 'G' and 'K' and twenty feet of a short alley; and on the west by high-water mark. Said above-described property conveying a portion of Page avenue as shown on the plan of said King City. To have and to hold the said described lot known as the Hotel Reservation unto her, the said party of the second part, her heirs and assigns, as aforesaid, in fee simple." Objections were urged to its admission, as follows: "(a) That the said deed without having accompanied with it to offer in evidence the map and plan referred to as being recorded in Book 'KK,' p. 593, was inadmissible and irrelevant. (b) That the said offered deed was not accompanied by the map or plan of King City therein referred to, by which said Hotel Reservation was clearly and specifically described. (c) That said alleged deed was void for lack of sufficient description of the land conveyed without the map and plat conveying same or proof of the contents of such map. (d) That, without such accompanying map and plan as referred to, there was no sufficient description of said 'Hotel Reservation' to authorize its introduction in evidence even as color." The description in the deed was sufficient without the map, and the reference to the map for more particular description of the property intended to be conveyed did not render introduction of the map essential to the admissibility of the deed.

2. The decision involved a construction of the deed referred to in the first division. It was insisted by the plaintiffs that the land conveyed to Mrs. Wallace did not include any part of Page avenue, nor extend to high-water mark on the shores of St. Simons Sound, while the defendants urged that it embraced a part of Page avenue and extended over to high-water mark. It appeared from allunde evidence that the deed misrecited the cardinal points. The map was introduced by the plaintiffs. It failed to recite the cardinal points. On the map was a space, rectangular in shape, designated "Hotel Reservation," which appeared to be

bounded on one side by Mallory street, on another by two lots and an alley, on another by Floyd street, and on the remaining side (shown by allunde evidence to be the south side) by Page avenue. The south line of the lot designated "Hotel Reservation" and the south line of other lots by the side of the "Hotel Reservation" formed a continuous line. South of the line thus formed was another line, parallel thereto, and in the space between these two lines were written the words "Page avenue." Still further south of the most southerly of the two above-mentioned lines was still another line, parallel to the one last mentioned, and between these two was a space in which were written the words "Beach Line—High-water Mark." Immediately south of all of these was a space marked "Saint Simons," which by allunde evidence was shown to be St. Simons Sound. The map did not recite the width of Page avenue, nor the width of the beach, but allunde evidence showed that Page avenue was 50 feet in width, and that there was a space of highland 52 feet wide intervening between the south line of Page avenue and the high-water mark of St. Simons Sound. In support of their position that the property conveyed did not include any part of Page avenue, the plaintiffs contended that the deed expressly referred to the map as more particularly describing the property intended to be conveyed, which was the lot therein designated as "Hotel Reservation," and that as the plat clearly designated "Hotel Reservation" as a particular lot, lying within designated bounds, none of which included any part of Page avenue or any land on the opposite side of Page avenue, the boundaries given in the plat should be regarded as controlling, and indicating the real intent of the parties as to what property was intended to be conveyed; and as the plat thus clearly showed what was intended to be conveyed, other language in the deed, reciting that one of the boundaries of the property conveyed was "high-water mark," and that the deed conveyed a portion of "Page avenue," was merely false description, and ought to be disregarded. In support of this contention the plaintiffs cited the case of *Harris v. Hull*, 70 Ga. 831, where it was said: "In construing conveyances of land, effect is to be given to every part of the description, if practicable; but if the thing intended to be granted appears clearly and satisfactorily from any part of the description, and other circumstances of description are mentioned which are not applicable to that thing, the grant will not be defeated, but those circumstances will be rejected as false or mistaken. What is most material and most certain in a description shall prevail over that which is less material and less certain." In *Sears v. Carver*, 133 Ga. 422, 65 S. E. 886, it was held: "Where the award of the commissioners to admeasure dower refers to an attached plat for

description of the land assigned, courses, distances, names, and marks on the monuments, as appearing on the plat, are to be considered as if written on the return of the commissioners." In the case of *Jefferis v. East Omaha Land Co.*, 134 U. S. 178, 10 Sup. - Ct. 518, 33 L. Ed. 872, it was said: "Where a plat is referred to in a deed as containing a description of land, the courses, distances, and other particulars appearing on the plat are to be as much regarded in ascertaining the true description of the land and the intent of the parties as if they had been expressly enumerated in the deed." These and similar rulings which might be cited are authority for the proposition that, where a plat is appropriately made a part of a deed, its descriptive averments become parts and parcels of the deed. It does not necessarily follow that they are to be given greater weight in construing the deed than other descriptive averments. They might, under particular circumstances, be entitled to greater weight, but they might not be entitled to greater weight under other circumstances. The deed, including the descriptive averments in the body of the instruments, as well as those in the plat, is to be construed as a whole, and effect given to every part thereof, if practicable. Civ. Code 1895, § 3607. Treating the map as a part of the deed, and construing the deed as a whole, in connection with the extraneous evidence, it appears that the recital in the body of the deed that Page avenue was on the west of the "Hotel Reservation" was erroneous; it being in fact on the south. The body of the deed did not expressly restrict the land conveyed to that particular lot which was designated on the map as the "Hotel Reservation," but recited a conveyance "of all that lot of land known as 'Hotel Reservation,' * * * more particularly and perfectly described on the map or plan of said King City," and proceeded to give the boundaries by streets, etc. On two sides it was described as bounded by streets, on another by two lots and an alley, and on the remaining side the only boundary given was high-water mark. The body then recited that the property conveyed included a portion of Page avenue as shown on the plan of said King City. Under the extraneous evidence, the boundary recited as "high-water mark" was on the south of the property conveyed, and, if the east and west lines were projected across Page avenue to high-water mark, it would include a portion of Page avenue, and also a portion of the highland intervening between Page avenue and high-water mark; but the plat did not indicate any such intervening land. According to its terms, while the width of Page avenue was not expressed, Page avenue covered the entire distance between the line designated on the plat as the south line of "Hotel Reservation" and the high-water mark. The deed expressly recited that on the side on which St. Si-

mons Sound was located it should extend as far as the high-water mark, and that it conveyed a portion of Page avenue. It also in this connection employed the language "as shown on the plan." While reference to the plan would show a perfect description of the tract of land designated "Hotel Reservation," it would not show that the lot so designated extended to high-water mark, or that it embraced any part of Page avenue. If it had not been intended to convey any part of Page avenue, or to grant all the property down to high-water mark, it is impossible to account for such express declarations as those which stated that it did include a part of Page avenue and extended to high-water mark. There is a conflict between these declarations and the map, but these descriptive averments are not such as ought to be disregarded as surplusage; but giving due effect to all of the deed, including the map, it should be construed as conveying the property down to high-water mark, including that part of Page avenue which lies between the east and west lines of "Hotel Reservation," delineated on the map, projected over Page avenue down to high-water mark.

3. The plaintiffs claimed title to the beach extending from high-water mark to low-water mark opposite the improvements of Mrs. Wallace. In 1804 and 1810 William Page was the grantee in two deeds which together conveyed to him what was afterwards called "Retreat Plantation," on St. Simons Island. They were recorded. Construing the terms of the deeds and the maps which were made a part of the description thereof, they expressly conveyed the land to low-water mark on St. Simons Sound. There was evidence of possession on the part of Page, and those holding under him, for many years. The plaintiffs in the present case were descendants of Page and persons holding under them. In 1896 a part of the "Retreat Plantation" was laid out into lots, and the name of "King City" was given to the survey. The defendant bought a portion of the land in King City. Her deed expressly bounded the land conveyed to her by high-water mark. A number of lots were sold in "King City" to different persons, but what was not sold off remained in the original owners and others who succeeded to their rights. As we construe the original deeds to include the land to low-water mark and the defendant's deed to include the land only to high-water mark, the land between the two remained in Page or those succeeding to his rights. In a word, the plaintiffs and the defendants both claim under the same title. The plaintiffs represent the holders of this title to the entire plantation down to low-water mark, except so much of it as has been sold off, while Mrs. Wallace holds a fraction of the plantation sold to her and by the terms of her deed extending only to high-water mark, thus leaving the land between high-water mark and low-water mark unconveyed.

Whether in a controversy between the state and an individual there is any presumption against the state from possession and lapse of time or not, or what would be the case if the state asserted title to a particular piece of land and granted it, there is undoubtedly a possession which may become a prescriptive title between a prescriber and other persons. Under the facts, as between the plaintiffs and the defendants, in 1902 the plaintiffs had a title to low-water mark and the defendants had not. The act of 1902 (Acts 1902, p. 108) did not affect the case. It did not undertake to take the title to land from one person and confer it upon another. The deeds to Page recited grants from the state to certain parties named, and that the conveyance to him covered such land. As already stated, Mrs. Wallace holds under this title. She simply took a deed to a part of a tract of land. The boundaries of the whole extended to low-water mark. The boundary of her deed was expressly high-water mark. What was left between the two remained in the owners of the entire plantation or in those succeeding to their rights, and the act of 1902 did not undertake to take this title away from the latter and confer it upon her. The thing complained of and sought to be enjoined was the construction and use of a wharf over the beach between high and low water marks. If it had been erected, it would have constituted a continuing nuisance. As the evidence demanded a finding in favor of the title of the plaintiffs to the whole of the beach, including that part to which title was asserted by Mrs. Wallace, it was erroneous to refuse to grant the injunction, as prayed, relatively to the beach.

4. Complaint was also made because the judge refused to grant the injunction in so far as it related to the encroachment upon Mallory street. It appeared from the evidence that the encroachment was brought about by extending the hotel building for a distance of five feet over the west line of Mallory street. The structure was permanent in character, and was completed before the institution of the suit. While it might be a nuisance if left in the street, and be subject to be abated as such, there is an adequate remedy at law, and injunction is not the remedy. The prayer was to prevent the defendants from maintaining the obstruction, and from interfering with the free use, enjoyment, and occupancy of the street by the plaintiffs and other owners of lots in King City. The effect was to pray for the removal of the structure from the street. It

was not alleged that maintaining the structure in the street would be a nuisance for any other reason than that it was in the way. The relief sought was positive in character, and cannot be accomplished through the offices of injunction.

Judgment reversed.

BECK, J., absent. The other Justices concur.

On Motion for Rehearing.

PER CURIAM. 1. On the motion for a rehearing, it was urged that, even if it should be held that the plaintiffs or those under whom they hold had title extending to low-water mark, yet the right of access to the water was an easement necessary and appurtenant to the land conveyed to the defendant. But no such contention was raised by the pleadings or urged in the briefs of counsel on the argument here. On the contrary, the brief of plaintiff in error contained the statement that "it will be seen that the only question to be determined in this case is whether or not the title to this strip of land lying between high and low water mark was in plaintiff in error at the time of the filing of this bill." This case having been apparently determined in the court below and argued here on that basis, we do not deal with any question of easement. Nor do we deem it proper to rule upon that question now, or to grant a rehearing because of such contention now made by the motion.

2. In the original opinion it was not decided as a general rule of law that where a conveyance specifies as one boundary the sea or an estuary thereof the title would extend to low-water rather than high-water mark. As will appear from a careful reading of the opinion, both parties claimed under a common source of title. In some of the deeds under which both parties obtained title references were made to grants and to maps attached to such deeds. Upon a construction of these deeds, we held that it appeared that the description extended one of the boundaries to low-water mark. The plaintiffs owned what had not been conveyed away. The title of the defendant expressly stopped at high-water mark. Hence, the strip between high and low water remained in the plaintiffs.

3. None of the grounds upon which the motion for rehearing was based present reasons sufficient to render a rehearing necessary.

Motion overruled.

(8 Ga. App. 132)

WILKINS v. McMAHAN. (No. 2336.)

(Court of Appeals of Georgia. Sept. 6, 1910.)

*(Syllabus by the Court.)***1. COSTS (§ 277*)—REMEDIES FOR COLLECTION—ABATEMENT OF SUBSEQUENT ACTION TILL PAYMENT.**

Upon the trial of a plea in abatement, filed upon the ground that the plaintiff had reinstated his action after dismissal without payment of the costs due in the first suit, it appeared that the plaintiff went to the clerk of the court in which the suit was pending, and paid what the clerk said was the amount of the costs, and took a receipt for it, and was not informed of any additional costs being due until after the second suit had been brought, when for the first time it appeared that there was a small item of costs which had not been included in the bill so rendered by the clerk, *held*, that a finding against the plea in abatement was authorized, there being nothing to impeach the good faith of the transaction.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1048-1060; Dec. Dig. § 277.*]

2. LANDLORD AND TENANT (§ 330*)—CROPS.

The plaintiff took from one who was in fact his cropper an instrument reciting that the relation between them was that of landlord and tenant, and creating a lien in the sum of \$300 for supplies to be furnished, and this was transferred by the plaintiff to the defendant, who, however, was cognizant of the actual relation existing between the parties. The cropper not only traded out with the defendant the \$300 mentioned in the written lien, but also made with him an additional account of some \$200. In the fall, and before there had been a final division of the crops, the cropper delivered to the defendant enough of the crops to amount to more than \$300, and additionally delivered to him the three bales of cotton for which the plaintiff sued. *Held*, that as the cropper had delivered to the defendant more than enough of the crops to satisfy the amount of the lien stated in the instrument in which the relationship of landlord and tenant was recited, and as the defendant was not actually otherwise deceived as to the true relationship existing between the landlord and the cropper, the plaintiff was not estopped from asserting title to the three bales of cotton in dispute as being his by virtue of the relationship of landlord and cropper.

(a) The plaintiff was not estopped from showing the true relationship existing between him and his cropper by reason of the fact that he had sued out a distress warrant alleging the cropper to be a tenant; it appearing that this distress warrant was sued out under a misapprehension, and was dismissed when the mistake was discovered. While the fact of the suing out of the distress warrant was in the nature of an admission on the part of the plaintiff, it was not a conclusive or unexplainable admission.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 330.*]

3. SUFFICIENCY OF EVIDENCE.

The verdict appears to be correct under the evidence.

Error from City Court of Monroe; W. S. Upshaw, Judge pro hac.

Action by Aaron McMahan against J. B. Wilkins. From a judgment for plaintiff, defendant brings error. *Affirmed*.

W. O. Dean, for plaintiff in error. Napier & Cox, for defendant in error.

POWELL, J. McMahan recovered a judgment in trover against Wilkins for three bales of cotton, and Wilkins excepts. It appears that Judge Atkinson was a cropper of McMahan's. During the year (in the month of May) McMahan, in order to arrange for the furnishing of supplies, caused Atkinson to execute to him a note for \$300, reciting that McMahan was landlord and that Atkinson was tenant, and that the note was given for the purpose of creating a lien for supplies to make the crops raised on the premises, and McMahan transferred this instrument to Wilkins. Wilkins, however, knew that the relationship between McMahan and Atkinson was that of landlord and cropper; i. e., he knew, as he himself testified, that Atkinson was working the crop "on halves," which is a common way of designating a cropper contract. Atkinson not only traded out with Wilkins the \$300 named in the written lien, but also made an additional account for nearly \$200. In the fall, after Atkinson had paid about \$400 to Wilkins out of the crops, he delivered to him the three bales of cotton in question. While there had been a tentative division between McMahan and Atkinson, there had been no final division.

The defendant relied chiefly upon the proposition that McMahan was estopped from asserting that Atkinson was a cropper, because he had taken from the latter and transferred to the defendant the instrument stating that the relation between them was that of landlord and tenant, and had also in the fall of the year sued out a distress warrant against Atkinson, alleging that he was a tenant. It appears, however, that this distress warrant was voluntarily dismissed by McMahan upon getting the advice of counsel to the effect that the relationship was not that of landlord and tenant, but that of landlord and cropper. The defendant further pleaded, by way of abatement, that McMahan had previously instituted a suit against him for the same cotton; that the same had been dismissed, and the costs had not been paid upon the renewal of the action. He also pleaded, by way of abatement, that the costs in the distress warrant case and a claim case which grew out of it had not been paid. It appeared that, upon the dismissal of the two suits mentioned, McMahan had gone to the clerk in one instance, and to the justice of the peace in the other, had asked for a bill of costs, and, upon receiving it, had paid it, though it did develop that there was a small amount of costs unpaid—a matter which was not called to McMahan's attention until after the present suit was filed.

We will take up the points in somewhat inverse order. The plea in abatement, so far as it related to the nonpayment of the

costs in the distress proceedings and the claim case which grew out of it, was plainly not well taken. The present action was in no proper sense a renewal of those suits. As to the nonpayment of the costs in the former action of trover between the same parties, we think that when the plaintiff went to the clerk, received the bill of costs, and paid it in full, he had done all that either law or good faith required, and that under the particular circumstances there was no error in finding against the plea in abatement.

If the amounts paid out of the crops to Wilkins by Atkinson had not amounted to enough to discharge the indebtedness of \$300 represented by the written lien transferred by McMahan to Wilkins, we think that McMahan would have been estopped from asserting any title to the crops (so far as was necessary to pay off the \$300) on the theory that Atkinson was his cropper and not his tenant. However, as it appears that Wilkins received an amount in excess of the \$300, and as it appears that he was not deceived in the transaction by any actual belief that Atkinson was a tenant, we see no reason for the application of any estoppel against McMahan's asserting his title to the crops as against Wilkins' holding it as a payment on open account. The jury's verdict is consistent with this view of the case, and appears to be a correct solution of the problem presented by the special state of facts.

Counsel for Wilkins insist, also, that the suing out of the distress warrant by McMahan amounted to a solemn admission in judicio, and precluded him from thereafter asserting that Atkinson was merely a cropper. To this proceeding, it must be remembered, Wilkins was not made a party by McMahan, and while the fact of McMahan's having sued out a distress warrant had probative value as an admission, it was not a conclusive admission, and was subject to explanation. *Sims v. Dorsey*, 61 Ga. 488; *Evans v. Napier*, 111 Ga. 105, 38 S. E. 428. The court properly allowed McMahan to explain the admission implied against him by reason of his having sued out the distress warrant by showing that he had sued it out in ignorance of the law, and that he promptly dismissed it so soon as he had received advice of counsel upon the actual facts of the case. After a careful review of the record, we find no sufficient reason for reversing the judgment.

Judgment affirmed.

(3 Ga. App. 239)

SOUTHERN RY. CO. v. GRANGER. (No. 2,219.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

(*Syllabus by the Court.*)

RAILROADS (§ 443*)—INJURY TO STOCK ON TRACK—NEGLIGENCE—EVIDENCE.

All the evidence rebutted the inference that the servants of the railway company failed to

exercise ordinary care to keep from killing the plaintiff's cow.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1617, 1618; Dec. Dig. § 443.*]

Error from Superior Court, Jeff Davis County; T. A. Parker, Judge.

Action by P. Granger against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

J. F. De Lacy, King & Chastain, and McDaniel, Alston & Black, for plaintiff in error. P. L. Smith, for defendant in error.

RUSSELL, J. Granger sued the railway company to recover damages for the killing of a cow, and obtained a verdict. The complaint of the railway company is that the verdict is contrary to law and without evidence to support it, and we have finally concluded that this complaint is sustained by the record, though to the mind of the writer it is extremely questionable whether the judgment of the trial judge, refusing a new trial, is not right. Upon my individual judgment I would be inclined to hold that, as all questions of negligence are for the jury, it was for the jury to determine (under the peculiar circumstances of the case and their special and general knowledge of cows) whether the exercise of ordinary care on the part of the servants of the railway company to keep from killing this cow required them to blow a whistle, or to adopt some other measure to frighten the cow away, or to prevent her from returning to the railroad track. Upon consultation, I yield my doubts.

It was admitted that the cow was killed by an engine of the defendant company. She crossed the track in plain view of the engineer and fireman about 300 or 400 yards in front of the engine, and they naturally supposed she was out of danger. There was an embankment at this point, and after the cow had crossed the track, and had gone into some weeds a few feet from the track, she suddenly wheeled, and, just before the engine got to her, she unexpectedly ran back on the track, immediately in front of the engine, and was killed. It is true that the train did not slow down, nor did the engineer sound his whistle; but the cow was apparently out of danger, and after she ran back on the track it was too late to keep from killing her. There was nothing in the cow's actions to give an indication that she would run back on the track, and that is the reason given by the engineer and fireman for not putting on the brakes or sounding the whistle.

Under this evidence we hold that the railway company rebutted the presumption of negligence, and the jury was not authorized to infer that the servants of the railway company had failed to exercise ordinary care to keep from killing the cow, merely because

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the cow acted in an extraordinary way. The burden was on the railway company to rebut the presumption that the cow was negligently killed, and to show that its servants exercised ordinary care and diligence to keep from killing the cow. The cow had crossed the track, and had gotten 7 or 8 feet the other side, when she wheeled around and came back on the track. The engineer and fireman could not reasonably have anticipated that the cow would turn around and come back on the track, although, according to the testimony, she was only 7 or 8 feet the other side of the track. With such knowledge of the bovine genus as we possess, we do not think that it could possibly have been foreseen, by the exercise of ordinary care, that the cow would "take a back track."

Judgment reversed.

(8 Ga. App. 377)

GEORGIA, S. & F. RY. CO. v. RANSOM.
(No. 2,428.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

(Syllabus by the Court.)

CARRIERS (§ 319*)—IMPROPER CONDUCT OF CONDUCTOR TOWARD PASSENGER—ACTIONS—EVIDENCE.

Under the evidence in this case, a verdict for \$1,000 damages is manifestly out of all proportion to the injury proved, and is so excessive as to demand the inference that the jurors were influenced by undue bias, partiality, or prejudice.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1344; Dec. Dig. § 319.*]

Russell, J., dissenting.

Error from City Court of Cordele; E. F. Strozler, Judge.

Action by Mrs. J. W. Ransom against the Georgia, Southern & Florida Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

John I. Hall, J. E. Hall, and J. T. Hill, for plaintiff in error. F. G. Boatright, for defendant in error.

HILL, C. J. Mrs. Ransom brought suit against the Georgia, Southern & Florida Railway Company to recover damages for an alleged tort of a conductor of a passenger train in addressing to her certain language which she alleges was "unnecessary, cruel, willful, and wanton, and was intended and did cause her great mortification, mental pain, and humiliation." She recovered a verdict for \$1,000, and the case is here on exceptions to the judgment overruling the defendant's motion for a new trial. The case was before this court on a previous occasion, when the plaintiff recovered a verdict for \$700 on substantially the same state of facts. 5 Ga. App. 740, 63 S. E. 525.

It is unnecessary to again set forth in extenso the evidence, which can be found fully stated in the previous decision of this court.

Briefly, the evidence makes the following case: Plaintiff was a passenger on defendant's train from Dakota to Cordele. She was accompanied by two small children, one a baby in arms, and the other about two years of age. When the conductor approached her and asked for her ticket, she could not find it, and he told her to look for it to see if she could not find it and passed on. The conductor approached her a second time, and asked her if she had found her ticket, and she replied that she had not. The conductor then told her again to look further for her ticket and again passed on. He returned the third time, when the train was in Crisp county nearing the point of destination of the passenger, and she still had not found her ticket, and did not offer a ticket or cash fare. The plaintiff's exact testimony on this point is as follows: "The conductor came to me and asked me for my ticket, and I told him I had lost it, and he went away and told me he would give me some time to find it—told me to look for it, and probably I would find it. In a few minutes he came back again, and I still hadn't found it, and I told him I hadn't found it, and he said, 'Well,' and he stated the fare, and I told him I didn't like to have to pay another fare without more time to search for my ticket, and he said I must pay fare if I rode on that train, and I told him I had paid it, as for that matter, and intended to pay it again, if I couldn't find my ticket; and he asked me then if I wanted him to stop at Arabi and put me off, and I told him 'No,' I wanted him to go to Cordele where I had paid him to go, and he said he hadn't seen any fare, and I said, 'Well, I had paid,' and I would pay again, if I couldn't find my ticket. He went away for a few minutes, and he asked me again, and I still hadn't found it, and he says: 'You are a woman. I see you are trying to take advantage of me, and I will pay your fare for you here in the presence of these gentlemen.' And I says, 'I haven't asked you to pay my fare'; and he said, 'No; you haven't asked me, but it is an advantage you are taking.'" The gentlemen to whom the conductor referred were two passengers sitting right behind the plaintiff and one to her left, across the aisle. She testified, further, that the conductor spoke in a very harsh manner, and that, after addressing to her the remarks above quoted, he went away, saying nothing more at that time. Subsequently she found her ticket and delivered it to the conductor, who said, according to her testimony, "I thought you had lost it." This concluded the incident. Immediately upon arriving at Cordele, the plaintiff sought out an attorney and filed her present suit for damages, alleging the language of the conductor and his manner as constituting the tort complained of.

It may be stated that there is no conflict between the evidence for the plaintiff and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that for the defendant, except that the plaintiff testified that she did not refuse to pay her fare, but stated that she would do so provided she did not find her ticket; and the conductor and the two passengers who were introduced as witnesses, all three testified that she did positively and unconditionally decline to pay her fare when the conductor demanded it of her on the third interview. She testified also that the language of the conductor was impolite and harsh. The conductor and the two passengers who were immediately behind the plaintiff and who testified as to the entire controversy between the conductor and the plaintiff stated that the conductor's manner was polite, courteous, and considerate. It will thus be seen that there was only an apparent conflict upon the question as to whether she did positively refuse to pay her fare after he came to her the third time, and we think the only fair conclusion from her own language to the conductor was that she expressed no present intention of paying the fare, although nearing her destination. But, for the purposes of the case, we must take the testimony of the plaintiff as the truth of the transaction, and, if in that testimony we find sufficient facts to justify a verdict for \$1,000, the verdict must stand.

When the case was before this court on a previous occasion, in discussing the amount of the \$700 verdict, we gave it as our opinion that the evidence for the plaintiff made an "extremely weak" case for a recovery, and that the verdict for the amount then rendered was "large to the point of generosity," and we further stated that in our opinion the jury were "very generous and chivalric; probably more so than the facts warranted." While, as before stated, there is no substantial difference between the evidence on the first and second trials as to what took place between the passenger and the conductor, there is considerable difference in the testimony on the first and second trials as to the effect of the alleged treatment by the conductor. On the first trial she proved a very nervous condition resulting from the interview between her and the conductor, and there was no evidence before that jury that there was any other cause for such condition. On the second trial there was testimony presented to the jury that both before and since the trial the plaintiff was frequently found in a nervous condition, and was under treatment for such condition by her physician, and the evidence on the second trial would seem to eliminate the nervous condition of the plaintiff as an element of damage, and we think it fair to limit the question of damages to what actually occurred between the plaintiff and the conductor on the train. Were the language and conduct of the conductor from the plaintiff's standpoint sufficiently tortious and inexcusable to require or justify a verdict for \$1,

000? It is insisted that the amount of the verdict is excessive, and, after a review of the entire evidence, we have arrived at the same conclusion. We do not think that either the language or the conduct of the conductor construed most strongly against him and in favor of the contention of the plaintiff would warrant a verdict for \$1,000 as damages. The conductor gave the passenger, it would seem, a reasonable time to make search for and to find her ticket. She did not find it, and she did not offer to pay fare, although she had failed to find her ticket. The conductor was presented solely by the conduct of the passenger with a difficult and embarrassing problem to solve. It was his duty as an official to collect the ticket or the fare, and, failing to do so, it was his duty to stop the train and put the passenger off at some convenient place, which he offered to do. But the woman had in her arms a baby, and was leading by the hand another infant. There was thus a conflict between the conductor's feelings as a man and his duty as an official, and he endeavored to reconcile the two. If his language was not apt or conciliatory, it was certainly neither harsh nor wholly unwarranted. The contention that his characterization of the passenger as a "woman" instead of as a "lady" was an insult is too frivolous and absurd for serious consideration. His statement that she was trying to take advantage of him because of her sex, while probably an equivocal expression, did not necessarily import falsity of the passenger's claim that she had purchased her ticket. It was but the expression by the conductor of his opinion of the situation. The fact that he offered to pay her fare was certainly not a very grave insult, if an insult at all, and was probably intended by the conductor for his own self-protection as an official, and the fact that he called upon the passengers to witness the payment of the fare was doubtless for the same purpose, and was not done in any manner for the purpose of calling attention to any improper conduct of the woman, and these gentlemen as witnesses fully rebut any conclusion of this kind by their testimony that the conduct of the conductor was courteous, kind, and considerate. But it is unnecessary to discuss the question any further. We just simply cannot get our minds to consent to the proposition that the offense of the conductor, if an offense at all, was of sufficient gravity to justify a verdict of \$1,000 in damages against the railroad company. The amount of the verdict seems to us to be manifestly out of all proportion to the wrong, and we are compelled to adopt the conclusion that the jury in assessing the amount of damages for so trivial a tort, if a tort at all, were influenced, not by the evidence, but by some extraneous fact which aroused their partiality for the plaintiff, or prejudiced them against the defendant. A

mother with a babe in her arms and a child by the hand appeals powerfully to sympathy, if she does not entirely shut the eyes of justice.

We are aware of the many decisions of the Supreme Court that in cases of tort and personal injury where the damages are unliquidated, and the law furnishes no rule of measurement save the enlightened conscience of impartial jurors upon the evidence before them, a verdict will not be set aside and a new trial granted upon the ground of excessive damages, unless the amount is so unreasonable and excessive as to evince passion, prejudice, partiality, corruption, or misapprehension; and every case must stand upon its own particular facts, there being no inflexible rule that can be laid down on the subject. And, while the question of damage is peculiarly one for the jury, both in the act complained of and any circumstances of aggravation, yet, where the finding is so excessive as to justify an inference of undue bias, partiality, or prejudice on the part of the jury, it is the duty of the courts to interfere. But this interference by the court is not to be taken as any reflection on the jury, but only a recognition of the well-known fact that jurors in some cases, of which the present case furnishes a type, are sometimes prone to allow their feelings to get the better of their judgment. In our previous decision of this case we did not expressly disapprove of the verdict for \$700, although, as intimated in the opinion, it went to the very limit of reasonable adjustment of the damage to the injury complained of. In the present case there is no substantial difference in the evidence; the only difference being another reason for the nervous condition of the plaintiff independent of the altercation between her and the conductor. We feel compelled to be consistent with the view then entertained, which has been strengthened by a further consideration of the evidence, by setting aside this verdict and granting a new trial on the ground that the verdict is excessive.

There are many other special exceptions set out in the motion for a new trial. Some of them are meritorious and some are without merit; but the necessity for a decision of any of them is eliminated by the grant of another trial on the ground stated.

Judgment reversed.

RUSSELL, J., dissents.

POWELL, J. (concurring). I know nothing of the facts or of the parties except what I gain from the record. After carefully considering the record I am forced to believe beyond any reasonable doubt that the verdict is the result of bias or prejudice as the plaintiff showed no appreciable wrong, and I therefore concur in the opinion of the Chief Judge.

(8 Ga. App. 240)

THOMASON v. SWIFT FERTILIZER WORKS. (No. 2,224.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

(Syllabus by the Court.)

DEMURRER PROPERLY SUSTAINED.

The defendant's plea failing to present any issuable defense the demurrer thereto was properly sustained.

Error from City Court of Bainbridge; W. M. Harrell, Judge.

Action between T. I. Thomason and the Swift Fertilizer Works. From the judgment, Thomason brings error. Affirmed.

R. G. Hartasfeld, for plaintiff in error. Hale & Nelson and Tye, Peeples & Jordan, for defendant in error.

RUSSELL, J. Judgment affirmed.

(8 Ga. App. 241)

TAYLOR v. STATE. (No. 2,247.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

(Syllabus by the Court.)

1. RIOT (§ 7*)—PROSECUTION—INSTRUCTIONS.

The indictment, in addition to charging that the defendants committed unlawful acts of violence, alleged that the persons accused, "being assembled and gathered together, and acting with a common intent, unlawfully, violently, and tumultuously did make a great noise, riot, tumult, and disturbance, to the great terror of Will Lovelace and others." It was therefore not error for the court to charge the jury, in explanation of the nature of the offense of riot, that "the act need not necessarily be an unlawful act in a violent and tumultuous manner. If you believe the defendant, in connection with others and acting with a common intent, did an unlawful act or any other act in a violent and tumultuous manner, you would be authorized, and it would be your duty, to convict him."

[Ed. Note.—For other cases, see Riot, Cent. Dig. § 12; Dec. Dig. § 7.*]

2. CRIMINAL LAW (§ 1147*)—SENTENCE—REVIEW.

The sentence imposed being within the limits prescribed by law is not subject to review. Reese v. State, 3 Ga. App. 610, 60 S. E. 284.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3072, 3073; Dec. Dig. § 1147.*]

3. RIOT (§ 1*)—ELEMENTS OF OFFENSE.

There was no evidence that the plaintiff in error and his associates were guilty of any unlawful act of violence; and the testimony failed to show that any act of the defendant himself or in conjunction with others was done in a violent and tumultuous manner. Consequently the verdict was without evidence to support it. To transmute acts which are intrinsically lawful into a riot, the commission of such acts must be attended with both violence and tumult. Both ingredients are essential in order to cause the reaction which is necessary to change the quality of a lawful act. Neither noise alone nor violence alone attending the performance of a lawful act can make a riot.

[Ed. Note.—For other cases, see Riot, Cent. Dig. §§ 1-5; Dec. Dig. § 1.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

*(Additional Syllabus by Editorial Staff.)***4. RIOT (§ 1*)—NATURE OF OFFENSE.**

Riot is essentially an offense against the public peace and good order, and looks to this rather than an infraction of the personal rights of any particular individual as such.

[Ed. Note.—For other cases, see Riot, Cent. Dig. §§ 1-5; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6240-6242.]

Powell, J., dissenting.

Error from City Court of Griffin; J. J. Flynt, Judge.

John Taylor was convicted of riot, and brings error. Reversed.

Robt. T. Daniel and T. E. Patterson, for plaintiff in error. Wm. H. Beck, Sol., for the State.

RUSSELL, J. 1, 2. The first and second headnotes are self-explanatory.

3. To show one guilty of the crime of riot, the act in which the accused must engage or participate in concert with another or other persons must be either an act of violence expressly declared by law to be unlawful, or it must be some act which (though it would not necessarily be criminal) is committed so violently and is attended with such tumult as that the manner in which the act is performed disturbs the public peace. Riot is essentially an offense against the public peace and good order, and looks to this rather than an infraction of the personal rights of any particular individual as such. The common-law offense of riot did not include that class of riots where two or more persons with a common intent might do any act in a violent and tumultuous manner (which from its present nature must be peculiarly an offense against the peace of the public); and yet, at common law, riot was specifically classified as a public wrong and as an offense against the public peace. 4 Chit. Bl. 108. Of course, where the rioters commit an unlawful act of violence, the violation of the personal rights of a certain individual may be a paramount consideration, and in this form of riot it is not necessary that the act which the law penalizes as a riot shall be done in a tumultuous manner, because the act in such case is of itself a crime, and the common intent of the perpetrators and their concert of action only adds an additional ingredient to the crime, and thereby aggravates the offense. The new criminal element is that of conspiracy, and, when this element is the inspiration of an unlawful act (or crime) of violence participated in by two or more, the crime, resultant from the union is riot. It is enough in such a case if the proof shows that the unlawful act was one involving violence and participated in by two or more. But in the extension of the offense of riot, as defined in section 354 of the Penal Code of 1895, be-

yond its common-law definition, so that the commission (by two or more persons) of a lawful act in a violent and tumultuous manner is made a crime (as the act done is of itself, and disconnected from the manner in which it is done, a lawful act), the proof must show, not only that the act in which the rioters were jointly engaged was an act involving violence, and in the execution of which violence was actually employed, but that it was done in a tumultuous manner so as to disturb the public peace.

The offense in such a case is wholly one against the public peace and tranquility, and, though an act be violently done by two or more persons, yet if it be a lawful act, and if there is no attendant tumult which disturbs the public peace, there is no riot.

Judgment reversed.

POWELL, J., dissents.

(3 Ga. App. 251)

BEACH LUMBER CO. et al. v. BAXLEY BANKING CO. (No. 2313.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 336*)—AMENDMENT.**

A bill of exceptions may on motion be amended by the addition of necessary plaintiffs in error, where the fact that they are necessary parties plainly appears from the record. The writ of error will not be dismissed where all necessary parties thereto have been properly supplied by amendment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1868-1876; Dec. Dig. § 336.*]

2. PROCESS (§ 167*)—CURE OF DEFECT BY SUBSEQUENT PROCEEDINGS.

A suit was filed against several defendants, some of whom resided in the county of the court's jurisdiction, and one in another county. The clerk failed to sign the process on the original petition, but the process annexed to the second original was properly signed, and the second original was served on the nonresident defendant. At the trial term the defendants moved to dismiss the suit upon the ground that there was no process signed by the clerk in said case, and that the process prepared was void and not amendable. Held, that the court did not err in directing the clerk to prepare and attach to the petition, and to the second original, process returnable to the next ensuing term of the court, with direction that service be perfected upon the defendants.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 256; Dec. Dig. § 167.*]

Error from City Court of Waycross; J. T. Myers, Judge.

Action by the Baxley Banking Company against the Beach Lumber Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

V. E. Padgett, for plaintiffs in error. Parker & Highsmith and J. L. Sweat, for defendant in error.

RUSSELL, J. 1. A motion is made to dismiss the writ of error upon the ground that the bill of exceptions does not show who composed the Beach Lumber Company (the plaintiff in error) which is alleged to be a copartnership, and that, as the individuals composing the firm are not named, the writ of error should fail for the want of proper parties. The plaintiff in error by a written motion asked this court to permit the bill of exceptions to be amended by adding as plaintiffs in error W. R. Beach, J. M. Beach, and J. F. Beach. Upon consideration of this motion, it was granted, because it appears from the record that they were defendants in the original action in the court below, and named as such in the original petition of the defendant in error. For this reason the amendment cannot affect any right of the defendant in error, and the motion to dismiss the writ of error is denied.

2. In addition to the statement of the second headnote, it may perhaps be proper to say that this was a suit upon a promissory note made by the Beach Lumber Company, payable to the order of J. F. Smith, and indorsed by W. R. Beach and J. F. Smith. Suit was brought in the city court of Waycross to the June term, 1909, of that court by the Baxley Banking Company as the transferee. The clerk in attaching process to the original failed to sign it, though he signed the process to the second original prepared to be served upon J. F. Smith, who was a resident of Appling county. Each and all of the defendants were served, and at the appearance term, there being no appearance, the case was marked in default. At the September term, which was the next term of the court, the defendant the Beach Lumber Company appearing only for that purpose, filed a written motion to dismiss the suit "because there is no process signed by the clerk in said case. The process, being prepared in the original and copy petitions not having been signed by the clerk, is absolutely void, and not amendable." The court refused to dismiss the suit, and, on motion of the plaintiff's counsel, ordered the clerk to issue a new process, requiring the defendants to be and appear at the next term of the court to be held on the second Monday in December, 1909, together with copies of said petition and process, to be served by the sheriff upon all of the defendants, and the December term being expressly made the appearance term of the suit.

We find no error in this order. It was not a question of a void process, which is not amendable. As to the Beach Lumber Company and the individuals composing this partnership, there was no process, and the court, having the right to control its process, could either dismiss the proceeding or (there appearing to be no fault or laches on the part of the plaintiff) take steps to have process

issued, instead of putting the plaintiff to the expense and trouble of recommencing his suit. A case is cited where it was held that void process is a fatal defect, or a void process cannot be amended. Of course, where a process is void, and yet the case is treated as if the process was sufficient, or where process returnable to a term already past is attempted to be substituted for process returnable to a term in future, the proceedings would be nugatory; but in any case where, through no fault of the plaintiff, there is an absolute failure to issue process, as also in a case where process may have issued, but for some reason with which the plaintiff is not chargeable there has been no service, it is within the power and discretion of the court to preserve the status of the case upon the docket, and to order the issuance of process, returnable to a future appearance term, and service thereof.

Judgment affirmed.

(3 Ga. App. 229)

STAMPS v. NEWTON COUNTY. (No. 2,190.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

(Syllabus by the Court.)

1. DEATH (§ 24*)—ACTION FOR DEATH OF CHILD—CONTRIBUTORY NEGLIGENCE.

In refusing to strike that portion of the defendant's plea which set up that the death of the plaintiff's child was the fault of the plaintiff herself in negligently and carelessly permitting the child to pass over the footbridge without the guidance of some other person, well knowing that the stream at that time was very much swollen and in a dangerous condition, and that the plaintiff aided and contributed to her own injury by allowing the child to enter upon said footbridge without some other person to guide the child and prevent her from falling, the court did not err, inasmuch as the defendant had the right to introduce evidence to show if it could that the mother was present, or at least in sight, at the time the child was drowned.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 25, 26; Dec. Dig. § 24.*]

2. DEATH (§ 24*)—OF CHILD—DUTY OF PARENT TO PROTECT CHILD.

While a mother who is compelled to earn her own living by her labor may not be required in the exercise of due diligence to be present at all times and personally overlook the care of her children, still she is responsible for the exercise of ordinary care for the safety of her child while the child is in her presence.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 25, 26; Dec. Dig. § 24.*]

3. BRIDGES (§ 46*)—ACTION FOR DEATH OF CHILD—QUESTION FOR JURY—NEGLECT.

While isolated excerpts from the judge's charge to the jury to which exception is taken, may seem inaccurate, the charge, construed as a whole, was extremely favorable to the contentions of the plaintiff in error, and fairly and fully presented the law applicable to the issues presented by the pleadings and evidence.

(a) Construed together, all of the instructions of the court tended to impress the jury with the statement that, if the death of the child was due to a defect in the bridge of which the county authorities had knowledge or notice, the

plaintiff's right of recovery could not be defeated.

(b) The instruction to the effect that the plaintiff was not entitled to recover unless the county authorities knew of the defect of the bridge, or unless this defective condition had existed for such a length of time that knowledge thereof on the part of the county authorities would be presumed, was correct. Under the evidence adduced, and, when taken in connection with the further instruction that if the bridge was originally negligently or defectively constructed, and any defect in the bridge was the cause of the child's death, the county would be liable, the charge afforded no ground for complaint.

(c) Whether the omission to replace guard rails upon the bridge, if guard rails were previously there, or the failure to put guard rails upon the bridge in first instance, was or was not negligence on the part of the county authorities, was a fact to be determined by the jury from the circumstances of the case.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 108-122; Dec. Dig. § 46.*]

4. APPEAL AND ERROR (§ 996*)—RES IPSA LOQUITUR—PROVINCE OF JURY.

In any case in which it is contended that the circumstances of the transaction call for the application of the doctrine of res ipsa loquitur, the prerogative of the jury to judge whether the circumstances of the case itself are such as to raise an inference of negligence and to fix the liability upon the defendant for the act complained of (unless satisfactory evidence is offered by him) is exclusive, and not reviewable. The jury was authorized in the present case to find that neither the condition of the bridge nor the other circumstances in the case placed upon the defendant the burden of proving how the casualty resulted, and that the negligence of the county was not responsible therefor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3908-3911; Dec. Dig. § 996.*]

5. BRIDGES (§ 37*)—MAINTENANCE AND REPAIR—DUTY OF COUNTY.

It is the duty of the proper county authorities to construct and maintain bridges across streams in a workmanlike and proper manner, so that any person may use them with safety, in the exercise of ordinary travel, but this duty is not one of extraordinary care and diligence, nor does its exercise extend to extraordinary occasions beyond the ken of general experience. The law does not make the county authorities insurers of the safety of any of those who use bridges.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 103-105; Dec. Dig. § 37.*]

6. EVIDENCE (§ 194*)—DEFECTS—INJURIES.

It was not error to exclude from the consideration of the jury nails taken from the bridge in 1909, since the question at issue was the condition of the bridge in 1908, more than a year previous.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 194.*]

7. TRIAL (§ 252*)—DUTY TO INSTRUCT.

In the absence of any evidence as to the value of the child's services it was not error to omit to instruct the jury upon the measure of the plaintiff to recover upon that count of the petition.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

8. DEATH (§ 24*)—OF CHILD FROM DEFECTIVE BRIDGE—RIGHT OF RECOVERY.

It was not error to instruct the jury in substance that, even though both the plaintiff

and the defendant might be negligent, the plaintiff's right to recover would not be defeated if the death of the child was caused by the negligent condition of the bridge, and the child in crossing was using as much care as a person of full discretion. The charge of which complaint is made presented one of the strongest contentions of which the evidence in behalf of the plaintiff was susceptible.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 25, 26; Dec. Dig. § 24.*]

9. EVIDENCE (§ 317*)—HEARSAY—ADMISSIBILITY.

Hearsay testimony is permissible in explanation of conduct or, as in this case for the purpose of identifying and locating objects referred to in the testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

Error from City Court of Covington, W. H. Whaley, Judge.

Action by Susan G. Stamps against Newton County. Judgment for defendant, and plaintiff brings error. Affirmed.

Middlebrook, Rogers & Knox, for plaintiff in error. R. W. Milner, for defendant in error.

RUSSELL, J. Susan G. Stamps brought suit for damages against Newton county, alleging that in August, 1908, her daughter, five years old, while crossing a public foot-bridge of the county, fell from it and was drowned, in consequence of the fact that one of the planks upon the bridge was not nailed, and tilted and threw the child into the stream. She sued both for the value of the child's life and the value of its services. The evidence in regard to the circumstances attending the child's death was conflicting. There was no testimony as to what was the value of the child's services or as to whether they were of any value. The verdict was for the defendant.

1. The plaintiff moved to strike that portion of the defendant's answer in which the county set up contributory negligence on her part. If the court erred in not sustaining the motion to strike, the error was secured by the instructions of the trial judge to the jury. They were told specifically that negligence on the part of the plaintiff could not defeat her recovery, if the proximate cause of the child's death was negligence of the county in the construction and maintenance of the bridge from which it fell to its death. But, aside from this, we do not think the judge erred in refusing to strike this portion of the defendant's plea, for conceding that a mother is not necessarily required to keep personal supervision of her children at all times, and that it might not be negligence on her part for them to wander away from home and expose themselves to danger, still the plea is not addressed to that state of facts. The defendant contemplated to state all circumstances in which the mother was in sight, and in such a case it would be a question whether she could or ought to have pre-

vented the child from going upon the bridge. And, if she was present and permissibly acquiesced in the child's putting itself in the situation where the danger was apparent, she might be brought within the rule laid down in the case of *Atlanta & Charlotte Ry. Co. v. Gravitt*, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145. Being present with the child, the circumstances would be so altered that the rule of diligence applicable would be entirely different from that which would apply if she had been necessarily away from her child.

2. It is strenuously insisted that a mother who is compelled by her financial necessities to earn support for herself and children is not required to exercise personal supervision over them at all times, that necessarily she must be absent from them in some occupations in which she may be engaged in earning a livelihood. Personally we agree with this contention, but we find nothing in the judge's charge to the jury which limited their right to consider this phase of the case. It is in every case a question for the jury as to whether the acts of the persons involved when considered in the light of all circumstances were duly diligent or unduly negligent under the peculiar circumstance of the case. Negligence in one case might not be negligence in another, but it is for the jury to say whether negligence existed or due diligence was exercised in either.

3. While the isolated excerpts from the charge of which complaint is made in several of the grounds for motion for new trial, viewed apart from their setting, might seem to be inaccurate, yet, when the charge is construed as a whole, it is plain that no right of the plaintiff was prejudiced. The instructions of the trial judge were extremely favorable to her contentions. So far as the charge of the court is concerned, the plaintiff would have been fully authorized to recover the full value of her child's life if the jury had been impressed with the view that the death of the child occurred in the way that she testified it did, and if it had been satisfactorily shown that the county authorities were negligent in the construction or maintenance of the bridge. On the other hand, the jury were fully authorized to conclude primarily that the death of the child might have occurred in some other way, or that, no matter how the death resulted, it was not due to any defects in the bridge which should have been obviated by the exercise of care on the part of the county authorities. The jury may have concluded, and we think could have done so, that the erection of a guard rail would have added nothing to the safety of the bridge, so far as a child four or five years old was concerned, for the reason that the child could have easily passed under these guard rails, and either walked off or fell off into the stream below. At any rate, the question as to what kind of bridge should have been

maintained at this point in the exercise of ordinary diligence was fully and fairly submitted by the court to the jury, and in the state of the evidence we do not think it was obligatory upon the trial judge to grant a new trial. For that reason, we certainly cannot interfere. It can serve no useful purpose to discuss the various exceptions to the charge to the jury, and, so far as reference thereto is necessary, our view will be found in the headnotes.

4. It is insisted that the circumstances of the case call for the application of the doctrine of *res ipsa loquitur*. If it be conceded that this is so, it is to be borne in mind that the maxim or doctrine of *res ipsa loquitur* is the mere statement of a rule of evidence; and there was nothing in this case to prevent the jury from applying it if it had seen proper. In any case in which it is contended that the circumstances of the transactions are governed by the doctrine of *res ipsa loquitur*, the prerogative of the jury to judge whether the circumstances of the case itself are such as to raise an inference of negligence and to fix the liability upon the defendant for the act complained of, unless a satisfactory explanation is offered by him, is exclusive and not reviewable. The jury was authorized in the present case to find that neither condition of the bridge nor the other circumstances in the case placed upon the defendant the burden of proving how the casualty resulted, and that the county was not responsible therefor. There was nothing in the charge of the court to prevent the jury from saying that the circumstances of the case itself spoke of negligence, and placed the burden of explaining the apparent *prima facie* negligence upon the county. But the jury were not compelled to indulge this inference, and, if the plaintiff in the court below had desired the attention of the jury to be addressed specifically to this rule of evidence, an appropriate request should have been made.

5. While it is the duty of the several counties of this state to construct all bridges (even footbridges) across streams in a workmanlike and proper manner, so that any person using ordinary care may use them with safety in ordinary travel, the county authorities are not required to use extraordinary care and diligence, even to foresee casualties resulting from extraordinary occasions. Of course, in the exercise of extraordinary care, the fact that streams will rise and freshets occur will be taken into account. But such an extraordinary case as that a bridge might be engulfed by an earthquake that too would not reasonably be anticipated and would not be within the purview of the county's duties. In other words, the county authorities are not insurers of the safety of those who use the public bridges. The county is to build bridges reasonably safe for ordinary use, with an eye to these extraordinary strains and extraordi-

nary occasions which rise within ordinary human experience.

6. The nails which were taken from the bridge in 1909 were properly excluded, not only because the accident occurred in 1908, nearly a year before, and therefore the nails were not illustrative of the condition of the bridge in 1908, but also because there was no evidence that they were taken from the plank which it was alleged tilted and caused the child's death.

7. There was no error in omitting to give the jury instructions as to the measure of the plaintiff's damage for the loss of the services of her child, for the reason that there was no evidence as to the value of the child's services. Furthermore, this omission could not have been harmful, for the reason that the plaintiff sued both for the value of the child's life and the value of its services, and she could not recover for both. It is probable that, if she had recovered, her recovery would have been larger in case the jury allowed her the value of the child's life than if the recovery were for its services until it reached its majority, and the right of the plaintiff to the value of the child's life, provided the jury found the county negligent, was fully explained.

8. The charge of which complaint is made in the eighth special ground of the motion for new trial was really very favorable to the plaintiff. It was equivalent to telling the jury that certainly, if the child was acting as a grown person would act, the plaintiff could recover, even though both the plaintiff and the defendant were negligent. In other words, the jury were told that, even if they believed the plaintiff was negligent in caring for the safety of her child, still in spite of that negligence, if the child was acting in the discreet and cautious way in which a careful grown person would be supposed to act, the defendant, if negligent, could derive no benefit from the plaintiff's negligence.

9. It insisted that the court erred in admitting the evidence of the witness John Dobbs, as follows: "I saw the bridge the next day after the child was drowned. I saw some children there that day. I saw the child that testified here. I just asked all of them where the child fell off, and could not tell which one told me. This one was present when I told some one to show me where the child fell off, and they showed me. I asked them all where she fell off, and they said right here about the middle of the bridge. This child was in the crowd, but I don't know whether she said a word or not." It is contended that this testimony was purely hearsay as to all the children save the

one who testified, and that it did not contradict her testimony. It is true this testimony is hearsay, but for the purpose of identifying location of time or as explanatory of conduct hearsay is admissible. The court did not err in overruling the objections to this testimony.

From a review of the case as a whole, we conclude that the jury decided that the bridge, a photograph of which was before them, was reasonably safe, and therefore its construction did not speak of negligence, and that the manner of the child's death was not proven to the satisfaction of the jury. Furthermore, there was no evidence that the child contributed to the support of the mother or as to the value of its services. There was no error in refusing a new trial.

Judgment affirmed.

(8 Ga. App. 187)

LEDBETTER v. SAVANNAH BREWING CO. (No. 2,475.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 544*)—NECESSITY FOR BILL OF EXCEPTIONS.

This court cannot review the action of the lower court in rejecting a tendered amendment, when it is not incorporated in a bill of exceptions, or attached as an exhibit thereto, or otherwise made a part thereof. The rejected amendment is no part of the record, and cannot be so specified (unless incorporated in exceptions pendente lite); and the formality of having filed it with the clerk of the court before the order of court disallowing it does not make it a part of the record. *Schaeffer v. Central of G. Ry. Co.*, 6 Ga. App. 282, 64 S. E. 1107, and cases cited.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2412; Dec. Dig. § 544.*]

2. LANDLORD AND TENANT (§ 169*)—INJURIES FROM DEFECTS IN PREMISES—PETITION—SUFFICIENCY.

Where the allegations of a petition, in an action against the lessee of premises brought to recover for damages caused by an excavation alleged to be on the leased premises, expressly negative the creation of the same by the defendant, and do not show affirmatively or by fair inference that the defendant was connected in any manner with the excavation, either in the use or the maintenance thereof, the petition was properly dismissed on demurrer.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 644; Dec. Dig. § 169.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action between D. N. Ledbetter and the Savannah Brewing Company. From the judgment, Ledbetter brings error. Affirmed.

Twiggs & Gazan, for plaintiff in error. Anderson & Cann, for defendant in error.

HILL, C. J. Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

(8 Ga. App. 277)

McGOVERN BROS. & LOTT v. WINSTEAD MEDICINE CO. (No. 2,861.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

*(Syllabus by the Court.)***EVIDENCE (§ 370*)—SALES (§ 52*)—DOCUMENTS—PROOF OF EXECUTION—EVIDENCE OF SALE.**

The court erred in directing a verdict for the plaintiff. The execution of the written order for the goods was not proved, nor the fact that the defendants ever received or accepted the shipment. If the plaintiff had sued upon the order, the defendant would have been obliged to deny its execution in a sworn answer. But when the contract was introduced in evidence in support of the account, the defendant had the right to insist upon the proof of its execution, and the fact that the contract, apparently executed at Holton, La., was sent by the plaintiff's Louisiana salesman, purporting to be signed by a firm doing business in Douglas, Ga., did not prove that the latter had signed it. If the plaintiffs had proved that the defendant gave the order, the proof of the delivery of the goods to the common carrier would have established a prima facie right of recovery; but proof of delivery to the carrier, without more, raised no presumption that the goods were bought or received by the defendants.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1559-1579; Dec. Dig. § 370;* Sales, Cent. Dig. § 118; Dec. Dig. § 52.*]

Error from City Court of Douglas; C. T. Roan, Judge.

Action by the Winstead Medicine Company against McGovern Bros. & Lott. There was a directed verdict for plaintiff, and defendants bring error. Reversed.

Lankford & Dickerson, for plaintiffs in error. J. W. Quincey and J. N. McDonald, for defendant in error.

RUSSELL, J. Judgment reversed.

(8 Ga. App. 228)

MARKS v. STATE. (No. 2,787.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

*(Syllabus by the Court.)***1. CERTIORARI (§§ 1, 17, 31, 36*)—NATURE AND SCOPE OF REMEDY.**

The right of certiorari is a constitutional right, and may be used to review any judgment of an inferior judiciary. The right of certiorari may be exercised without moving for a new trial in the court in which the case was tried, or it may be used as a means of reviewing the judgment upon the motion for a new trial; and the right is unaffected by anything that may have transpired in the lower court, if the remedy is pursued in time.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 1, 22, 51, 52, 88; Dec. Dig. §§ 1, 17, 31, 36.*]

2. CERTIORARI (§ 44*)—PETITION—PRESUMPTION OF VERITY.

The statements of a petition for certiorari, properly verified when the petition is presented for sanction, are to be presumed true until the coming in of the answer. As the evidence upon the trial, as appears from the brief of the evidence approved by the judge of the city court as incorporated in the petition for certiorari, did

not authorize the conviction of the defendant, his certiorari should have been sanctioned.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 98-107; Dec. Dig. § 44.*]

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Henry Marks was convicted of crime, and he brings error. Reversed.

Doyle Campbell, for plaintiff in error. Jos. E. Pottle, Sol. Gen., for the State.

RUSSELL, J. Judgment reversed.

(8 Ga. App. 223)

WIMBUSH v. CURRY. (No. 2,142.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

*(Syllabus by the Court.)***1. JUSTICES OF THE PEACE (§ 106*)—LANDLORD AND TENANT (§ 326*)—RENTS—TIME FOR COLLECTION—DISMISSAL.**

The justice of the peace did not err in dismissing the suit. The account attached to the summons was upon its face barred by the statute of limitations, and it was not verified by the affidavit of the plaintiff, so as to require the court to continue the case until the next term of the court. The judge of the superior court erred in sustaining the certiorari. (a) In the absence of a contract to the contrary, the landlord's right to collect his part of the crop, as well as to demand payment for any supplies furnished by him to aid in making the crop, accrues upon the maturity of the crop, and is not postponed until the end of the year.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 850; Dec. Dig. § 106;* Landlord and Tenant, Dec. Dig. § 326.*]

*(Additional Syllabus by Editorial Staff.)***2. LIMITATION OF ACTIONS (§ 43*)—ACCRUAL OF RIGHT OF ACTION.**

Statutes of limitations begin to run from the time that the right of action accrues.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 217-218; Dec. Dig. § 43.*]

3. LIMITATION OF ACTIONS (§ 53*)—ACCRUAL OF RIGHT OF ACTION—ENTIRE ACCOUNT.

In the case of an entire account, limitations begin to run from the date of the last item in the account.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 285; Dec. Dig. § 53.*]

Error from Superior Court, Butts County; E. J. Reagan, Judge.

Action by F. Z. Curry against Sank Wimbush. Judgment for plaintiff, and defendant brings error. Reversed.

J. T. Moore and Y. A. Wright, for plaintiff in error. C. L. Redman, for defendant in error.

RUSSELL, J. The defendant in error brought a suit in a justice's court against the plaintiff in error. The summons was dated December 31, 1908. Though an affidavit had been prepared for execution, as appears from the record, the proposed affidavit was neither signed nor sworn to by the plaintiff, nor was the jurat signed by any

one. So that the account was not verified. Upon the call of the case in the justice's court at the first term, the plaintiff in error demurred to the suit, upon the ground that the account sued on was barred by the statute of limitations, as appears upon the face of the account itself. The magistrate sustained this demurrer and dismissed the suit. Upon certiorari to the superior court, the judgment of the justice of the peace was set aside, and it was ordered that the case be tried. We think this judgment was error, and that the certiorari should have been overruled and dismissed. The plaintiff's account as attached to the summons plainly shows that it was for indebtedness due to a landlord. Starting with an undated "balance due from the account of 1903," the dates of the several items embraced in the account range from January 8, 1904, to November 21, 1904. The last item is a charge of \$50 for the rent of two mules, dated November 21st. The several items of the account aggregate \$812.62. There is a credit for certain work in the month of April, which follows charges of cash items of the same date, and the last item of the account to which we have referred is followed by a credit for the crop of 1904 as a whole, amounting to \$699.19.

From the statement of the account, it is apparent that the last item charged would have become barred on November 21, 1908, unless, as insisted by the counsel for the defendant in error, there is something which would suspend the operation of the statute of limitations. It is insisted in the argument that the bar of the statute was suspended because it is the custom between landlord and croppers to settle at the end of each year. Whether this custom prevails or not, it does not appear from the face of the account; and certainly this custom does not supplant the law. It is a general principle that statutes of limitation begin to run from the time that the right of action accrues. In the absence of a contract to the contrary, a landlord's right to collect his rent, as well as to collect for any supplies he may have furnished to aid in making the crop, arises upon the maturity of the crop. It would never do to hold that a landlord could not proceed to collect advances or rent until the end of the year, for if this was the case, in most instances the right of action would be absolutely worthless. It is a matter of common knowledge that the staple crops of this state mature before the end of the year and the statement of this very account bears evidence of that fact in the credit given the cropper for the crop which seems to have been sold to the landlord. The statement, too, of this credit, causes the account upon its face to evidence that there had been settlement of some kind between the plaintiff and the defendant prior to December 31, 1904, which would have given the plaintiff the

right to commence an action for the unpaid balance even if he had not been a landlord. So far as the account shows upon its face, every item was barred by the statute of limitations when the suit was commenced on December 31, 1908, for there is nothing to indicate that the account was in any of those classes (referred to in section 2885 of the Civil Code of 1895) whose accounts, by custom, become due at the end of the year. Happily for the agricultural landlord, no custom postpones his right of action to collect what is due him either for rent or for supplies after a sufficiency of the crop of the year is sufficiently matured and gathered to pay the same. If custom is the result of universal understanding between landlords and croppers and landlords and tenants, we would say that this was the custom of the country. The law fixes the landlord's special lien for rent on the crop by the date of the maturity of the crop. *Saulsbury, Respass & Co. v. McKellar*, 59 Ga. 302. See, also, *Thompson v. Commercial Guano Co.*, 93 Ga. 282, 20 S. E. 309, and *Colding v. Williamson*, 71 Ga. 89. Upon the face of the account, it seems to have been an entire account between the parties, being the balance for the year 1903, and an itemized account for the year 1904, and consequently the statute began to run against it from the date of the last item in the account, November 21, 1904. This is said on the view that the plaintiff may not be a landlord. If, as is apparently the case, the plaintiff's account evidences the indebtedness of a cropper or a tenant to a landlord, then this account for supplies furnished by the landlord was due when the crop of 1904 was mature. The landlord has the benefit of summary foreclosure, and this remedy is applicable when the tenant fails to pay his rent, or disposes of any portion of the crop without paying the landlord for necessary advances. For this reason, we think it plain that the statutory bar began to run when the defendant in error saw proper to convert his demand into an open account by failure to use his statutory remedy of foreclosure. As the demurrer was properly sustainable under the ruling in *Colding v. Williamson*, supra, we think the court erred in sustaining the certiorari. The case is not affected by the provision of section 4130, because the record shows that the account was not verified by the affidavit.

Judgment reversed.

(3 Ga. App. 246.)

PRUDENTIAL INS. CO. OF AMERICA v.
CHESTNUT. (No. 2,296.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

(Syllabus by the Court.)

1. INSURANCE (§ 367*)—LIFE INSURANCE—CONSTRUCTION OF POLICY.

There was no error in overruling the demurrer to the plaintiff's petition. Construing

the insurance policy as a whole, it is apparent that the insurance was in force at the date upon which one of the insured parties died. As the insurance company accepted the payment of the premium quarterly, instead of annually, the insured, in any view of the case under the expressed provisions of the contract, would have had 120 days of extended insurance from the day on which there was default in the payment of the quarterly premium.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 935, 938; Dec. Dig. § 367.*]

(Additional Syllabus by the Editorial Staff.)

2. INSURANCE (§ 146*)—CONSTRUCTION OF POLICY.

A contract of insurance being prepared by the insurer should be at least reasonably construed in favor of insured, and where there are conflicting provisions, rendering the real intent of the parties doubtful, public policy requires that that construction be adopted which is most favorable to insured, and every part of the contract will be considered in connection with every other part in an effort to reach the true intent of the parties.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by T. R. Chestnut against the Prudential Insurance Company of America. Judgment for plaintiff, and defendant brings error. Affirmed.

McDaniel, Alston & Black, for plaintiff in error. Moore & Pomeroy, for defendant in error.

RUSSELL, J. We see no error in the judgment overruling the demurrer which the defendant insurance company filed in the court below, to which exception is taken. By the demurrer it is insisted that the plaintiff's petition fails to set forth a cause of action because it is apparent from the contract of insurance which is attached to the petition that the insurance policy had lapsed. From an examination of the policy it appears that this is a contract by which the Prudential Insurance Company undertook to insure the joint lives of Thomas R. Chestnut and Ruby Valentine Chestnut, the amount of the policy being payable to the survivor. The petition alleges that all of the premiums were paid in quarterly installments, and that the petitioner paid to the defendant the premiums for two years and six months, and that all premiums due and payable upon the policy up to and including December 21, 1908, were paid. The petitioner, therefore, sets up that by the operation of the policy it is extended for 331 days from December 21, 1908, and that the extended insurance was in force at the time of the death of Ruby Valentine Chestnut, the insured, July 8, 1909.

In supporting its contentions that this insurance policy had lapsed, the plaintiff in error insists that the paid-up joint life policy provided for by the contract in the form of extended insurance applies only after the

policy, has been in force three full years. The argument in favor of this contention is attempted to be supported by a stipulation in the contract which reads as follows: "If this policy, after being in force three full years, shall lapse or become forfeited for the nonpayment of any premium on the date when due as specified on the first page hereof, or of any note given for a premium or loan made in cash on such policy as security, or of any interest on such note or loan, it may be surrendered for a nonparticipating paid-up joint life policy as specified in the following table, provided the policy be legally surrendered to the company within three months after the date on which premiums have been duly paid. If this policy having lapsed or become forfeited as above be not surrendered for a paid-up joint life policy, the company will write in lieu of this policy without any action on the part of the insured, a nonparticipating paid-up joint term policy for the full amount insured by this policy. Such paid-up joint term policy to be dated on the day to which premiums have been duly paid and to continue in force for the term indicated by the following table." It is insisted by counsel for plaintiff in error that this sentence in the policy clearly indicated that the paid-up joint life policy shall apply only after the policy has been in force three full years. The plaintiff in error attempts to void the provisions contained in a table providing for cash loan values, paid-up joint life policy values, extended insurance values, and cash surrender values headed "Privileges" by pointing out that there is no cash loan privilege or joint life policy nor any cash surrender value as a privilege until the end of three years, and that, though there is a privilege given for extended insurance of 60 days at the end of one year and of 120 days at the end of 2 years, these privileges must be construed as special privileges subject to and conditional upon the language under the heading of "Special privileges," to wit, "Policy nonforfeitable after the first year's premium has been paid. If this policy, after being in force one full year, shall lapse for nonpayment of premium, the company will continue in force the insurance under the policy for a period of 60 days from the due date of such premium as specified on the first page hereof. If this policy, after being in force two full years, shall lapse for nonpayment of premium, the company will continue in force the insurance under the policy for 120 days from the due date of such premium, provided, however, that, if the death of either of the insured shall occur during the period of continued insurance herein defined, there shall be deducted from the amount payable by the company any premium that would have become due on this policy up to the time of such death, if the policy had been continued in force. After

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the policy has been in force for 3 or more years, the above privilege, 'Paid by the joint life policy or extended insurance,' will apply." It is insisted that this clause shows that the 60 days and 120 days extended insurance named in the table "is not to be considered as extended insurance under the policy, but as special privilege agreed to by the company under the policy." We think this is a distinction without a difference, because the plaintiff's right is the same whether the stipulation above quoted is to be considered as an extended insurance value under the policy, or as a special privilege, provided it is likewise included in the policy. Whether the extended insurance is a special or a general privilege, it is very plain, from the provisions of the policy set out in plaintiff's petition, together with the statement that the premiums were payable quarterly, that the holder of the policy had a right to extended insurance when he had paid the premiums for one year and for two years, and we fail to see why he would not have the same right merely because he had paid two years and a half instead of two years. In fact, the policy itself provides that, "if the premiums on this policy be paid in quarterly or semiannual installments, due allowance will be made in computing benefits from the above table for that portion of a year's premium paid over and above the full number of years' premiums indicated."

The insistence of the defendant in error is that, under this latter clause, he is entitled to extended insurance based upon the additional extended insurance to which he would be entitled when the policy was $2\frac{1}{2}$ years old over what extended insurance he would be entitled to when the policy was 2 years old. The plaintiff seems to have reached the extent of his extended insurance as claimed in his petition by deducting from the duration of extended insurance to which he would have been entitled if the premiums for three full years had been paid the 120 days of extended insurance allowed for the payment of the first two years' premiums, and dividing the difference by two. The amount of the extended insurance if the premium had been paid for three years would be 542 days. The extended insurance for the 2 years is 120 days. The difference 422 days and the half which would be apportioned for the premiums paid for the additional 6 months would be 211 days, which would extend the policy from December 21, 1908, to a date beyond July 8, 1909, when Mrs. Chestnut, the insured, died.

We need not decide whether the judgment overruling the demurrer can be sustained by the method upon which the plaintiff based his calculations as to the duration of the extended insurance. There is no difficulty whatever in determining that the policy had not lapsed when the allegations of the petition that the payments were paid quarterly, and that the premium due December 21, 1908, was

paid, are construed with other clauses of the contract. It must be remembered that the contract was prepared by the insurance company, and is to be at least reasonably construed in favor of the insured. Where there were any conflicting provisions which render the real intent of the parties doubtful, public policy requires that that construction be placed upon the policy most favorable to the insured. And every part of the contract will be considered in connection with every other part in an effort to reach the true intent of the parties in making the contract. Certainly it cannot be said that the contract will authorize the construction which would give the insured less rights because he had paid the premiums for two years and a half than he would have had when he had only paid premiums for two years. Certainly the fact that the company had received the premiums for the additional six months must be taken into consideration, and it cannot be held that the insurer should be permitted to take this much money without giving anything in return. The demurrer admits that the premiums in this case were paid quarterly, and the policy provides for such a payment, and goes on to say that in such a case "due allowance will be made, in computing benefits from the above table, for that portion of a year's premiums paid over and above the full number of years' premiums indicated." The only difference between the benefits conferred by the table upon those who have paid only one year's premium or two years' and those who may have paid more is that, while those who have paid premiums for one year and two years have the privilege of definitely fixed extended insurance, they are not entitled to cash loan values, cash surrender values, or a paid-up joint life policy. But the second clause of the "Special privileges" provides that, if this policy "after being in force two full years shall lapse for nonpayment of premium, the company will continue in force the insurance under the policy for 120 days from the due date of such premium." This is followed by a provision that any unpaid premiums shall be deducted from the amount to be paid by the company. Treating the scheme of the company as a fair and equitable one, the next quarterly payment (after the one which was paid on the 21st of December, 1908) was due March 21, 1909. It was not paid. But the policy had been in force two full years and more. One of two things was obliged to happen. Either the company after having received the premium due on December 21, 1908, would have it in its power to put the insured in a worse condition than if he had not paid that money, or else, as it is undenied that two full years' premiums had been paid, the holder of the policy would be entitled at least to as much extended insurance as he would have been if only two years' premiums had been paid and no more. By no method of computation could one who had

paid more than two years' premiums be entitled from the reserve fund of the company in which he has an interest to a less amount than he would be entitled to if he had paid exactly two years' premiums. By any process of reasoning this contract would come in the class of those which had been in force two full years, and the plaintiff would be entitled to an extension of 120 days from March 21st, which was the due date of the quarterly premium. This would have extended the policy to July 19, 1909, and consequently there can be no question but that the extended insurance was in force on July 8, 1909, when Mrs. Chestnut died. The provision in regard to a "paid-up joint term policy," on which the counsel for plaintiff in error relies, of course, has no reference to the state of affairs such as those detailed in the petition, because that provision has special reference to a policy which has been in force for three full years. It is, however, not a paid-up joint term policy, but the benefit of the provision in regard to extended insurance for a definite time, which the plaintiff seeks to recover by his petition.

Judgment affirmed.

(8 Ga. App. 253)

SUMMERFORD v. KINARD.

KINARD v. SUMMERFORD. (Nos. 2,819, 2,820.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 139*)—WAIVER OF SERVICE OF MOTION.

One who appears at the time and place set for a hearing of the motion for a new trial and orally agrees to the brief of evidence filed with the motion, but who, after the judge has corrected and approved the brief of evidence, moves to dismiss the motion for a new trial for want of service, can properly be held to have waived any formal service of the motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 279; Dec. Dig. § 139.*]

2. TROVER AND CONVERSION (§ 16*)—TITLE TO SUPPORT ACTION—RIGHT OF POSSESSION.

The evidence was sufficient to show such constructive delivery of the chattel as to complete the sale and pass title to the plaintiff. However, even if there was doubt upon this point, the evidence of the plaintiff's right of possession was sufficient to authorize a recovery in trover.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 119-147; Dec. Dig. § 16.*]

Error from City Court of Sylvester; J. B. Williamson, Judge.

Action by E. B. Kinard against J. H. Summerford. Judgment for plaintiff and defendant brings error; plaintiff filing cross-exceptions. Judgment on main bill of exceptions affirmed, and cross-bill dismissed.

Perry & Foy, for plaintiff in error. Claude Payton and C. E. Hay, for defendant in error.

RUSSELL J. In the main bill of exceptions, error is assigned upon the judgment overruling a motion for a new trial; and by a cross-bill error is assigned upon the refusal of the trial court to dismiss the motion for a new trial for want of service.

1. We will first consider the cross-bill of exceptions. It appears from the record that at the hearing of a motion for a new trial which had been filed by Summerford, Mrs. Kinard, the respondent, moved to dismiss the motion "for want of sufficient service on her, there being no official entry of service of a copy of said motion on her, or of the rule nisi or other part of said proceeding, and no acknowledgment of such service and no written waiver of such service, which said motion to dismiss the court overruled on the ground that it came too late, it being made after counsel for both sides had orally agreed to the correctness of the brief of evidence, and after the court had approved the brief of the evidence and the amended motion for a new trial, and after the court had orally announced its decision on the motion for a new trial." However, the motion to dismiss was made before the court had written or signed its judgment on the motion for a new trial.

We think the court properly refused to dismiss the motion for a new trial. The only purpose of the service of a motion for a new trial is to give the respondent such timely notice as will enable him to prepare for the hearing and to enable him, if he can, to show cause why a new trial should not be granted. The motion in this case does not contain any statement that the respondent was less prepared to resist the motion for a new trial than he would have been if he had been duly served. Of course, service of a motion for a new trial is always necessary in order to give notice, but formal service may be waived, and in this case under the facts stated, we think it was waived. In an ordinary suit service may be waived by appearance and pleadings. In the case of a motion for a new trial where ordinarily the respondent is not required to plead, we think appearance and participation in the preparatory steps necessary to perfect the motion is such a circumstance as that it may be inferred that the respondent had notice of the pendency of the proceeding equivalent to that which would have been given him of actual service, and, where no point is made to the effect that the notice was not given in sufficient time to enable the respondent to prepare for the hearing, it can be presumed that any formal service was waived.

2. Mrs. Kinard brought an action of trover to recover from Summerford a set of harness. According to the testimony for the plaintiff, Summerford sold Mrs. Kinard a set of harness in the settlement of a debt, and Mrs. Kinard was to get the harness whenever she sent for it. The defendant denied having

sold the harness to Mrs. Kinard. The jury, by finding for the plaintiff, sustained the theory that Summerford sold the harness to Mrs. Kinard, and held them as her agent until she should call for them. We think the evidence is sufficient to establish constructive delivery and perfect the sale. Or, construing it in another way, the jury were authorized to find that, by the terms of the sale, a bailment was created, and that the harness was thereafter in the possession of Summerford as Mrs. Kinard's agent who was holding them for her use. In either event, the verdict in favor of the plaintiff would withstand the point raised against it by the plaintiff in error.

It was not necessary that the plaintiff should show that she was in possession of the harness if the jury believed her testimony, and that she bought them from Summerford and had paid for them. According to this testimony, the manual delivery was to be postponed until Mrs. Kinard called for the harness. This gave her the right of possession, and, upon her demand being refused, the right of possession would afford ground for an action of trover. The right of possession wrongfully withheld may authorize a recovery in trover. See *Roper Wholesale Grocery Co. v. Favor*, 8 Ga. App. —, 68 S. E. 883.

Judgment on the main bill of exceptions affirmed; cross-bill of exceptions dismissed.

(8 Ga. App. 243)

CENTRAL OF GEORGIA RY. CO. v. BUTLER. (No. 2,271.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—NEGLECT—PRESUMPTION.

The court did not err in refusing to award a nonsuit. The evidence was sufficient to authorize the jury to infer that the plaintiff's injury was attributable to the negligent act of a person in the employment of the railroad company, which would raise the statutory presumption of negligence on the part of the company. Civ. Code 1895, § 2321.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 877-908; Dec. Dig. § 265.*]

2. MASTER AND SERVANT (§ 284*)—INJURY TO SERVANT—SUFFICIENCY OF EVIDENCE.

Even if there had been no statutory presumption of negligence, it would have been proper for the court to have submitted to the jury the circumstance that the instrument which caused the plaintiff's injury was in the control and under the management of the defendant, and to have allowed the jury to determine, from the circumstances under which the casualty occurred, whether the defendant had satisfactorily explained the occurrence and rebutted the inference of negligence arising from the event, if, indeed, negligence could be inferred from the nature of the occurrence. In any case where the inference of negligence may as well be drawn as the inference that the casualty resulted from accident, it is error to award a nonsuit. Even if the explosion of a tank used to hold Pintsch

gas is not such an unusual occurrence as to support the inference that an injury resultant from the explosion was due to the negligence of the defendant's servants having the tank in charge and engaged in repairing it, the evidence in behalf of the plaintiff showed that he was himself free from fault, and that the injury was inflicted upon him by the acts of others in the employment of the defendant railroad company. This raised the presumption that the defendant was negligent in the respects alleged in the petition, and presented a prima facie case, which was properly submitted to the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1004, 1005; Dec. Dig. § 284.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Charlie Butler against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Butler sued the Central of Georgia Railway Company upon the following cause of action: He was in the employ of the defendant as a helper around the defendant's machine and repair shop. He was at work as a helper to the carpenters, and had been sent to carry some irons into the boiler room. He did so, and, as he started out, the tank exploded, causing the injury described in the petition. A Pintsch gas tank used on passenger cars for illuminating purposes was being repaired in the boiler shop. It contained a large amount of illuminating gas, which was highly explosive, and this gas precipitated an oil coating on the side of the tank, which, when heated, forms a highly explosive gas. The machinist and his helper were repairing this tank or reservoir. The plaintiff had nothing to do with its repair. The tank was being repaired by heating a dented place so as to soften the metal, and then turn on compressed air to force it out in its proper shape. Twenty pounds of air pressure was all it could safely stand, but the defendant's servants turned on a pressure of over 60 or 65 pounds. This large amount of moist air coming in contact with the gas residue remaining in the tank and with the gas generated by the heating of the coating precipitated upon the side of the tank and with the heated sides of the tank caused a violent explosion. The plaintiff did not know that the tank was likely to explode, or that it was going to explode, and nobody had warned him as to the danger of an explosion. The petition charged the defendant with negligence in the following particulars: (1) In causing said reservoir to be heated while it contained illuminating gas. (2) In causing compressed air to be forced into said reservoir while it had illuminating gas stored in it. (3) In causing a high and dangerous pressure of moist compressed air to be turned into the tank or reservoir, to wit, a pressure of 60 to 65 pounds. (4) In failing to furnish, keep, and maintain a safe

place of work for plaintiff. (5) In failing to notify and warn plaintiff that the tank was likely to explode, and that it was dangerous for plaintiff to be near it.

The plaintiff's evidence established the following facts: He was at work for the defendant on February 23, 1909, as a carpenter helper, toting iron and stuff backward and forward to the carpenters. On that day the gas tank burst and the plaintiff was hurt. He went into the boiler room to carry some corner irons to be cut off and a couple of holes bored in them. When he had put the corner irons down and had gotten within about four feet of the tank, going to the blacksmith's shop, the tank burst, and something struck him and knocked him unconscious, breaking his skull, burning his arm, and injuring his finger. He was working under a carpenter named Long who sent him into the boiler room. He went to the boiler shop and carried the things where he was ordered to carry them. Nobody told him there was any danger in being around the tank. He did not know that the tank was going to explode or was likely to explode, and nobody had warned him as to the danger of an explosion. A witness for the plaintiff testified that he was a boiler maker, and at the time the plaintiff was injured was at work for the defendant. That day a gas tank exploded. This gas tank had been used for storing Pintsch gas on passenger or sleeping cars, and had been damaged or mashed out of shape. He and his helper were working on it. He was heating it and putting the pressure of compressed air in it. At the time of the explosion he had turned the air into the tank while it was heated. Twenty pounds of air were first turned on, but this did not cause an explosion. Then the foreman, Mr. Linder, turned on about 60 or 65 pounds. In a short time after this high pressure was turned on the explosion occurred. The plaintiff had nothing to do with the work on the tank. The tank was not of the latest kind, but of the old kind, and the air that was used in the tank was very damp. The plaintiff proved that his age was 23 years, and introduced mortality tables. Some other evidence was introduced as to the nature of the plaintiff's injuries, but it is not material to the issue presented. Upon the conclusion of the plaintiff's testimony, the defendant moved for a nonsuit, which the court refused, and exception is taken to the judgment refusing to nonsuit.

Lawton & Cunningham, for plaintiff in error. Osborne & Lawrence, for defendant in error.

RUSSELL, J. (after stating the facts as above). We think it would have been error to have nonsuited the plaintiff. We are clearly of the opinion that the evidence was sufficient to show that he received his injury

at the hands of a person in the employment of the defendant. There is no dispute as to this fact, unless it be assumed that the explosion was an accident, and only the jury could act upon this assumption. The evidence being sufficient to raise the statutory presumption under section 2321 in the Civil Code of 1895, the plaintiff had proved a prima facie case placing upon the defendant liability for the negligence alleged in the petition, which it was the duty of the defendant to rebut. But, even if this had not been the case, the explosion of the tank was such an unusual circumstance that the jury might have inferred from this unusual circumstance and the fact that the tank was in the possession and control of the defendant at the time, that the thing spoke for itself of negligence. In that event the burden would have been cast upon the defendant of showing what was the real cause of the explosion, or that the defendant was not liable therefor. The ruling of the court in refusing a nonsuit was clearly right.

Judgment affirmed.

(8 Ga. App. 221)

MARSHALL v. WOODBURY BANKING CO.
(No. 2,127.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

(Syllabus by the Court.)

TRIAL (§ 142*)—QUESTION FOR JURY—INFERENCES FROM EVIDENCE.

A verdict for the plaintiff was not demanded by the evidence, and the court erred in directing the verdict in this case. In any case where the evidence may be subject to more than one construction, or where more than one inference may be drawn, even from undisputed facts, the duty of solving the mystery should be placed upon the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. § 142.*]

Error from City Court of Greenville; H. H. Revill, Judge.

Action by the Woodbury Banking Company against Mrs. T. J. Marshall. There was a directed verdict for plaintiff, and defendant brings error. Reversed.

W. R. Jones, and J. Y. Allen, for plaintiff in error. Hill & Culpepper and Greene F. Johnson, for defendant in error.

RUSSELL, J. Judgment reversed.

(8 Ga. App. 255)

HARTMAN STOCK FARM v. HENLEY
et al. (No. 2,321.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

(Syllabus by the Court.)

1. EVIDENCE (§ 431*)—PAROL EVIDENCE—DENYING EXECUTION OF WRITTEN INSTRUMENT.

There was no error in overruling the demurrer to the defendants' plea. While parol evidence is inadmissible to vary the terms of

a written contract, it is always permissible for the defendant to show, if he can, not only that the writing was not in fact executed by him, but even in a case where execution is admitted that the written instrument was never in fact delivered as a present contract, unconditionally binding upon the obligor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1969, 1975-1980; Dec. Dig. § 431.*]

2. TRIAL (§ 139*)—DIRECTION OF VERDICT.

The court erred in directing a verdict for the defendants for the reason that a finding in favor of their answer was not demanded. Their antecedent and coexistent obligation in writing which related to the same subject as the note sued upon and provided for their joint and several liability would have authorized a recovery in favor of the plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332-341; Dec. Dig. § 139.*]

3. EVIDENCE (§ 420*)—PAROL EVIDENCE—VARYING WRITTEN CONTRACT.

One who in the purchase of personal property enters into a written obligation, agreeing to pay therefor a certain stipulated sum and to execute notes with others, imposing upon the makers joint and several liability therefor, will not be heard thereafter to prove by parol conditions contradictory to a writing which, it is not denied, was executed as to signature as well as finally delivered.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1929-1944; Dec. Dig. § 420.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Hartman Stock Farm against J. T. Henley and others. Judgment for defendants, and plaintiff brings error. Reversed.

J. S. James, for plaintiff in error. Roberts & Hutcheson, for defendants in error.

RUSSELL, J. The Hartman Stock Farm brought a suit upon a promissory note for \$933, attaching a copy of the note to its petition. The defendants filed an answer, in which they set up that the note was not binding upon them, for the reason that an agent of the plaintiff represented to them that in the event that any of the purchasers of a certain horse (which was the consideration of the note), and especially W. C. Abercrombie, W. J. Camp, and T. S. Abercrombie, should fail or refuse to sign the note with them, the note was to be a nullity, and not to be delivered to the plaintiff. The plaintiff demurred to the answer of the defendants, especially upon the ground that the answer undertakes to add conditions to the note other than those stated and to vary its terms. The main insistence of the plaintiff's demurrer was that the defendants' answer tended to let in parol evidence to vary the terms of the writing, which was the basis of the suit.

We think the court properly overruled the plaintiff's demurrer to the answer. As was held in *Heltmann v. Commercial Bank*, 6 Ga. App. 584, 65 S. E. 590, a written instrument "may, by parol or other extrinsic evidence,

be shown not to be a contract at all, because of the nonperformance of a condition precedent as to which the writing is silent. * * * It may be shown by parol or other extrinsic evidence that the writing is not a valid or enforceable legal obligation because it does not possess finality of utterance as a completed, all-comprehensive, and presently operative embodiment of the entire agreement of the contracting parties." It is manifest, as pointed out in the *Heltmann Case*, that there is a very marked difference between allowing parol evidence for the purpose of varying the terms of a writing whose execution and delivery is not denied and allowing proof, even though it be parol, for the purpose of showing that on account of the nonperformance of some condition, perhaps not stated in the instrument, the alleged contract was in reality never created at all. And in that case we cited a number of authorities in this state and from other jurisdictions in which it has been held that it may be shown even by parol that a writing absolute on its face and whose terms are not disputed has never become operative as a binding contract because of a contingency which was the subject of an extrinsic agreement not referred to in the writing itself. In the present case, in answer to the plaintiff's petition, the defendants had the right to set up, if they could, that they signed the note, not as a completed contract, but subject to the condition that the note was to become binding only when signed by all of a number of designated persons, and that none should be bound unless all of those whom it was agreed should sign the note did in fact sign it. While parol evidence is inadmissible to alter or vary the terms of a written contract, where the contract itself is admitted or proved, the delivery of a writing is as essential as its signing. Each one of the parties who signed the note in this case had the right to show that his execution of the note depended upon all of the parties signing who had agreed to sign with him, and that the completion of the contract and the delivery of the note itself were to be postponed and be subject to this condition. It was immaterial whether this condition was stated in the note or not, for, if those who signed the note did show this distinct understanding, the note was not complete or executed until all had signed the instrument whose signatures were necessary to make it complete in accordance with the agreement. Section 3706 of the Civil Code of 1895 which provides that "any fact going to show that the original contract was not obligatory, though executed, may be set up as a defense," is closely akin to the principle which we have just stated, though, of course, where it is expressly agreed that an instrument is to have no effect until three designated persons sign it and only two of them in fact sign,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

'the proposed contract fails to come into being as a legal entity. In such a case evidence brought to attack it cannot be classified as being introduced for the purpose of varying the terms of a contract, but is rather as an effort to deny its existence.

2. The court erred in directing a verdict for the defendants for the reason that a finding in favor of their answer was not demanded. Their antecedent and coexistent obligation in writing, which related to the same subject as the note sued upon, and provided for their joint and several liability, would have authorized a recovery in favor of the plaintiff. All of the defendants who were sworn testified that Johnson, whom they asserted to be an agent of the plaintiff, procured their signature to the note only upon his expressed assurance that the note should not be binding unless it was signed by all of those who had subscribed for the stallion, and especially unless it was signed by W. J. Camp, T. S. Abercrombie, and W. C. Abercrombie, and that the note was to be void and to be canceled unless these parties did in fact sign it. There was no evidence sustaining that portion of the defendants' answer in which it was insisted that the three shares alleged to have been sold to W. J. Camp, W. C. Abercrombie, and T. S. Abercrombie were never in fact sold or subscribed for by them in good faith. On the contrary, the plaintiff introduced the following contract, which was not only signed by the defendants, but by W. J. Camp and the two Abercrombies:

"Douglasville Ga. Aug 10, 1905. Name of stallion: German Coach Daemon, # 636. Hartman Stock Farm agree to sell the above-named stallion for \$2,800 to the other undersigned subscribers, who, wishing to improve their stock, agree to pay Hartman Stock Farm \$200 for each share in the said stallion. Capitol stock \$2,800. Number of shares, 14. Payments to be made in cash, or one-third in one year, one-third in two years, and one-third in three years after Aug. 15, 1905. Secured by joint and several negotiable notes, with interest at seven per cent. per annum.

Hartman Stock Farm.	Shares.
A. S. Baggett & Co.....	2
W. J. Camp.....	1
W. W. Selman & Sons.....	1
F. M. Yancey, Jr.....	2
W. C. Abercrombie & Bro.....	2
J. T. Henley.....	1
C. W. McGouirk.....	2
T. S. Abercrombie.....	1
J. H. Brock.....	1
L. G. Camp.....	1

14"

This contract was pre-existent and coexistent with the note itself, and could have as well afforded the basis for a suit as the note itself. This contract of sale and purchase, it will be noted, was made five days prior to the purported agreement of August

15, 1905, by which the signers to the latter instrument agreed among themselves to form a stock company. The execution and delivery of this contract of purchase not being denied, the Hartman Stock Farm could not be affected in any way by the subsequent agreement of the subscribers to form a stock company, or by a subsequent parol statement that none should be bound on the note unless others signed with them. The parties who signed the obligation which we have quoted above would be jointly and severally bound for the amount therein specified whether they afterwards succeeded in forming a corporation or not, and even if Johnson, as agent, agreed that he would form the corporation for them. The defendants are not prejudiced in any of their rights under the obligation voluntarily assumed by them on August 10, 1905, by reason of the fact that the two Abercrombies and W. J. Camp did not sign the note. The obligation of the notes was to be several. Certainly, when this contract was introduced by the plaintiff, it became a question of fact for the jury whether the defendants signed the notes as they testified because of Johnson's representations, or in pursuance of their agreement and written obligation made several weeks before to make just such a note. In fact, it is questionable whether under the answer as filed the testimony introduced in behalf of the defendants could seriously be considered in the face of the written agreement and while its validity is unquestioned. We do not rule upon this at this time, but it would seem to be a violation of the rule invoked by the counsel for the plaintiff in error to permit the defendants to vary the terms of the agreement of August 10th by parol testimony in conflict therewith. To say the least of it, however, the introduction of this contract by which the defendants agreed to buy the horse in question and to give their several note raised such an issue as should have been submitted to the jury. It is to be noted, too, that the defendants did not plead that the horse was not delivered to any one of the defendants, nor is there any plea that the horse was not all that he was represented to be. The whole contention of the defendants' answer upon this subject is that the horse was not delivered to the corporation which the defendants insist the plaintiff agreed to form. It seems that this proposed corporation was to be known as the Douglasville German Coach Horse Company, and on August 15, 1905, all of the parties who signed the contract of purchase of August 10th agreed to form a corporation by this name. Of course, this did not effectuate an incorporation, but the difficulty is that the agreement of August 10th, which we have quoted and which is signed by the Hartman Stock Farm, as well as by the defendants, was not made with the Douglasville German Coach Horse Company, but with certain individuals, part of

whom are the defendants in this case. It is perhaps true that the defendants made a bad trade. They may have been overreached in making it; but the record shows that they failed to set aside the contract of August 10, 1905, by which they bound themselves to do the same thing, no more and no less than the note which they attempted to disown requires of them. If the Abercrombies and W. J. Camp, as the evidence discloses, are men of large means, the defendants have their right of contribution preserved unimpaired by the contract which the Abercrombies and W. J. Camp appear to have signed.

As we stated above, the plaintiff could have proceeded upon the contract against all the parties instead of suing on the note which was not signed by three of those who signed the contract; but the failure of these three to sign the note will not relieve them from the obligation of the pre-existing contract in which they agreed to sign just such a note.

There is considerable testimony in the record in regard to the nondelivery of the horse. The testimony of the witnesses, however, is to the effect that the horse was not delivered to any member of the Douglasville German Coach Horse Company as such. As we have stated above, neither the contract nor the note was entered into by the Douglasville German Coach Horse Company, or refers to it. The Hartman Stock Farm is not a party to the contract or agreement of the subscribers who agreed to form this corporation. There is no evidence that the Hartman Stock Farm ever delegated to any of its agents the authority of forming corporations. In the absence of such evidence, authority to form a corporation cannot be implied as one of the duties of one employed to sell a horse. The statement of Johnson that that was one of his duties could not be sufficient evidence of his authority to bind the Hartman Stock Farm in that respect. But, even if a jury could infer all of these things from the evidence, there is certainly evidence in behalf of the plaintiff that Johnson had no such authority; and therefore it became such an issuable fact as rendered it necessary that the question should be submitted to the jury if the question was material. In our view of the matter, however, if the horse was delivered to any one of the individuals who signed the contract or the note in accordance with the terms of the contract, and in the absence of any express direction that the horse should be delivered to a specified individual, the delivery of the horse to any one of the persons

who purchased him jointly would be delivery to all of them, for the person to whom the horse was thus delivered could hold him in his own right and as agent for all of the other subscribers. Considering the case in the view most favorable to the defendants, there is nothing said in the original contract about a formation of a corporation, and the defendants were bound to know that no legal corporation had in fact been formed. There is therefore nothing in the point that the horse was not delivered to any officer of the corporation. The agreement to form a corporation, if it had any effect at all, might have created a partnership between the subscribers thereto, even though the name imported a corporation; but, if that were the case, delivery of the horse to any one of the partners would be as good as delivery to the partnership as a whole. It is obvious, therefore, that the testimony in regard to the nondelivery of the horse is ineffectual for that purpose. If the subscribers to the contract of August 10, 1905, bound themselves jointly and severally to pay the amount specified and agreed to execute the note to cover the total amount, it seems to us that those who signed the note could not be relieved from its payment merely because others may not have signed the note as all agreed to do. The joint and several obligations to pay would survive, though the joint and several obligations to make a note were not complied with. And it is questionable if one who does not deny having assumed several liability for the whole of the debt evidenced by a promissory note will be heard to say that he should be relieved from payment which he has undertaken merely because one of his co-obligors declines to perform one of the duties which they jointly and severally assumed.

The court did not err in refusing to direct a verdict for the plaintiff, because it is never error to refuse to direct a verdict; but we are clear that the verdict should not have been directed in favor of the defendants upon the plea as filed.

The court did not err in ruling out the bill of sale purporting to have been made by the Hartman Stock Farm to the Douglasville German Coach Horse Company. There was no evidence that it had ever been delivered to the defendants or either of them or that they had any knowledge of such a paper.

All of the other exceptions, though not specifically referred to, are sufficiently dealt with in the opinion.

Judgment reversed.

(87 S. C. 84)

EDWARDS & WALTER v. ENTERPRISE BANK.

(Supreme Court of South Carolina. Sept. 30, 1910.)

1. CONTRACTS (§ 346*)—SPECIAL CONTRACTS—RECOVERY.

Under a complaint based on a special contract plaintiff may not recover on a quantum meruit.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1748; Dec. Dig. § 346.*]

2. CONTRACTS (§ 349*)—SPECIAL CONTRACTS—ACTIONS—EVIDENCE.

Where the existence and terms of a special contract for services are in dispute, evidence of the reasonable value of the services rendered is admissible to show which statement as to the special contract is probably correct.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 349.*]

3. CONTRACTS (§ 346*)—SPECIAL CONTRACTS—ACTIONS—EVIDENCE.

Where, in an action for architect's services, the complaint alleged a special contract for the services and their reasonable value, and the answer raised an issue on the allegations of the complaint, evidence of the reasonable value of the services was admissible as responsive to the issues.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1718-1748; Dec. Dig. § 346.*]

4. CONTRACTS (§ 349*)—SPECIAL CONTRACTS—ACTIONS—EVIDENCE.

Where defendant, in an action for architect's services, alleged that under the contract the price was to be made satisfactory to him, plaintiff could show the reasonable value of the services and the usual price paid therefor to show the price which defendant should regard as satisfactory.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1795; Dec. Dig. § 349.*]

5. APPEAL AND ERROR (§ 204*)—QUESTIONS REVIEWABLE—QUESTIONS NOT RAISED IN TRIAL COURT.

An exception to the admission of evidence is not reviewable where it does not appear that any objection was made to the introduction of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1258-1280; Dec. Dig. § 204.*]

6. APPEAL AND ERROR (§ 1066*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

Where, in an action for architect's services, the pleadings raised an issue as to the reasonable value of the services, and whether full compensation had been made on that basis, a charge that if defendant was to pay what the work was reasonably worth, taking in consideration the amount which had been paid, and that if defendant had paid as much as the work was reasonably worth, the verdict must be for him, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

7. APPEAL AND ERROR (§ 706*)—QUESTIONS REVIEWABLE—RECORD.

An exception to the refusal to grant a new trial on the ground of improper argument of the attorney of the successful party cannot be considered on appeal, where there is nothing in the record on which to base it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2944-2947; Dec. Dig. § 706.*]

Appeal from Common Pleas Circuit Court of Laurens County; C. C. Featherstone, Special Judge.

Action by Edwards & Walter against the Enterprise Bank. From a judgment for plaintiffs, defendant appeals. Affirmed.

Dial & Todd and Simpson, Cooper & Babb, for appellant. Nichols & Nichols and Richey & Richey, for respondents.

JONES, C. J. The plaintiffs, who are architects, brought this action to recover a balance of \$571.22 alleged to be due them by defendant for drawing plans and specifications, inspecting and advising as to bids, and supervising the construction of defendant's bank building, alleging that defendant had agreed to pay plaintiffs for their services 5 per cent. of the gross cost of the building, including ornamental plaster, electric wiring, heating, bank furniture, and plumbing; that the gross cost of the building was \$31,424.50. The complaint further alleged that plaintiffs were entitled to receive for their services under the contract \$1,571.22, and that plaintiffs' services so rendered were reasonably worth the said 5 per cent.; but that defendant has only paid \$1,000 on their account for said work. The answer denied the allegations of the complaint, alleged that defendant did engage plaintiffs to draw plans and specifications for a bank building but that no specific sum was agreed upon for said services, and that plaintiffs promised to make the price satisfactory to defendant, that the work was performed in a dilatory and careless manner, and that the sum of \$1,000 paid them was sufficient and full satisfaction for the services rendered by plaintiffs, and that defendant owed them nothing. The verdict and judgment was in favor of plaintiffs for \$471.

While the exceptions relate to the admission and rejection of testimony, the refusal of the presiding judge, Hon. C. C. Featherstone, to grant the motion for a new trial, and the charge of the presiding judge, the controlling question presented is whether under the pleadings it was competent for plaintiffs to introduce evidence as to what their services were reasonably worth, as to what was paid in the same town about the same time for similar services. Waiving the point that the objections to the testimony were practically withdrawn at the trial by counsel for appellant, we think the testimony was competent. The general rule is that, under a complaint based upon a special contract, plaintiff cannot recover upon a quantum meruit. *Fitzsimons v. Guanahani Co.*, 16 S. C. 192; *Birlant v. Cleckley*, 48 S. C. 306, 26 S. E. 600. But it does not follow that under a complaint for services based upon a special contract testimony as to the reasonable value of the services is wholly irrelevant and its admission reversible error.

While such testimony may not be admitted as a ground of recovery, it is admissible and relevant, when there is conflict as to the existence and terms of the special contract, for the purpose of showing which statement as to the special contract is probably correct. *Tarrant v. Gittelson*, 16 S. C. 234; 9 Cyc. 767, and note 74.

In the case at bar the complaint not only alleges a special contract, but contains an allegation that the services rendered were reasonably worth the amount claimed, and the answer raised an issue on these matters. The testimony was therefore responsive to the allegations and issues raised, and hence was also admissible on that ground. 22 Ency. p. 1876. The contention of defendant was that under the contract the price for the services was to be made satisfactory to it. Upon this issue it was competent for plaintiffs to show the reasonable value of the services and the usual price paid therefor as tending to show a price which defendant should have regarded as satisfactory. For these reasons the testimony was admissible.

The exception to the admission in evidence of a certain list showing the items upon which plaintiffs based their charge for services, and items excluded as a basis for such charge, cannot be sustained, first, because it does not appear that any objection was made to the introduction of the list, and, second, because we fail to see how defendant was prejudiced. Exception is taken to the second sentence in the following charge: "If you find that the plaintiffs have made out to your satisfaction, by the greater weight of the evidence, that this defendant did make an express contract, and that this defendant was to pay them 5 per cent. on the gross cost of that building, then you find from the testimony what that cost was, get 5 per cent. of that amount, deduct what has been paid, and write your verdict for the plaintiffs. If you find, on the other hand, that there was no express contract, and that this defendant here was simply to pay the plaintiffs what the work was reasonably worth, then you find from the testimony what that work was worth, take into consideration the \$1,000 which it is admitted has already been paid, and write your verdict accordingly. Of course, if the defendant has already paid as much as the work was reasonably worth, provided you find there was no express contract, there is an end of the case, and you write your verdict for the defendant." As the pleadings raised an issue as to the reasonable value of plaintiffs' services and whether full compensation had been made on that basis, the charge was not prejudicial to plaintiffs.

The exception that a new trial should have been granted because one of the plaintiffs' attorneys in his argument to the jury brought in foreign and extraneous matter

cannot be sustained or considered, as there is nothing in the record upon which to base the exception.

The exceptions not directly referred to are either involved in the rulings made or are not deemed of sufficient importance to require further notice.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

(87 S. C. 79)

SOUTHERN SEATING & CABINET CO. v. FIRST NAT. BANK.

(Supreme Court of South Carolina. Sept. 26, 1910.)

ASSIGNMENTS (§ 49*)—BANKS AND BANKING (§ 140*)—CHECKS—PAYMENT OF DUPLICATE.

Where, an original check not having been presented for payment, the duplicate was executed by the drawer and sent to the payee directing payment of the same sum with the qualification "if previous check for \$500, dated March 9th, is still unpaid," the drawee bank not having paid the original check, the duplicate became on presentation an assignment pro tanto of the drawer's deposit account, and the bank became liable to the payee for the amount thereof, the drawer by executing the duplicate having assumed all risk as to the first check, including the risk that it might be necessary for the bank's protection that it should hold a sufficient amount of the drawer's funds to meet the original in case it should be presented by a bona fide indorsee for value.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. §§ 86-98; Dec. Dig. § 49; * *Banks and Banking*, Dec. Dig. § 140.*]

Appeal from Common Pleas Circuit Court of Charleston County; Chas. G. Dantzier, Judge.

Action by the Southern Seating & Cabinet Company against the First National Bank. Judgment for defendant, and plaintiff appeals. Reversed.

N. B. Barnwell, for appellant. Buist & Buist, for respondent.

WOODS, J. On March 9, 1907, Bishop H. P. Northrop sent to the plaintiffs a check for \$500 on the First National Bank of Charleston, S. C. This check has never been presented for payment. The plaintiffs having written Bishop Northrop asking payment of the balance of a debt which the check was intended to pay, Bishop Northrop sent another check written in these words: "Charleston, S. C. 8th April, 1907. No.

_____. The First National Bank of Charleston, S. C. Pay to the order of the Southern Seating and Cabinet Company, \$500, five hundred 00/100 dollars. If previous check for \$500, dated March 9th, is still unpaid. H. P. Northrop." This check having been duly presented and payment having been refused when Bishop Northrop had to his credit on his deposit account over \$5,000, the plaintiffs sued the bank thereon. The circuit court sustained the bank's defense that it could not be required to pay the sec-

ond check when it had notice by the writing on the check that the original check covering the same debt was outstanding. The case does not call for a discussion of the rights of the bank and the depositor and the payee when ordinary original and duplicate checks are given; for the depositor on the face of the check gave explicit directions as to the application of his funds which the bank was bound to follow. Having abundant funds to pay both checks, he directed the bank in language which could not be made plainer to pay the plaintiffs the sum of \$500 and charge it to his deposit account, unless the bank had already paid another check for a like amount dated March 9th in favor of the same payees. As the bank had not paid such other check, this check, under the law of South Carolina, became on presentation an assignment pro tanto of the deposit account, and the bank became liable to the payee for the amount of the check. *Loan & Savings Bank v. Farmers' & Merchants' Bank*, 74 S. C. 210, 54 S. E. 364.

There is no risk to the bank in paying the check. The depositor, Bishop Northrop, by the express direction to pay the second check if the first had not been paid, chose to assume all risks as to the first check given by him, including the risk that it might be necessary for the bank's protection that it should hold \$500 of his funds to meet the first check in case it should be presented by a bona fide indorsee for value.

The judgment of the circuit court is reversed.

(87 S. C. 76)

PARK v. FUNDERBURK et al.

(Supreme Court of South Carolina. Sept. 26, 1910.)

1. PARTNERSHIP (§ 146*)—INDORSEMENT OF NOTE—GENUINENESS.

Where a note executed to a firm was presented for transfer by one of the members thereof with the indorsement of the name of the payee thereon, such act constituted the adoption of the indorsement, and was sufficient proof of the genuineness thereof.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 251; Dec. Dig. § 146.*]

2. BILLS AND NOTES (§ 497*)—INDORSEMENT—PRESUMPTIONS.

The holder of a note with the name of the payee indorsed thereon is presumed to be an indorsee for value before maturity and without notice.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1675-1687; Dec. Dig. § 497.*]

3. BILLS AND NOTES (§ 373*)—NATURE OF PAPEER—FRAUDULENT REPRESENTATIONS—BONA FIDE PURCHASER.

Fraudulent representations of the payee of a note as to the nature of a paper which can be plainly read will not avail the maker in a suit brought on the note by an indorsee for value before maturity and without notice.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 968; Dec. Dig. § 373.*]

Appeal from Common Pleas Circuit Court of Lancaster County; J. C. Klugh, Judge.

Action by Howard C. Park against W. A. Funderburk and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Williams & Williams and Ernest Moore, for appellants. J. Harry Foster, for respondent.

WOODS, J. The defendants bought a stallion called "Capuchin" from McLaughlin Bros., of Columbus, Ohio, at the price of \$3,500, for which they gave three plain negotiable notes. At the same time McLaughlin Bros. gave the defendants a separate paper containing certain guaranties with respect to the soundness and capacity of the horse. The plaintiff, claiming to be an indorsee and purchaser for value before maturity, brought this action on the note for \$1,166 due December 1, 1907. The defendants denied in a qualified way that they had given the note, and set up the failure of McLaughlin Bros. to make good their guaranties, and the return of the horse to them. They denied the transfer of the note to the plaintiff, and alleged that, if the transfer had been made, the plaintiff took it with notice of their defenses. On the trial the circuit judge directed a verdict in favor of the plaintiff, and the question made by the appeal is whether the evidence admitted of any other inference than that the plaintiff had acquired title to the note by indorsement before maturity without notice of a valid defense thereto.

The plaintiff introduced the note with the name of the payees written on the back, and testified that he bought it in the regular course of business, giving his bank check for the purchase money without notice of the consideration or of any collateral agreement or of any defense. The check for \$1,100 indorsed by McLaughlin Bros. was also introduced. The defendants insist that there was no evidence that the indorsement of the name of the payees was made by them or by their authority, but this position is untenable, since the plaintiff testified that the note was delivered to him by one of the members of the firm of McLaughlin Bros. with the firm name written thereon. Obviously this was an adoption by the firm of the signature on the back of the note; and a signing authorized by a party or adopted by him is quite as good as a signature written by his own hand. But, aside from this evidence, the holder of a promissory note with the name of the payee indorsed thereon is presumed to be the indorsee for value before maturity without notice. *First National Bank v. Anderson*, 28 S. C. 143, 5 S. E. 843; *Id.*, 11 S. E. 379, 32 S. C. 538; *Cyc.* 229. There was no evidence whatever offered by the defendants on this point contrary to that

of the plaintiff, or tending to overcome the presumption of law.

The defendants next contend that the court should have submitted to the jury the question whether the note was invalid in the hands of the plaintiff, because there was evidence that it had been procured from the defendants by the fraudulent representations of the payees of the note to the effect that it was not a negotiable promissory note, but a paper expressing conditional liability. No principle is better established than that the fraudulent representations of the payee of a promissory note as to the nature of a paper which can be plainly read will not avail the maker in a suit brought by the indorsee for value before maturity without notice. *Sims v. Lyles*, 1 Hill, 39, 26 Am. Dec. 155; *Hand v. Savannah & Charleston Railroad Co.*, 17 S. C. 219.

The position on behalf of the defendants *M. C. Gardner*, *Samuel Laney*, and *W. S. Langley* that there was no evidence of their signing the note is not well taken. The defendants *T. M. Belk*, *L. M. Clyburn*, and *L. S. Elliott* testified, in effect, that all the defendants signed the note, and there was no evidence to the contrary.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(87 S. C. 67)

W. S. FORBES & CO. v. W. M. & J. J. PEARSON.

(Supreme Court of South Carolina. Sept. 26, 1910.)

1. EVIDENCE (§ 155*)—ADMISSIBILITY—SIMILAR EVIDENCE BY ADVERSE PARTY.

Plaintiff could examine witnesses as to whether in their opinion a contract contemplated a sale of goods with a future delivery, or was merely a gambling transaction; defendant having already examined them as to their knowledge of such contracts.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 445-458; Dec. Dig. § 155.*]

2. EVIDENCE (§ 448*)—EXPLAINING WRITTEN CONTRACT—ADMISSIBILITY.

Where the meaning of the terms of a contract is doubtful, parol evidence to explain them is admissible; but, if the language is plain, it is not admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2003-2084; Dec. Dig. § 448.*]

3. EVIDENCE (§ 457*)—ADMISSION—EXPLAINING WRITING.

The appellate court will not say that the trial court erred in admitting oral testimony defining the terms "loose delivered Bennettsville," "shipment buyer's option," "dry salt," and "margins to cover any decline in the market shall be deposited by the buyer promptly on demand of the seller, and the failure to deposit same promptly shall entitle the seller to close out his contract and hold the buyer for any loss," in a contract; the judge having admitted it on the ground that he did not understand such terms.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2104, 2107, 2108; Dec. Dig. § 457.*]

4. APPEAL AND ERROR (§ 1050*)—EVIDENCE EXPLAINING A WRITTEN CONTRACT—ADMISSION OF—HARMLESS ERROR.

Defendants cannot complain on appeal that a witness was permitted to explain the meaning of the terms of a written contract; the explanation being in accordance with their own contention as to such meaning.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1050.*]

5. GAMING (§ 13*)—GAMBLING CONTRACTS—FUTURE DELIVERY OF GOODS—OPTIONS.

An option in a contract for the future delivery of goods that will allow another settlement of the contract than the actual delivery is not invalid; it being also provided that there should be an actual delivery of the goods.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. § 24; Dec. Dig. § 13.*]

6. GAMING (§ 12*)—GAMBLING CONTRACTS—VALIDITY—FUTURE DELIVERY OF GOODS—INTENTION THE CRITERION.

Although a contract contained the provision that on the decline of the market price of goods before delivery the seller may close out the contract and hold the buyer responsible for any loss, yet, if there was a bona fide intention of the parties that the goods should be actually delivered, the contract was valid under the statute making such bona fide intention of both parties at the time of making the contract the criterion.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. § 22; Dec. Dig. § 12.*]

7. APPEAL AND ERROR (§ 1046*)—REVIEW—VERDICT—REMARKS OF JUDGE.

Remarks of the trial judge implying that the preponderance of the evidence was contrary to the verdict could not afford ground for the granting of a new trial by the appellate court.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1046.*]

Appeal from Common Pleas Circuit Court of Marlboro County; *G. W. Gage*, Judge.

Action by *W. S. Forbes & Co.* against *W. M. & J. J. Pearson*. Judgment for plaintiff, and defendant appeals. Affirmed.

Townsend & Rogers, for appellant. *Newton & Owens*, for respondent.

WOODS, J. The question involved in this case was whether a gambling venture on the future price of meat, or a real sale of meat to be actually delivered in the future, was contemplated by the following contract: "*W. S. Forbes & Co.* have sold to *M. W. & J. J. Pearson*, *Bennettsville, S. C.*, the following product: 25,000 pounds 55-60 Av. Ribs at 9.55 loose delivered *Bennettsville*. Shipment buyer's option. The above price is based on shipment on or before January 31st, 1907. A carrying charge of 7½ cents per one hundred pounds per month, or fraction thereof to be added to the above price if the meat is carried beyond January 31st, 1907, and the entire contract to be completed by May 31st, 07. Margins to cover any decline in the market shall be deposited by the buyer promptly on demand of the seller, and the failure to deposit same promptly shall entitle the seller to close out this contract and hold the buyer for any loss. Ribs exchangeable for other cuts of Dry Salt meat at

ruling difference in price 'day of shipment. [Signed] W. S. Forbes & Co. Accepted: [Signed] M. W. & J. J. Pearson. January 18, 1907." After the contract was made, there was a decline in the price of meat, upon which plaintiffs made a draft on defendants for the margins according to the agreement. Defendants refused to pay the draft, and plaintiffs then wrote that, the time for ordering out the meat having expired, they would ship it according to the contract unless defendants arranged promptly for the margin. The defendants failed to comply with this demand, and by letter of May 31, 1907, directed the plaintiffs not to ship the meat. Thereupon the plaintiffs sold the meat on the market below the contract price and brought this action to recover the loss of \$260.25. The verdict and judgment was in favor of the plaintiffs for the amount claimed.

The first exception assigns error in allowing the witnesses McKellar and Exum to give their opinions as to whether the written contract contemplated an actual delivery of the meat. The exception cannot be sustained, for the court refused to allow plaintiff's counsel to elicit from the witnesses any opinion as to the meaning of the contract, until defendant's counsel had himself opened the subject by examination of the witnesses as to their understanding of the true meaning of contracts like this, appearing to contemplate future delivery, and as to the dealings of the witnesses with the plaintiffs.

The defendant next contends that the witness De Pass should not have been allowed to define the meaning of these expressions found in the contract: "Loose delivered Bennettsville"; "shipment buyer's option"; "dry salt"; "margins to cover any decline in the market shall be deposited by the buyer promptly on demand of the seller, and the failure to deposit same promptly shall entitle the seller to close out this contract and hold the buyer for any loss." Where doubt arises as to the meaning of the words used in a contract, for the enlightenment of the judge or jury, parol evidence may be admitted of the signification the words have according to the usage of those accustomed to make contracts of this kind; but such evidence is not admissible when the meaning of the language is plain. *Fairly v. Wappoo Mills*, 44 S. O. 227, 22 S. E. 108, 29 L. R. A. 215; *Kentucky Co. v. People's Supply Co.*, 77 S. C. 92, 57 S. E. 676, 122 Am. St. Rep. 540. In this case, the circuit judge having admitted the evidence on the ground that he himself did not understand the meaning

of the terms used, surely this court cannot say that they were too plain to need explanation. Furthermore, the defendants have no ground for complaint, for the meaning expressed by the witness was that which appellants' counsel contend was perfectly plain.

There was no error in the following instruction to the jury: "An option in a contract for future delivery of goods that will allow another settlement of the contract than the actual delivery of the goods is not invalid, if it is also provided in the contract, and it was the intention of the parties to the contract, that there should be an actual delivery of the goods sold." The defendants insist on this point that, although the parties may have entered into the contract with the bona fide intention that the goods contracted for should be actually delivered, yet the contract was made illegal by the provision giving the seller the right on decline of market price before delivery "to close out this contract and hold the buyer responsible for any loss," on failure of the buyer to put up margins as security against loss. As to this contention it is enough to say that the court can add nothing to the statute, which makes the test of validity of such a contract the bona fide intention of both parties at the time of making the contract that the article sold shall be actually delivered by the seller and received by the buyer.

There is no ground to ask this court to reverse the order of the circuit court refusing a new trial. There was strong evidence on both sides of the issue whether the contract contemplates merely betting on the market or a bona fide delivery of the meat. We do not understand the following language used by the circuit judge to imply that he thought there was a preponderance of the evidence in favor of the defendants: "Candidly, I should have drawn a different conclusion from that which the jury drew; but I do not know how largely my judgment was affected by my antipathy to gambling contracts, and by my suspicion that such transactions are of too common occurrence. Viewing the testimony apart from these prejudices, I cannot say the verdict was against the clear preponderance of the testimony." But even if such an inference could be drawn as to the opinion of the circuit judge, it would not be ground for this court to order a new trial. *Beaudrot v. Southern Ry.*, 69 S. O. 163, 48 S. E. 106; *Hall v. Northwestern Ry.*, 81 S. C. 522, 62 S. E. 848.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(87 S. C. 74)

ALLEN PFEIFFER CHEMICAL CO. v. OWINGS.

(Supreme Court of South Carolina. Sept. 26, 1910.)

1. EVIDENCE (§ 264*)—ADMISSIONS—CONSTRUCTION.

An unqualified admission that a tender was made amounts to an admission that the tender was made at the proper time.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 264.*]

2. SALES (§ 64*)—INTERPRETATION—SALE OF MEDICINE.

Under a contract of sale of medicines providing that, "if the goods are not satisfactory, we agree to credit \$36 at the end of six months, and exchange other goods for goods of our manufacture," the buyer had a right to make the deduction after the expiration of six months, on finding that the goods were unsaleable, though he did not exercise the option within six months, the contract being interpreted in view of the nature of the goods and the situation of the parties.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 64.*]

Appeal from Common Pleas Circuit Court of Richland County; R. W. Memminger, Judge.

Action by the Allen Pfeiffer Chemical Company against O. Y. Owings. Judgment for defendant in the magistrate's court reversed on appeal to the circuit court, and now defendant appeals. Judgment of the magistrate's court affirmed.

De Pass & De Pass, for appellant. A. M. Lumpkin, for respondent.

WOODS, J. The defendant made a written contract with the plaintiff for the purchase of medicines; the price agreed upon being \$68.75. On the contract the plaintiff's agent indorsed and signed this condition: "If goods are not satisfactory we agree to credit \$36.00 at the end of six months, and exchange other goods for goods of our manufacture." The plaintiff sued in a magistrate's court for the entire purchase money. On trial the defendant testified that the goods were not satisfactory, in that he had been able to sell only \$2.50 worth of them; that he had tendered \$32.75, the sum due after deducting the credit of \$36 to be allowed by the contract, and the defendant offered to allow judgment against himself for \$32.75. The magistrate sustained the defense, and gave judgment in favor of the plaintiff for only the sum admitted by defendant to be due, but, upon appeal, the circuit court held "that, the defendant having failed to make the exchange of goods within six months as shown by notation above mentioned or avail himself of the option thereby given him within the six months, defendant has become liable for the full amount sued for at the regular price." The record does not indicate the date of the execution or of the maturity of the contract, or the date of the tender or of

the commencement of the action. It does, however, contain an admission by plaintiff of tender; and a general and unqualified admission of tender must be held to be an admission of the tender of the amount stated at the proper time. The words expressing the condition of the contract, "If goods are not satisfactory we agree to credit \$36.00 at the end of six months and exchange other goods for goods of our own manufacture," are to be interpreted in view of the nature of the goods and the situation of the parties. The drugs were of a kind not before dealt in by the defendant, and the purpose of the condition was doubtless to allow the defendant to try their salability and value before paying full price for them; but, to provide for a fair trial of the goods, it was agreed that the defendant could claim the credit only after the expiration of six months. When, therefore, at the expiration of six months, the defendant found the goods unsatisfactory because unsaleable, he had a right to be discharged on payment of the purchase price, \$68.75, less the credit of \$36 stipulated in the contract.

The judgment of this court is that the judgment of the circuit court be reversed, and the judgment of the magistrate's court be affirmed.

(87 S. C. 55)

WALKER v. ALVERSON et al.

(Supreme Court of South Carolina. Sept. 20, 1910.)

1. EXECUTION (§ 33*)—SUBJECTS—ESTATES IN REMAINDER.

A contingent remainderman's interest cannot be sold under execution against him during the life of the precedent estate, but a vested remainderman's can.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 79; Dec. Dig. § 33.*]

2. WILLS (§ 629*)—ESTATES CREATED—TIME FOR VESTING.

The law favors the vesting of estates at the earliest possible time.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1461, 1462; Dec. Dig. § 629.*]

3. WILLS (§ 629*)—CONSTRUCTION.

No remainder will be held contingent if, consistently with intention, it can be deemed vested.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1461, 1462; Dec. Dig. § 629.*]

4. WILLS (§ 439*)—CONSTRUCTION—GUIDES—INTENT.

Testator's intent controls construction of his will, unless it violates some rule of law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.*]

5. WILLS (§ 471*)—CONSTRUCTION—CONFLICTING PROVISIONS.

When a gift is made in one clause of a will in clear and unequivocal terms, the quantity or quality of the estate given should not be qualified by words of doubtful import found in a subsequent clause.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 939; Dec. Dig. § 471.*]

6. REMAINDERS (§§ 1, 4*)—NATURE—"VESTED REMAINDER"—"CONTINGENT REMAINDER."

While a contingent remainder is one limited to take effect either to a dubious and uncertain person or upon a dubious and uncertain event, it does not follow that every remainder which is subject to a contingency or a condition is therefore a contingent remainder; if the condition be precedent the remainder is contingent, and, if subsequent, the remainder is vested, subject to divestiture on the happening of the condition.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. §§ 1, 2; Dec. Dig. §§ 1, 4.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1503-1506; vol. 8, p. 7615; vol. 8, pp. 7828, 7829.]

7. REMAINDERS (§ 1*)—NATURE—TEST—APPLICABILITY.

The test whether a remainder is vested or contingent by inquiring whether the owner, being *sui juris*, could, by uniting with the owner of the particular estate, convey a fee-simple title, is inapplicable to a vested remainder, which is subject to a divesting contingency, or which is given to a class some of whom are not in esse.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 1; Dec. Dig. § 1.*]

8. WILLS (§ 634*)—ESTATE DEVISED—NATURE OF REMAINDER.

A devise of a remainder to a cousin or her heirs, but to others if she predeceased the life tenant, gave her a vested interest subject to divestiture by such predecease.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.*]

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of Spartanburg County; R. Withers Memminger, Judge.

Action by Roxana Walker against Selva Alverson and another. Judgment for plaintiff, and defendants appeal. Reversed.

Nichols & Nichols and Wm. M. Jones, for appellants. Johnson & Nash, for respondent.

HYDRICK, J. Mary Ann Johnson disposed of her property real and personal by her will as follows:

"Item 2. I give, bequeath and devise all of my property * * * unto my beloved husband, Thomas P. Johnson, for his sole use and control, during his natural life.

"Item 3. After the decease of my husband, it is my will and desire that my cousin, Roxana Sowell or her heirs, shall come into possession of all my property, both personal and real, forever.

"Item 4. In the event, if my cousin Roxana Sowell shall decease before my husband, Thomas P. Johnson, leaving no heir or heirs, I will and desire that the heirs of my brother S. James Ellis, or their heirs shall inherit all of my estate, after the death of my husband, Thomas P. Johnson."

During the life of Thomas P. Johnson the interest of Roxana Sowell (now Walker) in the real estate was sold under execution against her. The defendant is in possession, claiming under the purchaser at that sale. After the death of the life tenant, Roxana

brought this action to recover the possession of the land. If the limitation to her was a contingent remainder, the purchaser at the sheriff's sale took nothing, and she is entitled to recover. But, if her interest was a vested remainder, it was conveyed by the sheriff's deed, and the defendant is entitled to retain the possession. *Allston v. Bank*, 2 Hill Eq. 235; *Roundtree v. Roundtree*, 26 S. C. 450, 2 S. E. 474.

The sole question, therefore, is: Was the limitation to Roxana a contingent or a vested remainder? The master and circuit court held that it was contingent, and gave judgment for plaintiff. The law favors the vesting of estates at the earliest time possible; and no remainder will be construed to be contingent which may consistently with the intention be deemed vested. 4 Kent, 195. "Whenever there is a doubt as to the quantity of the estate devised, or whether it is vested, the rule is to presume that the testator intended to give an absolute rather than a qualified estate, and a vested rather than a contingent interest; and even where the words import a contingency, but do not create a condition precedent, they give a vested interest to the devisee, subject, however, to be divested if the contingency should not happen." *Smith v. Hilliard*, 3 Strob. Eq. 223, 224. In considering the difference between vested and contingent remainders, Mr. Fearne calls attention to the confusion which sometimes arises from the failure to observe the distinction between the uncertainty which makes a remainder contingent and the uncertainty of its ever taking effect in possession, "a distinction," he says, "not always attended to, but absolutely requisite to complete an accurate notion of what is in law considered as a contingent estate; for, wherever there is a particular estate, the determination of which does not depend on any uncertain event, and a remainder is thereon absolutely limited to a person in esse and ascertained, in that case, notwithstanding the nature and duration of the estate limited in remainder may be such, as that it may not endure beyond the particular estate, and may therefore never take effect or vest in possession, yet it is not a contingent, but a vested, remainder. As if a lease be to A. for life, remainder to B. for life or in tail, here notwithstanding B. may possibly die, or die without issue in the lifetime of A. and consequently never come into possession; yet is his remainder vested in interest, and by no means comprised in the legal notion of a contingent estate. It is not the uncertainty of ever taking effect in possession that makes a remainder contingent; for to that every remainder for life or in tail is and must be liable, as the remainderman may die, or die without issue before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to

become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." *Fearne, Rem.* p. 215. Again, at page 216, he says: "Wherever the preceding estate is limited, so as to determine on an event which certainly must happen, and the remainder is so limited to a person in esse, and ascertained, that the preceding estate may by any means determine before the expiration of the estate limited in remainder, such remainder is vested." Chancellor Kent thus expresses the difference: "It is not the uncertainty of enjoyment in the future, but the uncertainty of the right to that enjoyment which marks the difference between a vested and contingent interest." 4 Kent, 198. Mr. Washburne says: "A vested remainder is one the owner of which has the present capacity of taking the seisin in case the particular estate were to determine. But no degree of uncertainty as to the remainderman's ever enjoying his remainder will render it contingent, provided he has by the limitation a present absolute right to enjoy the estate the instant the prior estate should determine." 2 Wash. Real Prop. § 1541. In *Faber v. Police*, 10 S. C. 376-387, this court pointed out the distinction between vested and contingent remainders as follows: "The most marked distinction between the two kinds of remainders is that in the one case the right to the estate is fixed and certain, though the right to the possession is deferred to some future period; while in the other the right to the estate as well as the right to the possession of such estate is not only deferred to a future period, but is dependent on the happening of some future contingency."

With these rules and distinctions before us, let us examine the will to ascertain the intention of the testatrix, for to that we must give effect, unless it conflicts with some rule of law. After the death of her husband (a certain event), she gives the property to Roxana (a person in esse, and ascertained) or her heirs. If she had said no more, there would be no difficulty. But, after having given her property unqualifiedly to Roxana, she says, in the next clause: "In the event, if my cousin, Roxana, shall decease before my husband, I will and desire that the heirs of my brother, S. James Ellis, or their heirs, shall inherit all of my estate, after the death of my husband." The previous devise to Roxana manifests the intention that she should take in preference to the Ellis heirs. But the context shows that, after testatrix had given Roxana the estate, it occurred to her that she might die before the life tenant, without leaving heirs, and, to provide for that contingency, she made the devise over. It is contended that the contingency expressed in the limitation over cut down the absolute interest previously given to Roxana, and made it contingent upon her sur-

living the life tenant. That depends upon whether the contingency expressed in the devise over is so incorporated into the substance of the gift to Roxana as to make her right to the estate depend upon her surviving the life tenant; or whether the testatrix, having in mind the uncertainty of her actual enjoyment of the estate, intended merely to provide for that contingency. We think the two clauses of the will taken together show the latter to have been her intention. If there had been no limitation over, precisely the same uncertainty as to Roxana's actual enjoyment of the estate would have existed. It is more consistent, therefore, with the intention expressed in the third clause of the will to give the estate to Roxana to hold that the fourth clause creates only a condition subsequent upon the happening of which the estate already vested will be divested. When a gift is made in one clause of a will in clear and unequivocal terms, the quantity or quality of the estate given should not be cut down or qualified by words of doubtful import found in a subsequent clause. To have that effect, the subsequent words should be at least as clear in expressing that intention as the words in which the interest is given. While a contingent remainder is one limited to take effect either to a dubious and uncertain person or upon a dubious and uncertain event, it does not follow that every remainder which is subject to a contingency or a condition is therefore a contingent remainder. The condition may be precedent or it may be subsequent. If the former, the remainder is contingent; if the latter, it is vested, though it may be divested by the happening of the condition.

There is a class of cases which closely resemble in the rules of construction applicable the case under consideration, in which vested remainders are limited in terms which seem to import contingency; but the contingent expressions are construed to denote merely the time when the estate is to take effect in actual possession; as, for example, when an estate is limited to one, "if," or "when," or "as soon as" he attains a certain age, with a limitation over, in case he dies under the age specified, or dies under that age without issue, etc. There the words of apparent contingency are held, not to create a condition precedent to the right of enjoyment, or to denote the time when the interest shall vest, but merely the time when enjoyment in possession shall commence, or when an estate already vested shall be divested.

The case of *Rivers v. Fripp*, 4 Rich. Eq. 276, is an illustration of the rule. In that case the devise was to testator's wife for life, and, after her death, to his son for life; "and from and immediately after the death of my wife and son, unto the issue of my said son living at the time of his death, who shall live to attain the full age of twenty-

one years, or who, dying before that time, shall leave issue to live until the time at which the parent or parents, if alive, would have reached the age of twenty-one years," and, in default of such issue, then over. Held to give a vested, but defeasible, interest, with immediate right to the rents and profits to a child of the son who survived both the wife and son, although such child died under 21 years of age, leaving no issue which lived until the time at which the parent, if alive, would have been 21 years of age. *Seabrook v. Gregg*, 2 S. C. 68, is another case construing the limitations of a will which, if not identical, are not materially different from those contained in the will construed in *Rivers v. Fripp*. In both these cases the English cases which established the rule of construction are reviewed at some length. The doctrine of these cases has never been questioned, and they are in accord with the current decisions, English and American, upon the point decided. In *Rivers v. Fripp*, at page 278, the court said: "The authorities concur that this inquiry must be determined by the sense in which the testator intended the devisee's interest in the property to depend upon his attaining the specified age. Thus, a devise to a person, if he shall live to attain a particular age, standing alone, would be contingent; yet, if it be followed by a limitation over in case he die under such age, the devise over is considered as explanatory of the sense in which the term is used, to wit, that at that age the estate should become absolute and indefeasible. The interest in question, therefore, is construed to vest instant. 1 *Jarman on Wills*, 738." So here the devise over is explanatory of the sense in which the testatrix intended the devise to Roxana to depend upon her surviving the life tenant, to wit, that at that time (the death of the life tenant) the estate should become absolute and indefeasible.

In *Haynsworth v. Haynsworth*, 12 Rich. Eq. 114, donor conveyed real and personal property to the use of his granddaughter M., wife of H., for life, and, after her death, to the use of H. for life, and, after his death, to the use of the children born and hereafter to be born of the said M. and their heirs; but, should the said M. and the said H. both die without leaving children living at the time of their decease born of the said M., then over. M. afterwards died, leaving H. and one child surviving her, and the child then died, leaving H. surviving him. Held, that the child took a vested transmissible interest, which became indefeasible at the death of M. leaving him surviving her, and consequently that the limitation over could not take effect. In the circuit decree, which was affirmed upon that point, Chancellor Carroll uses the following language: "If the words employed be in other respects sufficient to pass a present interest, the mere circumstance of its being limited over on a

contingency does not in itself prevent the interest from vesting. *Rutledge v. Rutledge*, Dud. Eq. 205; *Skey v. Barnes*, 3 Meriv. 340. On the contrary, there is high authority for the proposition that it has precisely the opposite effect." A limitation over in case of the prior devisee dying under certain circumstances, or before attaining a certain age, or in case of his dying before the life tenant, etc., is an argument in favor of the prior devisee's taking an immediately vested interest; for, as said by Tindall, C. J., in *Phipps v. Ackers*, 9 Clarke & Fin. 583, the limitation over "sufficiently shows the meaning of the testator to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which, of course, gives him the immediate interest, subject only to the chance of its being divested on a future contingency." It shows, therefore, that the prior devisee is the preferable object of the testator's bounty from which a presumption arises of an intention that the estate should vest in him subject to the divesting contingency. *Smith v. Hilliard*, supra. See, also, *Rutledge v. Rutledge*, Dud. Eq. 205; *Kersh v. Yongue*, 7 Rich. Eq. 100; *Boykin v. Boykin*, 21 S. C. 529; *Brown v. McCall*, 44 S. C. 503, 22 S. E. 823; and *Woodley v. Calhoun*, 69 S. C. 290, 48 S. E. 272.

There is another class of cases which are analogous to the one we are now considering, in which Mr. Fearn says: "The contingency upon which an estate is limited has been considered as a condition subsequent instead of precedent, so that the estate becomes vested immediately, subject to be defeated by the condition when it happens, in the room of not taking effect till such condition happens." He gives the case of *Stocker v. Edwards*, 2 Snow. 398, as an instance. In that case there was a surrender of copyholds to the use of the surrenderor for life, and afterwards to the use of his youngest son, and the heirs of his body, if he attained the age of 18, and, if he died before 18 without issue male, then to the right heirs of A. It was held to be a condition subsequent with respect to the youngest son, and therefore the remainder vested immediately, subject to be defeated by the condition of his dying without issue male before he attained the age of 18. The doctrine of *Stocker v. Edwards* upon this point was recognized in *Bromfield v. Crowder*, 1 New Rep. (B. & P.) 313, where testator devised all his estate to D. and R. for their lives successively, and after the death of the survivor to B. if he lived to attain the age of 21, but not otherwise, and, in case he died before attaining that age, over. Both D. and R. died while B. was under 21. Held, that B. took a vested estate in fee simple, defeasible on his dying under the age of 21. In *Phipps v. Ackers*, 9 Clarke & Fin. 583, the earlier English cases were reviewed and the doctrine established by them reaffirmed.

There is still another class of cases to which this case belongs, in which the same rule of construction is applied, and that is where the contingency is the devisee's surviving the life tenant. In *Williamson v. Field's Executors*, 2 Sand. Ch. 533, it is said: "When the person to whom a remainder after a life estate is limited is ascertained, and the event upon which it is to take effect is certain to happen, it is a vested remainder, although by its terms it may be entirely defeated by the death of such person before the termination of the particular estate." In *Blanchard v. Blanchard*, 1 Allen (Mass.) 223, there was a devise to the wife for life, and, after her death, to five children by name, with a proviso that, if any of the children named should die before the wife, the property should be equally divided amongst the survivors, except those so dying should leave issue, and, in that case, to the issue. Held, that the portion of the will preceding the proviso was a devise to the wife for life, remainder, at her death, to the children named; and, there being in that portion of the will no words of contingency such as "if they shall be living at her death," or "to such of them as shall be living at her death," or other words apt and proper to create a condition precedent, and thereby make the remainders contingent, the remainders were vested, subject to be divested by the happening of the condition. In *Mercantile Bank v. Ballard*, 83 Ky. 481, 4 Am. St. Rep. 160, the devise was to the use of B. for life, after her death, to be conveyed to her children and their descendants in the same proportion as if it had descended from her; but, if she left no child, nor descendant of a child, to the use of C. Held, that the children of B. living at the death of testator took a vested fee simple, subject to be divested by their dying before B. The court said: "A devise to A. for life, remainder to B., but, if B. is dead at the termination of the life estate, then to C., passes to B. a vested estate, and a contingent interest to C." In *Avery v. Everett*, 110 N. Y. 317, 18 N. E. 148, 1 L. R. A. 284, 6 Am. St. Rep. 368, a devise to the testator's wife for life, remainder to his son, C. H., and, in case C. H. should die without children, then, after the wife's death and the son's death, to A. S., a nephew, was held to give C. H. a vested fee at testator's death, subject to be defeated by his death without children. In *Ducker v. Burnham*, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135, a devise to the testator's wife for life, with full power of sale, remainder to five children named, to be divided equally amongst them, in case of the death of any of them, without issue, either before testator, or before receiving the portions given them, the share of such to be equally divided amongst the survivors. Held, each of the children took a vested remainder, subject to be divested by

the exercise of the power of sale or by death, without issue, before the life tenant. In *Finch v. Lane*, L. R. 10 Eq. 501, the devise was to testator's wife for life, remainder, as to part, to his brother for life, and after the death of the wife, subject to the brother's interest in the part, to M. in fee, if she should be living at the death of the wife, but, if she should die before the wife without leaving issue, then over. M. died before the widow, but left issue. Held, that M. took a vested remainder. That case seems to be directly in point, and as near on all fours with this case as well can be. It was decided on the authority of *Phipps v. Ackers*.

Both the master and the circuit judge seem to have based their conclusion in part, at least, upon the application of a test laid down in *Faber v. Police*, 10 S. O. 388, for determining whether a remainder is vested or contingent, to wit: "To inquire whether the person claiming such remainder, being sui juris, could, by uniting with the owner of the particular estate, convey a fee-simple title. If he could, such a remainder must be regarded as vested; otherwise, it is contingent." Whatever may be said of the applicability and reliability of that test in ordinary cases, it is obvious that it fails when applied to the case of a remainder which is vested subject to a divesting contingency, and also to the case of a vested remainder to a class some of whom are not in esse. That there are such vested remainders all the authorities are agreed.

The cases above cited fully illustrate the principles upon which this case must be decided. Our conclusion is that Roxana took a vested interest, subject to be divested by her death before the life tenant, leaving no heir or heirs. Her interest therefore passed under the sheriff's deed, and she cannot recover.

Judgment reversed.

GARY, A. J., dissents.

(153 N. C. 66)

COMMISSIONERS OF BEAUFORT COUNTY v. BONNER.

(Supreme Court of North Carolina. Sept. 21, 1910.)

1. EMINENT DOMAIN (§ 82*)—COMPENSATION—NECESSITY.

Land lying between a creek and a public road running parallel to it is not a part of the easement of the road, as to allow its being summarily taken for a ferry, but can only be done so under the power of eminent domain.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 215-219; Dec. Dig. § 82.*]

2. JURY (§ 19*)—CONDEMNATION PROCEEDINGS—ISSUE AS TO DAMAGES.

Defendant is not entitled to trial by jury of the issue as to the quantum of damages in condemnation proceedings.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 116; Dec. Dig. § 19.*]

3. EMINENT DOMAIN (§ 8*)—STATUTES—WHEN POWER IS GRANTED.

Revisal 1905, § 1818, enumerating the powers of the board of commissioners in regard to the public roads, does not confer upon them the power of eminent domain; it neither being expressed, nor necessarily implied.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 25, 30, 43, 44; Dec. Dig. § 8.*]

4. EMINENT DOMAIN (§ 8*)—STATUTES—WHEN POWER IS GRANTED.

The power of eminent domain will not be implied from vague language, except where to deny the power would defeat the grant.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 25, 30, 43, 44; Dec. Dig. § 8.*]

5. EMINENT DOMAIN (§ 8*)—STATUTES—INTENT—PRESUMPTION.

Where a statute is silent as to the grant of the power of eminent domain, it is to be presumed that the Legislature intended that the property should be obtained by contract.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 25, 30, 43, 44; Dec. Dig. § 8.*]

6. EMINENT DOMAIN (§ 8*)—STATUTES—NO PROVISION FOR—INTENT—PRESUMPTION.

Where a statute makes no provision for compensation, it is to be presumed that the Legislature did not intend that the power of eminent domain should be exercised.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 25, 30, 43, 44; Dec. Dig. § 8.*]

7. EMINENT DOMAIN (§ 69*)—STATUTES—NO PROVISION FOR COMPENSATION—EFFECT.

A statute authorizing the exercise of the power of eminent domain without providing for compensation is void.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 171-179; Dec. Dig. § 69.*]

8. CONSTITUTIONAL LAW (§ 70*)—JUDICIAL POWERS—GRANT OF POWER OF EMINENT DOMAIN.

The granting of the power of eminent domain is for the Legislature, and not for the courts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-131; Dec. Dig. § 70.*]

Appeal from Superior Court, Beaufort County; Ferguson, Judge.

Condemnation proceedings by the Commissioners of Beaufort County against L. D. Bonner. Judgment for defendant, and plaintiff's appeal. Affirmed.

The record disclosed that at January session, 1910, of the board of commissioners of Beaufort county, on a petition to condemn about an acre of defendant's land for a public landing, at a point in said county where the "public road runs along the banks of Durham creek," the following order was made and entered: "At the January session, 1910, of the board of commissioners of Beaufort Co., the following order was passed, to wit: 'Record of Commissioners. In the Matter of the Petition of Gilbert Bonner and Others. The board of commissioners having heard all the evidence in these matters, and argument of counsel, and having duly deliberated upon the matters and questions at is-

sue, it is now unanimously ordered by the board as follows: First. The petition to remove the draw and establish a new road is continued. Second. The petition to establish a public landing is granted, and the board offers to pay for the same the sum of seventy-five dollars. If this offer is refused, the board having decided same is necessary, the county attorney is instructed to take all necessary steps looking to this end and as early as practicable.'"

Thereupon the present proceedings were instituted before the clerk for the purpose of condemning the land and assessment of the damages therefor and filed complaint in terms as follows: "The plaintiff for cause of complaint alleges and says: First. That it is a corporation duly created, organized, and existing under and by virtue of the laws of the state of North Carolina, and as such has the power to discharge the duties set out in chapter 23 of the Revisal of 1905 of North Carolina. Second. That among other powers conferred upon the board is the right to establish such public landings as the board of commissioners may think proper. Third. That it is necessary for a public landing to be established on Durham's creek at some place on the land of the defendant L. D. Bonner. That the land which the defendant desires to condemn as a public landing is described as follows: 'About one acre, fronting on Durham's creek and the public road.' Fourth. That L. D. Bonner, the defendant above named, is the only one who owns or has any interest in said land; that the land described as aforesaid is required for a public landing, and L. D. Bonner is a resident of Beaufort county."

A demurrer of defendant having been overruled and exception duly noted, defendants answered, denying the power of commissioners to condemn defendant's land for the purpose indicated, denying that necessity existed for such condemnation, and demanding a jury trial of the issue as to the necessity, etc. The motion was overruled, and on the hearing before the clerk plaintiff offered in evidence the record of the order of the county commissioners above quoted, and introduced a witness who testified "that one acre of defendant's land is available for a public landing site at the point described in the complaint," and rested. Defendant offered to prove that it was not necessary to establish the landing, and the evidence was excluded on the ground that the necessity for the land was conclusively established by the action and order of the county commissioners, and defendant excepted. The clerk gave judgment of condemnation, and appointed commissioners to go upon the land, lay out and make the site and assess the damages. On appeal this order of the clerk was reversed by the judge, and plaintiff excepted and appealed.

W. C. Rodman, for appellants. Ward & Grimes, for appellee.

HOKE, J. Whatever rights may arise to the public in this case by reason of the fact stated that a public road lay along the banks of the creek (presumably a navigable stream), they did not include or embrace the easement sought to be established in this proceeding—the appropriation of an acre of defendant's land “for the purposes of a public landing.” This right as proposed and described entirely exceeded the easement of a public highway, and could only be acquired in invitum, by condemnation, and under the power of eminent domain. *Barrington v. Ferry Co.*, 69 N. C. 169; *Pipkin v. Wynns*, 13 N. C. 402; *Chambers v. Furry*, 1 Yeates (Pa.) 167; 3 Kent's Commentaries, p. 420.

The claim of the petitioners admits and proceeds upon the theory that the exercise of such power is required to uphold it as made; and we concur with the appellee and the ruling of the clerk thereon that, if this right of condemnation has been granted to the board of commissioners, the occasion and necessity for its exercise rests very largely in their discretion. *Brodnax v. Groom*, 64 N. C. 244, cited and approved in several recent cases, notably in *Burgin v. Smith*, 151 N. C. 567, 66 S. E. 607; *Board of Education v. Board of Commissioners*, 150 N. C. 116, 63 S. E. 724; *Ward v. Commissioners*, 146 N. C. 534, 60 S. E. 418, 125 Am. St. Rep. 489.

Nor is the issue as to the quantum of damages one entitling the private owner to a common-law jury trial as a matter of right. *State v. Jones*, 139 N. C. 613, 52 S. E. 240, 2 L. R. A. (N. S.) 313; *Railroad v. Parker*, 105 N. C. 246, 11 S. E. 328; *Railroad v. Davis*, 19 N. C. 451; *Bauman v. Ross*, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270; 2 Lewis, Eminent Domain, § 311. After giving the matter, however, the full and careful consideration which its importance demands, the court is of opinion that the statutes controlling the question have not conferred upon the commissioners the right to acquire defendant's property for the purpose indicated by condemnation, and that the judgment of the superior court to that effect and dismissing the petition on that ground must be affirmed. There is general consensus of authority to the effect that the right of condemnation may not be exercised unless conferred by the lawmaking power in express terms or by necessary implication. In 1 Lewis, Eminent Domain, § 240, the author says: “The exercise of the power being against common right, it cannot be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication. If the act is silent on the subject, and the powers given by it can be exercised without resort to condemnation, it is presumed that

the Legislature intended that the necessary property should be acquired by contract. Thus the authority to construct and maintain booms or bridges does not carry with it the right to condemn property. If the act makes no provision for compensation, it is presumed that the Legislature did not intend that the power of eminent domain should be exercised.” And well-considered decisions support the doctrine as stated. *U. S. v. Rauhers* (D. C.) 70 Fed. 748; *Schmidt v. Densmore*, 42 Mo. 225; *Tacoma v. State*, 4 Wash. 64, 29 Pac. 847; *Chaffee's Appeal*, 56 Mich. 244, 22 N. W. 871; *Allen v. Jones*, 47 Ind. 438; *People ex rel. Hayden v. City of Rochester*, 50 N. Y. 525. And, while the courts may have differed at times in defining the necessity required for the grant of this power by implication and are disposed to be less exacting in cases where the right is claimed in behalf of public corporations exercising their powers strictly for the public benefit (Lewis, § 240), there is eminent authority for the proposition that the right of condemnation will not arise by implication unless the necessity for it is so strong that without it the grant itself will be defeated. Thus in *Pennsylvania R. R.'s Appeal*, 93 Pa. 159, *Gordon, J.*, delivering the opinion, said: “It is true that a franchise is property, and as such may be taken by a corporation having the right of eminent domain, but in favor of such right there can be no implication unless it arises from a necessity so absolute that, without it, the grant itself will be defeated. It must also be a necessity that arises from the very nature of things, over which the corporation has no control. It must not be a necessity created by the company itself for its own convenience or for the sake of economy. To permit a necessity such as this to be used as an excuse for the interference with or extinction of previously granted franchises would be to subject these important legislative grants to destruction on a mere pretense; in fact, at the will of the holder of the latest franchise.” A position referred to and on a given state of facts approved by this court in *Street Ry. v. Railway*, 142 N. C. 435, 55 S. E. 345. True, there is a well-recognized general principle, stated and approved in *Dewey v. Railroad*, 142 N. C. 392, 55 S. E. 292, and in other cases, “that, when a power is conferred by statute, everything necessary to make it effective or requisite to attain the end is inferred.” But, in applying the principle to the question of condemnation, this being in derogation of common right, the necessity must be determined in view of the principles heretofore stated, and in *Dewey's Case* the court was careful to note that the power of condemnation in that case had been given in express terms.

Again, the courts have held that in certain instances the fact that an act of the Legis-

lature conferring a given power had failed to provide any method of procedure for awarding compensation to the individual owners would of itself afford sufficient evidence that the right of appropriation by condemnation was not intended. *Chamberlain v. Steam Cordage Co.*, 41 N. J. Eq. 43, 2 Atl. 775. And a decision of our own court is to the effect that a statute which purports "to authorize the seizure of private property, in the exercise of the right of eminent domain, but making no provision for compensation to the owner, would be void." *State v. Lyle*, 100 N. C. 497, 6 S. E. 379, a case that has been referred to with approval in several recent decisions of the court. *State v. Wells*, 142 N. C. 594, 55 S. E. 210; *State v. Jones*, 139 N. C. 619, 52 S. E. 240, 2 L. R. A. (N. S.) 818.

In the present case the power in question is claimed under and by virtue of chapter 23, Revisal 1905, § 1318, subsec. 19, in terms as follows: "The board of commissioners shall have power [subsection 19] * * * to establish such public landings and places of inspection as the board of commissioners may think proper and to appoint such inspectors in every town or city as may be authorized by law." The statute purports to contain an enumeration of the general powers conferred on boards of commissioners throughout the state, and this subsection quoted, being section 1318, subsec. 19, expresses all the provisions of our statute of law relating to the subject to which we were referred by counsel or which we have been enabled to discover. It will be noted that the law does not confer in express terms the power of condemning the lands of the citizen for the purpose indicated, and we are of opinion there is no such necessity shown as would justify the exercise of the power by implication. Furthermore, there is no provision made for awarding compensation to the owner. And, applying the principles approved and sustained by the authorities referred to, we are impelled to the conclusion that in establishing these public landings provided for in section 1318, subsec. 19, the commissioners are confined to lands already dedicated to a public use sufficient to embrace or include the purpose proposed, or that they must acquire a site by agreement or purchase.

We are confirmed in the view we have taken of this subsection by a perusal of the other portions of the statute. Thus, in subsection 8, the commissioners are authorized to lay out, alter, or discontinue public roads to establish and settle ferries, to build and keep up bridges, etc., and this subsection further provides that, in exercising the powers thus conferred, the commissioners shall act under the "rules, regulations, restrictions and penalties prescribed and imposed in the statute on roads, ferries and bridges." In this

chapter referred to express provision is made for condemning land and awarding compensation therefor "in the case of roads and ferries," showing that the Legislature in framing this very statute had in mind the necessity of expressly granting the right of condemnation where they considered it desirable to confer it. We are not inadvertent to the great importance of having these public landings established at places convenient to the citizens of different communities, and if it is demonstrated that the well ordering of the affairs of the county require it. The Legislature will no doubt be quick to confer the power of condemnation for the purpose. But the granting or withholding such power is for the Legislature, and not for the courts. And, until the Legislature has seen fit to grant the power for a public use and in express terms or by necessary implication, we are not permitted to sanction or uphold its exercise. There is no error, and the judgment of the court below dismissing the action is affirmed.

Affirmed.

BROWN, J., not sitting.

(153 N. C. 113)

BRIDGERS v. ORMOND.

(Supreme Court of North Carolina. Sept. 29, 1910.)

1. CONTRACTS (§ 176*)—CONSTRUCTION.

Where the terms of a contract are explicit, the construction is for the court.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 767-770, 1097; Dec. Dig. § 176.*]

2. CONTRACTS (§ 159*)—CONSTRUCTION.

The court in construing a bond whose payment was conditioned on the building of a permanent railroad from T. to H., and to a depot to be erected within "or" adjacent to the southern limits of the town of H., could not change the word "or" to "and"; the real purpose of the contract being to secure the building of a road between the points named.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 159.*]

Appeal from Superior Court, Edgecombe County; Gulon, Judge.

Action by Henry Clark Bridgers against W. W. Ormond. There was a nonsuit, and plaintiff appeals. New trial.

Plaintiff seeks to recover \$1,120 upon the following bonds: "\$1,050.00. For and in consideration of the building and equipment of a permanent standard railroad from Farmville to Hookerton, N. C., to a depot to be erected within or adjacent to the present southern limits of the town of Hookerton and on the south side of Contentnea Creek, within twenty-four months from the 29th day of March, 1906, we promise to pay to Henry C. Bridgers, or order, the sum of one thousand and fifty dollars. It is agreed and understood that this note shall be held and kept by W. W. Ormond, J. I. Beaman, J. E. W. Sugg,

F. M. Taylor, and B. F. D. Albritton, committee, or by either of them, as may be agreed by the others; and when said depot is erected as set out above, and said railroad is completed and equipped to within one-half mile of the Academy building in the town of Hookerton, then this note shall become due and payable, and said W. W. Ormond and others may proceed to collect the same and hold the proceeds, to be paid to said Henry Clark Bridgers when he shall have built and equipped said road and depot as set out above in first paragraph; and it is further understood and stipulated that if said Henry C. Bridgers should fail to build and equip said railroad and erect said depot by the 29th day of March, 1908, as first set forth herein, then this note is to be null and void. Witness our hand and seal, this the 19th day of April, 1906. W. W. Ormond. [Seal.] Elias Turnage. [Seal.] Y. T. Ormond. [Seal.] The above change in date and time for the completion of the railroad referred to in this note was made with my knowledge and consent. W. W. Ormond." The defendant W. W. Ormond executed another note, of like tenor and purport, for the sum of \$70. At close of evidence the court intimated that plaintiff could not recover and he submitted to a nonsuit and appealed.

John L. Bridgers, for appellant. Y. T. Ormond, for appellee.

BROWN, J. Plaintiff introduced evidence tending to prove that he had constructed, equipped, and had in operation, within the time required by the contract, a permanent standard railroad from Farmville to Hookerton, N. C., to a depot erected within the town of Hookerton, and on south side of Contentnea creek. These facts are not controverted.

But it is contended that the contract requires that the depot shall be erected in Hookerton "and" adjacent to the present southern limits of the town. The learned judge below seems to have so construed the contract. We are unable to adopt such construction, as we feel unauthorized to strike out the word "or" in the contract and substitute in its place the word "and." The one purpose of a written contract is to make certain what the contract is. "Words must not be forced away from their proper signification to one entirely different, although it might be obvious that the words used, either through ignorance or inadvertence, express a very different meaning from that intended." 11 Parson's Law Cont. p. 7. The terms being explicit, the construction is for the court. *Wilson v. Cotton Mills*, 140 N. C. 52, 52 S. E. 250; *Banks v. Lumber Co.*, 142 N. C. 49, 54 S. E. 844. In the phrase under consideration an important word is the disjunctive "or." We have no more right to strike it out than we have to strike out the word "Hookerton." To substitute the conjunctive

"and" for it in the contract is not warranted by either the uses of language or the context of the writing. There have been such changes in the words of a written instrument when clearly demanded by the context. Such a substitution would put upon the plaintiff in this case a double liability, and a condition he did not contract for. The substitution of a conjunctive for a disjunctive attaches such a qualification that of necessity changes the terms and meaning of the contract; and, in effect, materially alters it in an essential feature.

The real purpose of the contract was to secure the building of a standard railroad from Farmville to Hookerton, and that is the only consideration expressed upon its face. One of the termini was to be a depot erected in Hookerton, or adjacent to its southern limits. There is nothing doubtful or ambiguous in the words used. They plainly confer upon the plaintiff the optional right to erect the depot in Hookerton, or, if not in Hookerton, then adjacent to its southern boundary. It is admitted that the plaintiff has constructed the depot and located it within the corporate limits of Hookerton.

His honor should have instructed the jury that upon the uncontradicted facts as presented in this record the plaintiff is entitled to recover.

New trial.

HOKE, J., concurs in result.

(111 Va. 238)

NEWBERRY SHOE CO. v. COLLIER et al.
(Supreme Court of Appeals of Virginia. Sept. 15, 1910.)

1. BANKRUPTCY (§ 400*)—ALLOWANCE OF HOMESTEAD EXEMPTION—CONCLUSIVENESS.

An allowance of lots in bankruptcy as part of the bankrupt's homestead did not affect a lis pendens lien previously acquired by a creditor in a suit in a state court.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 400.*]

2. BANKRUPTCY (§ 433*)—DISCHARGE—EFFECT ON LIENS.

A discharge in bankruptcy does not necessarily affect a specific lien, but only releases the bankrupt from personal liability.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 808-823; Dec. Dig. § 433.*]

3. BANKRUPTCY (§ 199*)—VALIDITY OF LIENS.

A lien on property of a bankrupt acquired within four months before he was adjudged a bankrupt was void if he was insolvent when the lien was obtained.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 199.*]

4. BANKRUPTCY (§ 433*)—DISCHARGE—EFFECT ON LIENS.

A discharge in bankruptcy does not affect a lis pendens lien previously acquired by a creditor in a suit in a state court.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 433.*]

5. BANKRUPTCY (§ 212*)—HOMESTEAD—POWER OF BANKRUPT COURT.

A bankruptcy court's jurisdiction of a bankrupt's homestead is limited to setting it aside, where he dedicates property as such, and the court is without power to adjudicate the rights of creditors therein; a creditor desiring to subject such property to the payment of a debt paramount to the homestead being required to pursue his remedy in the state courts.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 212.*]

Appeal from Circuit Court, Wise County.

Bill by the Newberry Shoe Company against M. D. Collier and others. From a decree dismissing the bill, complainant appeals. Reversed.

Bond & Bruce, for plaintiff in error. Burnett & Bremner, for defendants in error.

HARRISON, J. On May 7, 1908, the bill in this cause was filed by the appellant in the circuit court of Wise county to have set aside a deed, dated January 14, 1908, from M. D. Collier to Martha Collier, the wife of the appellee J. A. Collier, conveying to her two lots or parcels of land, upon the ground that J. A. Collier had paid for the lots with his own means and had them conveyed to his wife for the purpose of hindering, delaying, and defrauding his creditors. On the same day that the bill was filed the complainant had recorded in the clerk's office a lis pendens under section 2460 of the Code.

The defendants not appearing, and the suit being duly matured, the court on July 20, 1908, entered a decree in favor of the complainant for the amount of its debt, set aside the deed, and declared the debt to be a lien upon the property thereby conveyed as of May 7, 1908, the date of the recordation of the lis pendens, and referred the cause to a commissioner to ascertain the liens.

On the 27th of April, 1909, the appellees, J. A. Collier and wife, appeared and by leave of court filed their joint and several answer to the bill, admitting the debt asserted in the bill, but alleging that, after the institution of the suit, J. A. Collier had filed his petition in bankruptcy, and had filed therein a schedule of his debts, including that of the complainant, and that he was adjudged a bankrupt and discharged from all debts and claims provable under the law in bankruptcy proceedings. The answer further alleged that Martha Collier had on June 20, 1908, conveyed the lots in question to her husband, J. A. Collier, and that the referee in bankruptcy had allowed them to J. A. Collier as a part of the homestead exemption claimed by him under the laws of the state. It is further alleged that the appellant and other creditors had objected to the lots being allowed to J. A. Collier as part of his homestead, but that the objection was overruled by the referee, and that the appellant had appealed from that action to the United States District Court for the Western District of Virginia, where the action of the

referee had been affirmed. Portions of the record in bankruptcy showing these facts are filed with the answer in support of the contention there made, that the right of the appellee J. A. Collier to hold these lots as a part of his homestead exemption as against the lien thereon acquired by the appellant in this cause had been decided by the United States District Court between the same parties, and was therefore res adjudicata.

Upon the filing of this answer the circuit court of Wise county rendered the decree complained of, setting aside all of the decrees theretofore entered in the cause, and dismissing the complainant's bill, with costs.

We are of opinion that this was error. The rights of the complainant in this cause were not affected by the proceedings in bankruptcy, but remained as they were before any petition in bankruptcy had been filed by the defendant J. A. Collier. A discharge in bankruptcy does not necessarily affect a specific lien, but only releases the bankrupt from personal liability. A lien on property of the bankrupt acquired within four months of the time he was adjudged a bankrupt is void, provided the bankrupt was insolvent at the time the lien was obtained. It is not alleged, and there is no evidence in the record showing, that J. A. Collier was insolvent at the time the lien in this cause attached.

In the case of Jackson v. Valley Tie Co., 108 Va. 718, 62 S. E. 965, this court, citing Simpson v. Van Etten (O. C.) 108 Fed. 199, says: "Not all liens obtained against one afterwards and within four months adjudged bankrupt are deemed null and void. It must appear that the person whose property is subject to the lien was insolvent at the time of the creation of the lien. It is evident a lien might be obtained against one who is adjudged a bankrupt within four months thereafter, but who was not insolvent at the time the lien was obtained. The act of bankruptcy and the insolvency might have occurred at some period subsequent to the creation of the lien. If so, the adjudication of bankruptcy would in no way determine whether or not the party was insolvent at the time the lien was created." And, further, at page 719 of 108 Va., 62 S. E. 966, it is said: "No presumption arises from the adjudication in bankruptcy that the bankrupt was insolvent for four months, or any period, before his petition was filed, and hence it is incumbent on the trustee to prove the insolvency."

It is clear that the lien herein asserted was not satisfied or affected by the appellee's discharge in bankruptcy.

The only evidence in this record that J. A. Collier claimed a homestead in the two lots involved here is a recital in the report of the referee in bankruptcy that the bankrupt had on the 25th of June, 1908, filed his homestead deed in the clerk's office of Wise county, claiming his homestead, among other things, in these two lots. Assuming, however, that such a homestead is shown to have

been claimed, the bankrupt court had no jurisdiction of homestead property, and therefore it could not adjudicate the rights of the parties with respect thereto.

When a bankrupt dedicates property as a homestead, all the bankrupt court can do is to set it aside to him. A creditor desiring to subject such property to the payment of a debt paramount to the homestead must pursue his remedy in the state court. *Lockwood v. Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061.

In the case cited, it is said, quoting from the opinion of Mr. Justice Bradley in *Re Bass*, Fed. Cas. No. 1,091: "In other words, it is made as clear as anything can be that such exempted property constitutes no part of the assets in bankruptcy. * * * The exemption is created by the state law, and the assignee acquires no title to the exempt property. If the creditor has a claim against it, he must prosecute that claim in a court which has jurisdiction over the property, which the bankrupt court has not."

It is plain from the record that the United States Court for the Western District of Virginia followed the authority of the case cited and the plain terms of the Bankruptcy Act of 1898, and simply announced that the bankrupt court had no jurisdiction over the two lots set apart as a homestead, and never intended to adjudicate the rights of the appellant with respect thereto. This being so, there is no foundation for the contention that the issues involved in this case are res adjudicata.

For these reasons, the decree appealed from must be reversed, and the cause remanded for further proceedings not in conflict with the views herein expressed.

Reversed.

CARDWELL, J., absent.

(111 Va. 261)

CLINCHFIELD COAL CO. et al. v. VIERS.
(Supreme Court of Appeals of Virginia. Sept. 15, 1910.)

1. BOUNDARIES (§ 37*)—LOCATION—EVIDENCE—WEIGHT.

Evidence in an action to quiet title held to sustain defendants' contention as to the location of a boundary line.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 37.*]

2. ADVERSE POSSESSION (§ 66*)—INTENTION—ESSENTIALITY.

When the occupation of the land is by a mere mistake, and with no intention on the part of the occupant to claim as his own land which does not belong to him, but with intention to claim only to the true line, wherever it may be, the holding is not adverse; intention to hold adversely being an indispensable element of adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 371-383; Dec. Dig. § 66.*]

Appeal from Circuit Court, Dickenson County.

Bill by H. H. Viers against the Clinchfield Coal Company and others. From a decree for complainant, defendants appeal. Reversed.

Phlegar & Powell, Ayers & Fulton, W. H. Rouse, Vicars & Peery, and A. A. Skeen, for appellants. Roland E. Chase and S. H. Sutherland, for appellee.

HARRISON, J. The bill in this case was filed by the appellee, H. H. Viers, asserting title to and possession of a strip of land containing 81.99 acres in the county of Dickenson, and alleging that, by reason of divers conveyances, the appellant Clinchfield Coal Company claimed to be the owner of the coal and minerals of said strip of land, and the appellants T. K. Colley and wife the owners of the surface thereof, and seeking to have the conveyances under which the appellants claimed set aside as alleged clouds upon his title.

The title of the appellee to the strip of land was put in issue by the pleadings, and upon that issue a final decree was rendered by the circuit court, sustaining the contention of the appellee and ordering the deeds mentioned in the bill to be canceled and annulled. This decree is brought under review by the present appeal.

It appears that about the year 1858 Robert Fugate, a surveyor, ran a line through the section of country where the lands here involved are situated. The true location of this line is the vital question upon which this controversy turns.

At the time this Fugate line was run, James Colley owned a large body of land in its neighborhood, and it is through him that both parties to this controversy claim title. In the year 1884 James Colley, who had been selling off portions of his land, had the line run which is known in the record as the Thornbury line. This line is $4\frac{1}{2}$ miles in length, is well marked and identified, and the appellants contend that it is the alleged Fugate line re-established by Thornbury.

A careful examination of the record leads us to the conclusion that this contention is sustained by the weight of evidence, both oral and documentary. It satisfactorily appears that throughout the entire length of this Thornbury line, and, as far back as the records shed any light upon the subject, the citizens on both sides thereof have recognized it as the true line by which their titles were determined. In numerous deeds passing title from one to the other on both sides of this line, it is referred to, sometimes as the Thornbury line and sometimes as the Fugate line, the metes and bounds in the respective deeds showing that the several tracts of land conveyed ran to this well-established line, thus recognizing the Fugate line and the Thornbury line as one and the same. The appellee, in effect, recognized this as the true line by deed of July 23, 1904, in which he unites with others in conveying to the gran-

tee all the coal on a certain tract of land, the boundary lines called for in the deed going exactly to and no further than the Thornbury line.

The line contended for by the appellee as the true Fugate line is located by him on an average of about 55 poles north of the Thornbury line, thus leaving the disputed strip between the two contending lines. In support of the contention that the true Fugate line is that insisted upon by him, appellee mainly relies upon certain marked timber in the neighborhood of the disputed land. Some of these marked trees were blocked and the blocks exhibited with the record, and considerable evidence given concerning them. The few blocks adduced were from trees embraced within a very short distance. They were all located in the neighborhood of and within the length of the boundary line to one side of appellee's tract of 105 acres. The evidence shows that these marks vary in age as much as 12 years, and one of them does not appear to have been made by an axe or hatchet, but to have been the result of a bruise on the tree. The evidence with respect to these marks wholly fails to show their value as tending to establish the true Fugate line. It very clearly appears that they were not made by Robert Fugate. One of the surveyors called by the appellee states positively that the marks in question were made by a surveyor by the name of Looney. These marks, so far as made by a surveyor, were evidently never made as indicating the Fugate line, but were made in running some other and much shorter line. Outside of these marks, there is not an object shown having the slightest tendency to establish the true Fugate line as being upon the location contended for by the appellee, which location, if established, would unsettle numerous titles and almost certainly precipitate much litigation.

It is not necessary, and we will not attempt in this opinion, to review all of the voluminous evidence adduced by both the appellants and the appellee in support of their respective contentions as to the true location of the Fugate line. It must suffice to say that in our judgment the appellee falls far short of sustaining his claim, and that the great preponderance of evidence establishes the Thornbury line to be, as claimed by the appellants, the true Fugate line. It follows from this conclusion that the disputed strip of land is not within the calls of the deeds of the appellee, but is covered by the deed of the appellants.

It is further claimed by the appellee that he has held adverse possession of the disputed strip of land for a sufficient length of time to acquire the legal title thereto as against the true owner.

It is only necessary to say in answer to this contention that the record clearly shows

that the appellee never claimed title further north than the true Fugate line, and had no intention of claiming land that did not belong to him. The great weight of authority is in favor of the view that when the occupation of the land is by a mere mistake, and with no intention on the part of the occupant to claim as his own land which does not belong to him, but intends to claim only to the true line, wherever it may be, the holding is not adverse; the intention to hold adversely being an indispensable element of adverse possession. *Schaubach v. Dillemath*, 108 Va. 86, 60 S. E. 745.

For these reasons, the decree appealed from must be reversed, and this court will enter such decree as the circuit court ought to have entered, dismissing the appellee's bill with costs.

Reversed.

CARDWELL, J., absent.

(111 Va. 302)

STONEGA COKE & COAL CO. v. NEECE.
(Supreme Court of Appeals of Virginia. Sept. 15, 1910.)

1. NEGLIGENCE (§ 121*)—BURDEN OF PROOF.

The burden is on one suing for injuries to show defendant's negligence, and, if the injury may have resulted from one of two causes, for only one of which defendant is responsible, plaintiff cannot recover, nor can he recover if it is just as probable that the damage was caused by the one as by the other.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 217–228; Dec. Dig. § 121.*]

2. MASTER AND SERVANT (§ 278*)—INJURY TO MINER — NEGLIGENCE — EVIDENCE — SUFFICIENCY.

Evidence in an action for injury to a car pusher in a mine held insufficient to show that the employer was negligent in failing to provide plaintiff with reasonably safe mine cars and couplings.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 278.*]

Error to Circuit Court, Wise County.

Action by John Neece against the Stonega Coke & Coal Company. From a judgment for plaintiff, defendant brings error. Reversed.

Bullitt & Chalkley, for plaintiff in error.
Vicars & Peery and Morton & Parker, for defendant in error.

WHITTLE, J. This action was brought to recover damages for injuries suffered by the defendant in error while employed as a car pusher at the plaintiff in error's coal mine.

The defendant company demurred to the plaintiff's evidence, but the court overruled the demurrer, and rendered the judgment under review in favor of the plaintiff for \$5,000, the damages conditionally assessed by the jury.

The negligence charged was the failure of the defendant to use ordinary care to provide the plaintiff with reasonably safe mine cars and couplings with which to discharge

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
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the duties of his employment; that, while the plaintiff was pushing a detached car along the track to the tipple to be dumped, other loaded cars, which were controlled by an electric motor, by reason of defective couplings, parted from the train, and ran down upon the plaintiff from the rear by force of gravity, catching him between the detached cars and the car he was pushing, and inflicting the injuries of which he complains.

The track from the inside of the mine to within a short distance of the mouth is slightly upgrade, from which point to the mouth of the mine it is level, and thence there is a light downgrade for the distance of about 240 feet to the dump on the tipple. Loaded cars are gathered on the main track in the mine, and pushed out in the direction of the tipple by an electric motor, near which they are successively released from the trip by the car pushers, shoved down to the mouth of the tipple and dumped. The empties are then switched on to another track and carried back into the mine to be reloaded, and the process of unloading is repeated. The cars were connected by three-link couplings attached to drawheads by a clevis and pin.

On the occasion of the accident, after the plaintiff had dumped from five to eight cars and had gone back for another car, he found the coupling so taut that it would not uncouple. Thereupon, he got upon the bumper of the forward car, and by pressing the links down with his foot produced sufficient slack to enable him to withdraw the clevis pin and uncouple the car. His account of the accident is as follows: "I had run five or six cars, and went back after another one, and I uncoupled it and started to push it and it stopped on me, was so hard I couldn't push it, and I pushed it a little ways apart, and went to step down between the cars on the ground, and just as I let my foot down it caught me—just in a dash—done so quick I couldn't tell how it was done. I didn't get my foot down to the ground, and they struck it with something. I suppose the motor struck it and caught me."

Continuing, the witness testifies that the detached car was driven forward a distance of three feet from the other cars by the force of the impact, and, before he could extricate himself (having sustained a fracture of the small bone of his right leg and other injuries from the first collision), the cars came together again, catching him about the calf of the injured leg, and holding him fast until some of his fellow servants set the brakes on the rear cars and released him.

The statement of the brakeman, Everidge, which is chiefly relied on to sustain the plaintiff's theory, is as follows: "I was brakeman and saw John Neece when he got hurt. John Neece had uncoupled one car and was shoving it down to dump it. The cars behind Neece, supposed to be coupled to the

train of cars, ran against Neece and caught him between the bumpers of the car he was shoving and the bumpers of the car behind him. I signaled the motorman to stop, which he did, but some of the cars, all but five or six, had broken loose from the motor, and these were the cars which caught Neece. In going to where Neece was I walked between the cars which had broken loose from the motor and the cars which were still attached to the motor. As I did so, I noticed that the clevis of the coupling was sprung so much that the pin wouldn't hold and pulled out. I caught the brakes and stopped the cars as soon as I could."

Now, it will be observed that Everidge does not undertake to say that the cars broke away from the five or six cars which remained attached to the motor before the accident. On the contrary, he says they were "supposed to be coupled to the train," and at the moment of the accident the entire train was moving in the direction of the tipple. It will also be remembered that the plaintiff himself attributed the collision to the force exerted by the motor in pushing the train. He expressed that opinion in his evidence in chief, and adhered to it throughout his testimony. The evidence of the motorman, Sopshur, the remaining witness for the plaintiff who speaks to the point, is strongly corroborative of Neece's opinion. He was on his motor some 35 or 40 feet inside the drift mouth with a trip of about 30 cars. These cars had been pushed slowly some 12 or 15 feet in the direction of the tipple when Everidge signaled him with a lantern to stop, which he did as quickly as possible. He thereupon walked toward the drift mouth to see who was hurt, and in passing the trip discovered that some 15 cars had pulled apart a distance of from 8 to 12 feet. When stopped, the rear end of these cars was still inside the drift mouth. He could not say whether the cars broke loose before or after he got the signal to stop, but he is satisfied they did not run apart until after he had stopped the motor. He could "tell by the feel of them that they were up against the motor," which was pushing them along the track. It is not pretended that Sopshur was guilty of any negligence in handling these cars. He was a motorman of long experience, and was pushing the cars out in the customary way. Moreover, the plaintiff was well apprised of the prevailing method of handling trains in connection with loading and unloading cars, and it was his duty and that of his working mate to set a sufficient number of brakes to prevent collisions.

Sopshur's testimony shows that the fugitive cars did not part from the rest of the train until after the motor was stopped, and consequently the collision resulted from the force exerted by the motor in pushing the cars, and not from force of gravity. If this be true, it is not possible that the defective clevis could have been the proximate cause

of the accident, and that is the sole issue presented by the pleadings.

The rule is firmly established by the decisions of this court that, "where damages are claimed for injuries inflicted through the alleged negligence of the defendant, the burden of showing negligence by a preponderance of the evidence is on the plaintiff, and if the injury may have resulted from one of two causes, for one of which the defendant is responsible but not for the other, the plaintiff cannot recover; neither can he recover if it is just as probable that the damage was caused by the one as by the other." *N. & W. Ry. Co. v. Poole*, 100 Va. 148, 40 S. E. 627; *Northington v. Norfolk Ry., etc.*, Co., 102 Va. 446, 46 S. E. 475; *C. & O. Ry. Co. v. Heath*, 103 Va. 64, 48 S. E. 508; *Moore Lime Co. v. Johnston*, 103 Va. 84, 48 S. E. 557.

The evidence on behalf of the plaintiff, which we have alone considered, does not sustain the allegation of negligence upon which his claim to damages is predicated, and in such case there can, of course, be no recovery.

For these reasons, we are of opinion that the circuit court erred in overruling the defendant's demurrer to the plaintiff's evidence, for which error the judgment must be reversed and the demurrer to the evidence sustained.

Reversed.

CARDWELL, J., absent.

(111 Va. 279)

McCRAW v. VERNON et al.

(Supreme Court of Appeals of Virginia. Sept. 15, 1910.)

INSURANCE (§ 594*)—ASSIGNMENT OF BENEFITS.

The assignment by deceased's sister of the benefit of his life policy to his wife, which stated that she relinquished all her interest and claims to it, amounted not only to an assignment, but a relinquishment of all her interest, though the wife's name was omitted; and, it being shown that she was the intended assignee, equity would supply her name.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1457; Dec. Dig. § 594.*]

Appeal from Corporation Court of Radford.

Suit by Nannie McCraw against Rena Vernon and another. Decree for defendant Vernon, and plaintiff appeals. Reversed and remanded.

Longley & Jordan, for appellant. J. C. Wysor and W. S. Tipton, for appellee.

HARRISON, J. This controversy is over the proceeds of a life insurance policy for \$500, issued May 15, 1905, by the Life Insurance Company of Virginia on the life of Calvin A. McCraw. The discussion of the case has taken a much wider range than is justified by the controlling facts which are clearly established and decisive of the question at issue.

It appears that at the time the policy was issued the insured was a single man and his sister, Rena Vernon, was named therein as his beneficiary, with the understanding that the beneficiary might be changed at any time. Three months after the policy was issued the insured married the appellant, and a short time thereafter he instructed the agent of the insurance company to change the policy by substituting his wife's name as the beneficiary therein. This request was repeated by the insured to the agent who had secured the policy several times, and he promised to attend to it. In April, 1909, the insured died, and it was found that the agent had failed to change the name of the beneficiary as requested, an oversight which he says resulted wholly from his neglect and forgetfulness.

On the 28th day of April, 1909, Rena Vernon, the beneficiary named in the policy, executed under her hand and seal the following paper:

"Know all men by these presents that I do hereby of my own free will and accord and do by these presents assign, transfer and set over all of my interest, title and ownership in policy No. 1,550,315 in the Life Insurance Company of Virginia on the life of Calvin A. McCraw, now deceased, in which policy I was named as beneficiary, and do by these presents and this assignment relinquish all of my interest in said policy, and any and all claims against the Life Insurance Company of Virginia, pertaining to said policy No. 1,550,315."

It will be observed that this assignment fails to name the intended assignee, but the proof of the justice of the peace who wrote the paper and others is conclusive that the intended assignee was Nannie McCraw, the appellant, who is the widow of the deceased Calvin A. McCraw, and that the omission of her name as assignee was a mere inadvertence of the scrivener.

Soon after the execution of this assignment the appellee, Rena Vernon, repented of her act, and in her answer to the bill in this case charges that she is the rightful beneficiary of the policy, and that the assignment was procured from her by fraud. This charge of fraud is wholly unsustained. On the contrary, it is satisfactorily shown that the assignment of the policy was freely made by the appellee in the presence of her husband and with his approval, and that it was made for the purpose of enabling the appellant to secure from the company the proceeds of the policy.

The paper executed by the appellee is more than a mere assignment. It is an absolute relinquishment by her of all right in and title to the policy, and this paper under seal is delivered to the admitted agents of the appellant, thus investing her with the indisputable right to the policy and its proceeds. Under such circumstances, equity will write

the inadvertently omitted name of the appellant into the paper as assignee, and direct the insurance company to pay the proceeds of the policy to her.

The decree appealed from, which directs the proceeds of the policy to be paid to the appellee, must be reversed, and the cause remanded for a final decree in accordance with the views expressed in this opinion.

Reversed.

CARDWELL, J., absent.

(111 Va. 254)
CHAMBERS v. ROANOKE INDUSTRIAL & AGRICULTURAL ASS'N et al.

(Supreme Court of Appeals of Virginia. Sept. 15, 1910.)

1. MUNICIPAL CORPORATIONS (§ 661*)—STREETS—CLOSING—MUNICIPAL AUTHORITY.

In the absence of authority from the General Assembly, a city cannot authorize an agricultural association to fence in part of a public street and erect barns, etc., thereon.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 661.*]

2. MUNICIPAL CORPORATIONS (§ 661*)—HIGHWAYS (§ 165*)—OWNERSHIP.

Streets and highways belong not partially, but entirely, to the public at large, and the supreme control over them is in the Legislature.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1432-1437; Dec. Dig. § 661.* Highways, Dec. Dig. § 165.*]

3. HIGHWAYS (§ 153*)—OBSTRUCTION AS NUISANCE.

Any unauthorized obstruction which unnecessarily impedes or incommodes the lawful use of a highway is a public nuisance at common law.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 299, 417, 419; Dec. Dig. § 153.*]

4. BOUNDARIES (§ 13*)—LAND ON NAVIGABLE RIVER.

The line of land bounded by the Roanoke river is the low-water mark.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 13.*]

5. DEDICATION (§ 63*)—STREETS—ABANDONMENT.

A dedication by recording a map of land as streets in an addition to a city was inchoate as to unopened streets, and was abrogated as to an unopened street 75 feet wide, where it was fenced 65 feet wide for several years, and has been so maintained by the public and those interested.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 103-106; Dec. Dig. § 63.*]

Appeal from Circuit Court of City of Roanoke.

Bill by one Chambers against the Roanoke Industrial & Agricultural Association and another. From decrees for respondents, complainant appeals. Reversed.

Smith & Wingfield, for appellant. Hall, Woods & Jackson, for appellees.

HARRISON, J. On January 16, 1906, the appellant entered into a contract in writing with the appellee, by which he agreed to sell and convey to it 10 acres of land in the city of Roanoke, the eastern line to be the line of Trueman and Plunkett, the northern line

to be Pleasant avenue, the southern line to be Roanoke river, and the western line to run through the lands of appellant at such point as 10 acres surveyed will locate it. Subsequently appellant had the land surveyed, and in conformity with such survey executed and delivered a deed to appellee which both parties supposed contained 10 acres.

The bill in this case was filed in July, 1906, by the appellant, alleging that, shortly after the deed was executed and delivered to the appellee by him, he discovered that the tract of land thereby conveyed contained more than 10 acres as the result of a mistake in the survey which he had followed in making the deed, and that the survey by which the deed was made did not conform to the boundaries prescribed by the contract. The bill further alleged that the appellee association, claiming to act under the authority of a resolution of the city council of Roanoke, was fencing up a strip of Pleasant avenue 35 feet wide, extending the full length of the land conveyed, and that which remained in the ownership and possession of appellant, and was engaged in erecting upon that part of Pleasant avenue so fenced up sheds, stables, and other buildings to be used for fair-ground purposes. Appellant further alleged that the effect of this action of appellee was to deprive him of his frontage on Pleasant avenue; that said avenue was his only outlet and right of way, except with great inconvenience in distance and travel; that he occupied the property as a home; and that the sheds, stables, and other buildings being placed in the avenue for the purpose intended would amount to a nuisance, and be a menace to the health of his family, and greatly depreciate and damage the value of his property.

The bill makes the appellee association and the city of Roanoke parties defendant, and prays that each be enjoined and restrained from obstructing Pleasant avenue in the manner alleged in the bill, or in any way interfering with the right of appellant to the unlimited enjoyment of the use of the entire street or highway. The prayer of the bill, further, is that the alleged mistake in the deed executed and delivered by the appellant to the appellee association be corrected, and the deed made to conform to the intention of the parties.

The city of Roanoke answered the bill, asserting its power to authorize the fencing up of part of Pleasant avenue to be used for fairground purposes, and denying that the appellant was injured thereby. The answer of the appellee association asserts the same propositions contended for by the city of Roanoke, and claims that the tract of land conveyed to it by the appellee contained .13 of an acre less than 10 acres, and asks that the purchase price be abated accordingly.

The circuit court granted an injunction in accordance with the prayer of the bill, and subsequently, on August 6, 1906, dissolved the same. On September 21, 1908, the cause was heard on the right of appellant to have the deed reformed as prayed for, and a decree was rendered holding that according to the terms of the contract, in pursuance of which the deed was made, the south line of the land sold was the low-water mark of the Roanoke river; and further holding that Pleasant avenue, the northern line of the land sold, was 75 feet wide, and appointing a surveyor to survey the land in accordance with the decree. From these two decrees this appeal was allowed.

We are of opinion that the court erred in its decree of August 6, 1906, dissolving the injunction theretofore granted restraining the appellee association from obstructing Pleasant avenue in the manner alleged in the bill.

The record shows that Pleasant avenue is a public highway, and, this being so, the city of Roanoke had no power or authority, in the absence of a grant from the General Assembly, to confer upon the appellee association the right to fence up any part of such highway and to erect the buildings complained of thereon. No such authority is found in its charter or the general law.

It is well settled that public highways, whether they be in the country or in a city, belong, not partially, but entirely, to the public at large, and that the supreme control over them is in the Legislature. It is also an established general rule that any unauthorized obstruction which unnecessarily impedes or incommodes the lawful use of a highway is a public nuisance at common law.

The city of Roanoke having no legislative authority to grant the use of Pleasant avenue for the purposes here complained of, its ordinance was a nullity, and furnished no warrant for the act of the appellee association in fencing up one-half of this public highway and building sheds, stables, and other buildings thereon for fairground purposes. *Richmond City v. Smith*, 101 Va. 161, 43 S. E. 345.

We are further of opinion that the circuit court properly held that the southern line of the 10 acres sold by the appellant was the low-water mark of the Roanoke river, but that it erred in holding that Pleasant avenue, the northern line of the land sold, was 75 feet wide.

The appellant contends that Pleasant avenue is 65 feet wide, and we think that contention is sustained by the evidence. The effect of the conclusion that Pleasant avenue is 75 feet wide is to put its southern line in and upon the inclosed property of the appellant, a distance of 10 feet, thus making it necessary to move the western line of the land sold considerably upon the property

reserved by the appellant in order to make up the 10 acres sold to appellee.

It appears from the record that the land in controversy is part of a tract of about 70 acres, which was conveyed in October, 1890, by the Roanoke Land & Improvement Company to the Pleasant Valley Land Company. This last-named company, with the purpose of selling the land off into lots for residences, had a map prepared showing the 70 acres laid off into streets and alleys, and among other streets shown thereon was Pleasant avenue, with a width of 75 feet. This map is the basis of the claim now made that in ascertaining the northern boundary of the 10 acres sold by appellant to appellee Pleasant avenue must be held to have a width of 75 feet. The Pleasant Valley Land Company sold a few lots with reference to this map, but none of the lots so sold were near to the property involved in this controversy. Like all similar enterprises started at and about that time, the Pleasant Valley Land Company failed, and in May, 1896, reconveyed the tract of land to the Roanoke Land & Improvement Company in discharge of a large balance of purchase money secured thereon by deed of trust, making certain reservations not material in this connection. Some time before this conveyance was made, the grantor, recognizing the failure of its scheme of selling the land off in lots for building purposes, rented out a large portion of it for purposes of agriculture. In the meantime Pleasant avenue, with a width of 65 feet, was fenced on its southern side by those interested. This fence was built along the southern line of the avenue, as then established, 65 feet south of its northern line, and has remained there ever since, regarded and treated by the public, and especially by those particularly interested, as the southern line of Pleasant avenue. Since the Roanoke Land & Improvement Company reacquired the land in 1896, it has sold off a number of parcels to different parties, including both the appellant and the appellee; the parcels thus sold, lying south of Pleasant avenue, front thereon, and run to the fence, long before built, marking the southern line of that avenue.

It is not necessary to determine whether or not the map which the Pleasant Valley Land Company had made in 1890 was recorded in accordance with the statute, for, if its recordation were admitted and constituted at that time a dedication, it was never acted upon by opening the streets and alleys designated thereon for the public use, and it would be, as said by this court in a very similar case, nevertheless true that, so far as the unopened streets are concerned, the dedication was inchoate merely, and had been abrogated by subsequent events. The general purpose of the dedication has failed, the property has been sold with a view to changed conditions, and these circumstances, coupled with the con-

tinuous failure of the public, during all these years, to open and maintain these streets, together with the systematic diversion of the land included in them to uses foreign to the dedication, all furnish unmistakable evidence of their abandonment. Any other conclusion would work great injustice to the present holders of the property.

Pleasant avenue being established and used by the public as a highway 65 feet wide with its southern line marked by a fence 65 feet south of its northern line, and upon which the 10 acres of land sold by appellant to the appellee fronts, and the southern line of the ten acres being fixed at the low-water mark of the Roanoke river, there can be no difficulty in ascertaining by survey the proper metes and bounds of the ten acres to be conveyed by the appellant to the appellee.

For these reasons, the decrees appealed from must be reversed and the cause remanded to the Circuit Court for further proceedings not in conflict with this opinion.

Reversed.

BUCHANAN and CARDWELL, JJ., absent.

(111 Va. 250)

BOLLING et al. v. MULLINS.

(Supreme Court of Appeals of Virginia. Sept. 15, 1910.)

1. CONTRACTS (§ 130*)—CONTRACT IN RESTRAINT OF BIDDING—JUDICIAL SALES.

An agreement by a bidder at a judicial sale of an insolvent's land that he would pay the difference between a fixed sum and any less sum at which he should be able to buy to sureties of insolvent who had paid off liens against him, if they would refrain from bidding, was void as against public policy and unenforceable.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 654-658; Dec. Dig. § 130.*]

2. CONTRACTS (§ 130*)—RESTRAINT OF BIDDING—JUDICIAL SALES.

Any agreement restricting competition at a judicial sale is void, except that creditors can make a fair and open compact, with the debtor's assent, that particular debts will be taken care of if the holders will abstain from bidding.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 654-658; Dec. Dig. § 130.*]

Error to Circuit Court, Wise County.

Action by one Bolling and another against one Mullins. From a judgment dismissing the declaration, plaintiffs bring error. Affirmed.

Ayers & Fulton, Dotson & Bond, and C. Q. Counts, for plaintiffs in error. Vicars & Peery and Bond & Bruce, for defendant in error.

WHITTLE, J. This writ of error brings under review a judgment dismissing the plaintiffs' declaration on demurrer on the ground that the contract sued on is contrary to public policy and void.

The essential allegations of the declaration are that the plaintiffs, as sureties of W. R. Gilley, had paid off liens against him aggregating \$2,400, of which amount \$1,750

remained due from the principal debtor; that Gilley was insolvent with the exception of his ownership of a tract of land which was the subject-matter of a lien creditor's suit; that the defendant, Mullins, who desired to purchase the land, had entered into an agreement with the plaintiffs to the effect that, if they would not become bidders at the sale, he, Mullins, would, if necessary, bid as much as \$1,500 for the property, or would procure some one else to do so, and, if he should purchase the land either directly or through some other bidder for less than \$1,500, that he would pay the plaintiffs the difference. Under this arrangement Mullins bought the land for \$940, but refused to pay the plaintiffs the sum of \$560, in accordance with his agreement.

We are of opinion that the case is controlled by the decision of this court in *Camp v. Bruce*, 96 Va. 521, 31 S. E. 901, 43 L. R. A. 146, 70 Am. St. Rep. 873. In that case the purchaser at a judicial sale before confirmation sold his bargain at an advance price; and it was held that the tendency of such contracts was to prevent the property from bringing the best price, and was therefore contrary to public policy. With respect to such agreements generally, the court at page 524 of 96 Va., at page 901 of 31 S. E. (43 L. R. A. 146, 70 Am. St. Rep. 873), observes: "We have no statute declaring that contracts like the one under consideration are unlawful, yet under the principles of the common law any contract that is made for the purpose of, or whose necessary effect or tendency is to lessen competition and restrain bidding at judicial sales, is held to be illegal because opposed to public policy. The object in all such sales is to get the best price that can be fairly had for the property. The policy of the law therefore is to secure such sales from every kind of improper influence. To allow one bidder to buy off another, which is but a species of bribery, and thus prevent the property from bringing the best price, is condemned by the law, and the courts will not enforce contracts founded in such practices. *Underwood v. McVeigh*, 23 Grat. 409, 428, 429; *Cocks v. Izard*, 7 Wall. 559, 562, 19 L. Ed. 275; *Fry on Spec. Per.* § 308; *Pomeroy's Contracts*, § 283; *Greenhood on Public Policy*, pp. 183-189."

In *Cocks v. Izard*, supra, the Supreme Court of the United States, speaking through Mr. Justice Davis, says: "The law will not tolerate any influence likely to prevent competition at judicial sales, and it accords to every debtor the chance for a fair sale and full price."

Indeed, the governing principle of all judicial sales is that there shall be untrammelled, free, and open competition, to the end that the rights of all parties in interest may be protected and a fair price obtained for property which has been withdrawn from

the control of the owner and is being administered by the courts. Any agreement, therefore, however speciously devised or craftily worded, which contravenes that policy, will not be tolerated, and will be condemned as illegal and void.

The contention that this particular contract was calculated to promote rather than to stifle bidding is met by the obvious answer that the sum in addition to his bid, which Mullins stipulated to pay, was not intended to reach the right pocket. *Hamilton v. Hamilton*, 2 Rich. Eq. (S. C.) 355, 46 Am. Dec. 58, 65. The neat result of the transaction was to deprive the judgment debtor of a credit of \$560, at the least, on his indebtedness to which he was justly entitled.

In condemning this agreement, we are not unmindful of the qualification of the general rule which sanctions a fair and open compact between creditors (made with the knowledge and assent of the debtor), that certain debts will be taken care of, provided the holders thereof will abstain from bidding. Such adjustments are often convenient and beneficial to all concerned, but this agreement is not of that class. It is even more clearly violative of the policy of the law than was the agreement in *Camp v. Bruce*, and it is not our purpose to relax the stringency of the just rule announced in that case.

The judgment of the circuit court is without error, and must be affirmed.

Affirmed.

CARDWELL, J., absent.

(111 Va. 240)

BARNES et al. v. CROCKETT'S ADM'R.
(Supreme Court of Appeals of Virginia. Sept. 15, 1910.)

1. NOVATION (§ 4*)—INTENTION.

Whether the taking of a new security of equal dignity is to be treated as a novation is a matter of intention, to be determined from all the facts and circumstances.

[Ed. Note.—For other cases, see *Novation*, Cent. Dig. § 4; Dec. Dig. § 4.*]

2. NOVATION (§ 4*)—WHAT CONSTITUTES.

Where land was deeded to brothers on condition that they pay a certain sum to their sisters, for which there should be a lien on the land, a release of the lien and the taking, in lieu thereof of the brothers' bonds for the amount due not only released the lien, but merged the brothers' implied contract under the deed into an express promise to pay under seal.

[Ed. Note.—For other cases, see *Novation*, Cent. Dig. § 4; Dec. Dig. § 4.*]

3. DEEDS (§ 157*)—CONDITIONS—AS CREATING IMPLIED CONTRACT.

Though the grantees in a deed containing a condition that they should pay a certain sum to third persons were not expressly bound by the condition since they had not sealed the deed, yet, having accepted it, they were bound by an implied promise to pay the sum, for which an assumpsit would lie.

[Ed. Note.—For other cases, see *Deeds*, Dec. Dig. § 157.*]

4. NOVATION (§ 4*)—EFFECT.

The parties being the same, the giving and acceptance of a bond for the payment of money due by simple contract extinguishes the simple contract liability.

[Ed. Note.—For other cases, see *Novation*, Cent. Dig. § 4; Dec. Dig. § 4.*]

5. APPEAL AND ERROR (§ 1056*)—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

Where a deed contained a condition that the grantees should pay a certain sum to third persons, and such third persons discharged the condition by accepting the bonds of the grantees, and an action was brought on the bonds, the refusal of evidence offered by the grantees, that in the bond transaction there was nothing said in regard to the effect it should have on the rights and liabilities under the deed, if error, was not prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

6. APPEAL AND ERROR (§ 1050*)—EVIDENCE—GROUNDS FOR REVERSAL.

The erroneous admission of evidence which cannot prejudice the party complaining is not ground for reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

7. APPEAL AND ERROR (§ 1068*)—INSTRUCTIONS—PREJUDICIAL ERROR.

Where the jury could not have found any other verdict than that rendered, error in giving or refusing instructions is not ground for reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4227; Dec. Dig. § 1068.*]

Error to Circuit Court, Tazewell County.

Action by Crockett's administrator against W. A. Barnes and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Chapman & Gillespie and Greever & Gillespie, for plaintiffs in error. Henry & Graham and T. C. Bowen, for defendant in error.

BUCHANAN, J. Numerous errors are assigned on this writ of error, but most, if not all, of them depend upon the question whether or not the bonds sued on which were given for an existing indebtedness were a novation of the prior contract.

It appears that Robert Barnes, the father of the petitioners (his three sons), made a conveyance to them of valuable lands, by which, among other things, he required each of them to pay certain sums to their three sisters at designated periods, but with the provision that, if either of the sisters died without issue living before any part of the amount directed to be paid her became due and payable, then such amount as was not due was not to be paid. The sums directed to be paid the sisters were made a charge or lien upon the lands conveyed. One of the sisters, the intestate of the defendant in error, died before all the money directed to be paid her became due and payable. Before her death her brother, W. A. Barnes, desiring to sell the lands conveyed to him free of the

lien or charge upon it, made an arrangement with his sisters by which they agreed to release the said lien and charge, and agreed to accept the bonds of their said brothers for the amounts due and unpaid, and to become due under the provisions of the conveyance of their father. The lien was released by deed entered of record and bonds executed for the then value of the sums due and to become due each of the sisters, payable one day after date with interest from date. The bonds thus executed and delivered to the intestate of the defendant in error not having been paid during her life this action of debt was instituted by her administrator for their collection.

The obligors in those bonds claimed that there was a failure of consideration, to the extent that the sum evidenced by the bonds was not due and payable to their sister at the time of her death. She having died without issue living before said sum became due and payable they were not liable for it under the terms of their grantor's deed, and made defense on this ground.

If the transaction or arrangement between the brothers and sisters by which the latter released the lien or charge on the lands and the former executed their bonds for the payment of said sums was a novation of the contract evidenced by their father's conveyance to his sons, the defense relied on was not good. If that transaction or arrangement was not a novation of the original contract, then the defense was a valid one.

Whether or not the taking of a new security of equal dignity is to be treated as a novation or substitution for and an extinguishment of a prior indebtedness is a matter of intention, to be determined from all the facts and circumstances of the case. *Morris v. Harvey*, 75 Va. 726, 732; *State Bank of Va. v. Dom. Sewing Machine Co.*, 99 Va. 411, 39 S. E. 141, 86 Am. St. Rep. 891; *Coles v. Withers*, 33 Grat. 186, 187; *Fid. Loan, etc., Co. v. Engleby*, 99 Va. 168, 37 S. E. 957.

The principles which govern in determining whether or not there has been a novation are pretty fully discussed in the cases cited, and need not be reiterated.

The effect of the transaction between the brothers and sisters was not only to release the lien which the latter had upon the lands to secure the payment of their debt, but it merged the implied simple contract of the brothers under the deed into an express promise under seal. The brothers, though grantees in the deed, did not seal it, and therefore were not bound by it as a deed, but, having accepted the deed and entered into the estate conveyed, it became their duty to pay the sums required to be paid their sisters, and the law implied a promise to pay, upon which in case of failure to pay assumpsit would lie. *Taylor v. Forbes*, 101 Va. 658, 663-665, 44 S. E. 888, and authorities cited. Hav-

ing released their lien and accepted the express undertakings of their brothers under seal to pay a debt evidenced by a simple implied contract, it would seem clear that the transaction and arrangement between the brothers and sisters for the release of the lien and the execution of the bonds discharged and extinguished all their rights and liabilities under the deed, unless there had been an agreement that it should not have that effect. The sisters could not afterwards enforce the lien created by the deed for they had expressly released it. They could not assert a personal liability against their brothers on the implied simple contract arising out of the deed and the acts of the grantees after accepting their express promise under seal to pay the same debt. It is well settled that, the parties being the same, the giving and acceptance of a bond for the payment of money due by a simple contract extinguishes the simple contract liability. *Ward v. Motter*, 2 Rob. 536; 2 Chitty on Contracts, 1160; *Notes to Cumber v. Wane*, 1 Smith's Lead. Cases, 458, and cases cited; 3 Min. Inst. 157.

The action of the court in refusing to admit certain evidence offered by the plaintiffs in error, and in admitting certain evidence offered by the defendant in error, did not prejudice the plaintiffs in error. The object of the evidence rejected was in effect to show that at the time the agreement between the brothers and sisters was entered into by which the said lien or charge was released and the said bonds executed no other or further agreement was made, and that nothing was said in reference to the effect of that transaction upon the rights of the parties under the deed of their father—in other words, that the entire transaction between the brothers and sisters was that the daughters should release their lien and the sons should execute their bonds for the sums due and to become due from them. If the plaintiffs in error had been permitted to prove this, it could not have benefited them, for, as we have seen, the legal effect of releasing the lien and the execution of the bonds was a discharge and extinguishment of the rights and liabilities of the parties under their father's will.

Nor were the plaintiffs in error prejudiced by the evidence introduced over their objection by the defendant in error. Even though the plaintiffs in error were not bound by the recital in the release deed that the debts due the daughters were discharged, that, as we have seen, was the legal effect of the transaction between them and their sisters.

The rejection of evidence which could not benefit, and the admission of evidence which could not prejudice, even if erroneous, is no ground for reversal.

Nor were the plaintiffs in error prejudiced by the action of the court in giving and refusing instructions, for upon the case made and offered to be made there could not have been properly found any other verdict than

that which the jury rendered. *Bryan v. Nash*, 110 Va. 329, 66 S. E. 69.

Upon the whole case we are of opinion that there is no error in the judgment complained of and that it should be affirmed.

Affirmed.

CARDWELL, J., absent.

(111 Va. 223)

BACHRACH v. BACHRACH.

(Supreme Court of Appeals of Virginia. Sept. 15, 1910.)

1. MORTGAGES (§ 37*) — ABSOLUTE DEED AS MORTGAGE — ORAL EVIDENCE — ADMISSIBILITY.

A deed absolute on its face may be shown by oral evidence that it was intended as a mortgage, and such evidence is not restricted to cases of fraud, accident, or mistake.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 97-107; Dec. Dig. § 37.*]

2. MORTGAGES (§ 36*) — ABSOLUTE DEED AS MORTGAGE — EVIDENCE — SUFFICIENCY.

The presumption is that a deed absolute on its face is what it purports to be, and, while oral evidence is admissible to show that it is a mortgage, it must be clear and convincing.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 95, 96; Dec. Dig. § 36.*]

3. MORTGAGES (§ 32*) — ABSOLUTE DEED AS MORTGAGE.

Whether a deed is to be regarded as a mortgage depends upon the circumstances under which it was made, the relations, and negotiations between the parties.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 60-63, 84-94; Dec. Dig. § 32.*]

4. MORTGAGES (§ 38*) — ABSOLUTE DEED AS MORTGAGE — EVIDENCE.

The evidence held to show that a deed absolute on its face was in reality a mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 38.*]

Appeal from Circuit Court, Roanoke County.

Suit by Ida Bachrach against Isaac Bachrach. Decree for complainant, and respondent appeals. Affirmed.

Hart & Hart and Halrston & Halrston, for appellant. Scott, Attizer & Watts, for appellee.

BUCHANAN, J. The question involved in this appeal is whether or not the trial court erred in holding that the deed from Jamison, trustee, to the appellant, Isaac Bachrach, conveying a house and lot in the city of Roanoke, which was absolute on its face, was in fact a mortgage to secure a debt due to him from the appellee, Mrs. Ida Bachrach.

It appears that the appellee in the year 1889 purchased the said house and lot, for which she agreed to pay the sum of \$725. She paid \$250 in cash and assumed the payment of certain notes evidencing the balance of the purchase money due from her vendor. The payment of these notes was secured by a deed of trust. In December, 1891, there remained due and unpaid on these notes about \$200 or \$225, when the trustee in the

deed of trust sold the house and lot at public sale and the appellant became the purchaser at the price of \$250, which sum seems to have been sufficient to satisfy the balance due on the notes secured by the deed of trust and the costs of sale. The trustee, upon the payment of the purchase price, executed a deed, absolute on its face, conveying the property to the appellant.

The appellee claims that the appellant purchased the house and lot for her under an agreement that he would do so, advance the purchase price for her, and take the legal title to himself to secure the repayment of the sum so advanced. The appellant denies that there was any such agreement, and claims that he purchased and paid for the property for himself.

It is well settled in equity that, although a deed is absolute on its face, it may be shown by oral evidence that it was intended as a mortgage, and that such evidence is not restricted to cases of fraud, accident, or mistake. See *Snively v. Pickle*, 29 Grat. 27; note to *Thornbrough v. Baker*, 2 White & Tudor's Lead. Cas. in Eq. (4th Ed.) pt. 2, 1983-1985, and cases cited.

The presumption is that a deed absolute on its face is what it purports to be, and, while oral evidence is admissible to show that it is a mortgage, it must be clear and convincing. *Snively v. Pickle*, supra; 3 Pom. Eq. Jur. (3d Ed.) § 1196.

Whether such an instrument is to be regarded as a mortgage depends upon the circumstances under which it was made, the relations, and negotiations between the parties.

It appears that at the time of the trustee's sale the appellee was financially embarrassed, and was unable to pay the balance of the debt secured by the deed of trust. Shortly prior to that time she entered into negotiations with one of her creditors, Mr. Hughes, of Lynchburg, to purchase the house and lot at the price of \$700, which would be sufficient to satisfy the debt (\$450) which she owed him and to pay the residue of the deed of trust debt. Mr. Hughes agreed conditionally to make the purchase if upon examination he found that the house and lot was worth that sum. The appellee thereupon consulted with her counsel as to the best method of perfecting her title to the property so that Mr. Hughes could get good title to it in the event he concluded to take the property. She was advised by her counsel to have the trustee advertise and sell the property, to get Mr. Hughes to bid it off in his name, pay the balance due on the deed of trust debt, and cancel her indebtedness to him. The trustee at her request did advertise the property for sale, but Mr. Hughes before the day of sale examined or had the property examined, declined to bid upon it, and did not attend the sale because he was unwilling to pay \$700 for it, the price asked

by the appellee, but a few days afterwards offered her \$525 for it, which she declined to accept. The appellee, as she claims, applied to her father and the appellant, her brother-in-law, who was in the habit of aiding her financially, and requested that one or the other of them should bid in the property for her when it was sold by the trustee; that at her instance and her father's the appellant agreed to bid off the property for her at a sum sufficient to satisfy the balance due upon the debt secured by the deed of trust, to advance that sum for her, and to have the house and lot conveyed to him to secure the payment of the sum. The appellee, her father, and the appellant were all present on the day of sale, and the property was bid off by the latter at the price of \$250, and upon the payment of that sum the trustee conveyed the property to him by a deed absolute on its face.

The appellant in his examination-in-chief denies positively that there was any agreement between himself and the appellee as to the purchase of the property, and asserts that he purchased it for himself. On his cross-examination he states that, when he went to the sale with the appellee's father, there was some arrangement between them by which one or the other was to bid for the property, but it had not been determined which of them should do so; and, when asked the direct question on cross-examination, if the arrangement or agreement between himself and Mr. May was not substantially as claimed and testified to by the appellee—that he should bid off the property for her and advance the money to pay for it—his reply was, "If there was anything of the kind I have forgotten it," but that he did not think there was.

The conduct and admissions of the appellant are inconsistent with the claim he now asserts. The evidence of the other witness and the circumstances surrounding the transaction strongly corroborate and sustain the appellee's contention. It clearly appears by the appellant's own admissions that he did not bid off the property for himself. It was knocked off to him for less than half its value, for within a few days afterwards the appellee was offered \$525 for it by Mr. Hughes, which offer she declined to accept. The appellee collected the rents from the property as her own for more than two years, and until she and the appellant's wife, who was her sister, had some disagreement, when the appellant notified the tenant in the property to pay the rents to him. The appellee at once consulted her counsel in reference to the matter, and he advised her to permit the appellant to collect the rents until he had received a sum sufficient to pay the advances made by him for her. The latter never asserted any claim to the rents collected by the appellee or sought to recover

them from her, and never, so far as the record shows, made the claim that he had purchased the property for himself until just before the institution of this suit, when the appellee and her husband, upon the advice of her counsel, called upon him for a statement of his collections and disbursements, so that there might be a settlement between them.

After a careful consideration of all the facts and circumstances disclosed by the record, we are of opinion that the trial court did not err in holding that the deed in question, although absolute on its face, was a mortgage, and in enforcing it as such.

The decree complained of must be affirmed. Affirmed.

OARDWELL, J., absent.

(111 Va. 245)

BECKER v. JOHNSON.

(Supreme Court of Appeals of Virginia. Sept. 15, 1910.)

1. EQUITY (§ 447*)—BILL OF REVIEW—REQUISITES.

After dismissal of a suit to avoid a sale of stock for false representations, the court should have allowed plaintiff to file a bill of review, based on newly discovered evidence, the bill being verified and accompanied by an affidavit as to the false representations, and it appearing that plaintiff had unsuccessfully tried to obtain such evidence for the trial from the affiant.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1091, 1094; Dec. Dig. § 447.*]

2. EQUITY (§ 447*)—BILL OF REVIEW—NEWLY DISCOVERED EVIDENCE.

In a suit to declare a sale of stock void for false representations that a certain person had bought some of the stock and had paid a certain price for it, plaintiff's request to such person to testify as to whether he had made such purchase was the use of such reasonable diligence to obtain that evidence as should sustain a bill of review on the ground of the subsequent procurement of such evidence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1091, 1094; Dec. Dig. § 447.*]

3. EQUITY (§ 460*)—BILL OF REVIEW—AFFIDAVIT—SUFFICIENCY.

Where plaintiff in a suit in equity seeks a review for newly discovered evidence, his verified bill accompanied by the affidavit of the proposed new witness setting forth his testimony, and declaring his willingness to testify, fulfills the requirement that an answer under oath requires at least the testimony of two witnesses, or of one witness and corroborating circumstances to overcome it.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1122; Dec. Dig. § 460.*]

Appeal from Corporation Court of City of Roanoke.

Suit by Becker against Johnson. From the decree for defendant, and the decree overruling the motion to file a bill of review, plaintiff appeals. Reversed.

A. B. Hunt, for appellant. Price & Kyle and S. H. Graves, for appellee.

WHITTLE, J. This suit was brought by the appellant, Becker, to rescind the sale of

20 shares of stock in the Universal Spring Motor Corporation and cancel 4 negotiable notes made by him for the purchase price thereof, on the ground that the sale was procured by false representations fraudulently made to the plaintiff by the appellee, Johnson. Upon the allegation that the notes in question had been placed in the custody of S. H. Graves and subsequently transferred to Tatum, Davis, and Adams, those parties were impleaded along with Johnson. Graves disclaimed all interest in or possession of the notes, but the other defendants asserted ownership of them as holders in due course.

The material allegations of the bill on the main features of the case are, in substance, that the defendant, Johnson, sold to the plaintiff the 20 shares of stock for \$1,200, taking his four negotiable notes therefor; that, as an inducement to the purchase, Johnson represented (among other matters not necessary to be mentioned) that A. E. King, an influential and prosperous citizen of Roanoke, had subscribed for 100 shares of the stock at the reduced price at which it was offered to the plaintiff, and had actually paid \$2,000 on his purchase; that he, moreover, represented that S. H. Hieronimus, another influential and prosperous citizen, had likewise subscribed for 25 shares of the stock; that the plaintiff knew nothing of the existence of any such company as the Universal Spring Motor Corporation, or of its organization and objects or the value of the stock, but relied and acted solely upon the representations of Johnson, which constituted the inducement to the purchase; and that the representations in both instances were false and made with intent to deceive and mislead the plaintiff and induce him to purchase stock which was worthless.

The bill called for an answer under oath, and Johnson filed his answer denying the allegations of the bill, and averring that his codefendants were bona fide transferees for value of the notes.

The depositions of the plaintiff and King were taken, and the charge in the bill as to the alleged false representations of Johnson of the sale of 100 shares of stock to the latter was substantially proved. But the plaintiff, after diligent effort, failed to discover evidence to establish the untruth of the representation touching the sale of the 25 shares to Hieronimus.

In this state of the proof the case came on to be heard, and the court was of opinion that the allegations of the bill were not sustained; that Johnson was the bona fide holder of the plaintiff's notes on June 18, 1908, and, establishing the titles of his respective transferees, passed the decree complained of dismissing the bill with costs.

Shortly thereafter and within the time prescribed by statute, the plaintiff presented a bill of review for newly discovered evidence, and moved the court for leave to file

the same and to reinstate the original case on the docket. This motion the court overruled, and from that order and the former decree dismissing the original bill this appeal was allowed.

The allegation of the bill of review, with respect to the newly discovered evidence, is substantially as follows: That prior to the hearing of the case the plaintiff had used due diligence to obtain evidence of the falsity of Johnson's representation that Hieronimus had purchased 25 shares of the stock at the price at which he was offering it to the plaintiff, and to that end sent his attorney to Hieronimus to ascertain the facts, but without avail, as he positively declined to furnish any information on the subject; that since the entry of the decree Hieronimus had voluntarily made the affidavit exhibited with the bill of review, to the effect that he did not own a single share of stock in the Universal Spring Motor Corporation, and had never at any time subscribed for any of the stock of that company, either in his own name or in the name of any one else; that he at one time made a partial agreement with Arthur Seibert by which they conditionally agreed between themselves that they would take some of the stock, but afterwards determined not to do so; and that he had never made an agreement with any agent or representative of the company to subscribe for stock; that, when he was first approached by counsel for the plaintiff to ascertain if he was a subscriber, he did not see fit to furnish any information on the subject; but that, since he and Seibert had agreed between themselves not to become subscribers, he had no hesitancy in disclosing the real facts.

This bill of review complies with the rule of practice of courts of chancery with respect to such bills. It is sworn to by the plaintiff, and sustained by the affidavit of Hieronimus. The evidence relied on is new and could not have been discovered by the use of ordinary diligence in time for the former trial; and it is relevant to a distinct charge of misrepresentation in the bill and is such as, if true, ought to produce a different result on a rehearing of the case. *Durbin v. Roanoke Building Co.*, 108 Va. 468, 62 S. E. 339; *Campbell's Ex'r's v. Campbell's Ex'r*, 22 Grat. 649, 696.

The appellant by his counsel in good faith made inquiry of Hieronimus to ascertain, if possible, the facts concerning the representation touching his ownership of the stock, but without success. He did all that reasonable diligence could demand in that behalf; and that satisfied the rule of practice, which only imposes the duty upon the applicant for a new trial of exercising ordinary (not extraordinary) effort in the search for evidence bearing upon the matter under investigation. 29 Cyc. 892.

It is obvious that the corporation court was of opinion that the evidence of the

plaintiff was not sufficient to satisfy the rule that, when the bill calls for an answer under oath and an answer under oath responsive thereto is filed, it furnishes evidence for the defendant, and will be taken as true, unless overcome by the testimony of two witnesses or of one witness and corroborating circumstances or by documentary evidence. *Coldiron v. Ashville Shoe Co.*, 93 Va. 364, 25 S. E. 238. This rule of practice, however, is answered by the affidavit of Hieronimus, which shows that he stands prepared to testify to the falsity of Johnson's representation that he had subscribed for 25 shares of stock.

For these reasons, we are of opinion that the corporation court erred in denying the plaintiff leave to file his bill of review, and for that error the order of refusal must be reversed and annulled, and the case remanded for further proceedings to be had therein not in conflict with the views expressed in this opinion.

Reversed.

CARDWELL, J., absent.

(111 Va. 307)

VICARS v. SALYER.

(Supreme Court of Appeals of Virginia. Sept. 15, 1910.)

1. STATUTES (§ 181*)—CONSTRUCTION—LEGISLATIVE INTENT.

The intention of the Legislature in enacting a statute as gathered from the words thereof or from the occasion and necessity of the law, where the words are not explicit, is the leading clue to the construction of the statute.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

2. STATUTES (§ 236*)—REMEDIAL STATUTES—CONSTRUCTION.

The court in construing a remedial statute should keep in mind the old law, the mischief to be remedied, and the remedy.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 317, 324, 325; Dec. Dig. § 236.*]

3. LIS PENDENS (§ 22*)—PURCHASERS PENDING SUIT—EFFECT.

The rule as to the effect of a lis pendens is founded on its necessity to give effect to judicial proceedings, for, without it, the administration of justice might be frustrated by alienations of that which is the subject of the litigation, pending the suit, and the rule, in the absence of statute, applies even in cases in which there is a physical impossibility that the purchaser could know with any possible diligence of the existence of the pending suit.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 31, 34-37; Dec. Dig. § 22.*]

4. LIS PENDENS (§ 18*)—RECORDING—INDEXING—NECESSITY.

Code 1904, § 3566, providing that no lis pendens shall affect a bona fide purchaser without actual notice unless a memorandum setting forth the description of the land, and the name of the person whose estate is intended to be affected by the suit "shall be left with the clerk of the court * * * who shall forthwith record the said memorandum in the deed book and index the same in the name of the person aforesaid," makes the recording of the memorandum and the indexing of it essential to the docketing of a lis pendens; the object of the statute be-

ing to provide a means by which one desiring to purchase land may by an examination of the deed books ascertain whether or not there is a pending suit which may affect the title.

[Ed. Note.—For other cases, see *Lis Pendens*, Dec. Dig. § 18.*]

5. LIS PENDENS (§ 22*)—BONA FIDE PURCHASER—NOTICE.

In the absence of record notice the knowledge required by statute which will affect a purchaser pending a suit must affect the conscience of the purchaser, and the notice may be either actual or circumstantial or presumptive; but it is not sufficient if it merely puts the purchaser on inquiry, but it must be clear and strong and such as to fix on him the imputation of bad faith in making the purchase.

[Ed. Note.—For other cases, see *Lis Pendens*, Dec. Dig. § 22.*]

Appeal from Circuit Court, Russell County.

Suit between one Vicars and one Salyer. From a decree for Salyer, Vicars appeals. Affirmed.

Vicars & Peery, for appellant. Bond & Bruce, W. W. Bird, and R. S. Meade, for appellee.

BUCHANAN, J. The appellee, Salyer, was a purchaser of land whilst a suit was pending to set aside a conveyance thereof (upon the ground that it was made to hinder and defraud the creditors of the grantor) and to subject the land to the payment of certain debts due from the grantor. Such proceedings were had in the cause as resulted in a sale of the land. The trial court held that the rights of the pendente lite purchaser were superior to those of the purchaser at the judicial sale. From that decree this appeal was taken.

The contention of the appellant is that the suit to subject the land was properly docketed under the provisions of section 3566 of the Code of 1904, or, if it were not, that the appellee had actual notice of the pendency of the suit when he purchased, and that the trial court therefore erred in holding his purchase valid.

The appellee, on the other hand, denies that the lis pendens was properly docketed, and also denies that he had actual notice of the pendency of the suit.

The ground upon which the appellee denies that the lis pendens was properly docketed is that it was not indexed as to the grantee in the deed sought to be set aside—the person from whom the appellee purchased.

The language of section 3566 of the Code is as follows: "No lis pendens, or attachment under chapter one hundred and forty-one, shall bind or affect a bona fide purchaser of real estate, for valuable consideration, without actual notice of such lis pendens or attachment, unless and until a memorandum setting forth the title of the cause, the general object thereof, the court in which it is pending, a description of the land, and the name of the person whose estate is intended to be affected thereby, shall be left with

the clerk of the court of the county or corporation in which the land is situate, who shall forthwith record the said memorandum in the deed book, and index the same in the name of the person aforesaid."

The question presented for our decision is whether "indexing" is a part and a necessary part of docketing of a *lis pendens*. In other words, is the docketing incomplete until the *lis pendens* is properly indexed in the name of the defendants, as provided by section 3566?

The meaning of that section is, of course, to be derived from the statute itself; but, as was said by Judge Moncure in *Fox's Adm'r v. Commonwealth*, 16 Grat. 1, 10: "In the exposition of a statute the leading clue to the construction to be made is the intention of the Legislature, and that may be discovered from different signs. As a primary rule, it is to be collected from the words. When the words are not explicit, it is to be gathered from the occasion and necessity of the law, being the causes which moved the Legislature to enact it."

Section 3566 being a remedial statute, in construing it there should be kept in mind the old law, the mischief intended to be remedied, and the remedy. *Clafin & Co. v. Steenbock & Co.*, 18 Grat. 860, and authorities cited by Judge Joynes.

It is not explicitly or distinctly stated in section 3566 that indexing is necessary to complete the docketing of the *lis pendens*. Neither is it explicitly or distinctly stated that recording in the deed book the memorandum left with the clerk is necessary to complete the docketing. Yet, if the recording of the memorandum in the deed book is not essential to the docketing of the *lis pendens*, little good would be accomplished by the section—at least, the statute would fall far short of remedying the mischief which existed under the old law.

In *Newman v. Chapman*, 2 Rand. 93, 102-105, 14 Am. Dec. 768, the doctrine upon which *lis pendens* rests is clearly, and, as we understand it, correctly, stated by Judge Green. He says that: "The rule as to the effect of a *lis pendens* is founded upon the necessity of such a rule to give effect to the proceedings of courts of justice. Without it the administration of justice might, in all cases, be frustrated by successive alienations of the property which was the object of litigation, pending the suit, so that every judgment and decree would be rendered abortive where the recovery of specific property was the object. This necessity is so obvious that there was no occasion to resort to the presumption that the purchaser really had or by inquiry might have had notice of the pendency of the suit to justify the existence of the rule. In fact, it applied in cases in which there was a physical impossibility that the purchaser could know, with any possible diligence on his part, of the existence of the suit. * * *

After showing that the rule of *lis pendens* was less harsh as administered by courts of chancery than by the common law courts, he continues: "This principle, however necessary, was harsh in its effects upon bona fide purchasers, and was confined in its operation to the extent of the policy on which it was founded. * * *

Because of the hardship which frequently resulted from the enforcement of the rule, especially to bona fide purchasers, statutes have been passed in England and in many of the states of this country intended, as far as practicable, to remedy the mischiefs of the old law, or to lessen its hardships. One of the objects of the Legislature in enacting section 3566 manifestly was to provide a means by which a person desiring to purchase land might by an examination of the deed books in the county where the land was situated ascertain whether or not there was pending a suit which might affect the title to the land. This object could not be accomplished by the mere leaving of the memorandum required with the clerk. An examination of the deed books would disclose nothing in regard to the pending suit, unless, as the section provides, that memorandum was spread upon or recorded in the deed book. As before stated, if indexing the *lis pendens* after it has been spread upon or recorded in the deed book is not an essential part of its docketing, then copying the memorandum in the deed book is not, for the language of the section cannot be mandatory as to the one and merely directory as to the other. The provision of the statute is that the memorandum required "shall be left with the clerk of the court of the county or corporation in which the land is situate, who shall forthwith record the said memorandum in the deed book and index the same in the name of the person aforesaid."

The provisions of the section as to recording the memorandum in the proper deed book and indexing it being the same, both are essential to the complete docketing of a *lis pendens* or neither is. To hold that neither is, not only renders the index to the deed books an untrustworthy guide in the examination of a title, but renders the deed books themselves an untrustworthy guide and makes it necessary, if a purchaser would be safe, to have the clerk's office searched to see if a memorandum of a pending suit had been left with the clerk. Such a construction would not remedy the mischief of the old law and accomplish the manifest intention of the Legislature of making the deed books of the county show the state of the title to land so far as affected by pending suits. It seems to us that to require a purchaser to look to any other source of information than the deed books—that which the statute has provided for him—would be contrary to the spirit and policy if not the letter of the statute.

We are of opinion, therefore, that section

sary that such intention should be expressly declared, but it may be gathered from the whole and every part of the instrument. But the will must be reasonably construed, even where by so doing the parties are put to an election. *Penn. v. Guggenheimer*, supra, and cases cited; *Wilkinson v. Dent*, L. R. 6 Chan. 339.

The difficulty of ascertaining the testator's intent is generally, if not always, greater where he has a partial interest in the property devised than where he undertakes to dispose of an estate in which he has no interest. In the former case the presumption is that he intended to dispose of that which he might properly devise and nothing more; and this presumption will always prevail unless the intention is clearly manifested by demonstration plain or necessary implication on the part of the testator to dispose of the whole estate including interests other than his own. Usually where he has an undivided interest in certain property, and he uses general words in disposing of it, as "all my lands," or "all my estate," no case of election arises; for it does not plainly appear that he intended to dispose of anything not his own. *Penn. v. Guggenheimer*, supra, and authorities cited; *Note to Noys v. Mordaunt*, 1 *White & Tudor's Lead. Cases*, pt. 1, 514, and cases cited. But, if a testator having an undivided interest in a particular property devises the property specifically to his co-owner, a case of election does arise, and the devisee must elect between his own interest in the property and the interest given him by the will. Same authorities; *Miller v. Thurgood*, 83 *Beavan*, 496; *Padberry v. Clark*, 2 *McNaughton & Gordon*, 297.

Let us apply these principles to the case under consideration. By the first clause of the will, the testator devises the dwelling house and land connected therewith occupied by him and his wife as a homestead. That property consisted of two parcels—one lot upon which the dwelling house was situated and in which he only owned an undivided moiety, and another lot connected with and used as a part of the homestead, of which he was the sole owner. The devise is not limited to his interest in the lands devised. The property is described specifically as that occupied as a homestead and as an entirety. The language of the devise is such as would be suitable in disposing of the whole property. It is ample, complete, and correct for that purpose, but wholly inapplicable to a gift of a moiety merely in the lot on which the dwelling house was located.

It seems to us that there can be no reasonable doubt that it was the intention of the testator to dispose of the entire homestead property.

Having reached the conclusion that the appellant by the provisions of her husband's will was put to her election, and that she could not and cannot choose both her own estate and the bequests made in her favor,

the next question is: Has she made such election?

The proof of an election may be express or it may be implied from the acts and conduct of the party, but in either case it must have been with knowledge of the party's rights and with the intention of making an election. See *Showalter v. Showalter*, 107 Va. 713, 720, 60 S. E. 48, and authorities cited.

There was no express election in this case. The acts and conduct of the appellant in holding and using the property actually owned by her husband and in claiming it in her bill show that she was claiming under the will. But there is nothing in her acts and conduct nor in the allegations of her bill which show that in claiming her husband's property given her by the will she knew that she must surrender her fee-simple interest in the dwelling house property, or that she intended to do so. There is nothing to show that she has not always placed the same construction upon the will that she now contends for, and that she did not in good faith shape her conduct by such interpretation. So far as the record shows, no one placed a different construction upon it prior to the filing of the answer of the adult appellees, or that she was ever called upon by any party in interest to elect which of the two interests she would take—her own fee-simple interest in the dwelling house property or the interest given her by the will.

Where an election is once made by a party bound to elect, either expressly or impliedly, with full knowledge of all the facts, it binds him and those who claim under him, although made in ignorance of the law. *Penn. v. Guggenheimer*, supra, 76 Va. 850, 851. Ignorance of law is no excuse for a party's conduct. But, as was held in *Burton v. Haden*, 108 Va. 51, 56, 60 S. E. 736, 15 L. R. A. (N. S.) 1038, the maxim that ignorance of the law is no excuse is confined to matters of the general rules of law, and has no application to the mistakes of persons as to their own private rights and interests. The latter, as was said in that case, stand upon the footing of mistakes of fact.

"It is true," said Lord Chancellor Westbury in *Spread v. Morgan*, 11 H. of L. Cases, 588, 602, "as a general proposition, that knowledge of the law must be imputed to every person, but it would be too much to impute knowledge of this rule of equity (election). * * *

Treating this rule of equity as a matter of fact and not as a matter of law, it would seem that the appellant's election to claim under the will of her husband was made under a misconception of her rights.

Where a party has elected to claim under an instrument under a misconception of fact, such election may not be binding.

In 2 *Pom. Eq. Jur.* § 515, it is said: "To raise an inference of election from the party's conduct merely, it must appear that he

knew of his right to elect and not merely of the instrument giving him such right, and that he had full knowledge of all the facts concerning the parties. As an election is necessarily a definite choice of the party to take one of the properties and to reject the other, his conduct, in order that an election may be inferred, must be done with an intention to elect and must show such intention."

In 1 Jarman on Wills, m. p. 435, it is said: "In order to presume an election from the acts of any person, that person must be shown to have had full knowledge of all the requisite circumstances, as to the amount of the different properties, his own rights in respect to them, etc., and a person having elected under a misconception is entitled to make a fresh election."

In 2 Min. Inst. (4th Ed.) at page 1006, quoted with approval in Showalter v. Showalter, supra, it is said: "It is well established that no one shall be constrained to make an election until the interests to which the election relates are clearly defined and their relative values ascertained, and an election made before that is done will for the most part be disregarded, at least if made under mistaken impressions as to the facts; but only upon the terms (supposing the election to have been unambiguously made) of restoring other persons, whose rights are affected by the party's act of election, to the same situation substantially as if the act had not taken place." And at page 1008 it is said: "Clear proof of an election made must be furnished, and ambiguous acts and conduct will in general not be so construed, unless in those cases where the interests of others have been affected by the acts and require that they should be interpreted to amount to an election. * * *"

Where a person bound to elect between two properties continues in possession or enjoyment or receipt of the rents and profits of both, without being called upon by the other party interested to elect, this conduct indicates no intention of taking one and rejecting the other, and does not therefore amount to an election. 1 Pom. Eq. (1st Ed.) § 575, citing among other cases, Spread v. Morgan, supra. See, also, Padbury v. Clark, supra.

From these authorities it would seem clear that, where a party elects to take under a will under a misconception of fact as to his rights and interests under the will, such election will be disregarded where the other parties affected by such election can be placed substantially in the same situation as if no such election had been made.

The only person affected by the election made by the appellant is her infant son, and nothing has grown out of her action which will work wrong or injury to him.

It is earnestly insisted by the appellees'

counsel that it is too late now for the appellant to make a new election, since the statute (Code 1904, § 2271) requires that a widow must renounce, if at all, the provisions of her husband's will within one year after its admission to probate.

That section has no application to a case like this. "It was intended to provide how a widow must proceed who desires to reject the provisions made for her by her husband's will out of property other than her own and take such interest in his lands as the law gives her. Where a testator disposes of property belonging to his wife in her own right, and also makes provision for her by his will, she has the same right of election as to such property as any other person, and whether or not she has elected to take under or against the will is to be determined as in other cases." Pence v. Life, 104 Va. 518, 521, 52 S. E. 257, and cases cited; Showalter v. Showalter, supra.

We are of opinion that the appellant has not yet made an irrevocable election, and that the trial court erred in holding that she had.

We are further of opinion that the trial court in the decree appealed from properly construed the will, and that the cross-error assigned is without merit.

For the error in the decree holding that the appellant had made a binding election, the decree must be reversed, and the cause remanded to be further proceeded in not in conflict with the views expressed in this opinion and with liberty to the appellant to make her election between her fee-simple interest in the dwelling house property and the life estate or less in all the property disposed of by her husband's will.

Reversed.

CARDWELL, J., absent.

(111 Va. 334)

WILBURN et al. v. RAINES et al.

(Supreme Court of Appeals of Virginia. Sept. 15, 1910.)

1. HIGHWAYS (§ 72*)—PROCEEDINGS—RES JUDICATA.

Where the good faith of applicants for changes of a road was not questioned, and it was not alleged that the requested changes were the same as those involved in previous applications, the decision on the previous applications was not res judicata, notwithstanding prior decisions on similar applications; the doctrine of res judicata not being strictly applied to such proceedings.

[Ed. Note.—For other cases, see Highways Dec. Dig. § 72.*]

2. CONSTITUTIONAL LAW (§ 280*)—DUE PROCESS OF LAW.

Acts 1908, c. 346, providing for the establishment, alteration, and discontinuance of roads in a county, and for the appointment in each magisterial district thereof of a board of road commissioners, with power to establish and alter roads on notice to the landowners, who may attend and offer evidence, and who may appeal to a commission from another district, and to the circuit court and the Supreme Court of Appeals on the question of just com-

pensation, etc., is not invalid as depriving the owners of their property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 280.*]

3. EMINENT DOMAIN (§ 1*)—NATURE OF POWER—JUDICIAL QUESTIONS.

The condemnation of private property for road purposes involves the exercise of the power of eminent domain as an attribute of sovereignty, which may be exerted by the Legislature directly or through such agencies as it pleases, and the matter of ascertaining compensation, which is judicial, so that the owner may have that question investigated and determined by an impartial tribunal, and under Const. 1902, § 88 (Code 1904, p. ccxxx), may appeal to the Supreme Court of Appeals, but the Legislature may limit the right of appeal to the judicial question only.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

4. STATUTES (§ 123*)—TITLE—SUFFICIENCY.

The title of Acts 1908, c. 346, relating to the establishment, alteration, discontinuance, and working of roads of a designated county, and to the punishment of obstructions of the road commissioners in the discharge of their duties, and the punishment of road officials for neglect of their duties, expresses the general purpose of the act, and the subordinate features of it are germane to the general object, so that the act does not contravene Const. 1902, § 52 (Code 1904, p. ccxxi), in that it embraces more than one object.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 123.*]

5. STATUTES (§ 109*)—TITLE—SUFFICIENCY.

A title fairly expressing the general subject of a statute covers provisions for all proper means and instrumentalities, which will, or may, facilitate the accomplishment or enforcement of the purpose expressed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 130-139; Dec. Dig. § 109.*]

6. HIGHWAYS (§ 157*)—OBSTRUCTIONS—STATUTES.

The Legislature may invest road officers with power to remove obstructions from public highways, and Acts 1908, c. 346, relating to roads in a designated county, is not unconstitutional because it gives the road officers provided for authority to remove obstructions from such roads.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 157.*]

7. HIGHWAYS (§ 19*)—ESTABLISHMENT—STATUTES.

Acts 1908, c. 346, providing for the establishment of roads in a designated county, must be construed in connection with the general road law, and the provisions of the general law prevail as to the establishment of a road through an orchard, cemetery, or home, where the special act is silent on that subject.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 19.*]

8. STATUTES (§ 97*)—HIGHWAYS—SPECIAL LAWS—VALIDITY.

Const. 1902, § 64 (Code 1904, p. ccxiv), prohibiting local laws in enumerated cases, does not forbid the passage of special road laws, where, in the judgment of the Legislature, the matter cannot be provided for by general law.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 97.*]

Appeal from Circuit Court, Giles County.

Suit by one Wilburn and others against one Raines and others. From a decree of dismissal, plaintiffs appeal. Affirmed.

Jackson & Williams and Williams & Farrier, for appellants. McCormick, Henson & Broun, for appellees.

WHITTLE, J. This appeal is from a decree dismissing on demurrer a bill in equity by the appellant, impleading the board of road commissioners of Walker's creek magisterial district in Giles county, to have an act to provide for "the establishing, altering, discontinuing, and working and keeping in repair the roads and bridges of that county," and for incidental purposes, as amended, approved March 14, 1908, declared unconstitutional. Acts 1908, p. 611, c. 346.

Before considering the constitutional questions relied on, we shall notice the assignment of error, that the matters prayed for in the application for a change of road are res adjudicata. This assignment rests upon the allegation that on three previous occasions, covering a period of 17 years, some of the present applicants had petitioned for the location or change of the same road through the land of the appellants.

The question whether the state ever exhausts its power of eminent domain in the matter of establishing public highways need not now be considered. It is an important public question, and too rigid an application of the doctrine of res adjudicata to such proceedings by a few individuals so as to bind the state or the community at large might be attended with embarrassing consequences. Conditions are constantly changing and circumstances which did not exist at the time of the first refusal may subsequently arise and render the establishment of a new road or a change in an old one imperative. On the other hand, courts of equity are always open to restrain the abuse of the power.

In this case the good faith of the applicants is not questioned, and, moreover, it is not alleged that the proposed changes are the same as those involved in previous applications.

The bill assails the constitutionality of the act on two grounds: (1) Because it deprives the owners of their property for public use without due process of law; and (2) because it denies them the right of appeal to this court except on the question of damages.

The act, to some extent at least, seems to have been modeled after the Pulaski county road law. Acts 1897-98, p. 97, c. 95. That act provides that the application of five freeholders for changes in the location of roads shall be made to the road board composed of the chairman of the board of supervisors and the member of the board and road commissioners from the district affected. This board viewed the location, and, if deemed advisable, made the changes, assessed damages to the landowners, and reported its action to the county court. The county court

was not empowered to supervise or review the action of the road board, but merely directed the report to be recorded and notified the landowners of its action in order that they might appeal on the question of damages. Such appeal was either to a supplemental commission or to the county court. In other words, the road was established ex parte and without the intervention of the court with right of appeal to the county court and jury only as to damages, and was final except on questions of law.

The Giles county act provides for a similar commission, the supervisor, and road commissioner, who in case of disagreement can call in the county surveyor. Their view is not ex parte, but notice of time and place is given the landowners who may attend and offer evidence which the commission must consider, and be heard; and, to avoid local prejudice, with right of appeal to a commission from another district. Likewise, in all cases an appeal lies to the circuit court and jury on the question of just compensation; and upon that question a further appeal lies from the decision of the court and jury to this court, both on law and fact, by virtue of the general law. The act thus provides for the location of the road only after notice and hearing, with right of appeal to a second commission, and unrestricted appeal to the court and jury and ultimately to this court on the question of just compensation.

This act is far more liberal to the landowner than the Pulaski county act. The latter act was construed by this court in *Painter v. St. Clair*, 98 Va. 85, 34 S. E. 989, and it was there held that it did not authorize the taking of private property without "due process of law." On that point the court said: "The act is also assailed as unconstitutional in that it takes the property of the citizen 'without due process of law.' The power of eminent domain is an incident of sovereignty. It is vested in the Legislature, and it can only be set in motion by virtue of legislative enactment, by which the time, manner, and occasion of its exercise are directed and controlled, except as restrained by the Constitution. The Legislature is clothed with exclusive authority to determine when the necessity exists for exercising the power. It may exercise it directly, or it may select such agencies as it pleases, and confer upon them the right, subject only to the limitations contained in the Constitution, and with respect to it 'due process of law' only requires that it shall be exercised in subordination to the established principle, that private property cannot be taken for public use without the consent of the owner, save upon payment to him of just compensation. 10 Am. & Eng. Enc. of Law (2d Ed.) 309; Chicago, etc., R. Co. v. Chicago, 166 U. S. 226 [17 Sup. Ct. 581, 41 L. Ed. 979]; *Lewis on Eminent Domain*, §§ 237, 238, 240, 242, 253, 254." *Commission of Fisheries*

v. Hampton Roads Oyster, etc., Ass'n, 109 Va. 565, 64 S. E. 1041, 3 Va. App. 290.

The second ground of objection is that the act is in conflict with section 88, art. 6, Const. Va. (Code 1904, p. ccxxx), in that it denies an appeal to this court in a controversy "concerning the condemnation of property * * * and a roadway," except as to the amount of damages.

This contention grows out of a misconception of the scope of the foregoing provision. The condemnation of private property for road purposes involves the exercise of dual functions. The one, the power of eminent domain, as an attribute of sovereignty, may be exerted by the Legislature "directly, or it may select such agencies as it pleases, and confer upon them the right." *Painter v. St. Clair*, supra. The other, the matter of ascertaining a just compensation for the property condemned, is judicial in its character, and the owner is entitled to have that question investigated and determined by an impartial tribunal, and by section 88 of the Constitution, with the ultimate right of appeal to this court. And this latter right is, as we have seen, fully safeguarded.

It is true that under the general road law there is an unrestricted right of appeal to this court; but it is also true that it is within the competency of the Legislature by special enactment to limit that right to judicial questions only.

It was urged in argument that the act contravenes section 52, art. 4 (page ccxi), in that it embraces more than one object. It is a sufficient answer to this objection to say that the general purpose of the act is expressed in the title, and that the subordinate features of it are not incongruous with, but are germane to, the general object.

The rule in such case is well stated in 26 Am. & Eng. Enc. of Law, p. 588: "A title fairly expressing the general subject covers provisions for all proper means and instrumentalities which will or may facilitate the accomplishment or enforcement of the purpose expressed, such, for instance, as a provision prohibiting violations of the act, or prescribing a penalty or other punishment for violations."

This general statement of the law is in harmony with the decisions of this court. See *Bertram v. Commonwealth*, 108 Va. 902, 62 S. E. 969, and cases cited.

It was also contended that the act is unconstitutional because it gives the road board authority to remove fences, woodpiles, or other obstructions which may be in the road. The part of the Constitution which this section of the act is supposed to infringe is not pointed out, and no objection is perceived to investing road officers with power to remove obstructions from public highways. Indeed, it is a right possessed by any citizen having occasion to travel the public roads of the commonwealth.

It was argued, however, that, as no express limitations are imposed on the road board with respect to the location of roads, they could invade the precincts of the citizen's home, yard, garden, orchard, or cemetery for purposes of expropriation. This is a total misapprehension of the act, which must, of course, be construed in connection with the general road law, and, when silent on any subject, the general law, which prohibits such taking, prevails.

Other questions relied on in argument have been considered, but are not deemed of sufficient importance to demand special notice. The Constitution of Virginia does not forbid the passage of special road laws where in the judgment of the General Assembly such enactment cannot be provided for by general law. Article 4, § 64 (page cccxiv). And it is matter of common knowledge that for time out of mind such laws have been enacted in this state many of which are now in force throughout the commonwealth, and it would lead to disastrous consequences for the courts to declare them invalid upon an overstrict construction of legislative discretion.

Upon the whole case, we find no error in the decree under review, and it must be affirmed.

Affirmed.

CARDWELL, J., absent.

(111 Va. 288)

SHOFFNER v. SUTHERLAND et al.
(Supreme Court of Appeals of Virginia. Sept. 15, 1910.)

1. APPEAL AND ERROR (§ 171*)—QUESTIONS REVIEWABLE—THEORY OF CASE IN TRIAL COURT.

Where a case was tried in the lower court on a theory not presented by the pleadings, the court on appeal will review the case on the same theory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1061; Dec. Dig. § 171.*]

2. WATERS AND WATER COURSES (§ 69*)—POLLUTION OF STREAM—RIGHTS OF RIPARIAN OWNERS.

Any use of a stream that materially fouls the water, or a deposit therein of any filth that so far affects the water as to impair its value for ordinary purposes, or anything which renders the water offensive to taste or smell, or which is calculated to excite disgust in those using it for ordinary purposes, is a nuisance, which equity will enjoin at the suit of a riparian owner injured thereby.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 60, 61; Dec. Dig. § 69.*]

3. WATERS AND WATER COURSES (§ 69*)—POLLUTION OF STREAM—RIGHTS OF RIPARIAN OWNERS.

An operator of a sawmill on a stream threw sawdust into the stream, so that the same was deposited in it and in springs near to it. The deposits discolored the water, and in warm weather the decaying sawdust gave it an offensive odor. Live stock in some instances refused to drink the water, and it was less fit for domestic purposes and was unwholesome.

Physicians believed that the decaying sawdust deposits affected the purity of the water, and generally caused disease along the streams where found. Held, that the use of the stream was in violation of the rights of a lower riparian owner, who could sue to restrain such use.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 60, 61; Dec. Dig. § 69.*]

Appeal from Circuit Court, Dickenson County.

Suit by J. E. L. Sutherland and J. M. Powers against J. E. Shoffner. From a decree for plaintiffs, defendant appeals. Affirmed.

Vicars & Peery, R. E. Chase, and A. A. Skeen, for appellant. S. H. Sutherland, for appellees.

BUCHANAN, J. This is a suit brought by lower riparian landowners to restrain a sawmill operator higher up the stream from casting into the stream sawdust and other substances which it is alleged polluted the water, and rendered it unwholesome and unfit for domestic purposes.

The relative rights of an upper and lower riparian owner were carefully considered by the court in the recent case of Trevett v. Prison Association, 98 Va. 332, 36 S. E. 373, 50 L. R. A. 564, 81 Am. St. Rep. 727, and the conclusion reached, as correctly stated in the syllabus of the case, that "the natural pollution of water in its flow through populous regions of country cannot ordinarily be restrained. But any use of a stream that materially fouls and adulterates the water, or the deposit or discharge therein of any filth or noxious substance that so far affects the water as to impair its value for the ordinary purposes of life, or anything which renders the water less wholesome than when in its ordinary state, or which renders it offensive to taste or smell, or which is naturally calculated to excite disgust in those using the water for the ordinary purposes of life, will constitute a nuisance which courts of equity will enjoin, or for which a lower riparian owner injured thereby is entitled to redress."

It is insisted by the appellees' counsel in argument that the appellant was not a riparian owner, and therefore did not have the rights of such an owner. Whether he was or not does not appear, and, as no such question was raised in the pleadings, this court will consider the case as if he were a riparian owner, as seems to have been done in the trial court.

It is a conceded fact in the case that the appellant was operating a sawmill on said stream and had been for some months, and that, except during the dry season, he did cast the sawdust from his mill into the stream. The appellant seeks to justify such use of the stream on the ground that he was almost entirely engaged in sawing poplar lumber upon his mill which was a band mill; that sawdust from poplar cut on a band mill

is very light, floats readily upon the water, and is carried down the creek into larger streams, and could not from the character and rapidity of the stream damage any one by lodging or sinking therein; and that even if it were deposited in and along the stream, which is denied, it is not a noxious or unwholesome substance, and did not pollute the stream or render it less valuable for domestic purposes.

The contention of the appellees, on the other hand, is that all the sawdust did not float into other streams, but was deposited in quantities in and along the stream, and in times of high water was backed and deposited in springs near the stream, thereby discoloring the water, causing it to have an offensive odor, impairing its value for domestic purposes, and rendering it unwholesome, offensive and injuriously affecting the health of the people dwelling along the stream.

The evidence is conflicting, but it clearly preponderates in favor of the appellees' contention. The weight of evidence not only shows that sawdust was deposited in and along the stream on which the sawmill was located and in springs near to the stream, but that these deposits discolored the water; that in warm weather the decaying sawdust gave the water an offensive odor; that stock in some instances refused to drink it; that it was less fit for domestic purposes, was unwholesome, and in the opinion of physicians decaying sawdust deposits affected the purity of the water, and were frequently, if not generally, the cause of disease along the streams in which the deposits were found.

It is insisted by the appellant's counsel that restraining sawmill operators from casting sawdust into the streams along which they are operating will be very hurtful to the vast lumber interests of the southwestern part of the state, and will hinder the development of that great source of wealth.

"It would," as was said in *Townsend v. Norfolk Ry. Co.*, 105 Va. 49, 52 S. E. 978, 4 L. R. A. (N. S.) 87, 115 Am. St. Rep. 842, "be a source of regret if, in the administration of justice by the establishment and enforcement of sound principles, the prosperity of our people should be hindered or checked, but it would be not only a source of regret, but of reproach, if material prosperity were stimulated and encouraged by a refusal to give to any citizen a remedy for wrongs he may sustain, even though inflicted by forces which constitute factors in our material development and growth. Courts have no policies, and cannot permit consequences to influence their judgment further than to serve as warnings and incentives to thorough investigation and careful consideration of the causes submitted to them."

Upon the facts disclosed by the record, we are of opinion that the use made of the stream by the appellant in casting sawdust

into it was in violation of the rights of the appellees, and that the trial court did not err in enjoining the appellant from such use. The decree complained of must therefore be affirmed.

Affirmed.

CARDWELL, J., absent.

MEADE et al. v. KING et al. (111 Va. 283)

(Supreme Court of Appeals of Virginia. Sept. 15, 1910.)

1. QUIETING TITLE (§§ 10, 12*)—PREREQUISITES TO REMEDY—LEGAL TITLE AND POSSESSION.

To sue to cancel a deed as a cloud on title, plaintiff must allege and prove that he holds the legal title and possession.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 8-12, 36-45; Dec. Dig. §§ 10, 12.*]

2. QUIETING TITLE (§ 12*)—POSSESSION OF PLAINTIFF—SUFFICIENCY TO MAINTAIN ACTION.

Since a landlord's rights under a lease devolved upon his grantees, an attempted attornment by the tenant to plaintiffs by delivering the keys was a fraud on the landlord's rights, and plaintiffs cannot rely on it as showing a possession entitling them to sue to quiet title.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 8-12, 44, 45; Dec. Dig. § 12.*]

Appeal from Circuit Court, Russell County.

Bill by J. D. King and another against Robert B. Meade and another. From a decree for complainants, defendants appeal. Reversed.

W. W. Bird and R. S. Meade, for appellants. E. S. Finney, for appellees.

WHITTLE, J. This is a suit in equity brought by the appellees, J. D. and Esther King (who assert ownership and possession of the land in controversy, and title to certain personal property, by deed from Margaret E. Patrick dated July 13, 1907), to set aside a deed of August 25, 1906, from Isaac L. Patrick and Margaret E. Patrick, his wife, conveying the same property to the appellants, Robert B. and Alice M. Meade, as creating a cloud on their title to the land. The consideration for both deeds was the support and maintenance of the grantors. The deed to the appellants also stipulated that they should add a room to their dwelling for the occupancy of the grantors, which was done, and Patrick and wife moved to the residence of appellants where they dwelt until November 25, 1906, when Isaac L. Patrick died.

In July, 1907, Mrs. Patrick, who was in very feeble health at the time, against the remonstrance of the appellants, left their home and was taken to the home of the appellees, where, having executed the deed of July 13, 1907, she died on August 25th following.

The alleged source of power in Mrs. Pat-

rick to execute the deed of July 18th is a will made by her late husband, dated April 7, 1906, in which, after providing for the payment of debts, he gives his entire estate to his wife. Appellants insist that this will was revoked and rendered wholly inoperative by the subsequent deed from the testator and wife which invested them with the complete title to the property, subject to be divested only by their failure to perform the conditions subsequent contained in their deed.

It was, moreover, contended that the breach of a condition subsequent does not ipso facto operate a reverter of the title, and the estate continues in full force until proper proceedings are taken to consummate the forfeiture, either by the grantor in his lifetime or his heirs at law, and that an unenforced right of reverter in property is not the subject of devise.

In our view of the case, it is not necessary to consider the issues of law and fact raised by these contentions. The sole ground of equitable jurisdiction set up in the bill is for the cancellation of the appellants' deed, as casting a cloud on the appellees' title.

The principle has been frequently enunciated and steadfastly adhered to by this court, that to maintain such a suit it is indispensable for the plaintiff to allege and prove that he holds both the legal title and possession of the land in controversy.

In *Smith v. Thomas*, 99 Va. 86, 37 S. E. 784, Cardwell, J., after laying down the foregoing rule, observes: "• • • And, even where such a bill avers title and possession of the lands in plaintiff, if, upon the hearing of the cause, the evidence failed to show his possession, the bill would be dismissed for the want of jurisdiction in a court of equity." *Carroll v. Brown*, 28 Grat. 791; *Stearns v. Harmon*, 80 Va. 48; *Otey v. Stuart*, 91 Va. 714, 22 S. E. 513; *Va. Coal & Iron Co. v. Kelly*, 98 Va. 332, 24 S. E. 1020; *Kane v. Va. Coal & Iron Co.*, 97 Va. 329, 33 S. E. 627; *Glenn v. Brown*, 99 Va. 822, 38 S. E. 189; *Steinman v. Vicars*, 99 Va. 595, 39 S. E. 227; *Neff v. Rymon*, 100 Va. 521, 42 S. E. 314; *Glenn v. West*, 103 Va. 521, 49 S. E. 671; *Tax Title Co. v. Denoon*, 107 Va. 201, 57 S. E. 586.

In this case the evidence fails to sustain the allegation that the plaintiffs were in possession of the land at the time of the institution of the suit in January, 1908.

The foundation of their claim to possession rests upon the alleged attornment to them by Davenport, who acquired possession under a lease from Isaac L. Patrick. This lease expired in the fall of 1907, but possession was continued under it until March 1, 1908. The rights of Patrick under the lease devolved upon the appellants as his grantees, and the attempted attornment by their tenant to the appellees by delivery of the keys to the premises was a fraud on the rights of the

landlord, in which the appellees participated, and they took in subordination to those rights.

In *Emerick v. Tavener*, 9 Grat. 220, 223, 58 Am. Dec. 217, Lee, J., says: "A tenant cannot be permitted to question or impugn the title of his landlord during the continuance of the tenancy, nor until he has restored the possession or done what would be regarded as equivalent; nor can he be permitted to deny that the possession so received was the possession of his landlord. And the rule is extended to the case of a tenant acquiring the possession by wrong against the owner, and to one holding over after the expiration of his lease; and it applies, whether the question arises directly in an action brought against the tenant to recover the possession, or in a collateral form in some other action." Again, at page 225, of 9 Grat. (58 Am. Dec. 217), the learned judge remarks: "Thus Alton acquired by the conveyance from Emerick and his transfer of the possession, as against the lessor Tavener, no greater right than that by which Emerick held the possession. He took the premises in the same plight and condition in which they were held by him, and with all the duties and responsibilities, so far as Tavener was concerned, which could attach to Emerick himself. This doctrine, that a tenant cannot be permitted, by any act of his during the tenancy, or until he surrenders the possession, to call in question his landlord's title, is as well sustained in reason and justice as it is supported by numerous authorities."

In *Reusens v. Lawson*, 91 Va. 226, 237, 21 S. E. 347, 350, the court says: "The relation of landlord and tenant is one carefully guarded by the law, and it will not allow one who has come into the possession of land under another to set up an adverse claim to it without full notice of his disclaimer or assertion of adverse title." *Hulvey v. Hulvey*, 92 Va. 182, 23 S. E. 233; *Neff v. Rymon*, supra.

Applying these principles to the evidence, it is clear that the plaintiffs were not in possession of the land at the institution of this suit, and therefore were not entitled to invoke the equitable jurisdiction of the court.

For these reasons, the decree appealed from must be reversed and the bill dismissed. Reversed.

CARDWELL, J., absent.

ROANOKE RY. & ELECTRIC CO. v.
STERRETT.

(Supreme Court of Appeals of Virginia. Sept. 15, 1910.)

1. APPEAL AND ERROR (§ 1002*)—REVIEW—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. DAMAGES (§ 214*)—PERSONAL INJURIES—INSTRUCTIONS.

An instruction that if one, suing for personal injuries, refused to submit to physicians' treatment or to follow their instructions, she could not recover so far as her injuries were aggravated by such refusal, was properly modified to require a finding that the refusal was unreasonable where the physicians were defendant's surgeons.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 542; Dec. Dig. § 214.*]

3. CARRIERS (§ 316*)—INJURIES TO PASSENGERS—NEGLIGENCE—BURDEN OF PROOF.

The burden rested primarily on a street car passenger, suing for injuries caused by a bridge collapsing under the car, to show the company's negligence, but proof of injury through the accident was sufficient.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1261, 1262, 1283-1294; Dec. Dig. § 316.*]

4. CARRIERS (§ 316*)—INJURY TO PASSENGERS—NEGLIGENCE—BURDEN OF PROOF.

In a suit by a passenger against a carrier for personal injuries, proof of the accident shows negligence *prima facie*, and requires the carrier to disprove negligence, and show that the accident was inevitable, or resulted from a cause against which human care and foresight could not provide.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1261, 1262, 1283-1294; Dec. Dig. § 316.*]

5. CARRIERS (§ 321*)—INJURIES TO PASSENGERS—INSTRUCTIONS—NEGLIGENCE.

In an action for injury to a street car passenger caused by a bridge collapsing under the car, it was not error to instruct that if the proximate cause of the collapse "might have been" the slipping of stringers, and that the defendant was negligent in the method adopted in placing the stringers in the bridge, plaintiff could recover.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1247, 1326-1337, 1343; Dec. Dig. § 321.*]

Error to Circuit Court, Roanoke County.

Action by Mary E. Sterrett against the Roanoke Railway & Electric Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Hall, Woods & Jackson and Kime & Fox, for plaintiff in error. Scott, Attizer & Watts, N. H. Hairston, and Hoge & Penn, for defendant in error.

WHITTLE, J. This case is before us the second time. See *Roanoke Ry. & E. Co. v. Sterrett*, 108 Va. 533, 62 S. E. 385, 19 L. R. A. (N. S.) 316, 128 Am. St. Rep. 971.

At the last trial the plaintiff, Mary E. Sterrett, was awarded \$5,700 damages for injuries sustained by her while a passenger on a motor car of the defendant caused by the falling in of its bridge over Tinker creek between Vinton and Roanoke. On the morning of the accident Mrs. Sterrett boarded the car in question near Vinton for Roanoke. The car continued to take on passengers until it reached the bridge, and entered upon it in an overcrowded condition, moving slowly, and, when upon the extreme western sec-

tion, the structure suddenly collapsed, and in the fall the plaintiff, who was standing in the aisle about midway of the car, received the injuries for which she sues.

On the last as upon the first trial, two wholly distinct theories were presented as to the cause of the accident. On behalf of the plaintiff it was insisted that the original plan of the bridge called for stringers with sufficient lap, resting upon eye-beams, and securely fastened together so as to prevent the possibility of slipping; that some eight or ten months prior to the accident the stringers originally used in the bridge by the Virginia Bridge & Iron Company, who constructed it, were removed and replaced by new stringers laid end to end and unfastened; and that the slipping of some of these stringers from their supports caused the bridge to collapse. On the other hand, the theory of the defendant is that there was a defective weld in one of the iron cords, upon which the bridge was dependent for support; that the cord broke at the weak point and the bridge fell; and that the defect was latent, and could not be discovered by inspection.

On the first appeal the evidence was found entirely insufficient to sustain the plaintiff's theory. Indeed, the plaintiff introduced no expert evidence on the subject, and the opinion witnesses for the defendant testified that the conditions described by the nonexpert witnesses, even if true, could not possibly have caused or contributed to the accident. They explained the mechanism of the bridge—that it was built in sections, united by iron cords, which bound them in one span and held up the structure, and that it fell by reason of the latent defect in the weld of one of the eye-bars forming the bottom cord, as before described. The judgment was consequently reversed by this court and a new trial awarded.

It would serve no good purpose to discuss in detail the evidence as disclosed by the present record. It is enough to say that it is to the last degree conflicting. The expert testimony of the plaintiff controverts utterly the defendant's theory, and sustains the opposing hypothesis, that the accident resulted from the slipping of the substituted stringers from the eye-beams caused by the negligent manner in which they were placed and maintained in the bridge. Upon familiar principles, therefore, the verdict of the jury is conclusive upon that phase of the case.

The assignments of error touching instructions involve the amendment of instructions "C" and "D" as offered by the defendant.

Instruction "C," as amended, told the jury "that if they believe from the evidence that the plaintiff unreasonably refused to submit to the treatment of physicians, or unreasonably refused to follow their instructions in regard to her injuries, and that in conse-

quence of her refusal so to do her injury was aggravated and increased, then she cannot recover * * * to the extent her conduct resulted in damage to her, and which might have been avoided and prevented by submitting to the treatment and following the directions of her physicians."

The objection goes to the interpolation of the word "unreasonably" in the instruction. The physicians alluded to were the surgeons of the defendant employed by the company to attend the plaintiff. She had also engaged physicians of her own selection, and by the instruction as originally offered was held bound at the risk of curtailing her recovery of damages to submit to the treatment prescribed by the defendant's surgeons whether reasonable or unreasonable. The amended instruction correctly told the jury that the plaintiff's right of recovery could only be affected by her unreasonably refusing to submit to the treatment or follow the instructions of physicians.

The concluding paragraph of instruction "D," as amended, is as follows, the italicized words indicating the amendment to which exception was taken: "Now, if the jury believe from the evidence that the proximate cause of the collapse of the bridge *might have been* the slipping of one or more of the stringers from the eye-beams, and that the defendant was negligent in the method it adopted in placing and maintaining said stringers in the bridge, they must find for the plaintiff; and, if they believe from the evidence that the proximate and sole cause of the collapse of the bridge was the breaking of said loop-bar, owing to a hidden or latent defect therein, then they must find for the defendant."

It is true the burden rested upon the plaintiff primarily to establish the negligence of the defendant, but, as was said on the former appeal, "where the plaintiff has shown that she was injured by the breaking down of the bridge and overturning of the car, then this is sufficient proof of negligence on the part of the defendant company to meet the requirements above stated."

In an action by a passenger against a common carrier for personal injuries, proof of the accident raises a prima facie presumption of negligence, and shifts upon the defendant the burden of proving that it has not been guilty of negligence, and that the accident resulted from inevitable casualty, or some cause against which human care and foresight could not provide. Accordingly, this court, on the first appeal, approved the following instruction: "The slightest neglect against which human prudence and foresight might have guarded, and by reason of which the injury may have been occasioned, renders the Roanoke Railway Company liable in damages for such injury. B. & O. R. Co. v. Wightman's Adm'r, 29 Gratt. 431,

26 Am. Rep. 384; B. & O. R. Co. v. Noell's Adm'r, 32 Gratt. 394."

The amendment objected to is in the language of the foregoing instruction, which correctly measures the high degree of responsibility owing from a common carrier to a passenger and is conclusive on the point at issue.

Upon the whole case we find no error in the judgment, and it must be affirmed.

Affirmed.

CARDWELL, J., absent.

(111 Va. 237)

BANK OF POCAHONTAS v. BROWNING.
(Supreme Court of Appeals of Virginia. Sept. 15, 1910.)

USURY (§ 53*)—TRANSACTION CONSTITUTING.

Notes given in satisfaction of a judgment and of claims in another pending suit under an agreement for an extension of time were usurious where they included a sum paid by the creditor as attorney's fees; the transaction not being affected by the fact that the judgment was marked satisfied, and the pending suit dismissed.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 114-118; Dec. Dig. § 53.*]

Error to Circuit Court, Tazewell County.

Action by the Bank of Pocahontas against James Browning. From a judgment for defendant, plaintiff brings error. Affirmed.

Sexton & Roberts and Henry & Graham, for plaintiff in error. Henson & Bowen, for defendant in error.

HARRISON, J. The facts in this case are agreed. They show that James Browning was indebted to the Bank of Pocahontas in the sum of \$26,217, of which \$2,200 had been reduced to judgment, and suit was pending to obtain judgment for the residue. In this situation Browning applied to the bank for an extension of time, which was granted, upon the terms that he would execute his notes with his wife as indorser, at 30 and 60 days, for the full amount of his indebtedness, and, in addition thereto, that he would pay \$600 due from the bank to its attorneys for their services in prosecuting the suits, and would also pay all costs of such suits. The bank on its part was to mark the \$2,200 judgment satisfied and dismiss the pending suit.

The notes executed in pursuance of this agreement, which included the \$600 debt due by the bank to its attorneys, were subsequently paid in full by Browning. The costs of the suits, amounting to \$87.74, which Browning had agreed to settle as part of his undertaking, not being paid, this suit was brought to recover that sum.

Browning, under proper pleas, claimed that the \$600 due from the bank to its attorneys which he had been required to pay was usury, which he was entitled within the year to recover back, and set up that amount as an offset to the demand of the bank. There was a judgment against the bank in

favor of Browning for the \$600 claimed by him, subject to a credit of \$87.74, the unpaid costs claimed by the bank, which we are asked to review.

The objections suggested to the proceedings in this case are without merit. The real question involved is: Was the transaction between the bank and Browning for the forbearance of money, and, if so, was the \$600 to that extent in excess of 6 per cent. and therefore usurious?

This question was decided in the case of *Toole v. Stephen*, 4 Leigh, 581, the only difference in the facts being that in the case cited the attorney's fees were paid directly to the attorney while in the present case they were paid to the bank. In that case the whole argument was directed to the question whether or not the agreement to pay the attorney for the bank his commissions of 5 per cent. in addition to the principal and interest of the debt rendered the transaction usurious, and this court held that it did.

It is contended that there were other considerations than the forbearance and extension of time in the case at bar, viz., marking the judgment satisfied and dismissing the suits. In the case cited the new obligation given was in satisfaction of existing judgments, but that fact did not make the transaction less usurious. Marking the judgment satisfied and dismissing the suits followed as the result of taking the new obligations, with other sureties, due after date.

The question here involved is clearly controlled by the case of *Toole v. Stephen*, supra, and the judgment complained of must therefore be affirmed.

Affirmed.

CARDWELL, J., absent.

(111 Va. 265)

CLINCHFIELD COAL CO. v. WHEELER.

(Supreme Court of Appeals of Virginia. Sept. 15, 1910.)

1. MASTER AND SERVANT (§ 217*)—ASSUMPTION OF RISK.

A servant when he enters the service of the master assumes all the ordinary risks of the service, and, as a general rule, he also assumes all risks from causes which are known to him or should be readily discernible by one of his age or capacity, in the exercise of ordinary care.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

2. MASTER AND SERVANT (§ 217*)—ASSUMPTION OF RISK.

A mature and experienced man was placed in charge of a traction motor used in hauling cars from a mine. He knew that he was undertaking to operate a motor on a 10 per cent. grade. He was instructed by an expert under whose immediate supervision he ran the motor time and again up and down the road, and under this instructor he stopped the motor and started it, applied and released the brakes, and tested its operation generally. When his attention was called to the grade, he said he had not run on a 10 per cent. grade, but on one nearly as heavy. He was cautioned to make

repeated examinations of the motor, and report anything that might be wrong. Held, that he assumed the risk of injuries occasioned by his permitting the motor to get away from him.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

Error to Circuit Court, Russell County.

Action by A. J. Wheeler, administrator, against the Clinchfield Coal Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

See, also, 108 Va. 448, 62 S. E. 269.

Phlegar & Powell, for plaintiff in error.
W. H. Werth, for defendant in error.

HARRISON, J. There is no error to the prejudice of the defendant in error in the proceedings by which this writ of error has been matured for hearing, nor is the bond taken open to the objections urged against it. The motion to dismiss is therefore overruled.

This is the second appearance of this case upon our docket. Upon the former hearing the judgment of the circuit court was reversed, the verdict of the jury set aside, and the case remanded for a new trial, if the plaintiff should be so advised; the court expressing the opinion that under the facts established by the record no verdict could be rightfully found for the plaintiff under any instructions. *Clinchfield Coal Co. v. Wheeler*, 108 Va. 448, 62 S. E. 269.

The salient facts of the case are fully stated in the former opinion, and need not be repeated here. On the part of the plaintiff the only additional evidence presented by the present record consists of innumerable figures and calculations relating to the mechanical efficiency of the motor, and the opinions of a number of witnesses, that it was not reasonably safe to operate a motor on a 10 per cent. grade. In the view we take of the case, it is not necessary to recite or comment in detail upon this new evidence. Taken as a whole, it has little or no bearing upon the crucial question upon which this case must turn if rightly decided. Much of it is incompetent, being the mere opinions of witnesses who are shown to be without sufficient knowledge or experience to express an opinion on the subject as to which they undertake to speak, and most, if not all, of it is misleading and calculated to divert the attention of the jury from the real issue to be determined by them.

The record shows that all grades and machinery used in coal mining operations are more or less dangerous, and that the degree of safety secured in doing such work is measured largely by the care and skill exercised by the operator in performing the duties undertaken by him.

In the case at bar, it is as true now as it was on the former hearing that every fact

which it is claimed contributed to the accident was as fully known to the deceased as it was to the defendant. He was a man of intelligence and considerable experience in such work, and he knew that he was undertaking to operate a traction motor on a 10 per cent. grade. The uncontradicted evidence shows that he was fully instructed in this particular operation by a highly competent and experienced expert, under whose immediate supervision he ran the motor time and again up and down the road; that under this instructor he stopped the motor and started it, applied and released the brakes, and tested its operation generally; and that, when his attention was especially called to the grade, he said he had not run on a 10 per cent. grade, but had run on one nearly as heavy. He was cautioned to make repeated examinations of the motor, and to report anything that might be wrong.

A servant when he enters the service of the master assumes all of the ordinary risks of such service, and also as a general rule assumes all risks from causes which are known to him, or should be readily discernible by a person of his age or capacity, in the exercise of ordinary care. When the employé is not placed by his employer in a position of undisclosed danger, but is a mature man, doing the ordinary work which he has engaged to do and whose risks are obvious to any one, he assumes the risk of the employment, and no negligence can be imputed to the employer for an accident to him therefrom. *Clinchfield Coal Co. v. Wheeler*, supra, and authorities there cited.

It is clear from the record before us that whatever danger may have attended the use of the traction motor and the operation generally in which the deceased was engaged was a risk assumed by him with full knowledge of all the facts.

The refusal of the circuit court to give the following instruction asked for by the defendant is assigned as error: "If the jury believe from the evidence that Jack Wheeler knew the railroad track, its grades, curves, and its length and condition that he represented to the defendant or its representative that he understood and could run the motor on that track, that he was a man of sufficient intelligence to know that the steeper the grade the faster a motor and train would run down it, and the harder it would be to hold them, and that he knew what load he was attempting to haul down the grade, he assumed the risk, and the jury must find for the defendant."

This instruction announced the well-settled doctrine of assumed risk. It was applicable to the case, and should have been given. The evidence tended strongly to establish every fact stated in the instruction, and, if those facts were proven to the satisfaction of the jury, the conclusion of the in-

struction, that the deceased assumed the risk and the jury should find for the defendant, was inevitable.

The judgment must be reversed, the verdict set aside, and the case remanded for a new trial.

Reversed.

CARDWELL, J., absent.

(111 Va. 875)

DENNISTON v. SAUL et al.

(Supreme Court of Appeals of Virginia. Sept. 15, 1910.)

1. TAXATION (§ 710*)—TAX SALES—REDEMPTION—PAYMENT OR TENDER.

Under Code 1904, § 651, providing that, where the purchaser at a tax sale refuses to receive the redemption price, it may be paid within the redemption period to the clerk of the court, a tender of the redemption price by the owner, through his attorney with power to act, to the clerk, made within the redemption period and immediately after the refusal of the purchaser, through his attorney, to receive the same, is sufficient to permit of a redemption.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1436, 1437; Dec. Dig. § 710.*]

2. TAXATION (§ 710*)—TAX SALES—REDEMPTION.

Where the purchaser of record at a tax sale and his attorney refused to receive the redemption price tendered within the redemption period by the owner, through his attorney with power to act, and there was no intimation that the purchaser was not the proper person to receive the payment or that a corporation had been created to which the redemption price should be paid, the owner could properly tender the price to the clerk of the court, and, when he did so, the right to redeem could not be defeated on the ground that the corporation to whom the land had been conveyed was ignorant of the owner's perfected right of redemption.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1436, 1437; Dec. Dig. § 710.*]

Appeal from Circuit Court, Roanoke County.

Suit by A. C. Denniston against J. P. Saul and another. From a decree of dismissal, plaintiff appeals. Reversed and remanded.

Thomas W. Miller, for appellant. Kime & Fox, for appellees.

HARRISON, J. The bill in this case was filed by the appellant, asking to have a tax deed conveying certain lots to the Salem Land Corporation declared null and void, and that he be allowed to redeem said lots by paying the taxes due thereon.

The lots in question were returned delinquent by the treasurer of Roanoke county in the name of the appellant, A. C. Denniston, and sold in January, 1907, to J. P. Saul for \$24, and in June, 1907, the sale was confirmed by an order of the circuit court of Roanoke county. In June, 1908, by direction of J. P. Saul, a deed from the clerk was recorded, conveying the lots to the Salem Land Corporation.

The record shows that within four months after the sale was confirmed the appellant, through T. W. Miller, his attorney, offered

to redeem the lots by paying to J. P. Saul, the purchaser, all that was due him on account of his purchase of the lots. The purchaser declined to receive payment, saying that R. W. Kime was counsel for the syndicate for which he had bought the lots, that he had the treasurer's receipt for what had been paid, and that appellant must deal with said counsel. Soon thereafter the owner of the lots, through his same attorney, tendered the amount due to R. W. Kime, the attorney for the purchasers who refused to receive the same upon the sole ground that under instructions from his client he could not receive the price of redemption until the attorney for the owner should produce in writing his authority to act in the matter of redeeming the lots. Thereupon T. W. Miller, the attorney for A. C. Denniston, the owner of the lots, made a sufficient tender of the amount due to C. D. Denit, the county clerk of Roanoke county, who declined to receive the same upon the ground that he did not consider himself authorized to do so by the statute.

Upon these facts, which are satisfactorily established by the record, the circuit court denied the prayer for relief, and dismissed the bill, with costs.

A. C. Denniston, the owner of the lots in question, lived in Philadelphia, and it clearly appears that T. W. Miller, of the city of Roanoke, was his duly authorized attorney, with full power to act for him in the matter of redeeming these lots. It is unnecessary to decide whether or not the purchaser of the lots at the tax sale had the right to decline to receive the redemption price from the attorney of the owner until he had produced a writing showing his authority to redeem. A sufficient tender of the redemption price was made to the clerk immediately after the refusal of the purchaser, through his attorney, to receive the same, and the statute expressly provides that, where the purchaser shall refuse to receive the redemption price, the same may be paid, within the redemption period, to the clerk of the circuit court of the county whose officer may have sold such real estate. Code 1904, § 651.

The Salem Land Corporation contends that its title, under the deed of June, 1908, cannot be disturbed because it had no notice of the tenders made by appellant in his efforts to redeem the lots.

It appears that at the time of the purchase of these lots by J. P. Saul he was acting for a syndicate composed of himself and others, and that it was then understood that a corporation was at some time thereafter to be formed, to which the lots should be conveyed. Pursuant to this understanding, the Salem Land Corporation was formed, with J. P. Saul, the purchaser of the lots, as its president, but when it was created does not appear. So far as the record shows, there is no evidence of its existence until

the deed was made to it in June, 1908, which was months after the day of redemption had passed. It is hardly credible, under the circumstances of this case, that the Salem Land Corporation did not know of the offers of the appellant to redeem his lots. It is, however, immaterial whether it knew of such offers or not. J. P. Saul was the purchaser of record, and the only person to whom the offer to redeem could be made. When Saul and his attorney successively refused to receive the redemption price, there was no intimation from either that J. P. Saul was not the proper person to receive the payment, or that a corporation had been created to which the redemption price of the lots should be paid.

In this case the owner had done all that the statute required of him in order to redeem his lots. He had tendered the amount due to the purchaser of record, and upon his refusal to receive it had tendered the same to the clerk. When the owner has done all that is required to entitle him to redeem his land, the purchase cannot defeat that right by having the land conveyed to a third person, although such third person be ignorant of the owner's perfected right of redemption. If this device were to prevail, the right of the owner to redeem could be easily defeated in many cases. The grantee in such a deed takes no higher or greater rights than the purchaser of record had.

The purchaser at the tax sale having refused to receive the amount due for the redemption of the lots, and a sufficient tender thereof having been made to the clerk and refused by him, the prayer of the bill should have been granted.

The decree appealed from must therefore be reversed and set aside, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

Reversed.

CARDWELL, J., absent.

(111 Va. 313)

VIRGINIA-CAROLINA RY. CO. v.
CLAWSON'S ADM'R.

(Supreme Court of Appeals of Virginia. Sept. 15, 1910.)

1. RAILROADS (§ 398*)—DEATH OF PEDESTRIAN—
NEGLIGENCE—EVIDENCE—WEIGHT.

In an action against a railway company for the death of a boy struck by a locomotive, evidence held to show that the engineer could not have discovered decedent's peril in time to have saved him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1356-1359; Dec. Dig. § 398.*]

2. RAILROADS (§ 396*)—CONTRIBUTORY NEGLIGENCE—CAPACITY OF CHILDREN—BURDEN OF PROOF.

The burden was on a railway company sued for the death of a boy struck by a locomotive to rebut the legal presumption that he was incapable of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1342; Dec. Dig. § 396.*]

3. NEGLIGENCE (§ 85*)—DEGREE OF CARE REQUIRED OF INFANTS.

Ordinarily less care is required of an infant than of an adult respecting his own personal safety, but his responsibility is always to be measured according to his maturity and capacity as determined by the particular circumstances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 121-129; Dec. Dig. § 85.*]

4. RAILROADS (§ 382*)—CONTRIBUTORY NEGLIGENCE—INFANTS.

An intelligent boy, 11 years old, who had kept a refreshment stand, had driven a horse, had lived near railway tracks, and was frequently around them, possessed sufficient capacity to appreciate the danger of crossing a track, as affecting the railway company's liability for his death caused by a locomotive striking him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1297-1304; Dec. Dig. § 382.*]

5. RAILROADS (§ 382*)—DEATH OF PEDESTRIAN — PROXIMATE CAUSE — CONTRIBUTORY NEGLIGENCE.

An 11 year old boy struck by a locomotive while attempting to cross in front of it was guilty of contributory negligence barring recovery for his death, where there was an unobstructed view of the locomotive's approach.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1301; Dec. Dig. § 382.*]

6. RAILROADS (§ 367*)—DUTY OF ENGINEER TO KEEP LOOKOUT.

The duty of locomotive engineers to keep a reasonable lookout for persons on the track does not necessarily require that both the engineer and fireman should be on the lookout at the same time.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1257, 1258; Dec. Dig. § 367.*]

Error to Circuit Court, Washington County.

Action by Fred Clawson's administrator against the Virginia-Carolina Railway Company. From a judgment for plaintiff, defendant brings error. Reversed.

White & Penn and G. E. Penn, Jr., for plaintiff in error. J. J. Stuart and L. P. Summers, for defendant in error.

WHITTLE, J. In our view of this case the only assignment of error which calls for extended notice is the action of the trial court in overruling the motion of the plaintiff in error, the defendant below, to set aside the verdict of the jury on the ground that the contributory negligence of the plaintiff's intestate was the proximate cause of the accident.

It is insisted in that connection that if it be conceded that the crossing at which the accident occurred was a public crossing, which imposed upon the railway company the duty of giving signals of the approach of its trains, and that it negligently failed to give such signals by blowing the whistle or ringing the bell, and to keep a reasonable lookout for persons on the crossing, as charged in the declaration, nevertheless the plaintiff's own evidence shows such contributory negligence on the part of his intestate as would bar a recovery.

The essential facts of the case may be summarized as follows: Fred Clawson, plain-

tiff's intestate, a boy about 12 years and 10 months old, was run over and killed by an engine and tender of the defendant in the daytime, at the extract company's crossing in the town of Damascus. The engine was drifting downgrade at a rate of speed variously estimated at from 8 to 20 miles an hour. At the point of accident the track of the defendant's railway, the Virginia-Carolina, and that of the extract company run parallel with each other, with an intervening space of 25 feet between rails. Clawson was playing with several other boys on the east side of the Virginia-Carolina track near the crossing, when the yard foreman of the extract company, who was shifting a box car on their track, called to them from the top of the car to come over and remove a plank which was lying across the rails. In response to his request two of the boys, Clawson and Tolley, crossed over to the west side of the Virginia-Carolina track, and Clawson removed the obstruction. Tolley was at the crossing and Clawson 15 feet above when they undertook to recross the Virginia-Carolina track. Tolley preceded his companion, and the engine was within a few feet of him when he cleared the eastern rail. Clawson was struck "just as soon as he got on" the track. This, in varying language, is substantially the account of the accident given by eyewitnesses of the plaintiff.

The engineer testified that he saw Tolley on the track at the crossing and Clawson at the side of the track a few feet above, but did not know of his attempt to cross in front of the engine until after the accident. It is clear from all the evidence that it was not possible for the engineer to have discovered Clawson's peril in time to have saved him.

Clawson being under 14 years of age at the time of the accident, the burden rested upon the defendant to rebut the legal presumption that he was incapable of contributory negligence. To meet that burden, the defendant, without contradiction, proved that he was a very intelligent boy; that he had formerly kept a stand in Damascus from which he sold pop and candy, and frequently drove his father's one-horse wagon, hauling wood and hay and other feed. (His father testified that he had a hired driver, and that, if his son ever drove the wagon unattended, it was without his knowledge.) The evidence also showed that the elder Clawson had been an engineer on the Virginia-Carolina Railway for about 16 or 18 months, and that young Clawson had lived for several years in the immediate vicinity of the railroad; that he was frequently about the track, and crossed it in going to school when his father lived at Louderdale.

Ordinarily a less degree of care is required of an infant than of an adult, but his responsibility is always to be measured according to his maturity and capacity, and de-

terminated by the circumstances of the case as shown by the evidence. *Washington, etc., R. Co. v. Quale*, 95 Va. 741, 30 S. E. 391; *Roanoke v. Shull*, 99 Va. 419, 34 S. E. 34, 75 Am. St. Rep. 791. See, also, 29 Cyc. 535.

In *McDaniel v. Lynchburg Cotton Mills Co.*, 99 Va. 146, 37 S. E. 781 (an elevator case), a boy 12 years and 8 months old was held guilty of contributory negligence, "with which he was properly chargeable by reason of his maturity and intelligence," and his administrator was denied a recovery for an accident which occasioned his death.

So, also, in *Seaboard & C. R. Co. v. Hickey*, 102 Va. 394, 46 S. E. 392, it was held "that an intelligent boy upwards of eight years of age, who was familiar with railroad trains and who had been repeatedly warned to keep off of moving cars," was guilty of contributory negligence in attempting to get on a flat car while the train was in motion, and could not recover for resulting injury.

These cases serve to illustrate the general principle with respect to the age and degree of intelligence and capacity necessary to render a child responsible for failure to exercise reasonable care for his own safety.

While the law sedulously guards the safety of an infant who is too young and inexperienced to be conscious of danger, or to exercise judgment and discretion in protecting himself, the rule is otherwise where he has attained sufficient age and experience to observe and avoid danger. In the latter case the law imposes upon him the obligation of using the reason he possesses, and of exercising a degree of care for his protection commensurate with his maturity and capacity, and for failure to do so will visit upon him the consequences of his own negligence.

In *Thompson on Negligence*, § 1492, the author observes: "In case of a child old enough to be in the language of the law *sui juris*, which roughly speaking means able to take care of himself, the question of his contributory negligence in attempting to cross a railroad track would be a question for a jury under much the same circumstances that it would in case of an adult."

The evidence which as we have seen was undisputed on the point leaves no room to doubt that plaintiff's intestate possessed ample capacity to have appreciated the danger of his surroundings, and his own negligence proximately contributed to the accident which cost him his life.

The oft-repeated language of *Riely, J.*, in *Johnson v. Chesapeake, etc., R. Co.*, 91 Va. 171, 179, 21 S. E. 238, 240, is very much in point: "The track itself was a proclamation of danger. It was his duty before going upon it to use his eyes and ears. He should have both looked in either direction from which a train could come and listened; and, if his faculties warned him of the near approach of a train, it was his duty to keep off the track. If he had done so in this instance,

he could not have failed to hear and see the coming train, and be made sensible of the danger of going upon the track. It was in plain view. And if he failed to look and listen, as duty required of him, and attempted to cross the track in front of a rapidly moving train, and was caught before he got across and killed, his own act, his own negligence, so contributed to the injury that a recovery therefor cannot be sustained."

In the instant case there was an unobstructed view of the track in the direction from which the engine was coming for more than 1,500 feet.

In *Southern Railway Co. v. Daves*, 108 Va. 378, 61 S. E. 748, it was said: "A railroad company cannot be held liable for the failure of its engineer to anticipate that a person, whether infant or adult, approaching a crossing, is going to step upon the track immediately in front of a moving engine, unless there is something to suggest to the engineer that such person does not intend to remain in a place of safety until the train has passed."

As the case must go back for a new trial, it is proper to say that upon evidence similar to that at the first trial instruction No. 1—that the duty to keep a reasonable lookout does not necessarily require that both the engineer and fireman should be on the lookout at the same time—ought to be given. *Brammer v. N. & W. Ry. Co.*, 104 Va. 150, 51 S. E. 211.

For these reasons, the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial.

Reversed.

CARDWELL, J., absent.

(111 Va. 319)

VIRGINIA IRON, COAL & COKE CO. v. BOND.

(Supreme Court of Appeals of Virginia. Sept. 15, 1910.)

1. JUDICIAL SALES (§ 58*)—BONA FIDE PURCHASERS—NOTICE.

A purchaser at a judicial sale donated land for school purposes on condition that it should revert to him on its ceasing to be used for that purpose. A public school was conducted thereon. The court directed a resale of the land for nonpayment of the price. The purchaser again purchased and transferred his interest to a third person who obtained a deed on payment of the price, and who conveyed the land to a grantee, excepting the interest of the school authorities. The grantee had no notice that the purchaser had any claim to the reversionary interest in the school land, and the proceedings in which the third person became the purchaser failed to disclose any such arrangements, and showed that the whole tract had been directed to be sold. *Held*, that the grantee was a purchaser of the entire tract without notice of the claim of the purchaser, and the title to the land used for school purposes reverted to the grantee on the school authorities ceasing to use the land for such purpose.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 114; Dec. Dig. § 58.*]

2. VENDOR AND PURCHASER (§ 239*)—BONA FIDE PURCHASER—NOTICE.

A complete purchaser for value and without notice, actual or constructive is not affected by any latent equity founded on trust, fraud, mistake, incumbrance, or otherwise.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 583-600; Dec. Dig. § 239.*]

3. APPEAL AND ERROR (§ 879*)—QUESTIONS REVIEWABLE.

Where a party denied relief, did not appeal, and was not made a party to the appeal, the correctness of the decision denying relief will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8581-8583; Dec. Dig. § 879.*]

Appeal from Circuit Court, Wise County.

Suit by W. H. Bond against the Virginia Iron, Coal & Coke Company. From a decree for plaintiff, defendant appeals. Reversed in part, and entered.

D. D. Hull, Jr., and Vicars & Peery, for appellant. Bond & Bruce, for appellee.

BUCHANAN, J. If the appellant, the Virginia Iron, Coal & Coke Company, is a purchaser for value without notice, or holds under such a purchaser of the land in controversy, the appellee, W. H. Bond, is not entitled to the relief sought.

It appears that in the year 1853 by a decree of the circuit court of the city of Richmond certain lands known as the De Tubeuf lands upon which the state held a mortgage were directed to be sold to satisfy the mortgage debt. The lands were sold in November of that year. One of the purchasers was a man by the name of Niel. The sale was reported and confirmed by the court. No provision having been made in that case for conveyances to the purchasers upon the payment of the purchase price, the General Assembly passed an act in 1873 (Acts 1872-73, c. 79) authorizing the circuit court of Wise county, where all or a large part of the land was situated, to appoint a commissioner to collect the unpaid purchase money, and upon its payment in full by the respective purchasers to make conveyances therefor. In 1874 a decree or order was entered by that court pursuant to the act, appointing George W. Kilgore such commissioner, with directions to convey to the parties who had paid and to resell the lands where the purchase money was not paid in full within six months from the date of that decree. In December of that year an 86-acre parcel of the Niel tract was sold under that decree by the commissioner to the appellee. The sale was reported to the court and confirmed. The appellee failing to pay, a bill was filed in the circuit court of Wise county to subject the land for the unpaid purchase price, and a decree was entered therein, directing Commissioner Kilgore to sell the said land. It was sold, the appellee

bidding it off. Before the sale was reported to the court, the appellee transferred his purchase to D. K. Banner. All these facts were reported to the court, which by a decree entered in 1878 confirmed the said sale and transfer and directed the commissioner to convey the land to Banner upon the payment of the purchase price. Banner having complied with the terms of the sale, the commissioner conveyed the land to him by deed dated May 1, 1888.

Prior to the institution of the last-named suit, the appellee, Bond, had by parol donated a small parcel of the land to the proper authorities for public free school purposes, with condition that, when the land so donated ceased to be used for public free school purposes, it should revert to him. A schoolhouse was erected thereon, and a public free school conducted there for a number of years.

In the year 1891 D. K. Banner conveyed the said 86-acre tract of land, together with other lands to the Virginia & Tennessee Coal & Iron Company. That conveyance, however, excepted from its operation the interest which the public free school authorities had in the schoolhouse lot under a deed or writing executed by the said Banner prior thereto. By mesne conveyances the appellant, the Virginia Iron, Coal & Coke Company, acquired title to the interests of the Virginia & Tennessee Coal & Iron Company in the said lands purchased from D. K. Banner.

In the year 1907 the appellee brought this suit in which he claims, in substance, that the public free school authorities had abandoned the lot donated by him for public free school purposes; that the said property which he had taken possession of had reverted to him, although Banner and the appellant were each asserting title thereto, and prayed that the rights of the parties be adjudicated, and that the school district authorities be compelled to convey the legal title thereof to him (the appellee), and for general relief.

The lower court upon a final hearing of the cause held that the lot had been abandoned by the public free school authorities, that the appellee was entitled to the schoolhouse lot in controversy, and ordered the appellant and the school district authorities to make and file deeds releasing to the appellee all their right, title, and interest in and to the said lot.

The effect of the proceedings had in the cause of Kilgore, commissioner, against the appellee, Bond, for a resale of the 86-acre tract of land was to clothe Banner with all the appellee's title and interest in the land, including his reversionary interest in the schoolhouse lot. The appellee's bill concedes that the legal title to the whole tract passed, but claims that Banner or his successor in

title, the appellant, holds the title to the schoolhouse lot as trustee for his benefit. This claim is based upon the theory that, when the appellee transferred his bid to Banner, he did not intend to include the reversionary interest in the schoolhouse lot, and that Banner knew this and did not intend to buy it.

The evidence relied on to show such an understanding or agreement between the appellee and Banner is vague and unsatisfactory, and inconsistent with the proceedings in the cause of Kilgore, commissioner, against the appellee and with the subsequent conduct of both the appellee and Banner. But whether the evidence be sufficient to establish any such understanding between the appellee and Banner is immaterial in the view we take of the case. The record wholly fails to show that, when the Virginia & Tennessee Coal & Iron Company purchased and received its conveyance from Banner, it had either actual or constructive notice that the appellee had or made any claim to the reversionary interest in the schoolhouse lot. The proceedings in the case in which Banner became the purchaser of the 86-acre tract of land not only failed to disclose any such arrangement, but showed that the whole of the 86-acre tract had been directed to be sold, and was sold in that cause. The effect of the proceedings in that cause was to convey the land to Banner, and to clothe him with the title of all the parties to the suit. *Zollman v. Moore*, 21 Grat. 313, 327-329. When the Virginia & Tennessee Coal & Iron Company purchased, the public free school authorities were in possession of the schoolhouse lot, and therefore, under the doctrine of *Chapman v. Chapman*, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846, in force at that time, it was affected with notice of whatever claim or interest the public free school authorities had in the schoolhouse lot. Before receiving its deed, it had actual notice of their interest in that lot. It obtained from the school authorities of the district a copy of a paper which purported to be a writing signed by Banner by which he granted, bargained, and sold to the trustees (naming them) for that district the schoolhouse lot, in which it was provided that, when the property was no longer used for school purposes, it was to revert to Banner. There is some conflict of evidence as to whether or not Banner had executed the paper of which the paper obtained purported to be a copy; but the evidence of disinterested witnesses shows directly that said copy was present when Banner executed his deed, that he had full knowledge of the contents of the paper, recognized its validity, received pay for the schoolhouse lot, and included it in his conveyance, subject, however, to the estate or interest the school trustees had therein. Neither before nor at

the time of its purchase did the Virginia & Tennessee Coal & Iron Company have notice of the appellee's claim. Its rights were therefore superior to the claim of the appellee, even if its existence had been clearly and satisfactorily established; for it is settled law that a complete purchaser for value and without notice, actual or constructive, is not affected by any latent equity founded upon trust, fraud, mistake, incumbrance, or otherwise. *Carter v. Allan*, 21 Grat. 241; *Snyder v. Grandstaff*, 96 Va. 478, 31 S. E. 647, 70 Am. St. Rep. 863; *Kerr on Fraud & Mistake*, 312, 436.

A brief has been filed in the cause by counsel for the school district, in which it is insisted that the trial court erred in holding that the schoolhouse lot had been abandoned by the school district for school purposes; but, as the school district did not appeal and was not made a party to this appeal, the question of whether or not the trial court erred in holding that the schoolhouse lot had been abandoned will not be considered.

We are of opinion that upon the abandonment of the schoolhouse lot by the school authorities the title to it reverted to the appellant and not to the appellee, and that the trial court erred in not so decreeing. The decree appealed from, to that extent, must be reversed, and this court will enter such decree as the trial court ought to have entered.

Reversed.

CARDWELL, J., absent.

(111 Va. 341)

MILLER v. TURNER, Judge.

(Supreme Court of Appeals of Virginia. Sept. 15, 1910.)

1. COSTS (§ 143*)—BOND FOR PAYMENT OF COSTS—LIABILITY.

A bond binding the obligor to pay all costs decreed against a third person in a suit against the obligor and another as trustees refers to costs which the third person had or would incur in the suit while the attitude of the parties remained unchanged, but it does not bind the obligor to pay costs when the third person became hostile to him.

[Ed. Note.—For other cases, see *Costs*, Dec. Dig. § 143.*]

2. JUDGMENT (§ 642*)—CONCLUSIVENESS.

Where the Supreme Court of Appeals on the original hearing and on rehearing adjudicates a controversy, it cannot be reopened.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1156; Dec. Dig. § 642.*]

Petition for mandamus by one Miller against one Turner, Judge. Mandamus awarded.

Keith & Richards and H. G. Moffett, for petitioner.

PER CURIAM. The case of *Miller, Trustee, v. Smith et al.*, lately pending in this court was remanded to the circuit court of

Rappahannock County for further proceedings. That court referred the cause to a commissioner to make a report distributing the fund under its control in accordance with the decree of this court. The commissioner reported on the 6th of November, 1909, returning with his report a paper in the nature of a petition from Edward T. Jones, one of the parties in interest, in which he claimed that there were other sums which should be allowed him, and with this claim the report of the commissioner deals.

Miller filed an answer to the petition of Jones, in which he insists that the matters set out in the petition are *res judicata*. When the case came before the circuit court upon the papers formerly read, the commissioner's report, the petition of Jones, and the answer of exceptions to the report, the court, holding that the claims of Jones were not valid debts against the fund, dismissed the petition and directed the commissioner, to whom the report was recommitted, to make a distribution of the fund in accordance with the decree of the Supreme Court of Appeals and the written opinion therein filed, and to carry out the decree, with the exception that after directing the appellees interested in the subject-matter of the litigation, to wit, E. T. Jones, Mary Ann Smith, and R. E. Miller, to pay the costs assessed against them by the Court of Appeals, the said circuit court expressed the opinion and directed that one-third of the costs, being the share of E. T. Jones, should be paid by John B. Miller, by reason of his obligation to pay costs as contained in his bond for \$400 to said Jones, dated February 5, 1903, which is filed in the cause.

The petitioner contends that these costs directed by the circuit court to be paid by Miller as the share of E. T. Jones were the costs incurred in the Court of Appeals, and were by that court decreed to be paid by Jones, and that the circuit court was without jurisdiction or authority to do otherwise than carry out the order of this court.

In the bond referred to for \$400 Miller binds himself to pay all costs decreed against Edward T. Jones in the suit of Smith, trustee, against J. B. Miller and R. E. Miller, trustees, but it is plain, we think, that the costs there referred to were such as Jones had at the date of the bond incurred in the suit or which might be incurred by him, the attitude of the parties remaining unchanged, but that it does not bind Miller to pay costs when Jones became hostile to Miller, and these very costs were incurred in defending a litigation to which Jones was an active party.

However this may be, the rights of the parties growing out of the bond which was given were the subject of litigation before this court at the former hearing, which is irrevocable and finally disposes of this ques-

tion. Not only is this so, but Jones appeared before this court at the September term, 1909, and asked for a rehearing of the decree of this court rendered on the 25th of June, 1909. In that petition the whole subject was again presented to this court, and the attention of the court specifically directed to the stipulation in the bond of \$400 given by Miller to Jones—that he was to pay all costs decreed against Jones in the suit of Smith, Trustee, v. Miller. That petition was considered by this court and its prayer denied, so that the whole subject had been fully adjudicated and cannot be reopened.

We are, therefore, of opinion that the writ of mandamus should issue as prayed in the petition. It is further ordered that E. T. Jones pay to the petitioner his costs in this behalf expended.

CARDWELL, J., absent.

(8 Ga. App. 325)

HERALDS OF LIBERTY v. BOWEN.
(No. 2,358.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

(Syllabus by the Court.)

1. INSURANCE (§ 814*)—MUTUAL BENEFIT INSURANCE—ACTIONS—SERVICE OF PROCESS.

The method of service on fraternal beneficial associations, provided by the act of 1900 (Acts 1900, p. 71), is only cumulative. Service may be perfected upon an insurance association by serving its agent who procured the issuance of the contract which is the basis of the suit, provided the agency continues until service.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 814.*]

2. TRAVERSE OF ENTRY OF SERVICE OF PROCESS PROPERLY OVERRULED.

It appearing that such an agent was served, the traverse of the entry of service was properly overruled.

3. INSURANCE (§ 687*)—FRATERNAL BENEFICIAL ASSOCIATIONS.

An association which issues policies of insurance, but, so far as appears, has no ritual, nor any initiation, cannot be legally classed as a fraternal beneficial association under the laws of Georgia, and may be treated as an ordinary insurance company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1824; Dec. Dig. § 687.*]

4. APPEAL AND ERROR (§ 671*)—REVIEW—EVIDENCE.

For the want of a proper brief of evidence, the exceptions depending upon a consideration of the evidence cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2872; Dec. Dig. § 671.*]

5. PETITION SUFFICIENT.

The petition amply disclosed the fact that the plaintiff sued in his representative capacity as administrator on the estate of the insured.

6. INSURANCE (§ 715*)—MUTUAL BENEFIT INSURANCE—REQUISITES OF POLICY—STATUTORY PROVISIONS.

The act approved August 17, 1906 (Acts 1906, p. 107), which provides that, wherever a policy of insurance contains any reference to the application for insurance or the constitution, by-laws, or other rules of the company as forming a part of the policy or contract between the parties, the policy shall contain, in itself

or in some exhibit attached thereto, a correct copy of the application, by-law, or rule, as the case may be, and that otherwise the application, by-law, etc., shall not be regarded as a part of the contract, applies to fraternal as well as to other insurance companies.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1853; Dec. Dig. § 715.*]

Error from City Court of Dalton; Moses Wright, Judge.

Action by W. C. Bowen, administrator, against the Heralds of Liberty. Judgment for plaintiff, and defendant brings error. Affirmed.

M. C. Tarver, for plaintiff in error. Maddox, McCamy & Shumate, for defendant in error.

RUSSELL, J. Judgment affirmed.

(8 Ga. App. 284)

ALLEN v. STATE. (No. 2,765.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 922*)—HARMLESS ERROR.

Under the undisputed evidence, the error of the court in not limiting the jury to a consideration of sales by the defendant within the two years preceding the indictment was not harmful to the defendant, and therefore affords no ground for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2218; Dec. Dig. § 922.*]

2. CRIMINAL LAW (§ 1129*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

The assignment of error complaining that the judge "failed to charge the jury upon the law of gifts and sales," is too general and indefinite for consideration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954-2957; Dec. Dig. § 1129.*]

3. CRIMINAL LAW (§ 1160*)—WRIT OF ERROR—CONCLUSIVENESS OF VERDICT.

The evidence, while not wholly satisfactory, is sufficient to authorize the conviction of the defendant; and, the verdict being approved by the trial judge, the finding of the jury cannot be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.*]

Error from City Court of Monticello; A. S. Thurman, Judge.

Dock Allen was convicted of crime, and brings error. Affirmed.

Eugene M. Baynes, for plaintiff in error. Greene F. Johnson, Sol., for the State.

RUSSELL, J. Judgment affirmed.

(8 Ga. App. 283)

TAYLOR v. NATIONAL CASH REGISTER CO. (No. 2,646.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

(Syllabus by the Court.)

SALES (§ 474*)—CONDITIONAL SALES—ATTACHMENT—ADMISSIBILITY OF EVIDENCE.

Under the ruling in Conder v. Holleman & Ballard, 71 Ga. 93, it was error to decline

to allow the claimant to prove that the indebtedness of the defendant in attachment to the plaintiff arose before the date of the conditional sale and the claimant's reservation of title; and for this reason, if for no other, the judge of the superior court properly sustained the certiorari.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1391; Dec. Dig. § 474.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between B. Taylor and the National Cash Register Company. From the judgment, Taylor brings error. Affirmed.

Hines & Jordan, for plaintiff in error. Anderson, Felder, Rountree & Wilson, and E. D. Thomas, for defendant in error.

RUSSELL, J. Judgment affirmed.

(8 Ga. App. 221)

OWENS et al. v. PARKER & HOOK.

(No. 2,136.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

(Syllabus by the Court.)

1. PLEA IMPROPERLY STRICKEN.

The court erred in striking, on motion of the plaintiffs, that portion of the defendants' plea which set up fraud and misrepresentation as to the mule sold to them by the plaintiffs, and which alleged a failure of consideration because of the worthlessness of the mule.

2. REVIEW ON APPEAL.

By reason of this error the verdict and the proceedings amendatory thereof were nugatory.

3. SALES (§ 479*)—CONDITIONAL SALES—REMEDIES OF SELLER.

It was not error to overrule the defendants' demurrer. Even if the attachment and the levy thereof had failed for defects, the plaintiff might recover a general judgment on the declaration, of which notice had been given.

(a) The holder of a note, in which there is a reservation of title of personal property and also a mortgage of the property to the payee, may sue out an attachment for purchase money, instead of pursuing the other remedies available to him.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1438; Dec. Dig. § 479.*]

4. SALES (§ 479*)—CONDITIONAL SALES—REMEDIES OF SELLER.

To perfect the attachment and levy, the holder of the legal title must file and record a reconveyance to his debtor, and if he fails to do this the levy of the attachment fails. But where a declaration has been filed and the prescribed notice given, the plaintiff may recover a general judgment, even though the attachment is dismissed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1438; Dec. Dig. § 479.*]

Error from City Court of Tifton; R. Eve, Judge.

Action between Parker & Hook and Emily Owens and others. From the judgment, Owens and others bring error. Reversed.

J. J. Murray, J. B. Murrow, and James H. Price, for plaintiffs in error. R. D. Smith and R. S. Foy, for defendant in error.

RUSSELL, J. Judgment reversed.

(3 Ga. App. 235)

QUINN v. FIRST NAT. BANK OF FITZGERALD. (No. 2,207.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

*(Syllabus by the Court.)***1. BILLS AND NOTES (§ 365*)—ACTIONS—DEFENSES.**

In order to let in a meritorious defense, the maker of a promissory note who is sued thereon may show that the plaintiff is not a bona fide holder of the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 944; Dec. Dig. § 365.*]

2. BANKS AND BANKING (§ 101*)—ACTIONS—DEFENSES—ULTRA VIRES TRANSFER.

The maker of a promissory note which has been transferred by one banking corporation to another (for the purpose of liquidating the affairs of the corporation originally named in the note as payee) cannot defend upon the ground that the contract whereby the note was transferred was ultra vires. Generally one who is not a party to a contract cannot attack it as ultra vires.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 237, 238; Dec. Dig. § 101.*]

3. USURY (§ 100*)—DEDUCTION FROM PRINCIPAL DEBT AND LAWFUL INTEREST.

Any payments made upon an usurious debt, even though the suit be upon notes given in renewal thereof (but without purging out the usury), are to be deducted from the principal debt and the lawful interest.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 219-234; Dec. Dig. § 100.*]

4. USURY (§ 47*)—COLLECTION OF INTEREST MONTHLY.

Interest may be collected monthly at the option of the parties, if only interest is collected, and no part of the principal is paid, and if the interest contracted to be paid and actually collected does not exceed the rate of 8 per cent. per annum.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 100; Dec. Dig. § 47.*]

5. APPEAL AND ERROR (§ 1176*)—DISPOSITION OF CASE—RENDITION OF JUDGMENT.

The court erred in directing the verdict for the amount returned, though the evidence demanded a verdict for the plaintiff for a smaller amount. For this reason this court will direct a final disposition of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4533-4596; Dec. Dig. § 1176.*]

Error from City Court of Fitzgerald; E. Wall, Judge.

Action by the First National Bank of Fitzgerald against J. H. Quinn. Judgment for plaintiff, and defendant brings error. Affirmed, with directions.

O. H. Elkins, for plaintiff in error. B. J. Reid and Haygood & Cutts, for defendant in error.

RUSSELL, J. The First National Bank of Fitzgerald sued Quinn on two notes which were payable to the order of the Citizens' Bank of Fitzgerald, and the trial resulted in the court directing a verdict for the plaintiff. The notes were apparently indorsed in blank by the Citizens' Bank of Fitzgerald by

J. C. Bush, cashier. The defendant pleaded that title to the two notes was not vested in the plaintiff, and that what appeared to be the indorsement of the Citizens' Bank was merely a receipt for interest; and, if the signature of the cashier was intended to be an indorsement, still the National Bank was not a bona fide holder, because it had notice of the equities in favor of the maker; furthermore, that the effort to transfer the note by indorsement was ultra vires, because the purported cashier was in fact not the cashier, and because the attempted transfer to the National Bank was with the purpose, on the part of the Citizens' Bank, of illegally liquidating its assets and discontinuing business. These pleas were stricken by the court, but the court allowed evidence upon certain pleas setting up usury. At the conclusion of the testimony, however, the court directed a verdict for the full amount of the note without any allowance for the usury in another note, of which it appeared the notes in suit were renewals.

We think the trial judge erred in striking the pleas, because, as was held in *Andrews v. John Church Co.*, 1 Ga. App. 560, 58 S. E. 130, the defendant had the right to show that the plaintiff was not a bona fide holder of the notes in question, in order to let in a meritorious defense. We think the court erred, also, in directing a verdict, because it is unquestioned that the plaintiff had reserved usury in the first note, of which the subsequent notes were renewals. Inasmuch, however, as it appears from the evidence, as well as from the answer of the defendant, that the payment of the usury is the only defensive matter really presented by the pleadings or the evidence, and as the defendant was permitted to offer his testimony upon this subject, the only effect of a reversal of the judgment would be to send the case back to reduce the finding against the defendant by the amount of interest exacted from him in excess of the legal rate. It is not to the public interest to retard the proper disposition of causes or indulge in needless litigation, and for this reason we will exercise our right of effecting a final disposition of the case in accordance with what can be its only proper termination under the pleadings and the evidence (*Finley v. Southern R. Co.*, 5 Ga. App. 723, 64 S. E. 312) by directing that, upon writing off by the plaintiff in the court below of the sum of \$106.66, the excess of interest reserved when the \$2,800 note was originally given to the Citizens' Bank of Fitzgerald, the judgment of the court below be affirmed, and that, upon failure to do this, the judgment be reversed.

It is not disputed in the evidence that, when the note for \$2,800 was originally executed by Quinn, the Citizens' Bank of Fitzgerald reserved \$300 as interest from September 28, 1906, to September 28, 1907, and

credited his account with a deposit of \$2,500. The two notes for \$1,100 each which are the subject-matter of this suit were given in renewal of the note for \$2,800, upon which Quinn received only \$2,500, and as held in *McGee v. Long*, 83 Ga. 156, 9 S. E. 1107, "all payments made upon an usurious debt are to be deducted from the principal and lawful interest, where the suit is upon renewal notes executed after such payments but without purging out the usury." To the same effect are the rulings in *Archer v. McCray*, 59 Ga. 546, and *Wilkinson v. Wooten*, 59 Ga. 584. The defendant and the cashier of the bank agreed that the amount actually paid by Quinn upon the \$2,800 note was \$638.30. It appears that in taking the new notes \$600 of this amount was credited upon the original note, because the renewals amount only to \$2,200, but it is evident that the usury which had been originally exacted when the \$2,800 note was given was not purged from the renewal notes. The \$38.30 does not exceed the legal rate of interest on \$2,800 from September 28, 1907, when the \$2,800 note was due, to February 26, 1908, when the renewal notes were given, but it appears that there was an additional payment of \$24 on September 24, 1907; and, whether this be considered or not, it is evident from the amount of the new notes that all of the usury included in the original note was not purged. Consequently, Quinn had the right which he would not ordinarily have of inquiring into whether the First National Bank of Fitzgerald was a bona fide holder for value or not, and for this reason we hold that the court erred in striking his plea to the effect that the bank had notice of the equities in his favor.

The court did not err in striking so much of the defendant's plea as set up that the transfer of the notes by the Citizens' Bank of Fitzgerald to the First National Bank of Fitzgerald for the purpose of liquidating the affairs of the first-named bank was ultra vires, because, under the ruling in *Weed v. Gainesville, etc., R. Co.*, 119 Ga. 576, 46 S. E. 886, Quinn, not being a party to the contract between the two banks, was not in a position to assert that either party thereto acted ultra vires. If the court had overruled the demurrer and had not directed the verdict, the defendant would have only been entitled to have proper deduction made for usury. This amount under the ruling in *Harrell v. Blount*, 112 Ga. 712 (5), 38 S. E. 56, is determined by eliminating the interest exceeding 7 per cent. which is included in the nominal principal. See, also, *Parker v. Lowry*, 79 Ga. 740, 4 S. E. 678. The defendant is really entitled to a credit of \$125, with interest thereon, because the bank reserved \$300, or interest at the rate of 12 per cent. on the amount actually paid the borrower. The interest at the rate of 7 per cent. on the

\$2,500 would be \$175, and the difference between the two is \$125. But, inasmuch as he only pleaded for \$106.66, it is beyond our power to increase the amount. The contention that the sum of \$10.40 is usury cannot be sustained, because interest may be collected monthly at the option of the parties, if only interest is collected and no part of the principal is paid, and if the interest collected does not exceed the rate of 8 per cent. per annum for the period of time covered by the payment.

Judgment affirmed, with direction.

(5 Ga. App. 225)

SOUTHERN RY. CO. v. JONES. (No. 2,153.)
(Court of Appeals of Georgia. Sept. 20, 1910.)

(Syllabus by the Court.)

1. NEW TRIAL PROPERLY REFUSED.
There was no error in refusing a new trial.
2. CARRIERS (§ 357*)—FAILURE OF PASSENGER TO PROCURE TICKET—RIGHTS OF CARRIER.
Railroad companies have the right to exact the train rate from passengers who without good and sufficient reason have failed to purchase tickets and the consequent right to eject one who refuses to pay the train rate. But the conductor or other agent of the railroad company who passes upon the merits of the excuse offered by the passenger for not having provided himself with a ticket or refuses to hear the excuse does so at the peril of the company.
[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1433; Dec. Dig. § 357.*]
3. CARRIERS (§ 355*)—CARRIAGE OF PASSENGERS—BOARDING TRAIN WITHOUT TICKET.
One who boards a train intending to pay for his passage therein is not a trespasser, even though he be in error as to the amount due for his fare.
[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1416; Dec. Dig. § 355.*]
4. DEFECTIVE CHARGES CURED BY OTHERS.
The defects in portions of the charge upon which error is assigned are cured by fuller instructions in other portions of the general charge.
5. REVIEW ON APPEAL.
The evidence in behalf of the defendant would have authorized the jury to relieve it from liability, but the plaintiff's evidence in conflict therewith authorized the finding which was returned in his favor.

Error from City Court of Baxley; C. H. Parker, Judge.

Action by I. L. Jones against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. B. Moore and J. E. De Lacy, for plaintiff in error. Padgett & Watson, for defendant in error.

RUSSELL, J. The plaintiff brought a suit against the Southern Railway Company for damages, alleging that he endeavored to buy a ticket from Baxley to Prentiss; that he went to the depot 20 minutes before the train was due to arrive for the purpose of purchasing a ticket, and looked in the ticket office for the agent, but the door was closed.

ed, and there was no one there to sell him a ticket; that after waiting for some time, and no agent being yet in sight, and the train approaching, he went to the point on the railroad where passengers were accustomed to enter the trains of the defendant, and boarded the train upon its arrival; that, when the conductor or auditor came for his fare, he handed him 10 cents, and told him he wanted to go to Prentiss, this being the ticket rate for passage to that place; that the conductor demanded 15 cents in addition because he had not bought a ticket; that he endeavored to explain to the conductor the reason why he had not bought a ticket, but that this agent of the company would not hear his explanation, and, instead, told him in rough and insulting language that he would either have to pay the 15 cents additional or get off the train; that he endeavored to explain to the conductor why he had no ticket, but the conductor refused to hear any explanation, and in a very insulting manner led him to the platform, and, after having checked the speed of the train considerably, but before the train was stopped, ordered him to get off or accept the consequences; that not wishing to be kicked off the train, he endeavored to get off; that the place at which he disembarked was unsuited for that purpose, as it was some distance from the steps of the coach to the ground, and, when he got off, he slipped or fell from the step, and skinned and bruised his leg. He alleged special damages in the sum of \$5 paid a physician for treating his wounds; and he asked for damages for the pain and anguish inflicted upon him, and also vindictive damages for the humiliation he suffered in being publicly and wrongfully ejected from the train in the presence of acquaintances and friends. The plaintiff's evidence did not make out quite as strong a case as was depicted in his petition, but in the main his testimony proved the case as laid. The charge of the court, considered as a whole, clearly presented the respective rights and duties of the plaintiff and the defendant in such a case. There appears to have been no error in the trial which could have caused the verdict to be for the defendant instead of the plaintiff. Consequently we find no error in the judgment of the court overruling the motion for a new trial.

2. Several special assignments of error are predicated upon extracts from the charge of the court. We will merely say, in regard to the complaint that in the third special ground of the motion for new trial the judge erred in his instruction upon the subject of contributory negligence (which is excepted to as being inapplicable to the facts in the case and liable to confuse the jury), that, even if this instruction was erroneous, it was manifestly not harmful to the plaintiff in error. The instruction might have had the effect of reducing the findings in favor of the plaintiff in the court below, but inasmuch as the

court instructed the jury that the plaintiff was not entitled to recover at all, unless he had used reasonable diligence in endeavoring to procure a ticket, and as the evidence nowhere pointed to any contributory negligence on the part of the plaintiff, it is evident that this instruction was not the cause of the jury finding for the plaintiff instead of for the defendant. It is alleged that this charge was error "because the judge failed to charge in the language of the rule of the Railroad Commission of Georgia that the plaintiff should have exercised reasonable diligence to procure a ticket before boarding the train, and because the judge failed to charge the jury that it was the duty of the plaintiff to exercise reasonable diligence to procure a ticket." The instruction complained of is as follows: "I charge you further that one who without having provided himself with a ticket may be compelled to pay fare at the train rate instead of the ticket rate, and if he refuses to pay at the train rate, he may be ejected from the train, without subjecting the defendant company to liability for damages, provided the failure of the passenger to provide himself with a ticket is due to his own fault or negligence, and provided, further, that only such force is used as is necessary to eject him from the cars, and that the expulsion be made in a decorous and proper manner." There is an evident lapsus of the words "boards a train," after the word "who" and before the word "without," in the first line of the above extract, but, supplying that, we find no error in the instruction. The statement of the judge that the plaintiff could be required to pay the train rate, and could be ejected in case he refused to pay it, without subjecting the carrier to any liability, if the failure of the passenger to provide himself with a ticket was due to his own fault or negligence, if not a stronger method of stating the plaintiff's duty of exercising reasonable diligence to procure a ticket than that suggested by the plaintiff in error, is at least sufficient. In the absence of a written request for more specific instructions.

3. Complaint is made as to another portion of the judge's charge, because it is insisted that, under the evidence, the plaintiff was not a passenger, but merely a trespasser. It is insisted that the judge erred in instructing the jury as to the duties of a carrier to a passenger, because the evidence showed the plaintiff had no ticket. It does not require a ticket to make one a passenger upon a railroad train. The law does require that one who intends to become a passenger shall use reasonable diligence to obtain a ticket. This is a regulation of public policy. But if an intending passenger uses ordinary diligence to obtain a ticket, and is prevented from doing so by any cause beyond his own control, and thereafter enters the train of a common carrier with the intention of pay-

ing for his journey and complying with all of the proper rules and regulations of the carrier, he is not a trespasser, but a passenger. One who boards a train intending to pay for his passage therein is not a trespasser, even though he be in error as to the amount due for his fare.

4. As to other defects alleged by defendant in the motion for a new trial, it is plain, upon a review of the charge as a whole, that every instruction needful to the jury in its consideration of this case is given in some portion of the general charge.

5. The finding in favor of the plaintiff was very moderate in amount. We do not say this in any spirit of criticism, because it was perhaps fully as large as the plaintiff was entitled to recover under his own evidence. We refer to it simply because it is apparent from this record that the case was one for the jury, and that no reason appears why the jury's finding should be disturbed. Numerous witnesses testified in behalf of the defendant, some of them apparently disinterested; and there was some testimony on the part of the defendant which flatly contradicted every material statement made by the plaintiff in his own behalf. If the testimony for the defendant is true, the conductor returned to the plaintiff the money which he had tendered, and the train was stopped and the plaintiff allowed to disembark at his own request. According to this testimony, there was no unkind or discourteous language used by the conductor, and the plaintiff alighted on ground perfectly smooth and level, and consequently the skinning of his leg must have been the result of his own negligence. But, while the evidence for the defendant would have debarred any recovery on the part of the plaintiff, the testimony of the plaintiff warrants the finding in his favor.

Judgment affirmed.

(8 Ga. App. 239)

FLEMING v. SHOCKLEY. (No. 2,160.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY (§ 190*)—VIOLATION OF BOND BY PRINCIPAL—REMEDY OF SURETY.

A surety upon a criminal recognizance who, in order to protect himself from a forfeiture of the bond and the liability consequent thereon, is forced to procure the issuance of a requisition and to expend money to compel the presence of the principal in accordance with his obligation, may recover of the principal on the appearance bond any expense necessarily incurred by himself as surety in preventing a breach of the bond by his principal and in enforcing the presence of the principal, in accordance with the latter's obligation to be present and to abide the judgment and sentence of the court in the criminal case against him. From the promise of the principal to be present without expense or trouble to his surety there arises an implied promise on the part of the principal to pay his

surety any loss or damage the surety may sustain by reason of the violation of his promise.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 190.*]

2. BAIL (§ 80*)—SURRENDER OF PRINCIPAL—RIGHT OF SURETY.

In a proper case the surety need not wait until the bond has been finally forfeited. He may diminish his damages by producing the principal, and prevent the bond from being estreated.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 328-334; Dec. Dig. § 80.*]

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action between T. J. Fleming and Eugene Shockley. From the judgment, Fleming brings error. Reversed.

Geo. A. H. Harris & Sons, for plaintiff in error. Ennis & Shaw, for defendant in error.

RUSSELL, J. Judgment reversed.

(8 Ga. App. 220)

BAINBRIDGE STOCK CO. v. KRAUSE McFARLIN CO. (No. 2,080.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§ 271*)—FORECLOSURE—AFFIDAVIT—AMENDMENT.

An affidavit made to foreclose a mortgage under the provisions of section 2754 of the Civil Code of 1895, and which stated that the defendant mortgagor has "placed himself in some one of the positions where process of attachment could legally issue against him," was amendable, and the plaintiff should have been allowed to amend, as he offered to do, by stating that the defendant was a nonresident of the state, and that this was the ground of attachment relied upon.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 271.*]

2. CHATTEL MORTGAGES (§ 271*)—FORECLOSURE—AFFIDAVIT—AMENDMENT.

The copy of mortgage attached to the foreclosure affidavit was verified in this case by the statement in the affidavit; but in any event the offer of the plaintiff to amend the affidavit by signing it should have been permitted.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 271.*]

3. CHATTEL MORTGAGES (§ 271*)—FORECLOSURE—AFFIDAVIT—AMENDMENT—CONSTRUCTION OF STATUTE.

The provisions of section 5122 of the Civil Code of 1895 relative to the amendment of affidavits are to be given a broad and liberal construction. *Collins v. Taylor*, 128 Ga. 789, 58 S. E. 448.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 271.*]

4. CHATTEL MORTGAGES (§ 291*)—FORECLOSURE—SUBSTANTIAL COMPLIANCE.

If the requirements for the foreclosure of a chattel mortgage have been substantially complied with, a claimant is not hurt by amendable irregularities, for the real issue made by the claim is whether the property is the defendant's or his own.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 291.*]

Error from City Court of Bainbridge; W. M. Harrell, Judge.

Action between the Bainbridge Stock Company and the Krause McFarlin Company. From the judgment the Bainbridge Stock Company brings error. Reversed.

M. E. O'Neal and R. G. Hartsfield, for plaintiff in error. J. C. Hale and E. C. Love, for defendant in error.

RUSSELL, J. Judgment reversed.

(8 Ga. App. 263)

SMITH v. BERMAN. (No. 2,330.)

(Court of Appeals of Georgia. Sept. 20, 1910.)

(Syllabus by the Court.)

1. BANKRUPTCY (§ 51*)—CUSTODY OF BANKRUPT'S PROPERTY.

Upon the filing of a petition in bankruptcy, followed by an adjudication, all property in the actual or constructive possession of the bankrupt passes into the custody of the bankruptcy court, subject to its exclusive jurisdiction to determine by plenary action of summary proceeding all adverse or conflicting claims with reference thereto.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 51.*]

2. EXEMPTIONS (§ 16*)—PROPERTY—PRESUMPTION OF HUSBAND'S OWNERSHIP.

"In this state, notwithstanding his reduced importance as a domestic factor," the husband is still recognized by law as the head of his family, "and, though his wife may reside with him, she does not thereby divest his possession of the homestead," nor does her co-residence alone rebut the legal presumption that the house and all the household effects belong to the husband as the head of the family.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 15-19; Dec. Dig. § 16.*]

3. COURTS (§ 489*)—STATE COURTS—JURISDICTION OVER OFFICERS OF FEDERAL COURTS.

State courts have jurisdiction against officers of the United States courts, such as marshals, referees, and trustees in bankruptcy, to recover damages for wrongful acts entirely beyond the legitimate scope and performance of official duties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1328, 1336; Dec. Dig. § 489.*]

4. BANKRUPTCY (§ 296*)—ACTION AGAINST TRUSTEE FOR CONVERSION.

Where, in a suit brought in a state court by the wife of a bankrupt against the trustee in bankruptcy to recover damages for an alleged trespass by the trustee in the wrongful conversion of personal property to which the wife claimed the title and the right of possession, it appeared, from the evidence, that the trustee was not a trespasser, but was in possession as trustee of the personal property involved in the controversy, the res being in the possession of the court of bankruptcy through its trustee, a verdict should have been directed for the defendant and the plaintiff left to her remedy in the court of bankruptcy, which, under the law, has exclusive jurisdiction to hear and determine all questions relating to the right of possession and title to the res in its custody.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 296.*]

Error from City Court of Blakely; W. A. Jordan, Judge.

Action by Fannie Berman against H. G. Smith. Judgment for plaintiff, and defendant brings error. Reversed.

Mrs. Fannie Berman brought suit in the city court of Blakely against H. G. Smith to recover damages for alleged trespass, and the jury found a verdict in her favor for the sum of \$8,000. The cause of action arose on the following state of facts: The defendant, H. G. Smith, was trustee in bankruptcy of Morris Berman, the husband of the plaintiff. Morris Berman filed in the District Court of the United States for the Northern District of Georgia a voluntary petition in bankruptcy, and on this petition an adjudication was entered January 8, 1909. In his schedule the bankrupt listed "merchandise debts amounting to \$7,461.11, and assets consisting of a stock of goods valued at \$3,000," and "household goods and furniture, household stores, wearing apparel and ornaments of the person valued at \$150." He claimed an exemption of "the household and kitchen furniture and wearing apparel of himself and wife, all in the house then occupied by him in Blakely, Georgia, and valued at \$150," and the remainder of the \$1,600 exemption out of the proceeds of any other property belonging to him. On January 21, 1909, he amended his schedule, as to his claim of homestead, "by striking therefrom his claim for household furniture, and by praying that his homestead amounting to \$1,600 be set apart and allowed to him out of any property belonging to the bankrupt estate." The house in which the bankrupt lived with his wife and child and a relative was rented by him. When the trustee qualified, the wife of the bankrupt was sick, and at the request of the bankrupt the trustee permitted him to remain in possession of the household and kitchen furniture, as there was no immediate necessity for its sale. The merchandise stock of the bankrupt was sold by the trustee at public outcry for \$1,580 cash. On investigation the trustee found that on January 7, 1908, the inventory showed merchandise on hand valued at \$2,006.84. On January 10, 1909, the inventory of the bankrupt's stock by the appraiser showed that its value was then \$3,162.73. No money or other property outside of this stock of goods was ever delivered by the bankrupt to the trustee. His scheduled and other debts being over \$7,500, the trustee found no explanation, after diligent research, of the apparently large shortage in the assets of the bankrupt during the year 1908. In 1908 the bankrupt's tax returns included the following item: "Household and kitchen furniture, piano, libraries, pictures, etc., \$200." His wife, Mrs. Fannie Berman, made no return whatever of any property for taxation. Among the bankrupt's bills, invoices, and paid checks, the trustee found a number covering purchases by him and payment therefor of household goods and furniture, and he also found that all of this household

furniture, including libraries, pictures, etc., was covered by three policies of insurance which the bankrupt had taken out in his own name.

The trustee in bankruptcy employed as his counsel Glessner & Park of Blakely, Ga.; and on March 20, 1909, his attorney, Mr. Park, informed him that in passing the bankrupt's house he had observed that the furniture and household effects were being packed up preparatory to shipment, and advised him that in his opinion the bankrupt was preparing to move this furniture to Birmingham, Ala. The furniture and household goods being the same that had been intrusted to the bankrupt by the trustee as above mentioned, the attorney advised the trustee that he should go ahead and take possession of these effects. At the request of the trustee, his attorney telephoned to the referee in bankruptcy, stating these facts, and asked him for instructions, and in reply to this telephone message the referee directed the trustee to take possession of the furniture and household effects, and stated that to authorize him to do so he needed no written instructions or other papers; that he was authorized to do so by the fact of his appointment as trustee. Up to this time Mrs. Fannie Berman had made no claim or assertion of title to any of the household or kitchen furniture, and the trustee was therefore advised by his attorney and the referee to take possession of all the furniture and household effects which were being packed up, and which it was apprehended would be shipped from the state unless prompt action was taken. Following these instructions from the referee and the advice of his counsel, the trustee took with him two young men, one of whom was to check out the personal property at Berman's house and the other to check it in upon its deposit in a warehouse, and repaired to the bankrupt's house for the purpose of carrying out the instructions which had been given him. When he reached the house, he found that the husband, the bankrupt, was not at home, but that the wife was present with a servant, a child, and a neighbor, and the trustee informed her of his mission. The wife objected to the trustee doing anything until her husband came, and at her request the trustee telephoned to her husband to come to the house, and he also called up Mr. Pottle, the attorney for the trustee. In a short time the bankrupt and his attorney arrived, and both demanded of the trustee his authority for entering the house and taking possession of the effects therein. The trustee replied that his authority was his appointment as trustee in bankruptcy. An altercation took place between the bankrupt and the trustee; the bankrupt taking the trustee by the arm and attempting to eject him from the house, and the trustee becoming angry and using profane language in the

presence of the bankrupt's wife. The attorney for the bankrupt also warned the trustee that he would act at his peril in taking possession of the furniture and effects in the house. The bankrupt and his counsel left the house, and, after their departure, the trustee informed Mrs. Berman that he would be compelled to take possession of all the household and kitchen furniture as the property of the bankrupt, and she stated to him that all the personal property in the house belonged to her and that nothing belonged to the bankrupt. The trustee stated that the question of title would have to be passed upon by the court, but that he would not take possession of her wearing apparel, or that of her child and husband. There was a trunk in the house, and the trustee asked Mrs. Berman what the trunk contained, and she stated that it contained only wearing apparel for herself and child. The trustee refused to take her word, and asked to be permitted to see in the trunk. Permission was refused by her, and after some controversy, in which she testified that the trustee used offensive and insulting language to her, the trunk was taken possession of by the trustee, and, not being able to obtain the key to the trunk from her, the trustee carried the trunk to a locksmith and had it opened, and in it found concealed in some clothing a man's leathern wallet containing \$1,940 in bank bills. After the trunk had been opened and the money found, Mrs. Berman stated for the first time that this money was her property; that it had been given to her in part by her relatives when she married in 1907; that \$600 of it had been paid to her by a former employer, being the amount of her wages which she had saved; that she had kept this money in her trunk all this time, except that she had loaned to her husband about \$1,000 of the money, which he had paid back from time to time. The money was deposited by the trustee to his credit in the bank, and the trunk, with all the other articles therein, was returned by the trustee to the wife, who at first refused to accept it without the money, but subsequently did so. The furniture was removed by the trustee from the house and stored, some was left in the house, and the house locked by agents of the trustee; but in a few days thereafter the house was delivered to the bankrupt by the trustee, with a large amount of the personalty still therein.

On March 21, 1909, Mrs. Fannie Berman filed a petition in the United States District Court claiming that this sum of \$1,940 in currency "was gotten and accumulated by her at and prior to her marriage in May, 1907, and kept by her since that time in that shape; that she cannot assert her claim to the specific money in the court of bankruptcy, because the trustee has deposited it and it has become commingled with other currency; that she is about to file in the city

court of Blakely a suit to determine her title to said money, 'so that she may have the proper basis upon which to seek necessary relief in the court of bankruptcy'; and that unless this court will enjoin the trustee from paying out and distributing the money she is in danger of loss." She prayed for an injunction to restrain the trustee from disposing of the money and household furniture. Judge Newman, of the United States District Court, upon considering the petition, passed an order, on March 22, 1909, "that the defendant, H. G. Smith, trustee, be enjoined and restrained as prayed in the petition, until the matters to which said petition relates can be brought before and passed on by B. T. Castellow, the referee in bankruptcy, and heard and determined; all of said matters being hereby referred to the said referee to be passed on by him as such referee." On the day on which this order was passed, Mrs. Berman filed in the city court of Blakely her suit against the defendant, H. G. Smith, for the recovery of \$1,940, the value of the money claimed by her and alleged to have been wrongfully converted by the defendant. On March 25, 1909, Mrs. Berman filed another suit in the city court of Blakely against H. G. Smith for the recovery of the value of their furniture, etc., taken from the house, alleging the value to be \$1,000, and also filed the present suit, in which she sought to recover the \$1,940 in money, which she alleged belonged absolutely to her, and \$1,000, the value of the furniture taken possession of by the trustee, alleging that both the money and the furniture were wrongfully converted by the defendant, and sought to recover, in addition to these actual damages, punitive and exemplary damages for the tortious acts of the defendant in connection with the trespass and conversion, setting out in her petition, in substance, all the foregoing facts as a basis for recovery.

On March 30, 1909, the trustee in bankruptcy filed a petition in the bankruptcy court setting forth the status and the different suits and prosecutions brought against him; he having also been indicted by the grand jury of Early county for using profane language in the presence of a female and for forcible entry and detainer, and he prayed for an injunction against these suits and prosecutions, and that the entire subject-matter of controversy be referred to the referee for decision. On this petition the following order was passed: "Upon reading and considering the foregoing petition, it is ordered that Fannie Berman be, and she is hereby, enjoined and restrained, as prayed in the petition, from proceeding further with the prosecution of the civil suits referred to in the foregoing petition, or from instituting others of like character against H. G. Smith, on account of his acts as trustee in bankruptcy for Morris Berman, until the matters to which said petition relates have

been passed upon by B. T. Castellow, referee in bankruptcy. In open court, this 30th day of March, 1909. W. T. Newman, U. S. Judge." On April 30, 1909, Mrs. Berman filed a petition to Judge Newman in the court of bankruptcy, alleging the pendency of the three suits above mentioned, in the state courts, setting forth the order by which the dispute was referred to the referee for decision, and complaining of delay in the determination thereof, and asking that the restraining order heretofore granted be dissolved; and on July 31, 1909, Judge Newman filed an elaborate opinion in the case, reviewing the various suits and matters in litigation and the authorities bearing on the case, and passed the following order: "After argument had upon the foregoing matter, and upon consideration thereof, it is ordered and adjudged that as to the suit in the city court of Blakely to recover \$1,940, and as to the suit to recover furniture and other personalty, an injunction be granted, restraining Fannie Berman from the further prosecution of same. And as to the suit for \$10,000 damages an injunction is denied, and the restraining order heretofore granted dissolved. Wm. T. Newman, U. S. Judge." Thereafter, at the August term of the city court of Blakely, the suit for damages was tried, and all the foregoing facts were in substance shown by the evidence, and a verdict in behalf of the plaintiff rendered.

The defendant first demurred to the petition as amended, and this demurrer was overruled and exceptions pendente lite duly preserved. The defendant then filed a plea to the jurisdiction of the state court, alleging in substance that the United States court alone had jurisdiction to determine the questions made by the petition. The court found against this plea, and to this judgment exceptions pendente lite were filed. The defendant then filed a plea in abatement setting up the pendency of the former suits against him for the recovery of the \$1,940, and the value of the furniture alleged to have been wrongfully taken possession of by the defendant. To meet this plea the plaintiff took an order dismissing the suit for the recovery of the personalty, and the court granted the order of dismissal and then sustained a demurrer to this plea, and exceptions pendente lite were filed. The case then went to trial on the merits, when the facts heretofore stated were shown by the evidence, and a verdict was returned for the plaintiff. The defendant filed a motion for a new trial, which was overruled, and he excepts to this judgment. The motion for a new trial contains, besides the general grounds, 57 special assignments of error. In the view entertained by this court of the controlling questions in this case, it will not be necessary to consider and determine many of the assignments of error, and we will therefore decide only those which we deem essential to a determination of the substan-

tial questions involved. Premitting any discussion on the many incidental and collateral questions raised by the record, we prefer to confine the opinion of this court to the merits of the controversy.

Smith, Hammond & Smith and W. F. Weaver, for plaintiff in error. Spencer R. Atkinson, J. W. Walters & Sons, and Hawes & Pottle, for defendant in error.

HILL, C. J. (after stating the facts as above). The conduct of the defendant relied upon by the plaintiff as constituting a trespass may be condensedly stated as his acts in entering the house without warning and in the absence of the bankrupt, taking possession of the house and the household effects therein, and taking possession of the trunk, removing it from the house, having it opened, and taking therefrom the \$1,940 in currency. The plaintiff claimed that the house was her home, which the trustee had no right to enter; that the household effects and the money belonged to her, and the trustee had express notice of her title, and she insists that the acts and conduct of the trustee above stated were tortious and entitled her to damages, not only to actual damages for the value of the property which it is alleged the trustee unlawfully took possession of, but also to punitive and exemplary damages arising from circumstances of aggravation in connection with the alleged trespass. The pivotal question, therefore, in the case around which every other question revolves, and upon the decision of which depends the right of recovery, is: In whom was the right of possession at the time the house was entered and the property seized by the trustee? If the right of possession, under the law and the facts, was in the trustee in bankruptcy, it is clear he could not have been guilty of any trespass in asserting that right. If the right of possession was in the plaintiff, of which fact the trustee had notice either actual or constructive, and he nevertheless disregarded that right and violated it, he was guilty of trespass and should be responsible to the plaintiff for the wrongful conversion of her property, and if the jury believed that there were circumstances of aggravation, either in act or intention, in the commission of the tort, she would also be entitled to punitive or exemplary damages.

It is admitted that the defendant was not acting in his individual capacity, but was acting as trustee in bankruptcy for Morris Berman, the husband of the plaintiff. It is admitted that he was duly appointed as such trustee on a voluntary petition in bankruptcy, on which there had been an adjudication, and that he had given bond and had qualified as such trustee. Under the provisions of the bankruptcy law, upon the filing of a petition in bankruptcy, followed by an adjudication, all the property in the possession of the bankrupt of which he claims ownership passes into the custody of the bankruptcy

court, subject to its jurisdiction to determine by plenary action or summary proceeding all adverse or conflicting claims. *White v. Schoerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183; *In re Schermerhorn*, 145 Fed. 341, 76 C. C. A. 215, 16 Am. Bankr. Rep. 507. As is said by the Supreme Court in the *White Case*, supra: "Property in the actual possession of the bankrupt on the day his case is referred to the referee in bankruptcy thereby becomes property in the lawful possession of and custody of the referee in bankruptcy, and of the bankruptcy court, whose representative and substitute he was." "In short, the adjudication operates as a seizure of all the property of the bankrupt, by which it is taken in custodia legis. * * * The possession of the bankrupt, without more, is transferred to the trustee. No demand for the surrender and possession of the bankrupt's property is necessary." 2 *Remington on Bankruptcy*, § 1807, pp. 1101, 1105, 1106, 1107. On page 1107 of this work the learned author states that "possession of the bankrupt may give jurisdiction to the bankruptcy court, even if the possession is not exclusive, and regardless of the capacity in which he holds, whether in his own right or as agent for another." And again: "The trustee's right summarily to seize the property found in the possession of the bankrupt or his agent, or in the possession of one not claiming any beneficial interest in it, or to get an order from the bankruptcy court requiring the surrender, is not affected by the fact that liens in favor of third persons exist on the property, or that third persons, not themselves in possession, are laying claim to the property, for the property is brought into the bankruptcy court subject to all liens and claims, and the rights of lienholders and claimants will be fully protected, and can be worked out through the machinery of the bankruptcy court." *Id.* § 1816, p. 1113.

It is clearly deducible from the above authorities that the title to all the property in the actual or constructive possession of the bankrupt at the date of the filing of the petition, followed by an adjudication, becomes ipso facto vested in the trustee in bankruptcy when appointed and qualified, subject to be administered by the bankruptcy court for the benefit of all claimants, lienholders, and creditors. Being vested with the title, the trustee is not only authorized by the statute to take possession of all the property in the actual or constructive possession of the bankrupt, but it is his imperative duty to do so. The question, therefore, recurs: In whom was the right of possession of the personal property in question and the house in question when the trustee entered the house and took possession of the personal property found therein? If the bankrupt had the custody or possession of the property when he filed his petition, it follows as a corollary that the trustee in bankruptcy had the right, under the plain provisions of the bankruptcy

law, to enter the house and take possession of the property therein, notwithstanding any adverse claim as to title set up by a third person. In other words, if the right of possession was in the trustee in bankruptcy, he had the right to take the property into his possession, and the title to the property was not affected by his possession, but the possession in the trustee was subject to the title to be subsequently determined by the proper tribunal.

A general principle of law well settled in this state is pertinent at this point, and, when concretely applied, would seem to be controlling. "In this state the husband is the head of the family." Civ. Code 1895, § 2473. "Possession by the husband with the wife, he being the head of the home, is presumptively his possession." *Broome v. Davis*, 87 Ga. 584, 13 S. E. 749. "In this state," declares Chief Justice Bleckley, "notwithstanding his reduced importance as a domestic factor, the husband is still the head of his family, and, though his wife may reside with him, she does not thereby divest his possession of the homestead, and make the possession her own." *Broome v. Davis*, supra. "When husband and wife live together upon land, the possession is presumptively in him as the head of the family, and such joint residence would not alone be sufficient to give notice of any claim of interest in the land by the wife." *Garrard v. Hull*, 92 Ga. 787, 20 S. E. 357. These decisions establish the doctrine that, when husband and wife live together, the house in which they live, and all the property in the house, is, in the legal possession of the husband as the head of the family, and presumptively the title to such property is also in the husband. The question of title, however, is not important, as possession is the determining factor in every case of this character. In the present case the trustee in bankruptcy is not compelled to invoke the general principle just considered, because the facts proved would seem fully to have justified his official conduct. Of course, when we say official conduct we leave out of consideration, as immaterial and irrelevant, the mere manner or method in which he asserted his rights as an official. It is conceded that the house was rented by the bankrupt at the time of his bankruptcy, and was in his possession under a rental contract when the adjudication in bankruptcy was made. The trustee was therefore entitled to the possession of the house for the remainder of the term of the lease, whatever it may have been. In *re Chambers, Calder & Co. (D. C.)* 98 Fed. 865; 2 *Remington on Bankruptcy*, 1118. It is conceded that the bankrupt had scheduled his household goods and had claimed them as the head of the family, and that the goods so scheduled and so claimed were in the house when the trustee entered and took possession. It is shown, by the undisputed evidence, that

the house and the household effects had been left in the possession of the bankrupt by the trustee because of the sickness of the bankrupt's wife. The plaintiff, the wife of the bankrupt, made no claim, prior to the seizure of the household goods by the trustee, to any part of the household goods; nor at the time of the seizure of the household goods did she make any specific claim to any part of them; nor did she at that time notify the trustee that there was any money in the trunk which was in the house, or that she claimed title to any money therein. The money was subsequently found concealed in the trunk, and it was only after the trunk had been seized by the trustee and opened and the money found therein, and the trunk, with the wearing apparel of herself and child, returned to her, that she made claim to the money.

Without extending the discussion, we conclude that the house, the household furniture, and the trunks in the house were all legally in the possession of the bankrupt at the date of the adjudication, and that at the date of the alleged trespass by the trustee all this property was held by the bankrupt by the permission of the trustee, and simply as the agent of the trustee. In other words, the trustee, instead of being a trespasser, was endeavoring to assert and maintain his possession of the property which presumptively belonged to the bankrupt, and to which the trustee was entitled by virtue of his trust, and of which he had previously taken constructive possession when he left the bankrupt in the actual possession thereof. The trustee in bankruptcy, not being guilty of any trespass against the rights of the plaintiff in connection with the matters charged against him, could not be legally liable in damages to her. Under the facts of this case and the law applicable thereto, we are satisfied that "there is not enough in the suit, independently of the effort to recover the \$1,940 and the personal property, to make a case for damages." And it follows that, with the question of trespass and the right to recover damages eliminated, there only remains in the case the claim of the plaintiff's ownership of the money and the other personal property which the trustee is alleged to have wrongfully converted by his seizure. This question of title is, in our opinion, under the evidence and the law, cognizable only in the bankruptcy court. As stated by Judge Newman in this very case, "the suit is in effect a proceeding to recover the property in the possession of the trustee." This personal property, having been taken possession of by the bankruptcy court through its lawfully appointed trustee, is thereby withdrawn from the jurisdiction of all other courts. The court, having possession of the property, has exclusive jurisdiction to hear and determine all questions respecting the title, possession, or control of the property. *Wabash R. Co.*

v. College, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed. 379. See opinion of Mr. Justice Moody in *Murphy v. Hofman*, 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327, where the learned justice collates the decisions bearing on the question, and deduces from them the proposition that when the court of bankruptcy, through the acts of its officers, such as referees, receivers, or trustees, has taken possession of the res as the property of the bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of third persons to it, and that its possession cannot be disturbed by the process of another court.

The foregoing opinion is not at all in conflict with the rule that an action may be brought in the state courts to recover damages for wrongful acts of officers of the bankruptcy court clearly beyond their duty to the prejudice of third persons. *Berman v. Smith* (D. C.) 171 Fed. 735, and cases cited. We are clear that the evidence in the present case does not make this rule applicable, for here the trustee in bankruptcy was guilty of no wrongful acts, as we have endeavored to show, in taking possession of the property in controversy, but was only in the exercise of his duty in the premises. The plaintiff's title to the property can be fully determined by the court of bankruptcy where the matter was duly referred by Judge Newman, and where such matters are properly and orderly cognizable. That court has lawful possession of the res, and its officer, the trustee in bankruptcy, is under bond to deliver the property to the plaintiff, if she proves her title and if the court decides in her favor.

We conclude that when it appeared from the facts proven before the trial court that there was nothing in the suit but the question of title to the res, which was in the rightful possession of the bankruptcy court, and that the defendant was not guilty of trespass, a verdict should have been directed for the defendant, and the plaintiff left, without prejudice, to pursue her remedy in the court of bankruptcy, to recover therefrom the res to which she claimed title.

Judgment reversed.

RUSSELL, J. (concurring specially). Errors in the charge of the court (which are not referred to in the opinion, but as to the quality of which we all agree) require the grant of a new trial, and hence I admit that there must be a reversal of the judgment refusing a new trial. However, I do not assent to the reasons upon which the reversal is predicated. Conceding that the state court has no jurisdiction to adjudicate the title, or right of property, as against the bankrupt, and that if the bankrupt had even a constructive possession of the personal property in question it would be and become the possession of his trustee in bankruptcy, I do not think the testimony required the jury to find

any such constructive possession. On the contrary, I think there is sufficient evidence to have authorized the jury to find that the trunk and its contents were in the possession of the plaintiff at the time it was taken from her by the defendant, who happened also to be trustee in bankruptcy, and not in the possession, either actual or constructive, of her husband. I think the evidence authorized the conclusion that the money which was taken from the trunk was the plaintiff's and I am clearly of the opinion that it was within the power of the jury to award the plaintiff punitive damages, in addition to the general damage consequent upon her being deprived of the possession of her money. The jury were not required to find that the trunk was in the possession of the bankrupt. While the furnishings of a home are presumptively in the possession of the husband as head of the family, the wearing apparel of a wife need not be treated as even constructively in the possession of her husband. Certainly there is no presumption that a wife's clothing is not her own. In the absence of any evidence to the contrary, a satchel or a trunk which contains a married woman's garments, in my opinion, is to be treated merely as the receptacle which segregates the wife's indispensable belongings from other household effects over which, presumptively, her lord and master exercises dominion. It is to be treated as a mere wrapping which aids to maintain a portion of that privacy to which every female, married or single, is entitled. I think the seizure and entry into the plaintiff's trunk, even by a trustee in bankruptcy, could be adjudged to be a trespass, and that it was for the jury to say whether the circumstances of the case were such as to call for the allowance of punitive damages.

POWELL, J. (concurring specially). I agree with the Chief Judge in the main, but do not go quite so far as he does as to some of the salient points of the case.

There is no question but that the trial court's jurisdiction in this case rests on possession, and not on title. The petition presented a prima facie case of possession unlawfully invaded by the trustee in bankruptcy, and was not subject to demurrer. The question is: How far did the proof sustain the petition?

In order for the plaintiff to recover, it was necessary for her to show not merely that she had title to the personal property, but also and specifically that she held possession of it exclusively of her husband, the bankrupt, and that the trustee in bankruptcy invaded this exclusive possession. The state court has no jurisdiction to settle the title of the property in a suit against the trustee in bankruptcy; but if the trustee, in the attempt to discharge his duties, violates an actual possession of property lawfully held by an adverse claimant, he can be held liable

in a state court for the trespass—the violation of the possession being the gist of the trespass.

Under the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), as construed by authoritative decisions, all possession of property held, actually or constructively, by a bankrupt, at the time of the filing of the petition, passes to the bankruptcy court and confers on it exclusive jurisdiction to settle contests as to the ownership. So that the possession of the bankrupt becomes the possession of the trustee in bankruptcy whenever the latter qualifies; the possession of the trustee being constructive or legal possession until he reduces the property to his actual detention and corporeal control.

In the case at bar, therefore, if the bankrupt at the time of the adjudication had the possession (actual or constructive) of the property involved, the subsequent transaction which gave rise to the present action was not a taking of possession by the trustee, but the mere retention and enforcing of a possession which in the eye of the law he already had.

As to the house and as to the household furniture, it is clear that the bankrupt had the possession, and that the possession passed to the trustee. The court plainly erred in submitting to the jury any right of the plaintiff to recover because the trustee went into the house (though the plaintiff, being the wife of the bankrupt, was using it as a home), or because he took the furniture, irrespective of whether in point of fact it was the wife's furniture or not.

As to the money: While the husband is *prima facie* in possession of the family home, where he and his wife jointly reside, and of the things located therein, yet this presumption is rebuttable. A wife may, even as against her husband, maintain such exclusive corporeal control of property that he will not in law be regarded as having possession of it, either actual or constructive. In this case, if the plaintiff, notwithstanding she was the wife of the bankrupt, and notwithstanding she resided in the house with him, had exclusive physical control and detention of the trunk and the money, her possession would be such as to make the defendant's act in taking the trunk and the money away a trespass, provided, of course, the trunk and the money did not in fact belong to her husband. Compare *Pollock & Wright on Possession*, 38, 40. I think, therefore, that so far as the money was concerned (the trunk and the remainder of its contents having been returned), the plaintiff might recover in the state court; and my Associate, Judge RUSSELL, concurs with me in this view.

As to the punitive damages I am inclined to agree with Judge HILL. The alleged in-

vasion of the house and the seizure of the household goods being out of the case, for lack of jurisdiction in the state court, the question is: Did the defendant's act in taking and keeping the money indicate such wantonness as to authorize the assessment of punitive damages? I think not. Any prudent man under similar circumstances would have kept it till the title to it could have been decided; and it must be remembered, so far as the mere taking of it is concerned, that the defendant did not even know that there was any money in the trunk when he took and carried it away from the defendant's possession. It is true that the trustee and the bankrupt had an altercation in the presence of the plaintiff, and that in the course of it the defendant used profane language to the bankrupt; but this was a separate affair, and not a part of the damage of taking the trunk and the money, which the trustee did not even decide to take until after this altercation was ended. Besides, it is impossible for an impartial mind to overlook the glaring fact that the bankrupt and his wife were acting very suspiciously and in apparent bad faith. The money and the furniture may have belonged to the plaintiff (personally, I think that the money and most of the furniture probably did belong to her); but, with all that, there are many things which would have fully justified the trustee in believing that the property belonged to the estate in bankruptcy, and that the plaintiff and her husband were about to move it away to another state. However, as the question of punitive damages is dependent purely on the facts, which may vary in the different trials, we deem it unnecessary to make an authoritative ruling on this point at this time.

The judgment of the court below must be reversed, but I concur specially upon the points mentioned above.

(8 Ga. App. 823)

MCNEILL v. MORGAN et al. (No. 2,348.)

(Court of Appeals of Georgia. Sept. 20, 1910.
Rehearing Denied Sept. 28, 1910.)

(Syllabus by the Court.)

JUDGMENT (§ 366*)—VACATION—ABSENCE OF COUNSEL.

The court did not err in setting aside the verdict, and vacating the judgment. A judgment rendered against a party whose sole counsel is absent by express leave of the court is properly vacated and set aside when that fact is properly called to the attention of the court by a timely motion in writing. Especially is this true where it was shown that the sole counsel for the defendant and appellant in an appeal from a justice's court, and who had promised to notify his clients when to be present, was taken seriously ill, and was in that condition when the judgment was rendered, and the only evidence in behalf of the respond-

ent was that counsel for the plaintiff did not know that the movant had a lawyer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 708; Dec. Dig. § 386.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Malcolm McNeill against H. W. Morgan and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Scott & Davis, for plaintiff in error. E. D. Thomas and Anderson, Felder, Rountree & Wilson, for defendants in error.

RUSSELL, J. The defendant in error filed the following motion, which is verified by the record and amply supported by evidence, and not contradicted in any way: "Georgia, Fulton County. To the Hon. John T. Pendleton, Judge of said Court: The defendants herein respectfully represent that on September 15, 1909, a verdict by a jury was rendered in said court, and a judgment was duly entered thereon; said verdict and judgment being in favor of the plaintiff and against your defendants. Same was rendered in their absence because of the following facts: Prior to August, 1909, they had employed E. D. Thomas, an attorney, to represent them, and was told by said Thomas that their case would be tried at the September term of said court, and because the time was uncertain he would give them due notice. Nevertheless, about the 1st of September, 1909, defendant Morgan called up the office of said Thomas to inquire the time of trial of said case, and for the purpose of getting a subpoena, that he might duly subpoena a witness for the defendant in said case, and was told by whoever answered the phone that said Thomas was sick and was confined in a sanitarium, and that his case had been checked until he could get well. That as a matter of fact said Thomas was sick and confined to his bed from August 25, 1909, until about October 5th, and was unable to attend to any business until the latter part of October. That said suit was an open account for alleged commissions for procuring a loan, and that these defendants had a good defense and were willing to and able to prove, had they an opportunity, that they had never employed the plaintiff to procure for them a loan, and in fact no loan was ever procured, and now are able, ready, and willing to go to trial with the defense. That the said Thomas in fact had a leave of absence from this court at the time said verdict was rendered against them. That the first knowledge they had of the judgment against them in said case was on Saturday, November 13, 1909, when the sheriff of said county threatened to make a levy on their property. They showed that they relied on (1) that their said attorney would notify them, and, after exercising all caution in calling the office of said Thomas,

they relied upon the fact that their case had been checked, wherefore they pray that the verdict rendered against them be vacated, that the judgment thereon be set aside, and for such other and further relief as the court may deem proper, and that the plaintiff be required to show cause why the prayers herein should not be granted."

There was no evidence for the respondent except the statement of his counsel that he did not know that movants were represented by any attorney until after the rendition of the judgment. No significance is to be attached to the fact that the name of counsel for the movants does not appear on the dockets of the superior court, except that it corroborates the testimony of Mr. Davis to the effect that he did not know, when the judgment was taken, that the movants had a lawyer. An appeal may be taken from the judgment of a justice court without employing counsel, and in many cases tried in justices courts there would be nothing in the record to show whether a party had or did not have a lawyer. The point in this case is that it was shown that the movants had employed a lawyer to represent them in the superior court. He was their sole counsel, and not only providentially absent (which might not have excused him if that had not been brought to the attention of the court), but was absent by express leave of the court. Judgment affirmed.

(135 Ga. 110)

BRANCH v. BISHOP.

(Supreme Court of Georgia. Sept. 21, 1910.)

(Syllabus by the Court.)

1. GROUNDS FOR NEW TRIAL INSUFFICIENT.

The grounds of the motion for new trial, based on rulings of the court as to the admissibility of evidence, so far as they were approved by the judge, and the grounds relative to the charge to the jury, so far as approved by the judge, do not disclose any such error as to require the grant of a new trial.

2. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS.

The action was damages for malicious prosecution. In his answer the defendant did not specially plead that, although there might not have been probable cause for causing the arrest, yet upon information he believed there was such cause and acted in good faith and not in a spirit of malice, and rely on allegations of that character either as a defense to the action or as mitigation of damages. But there was evidence tending to establish the facts above enumerated, and it was complained in one of the grounds of the motion for new trial that the court, although not requested in writing, omitted to charge such theory of defense. It appears from other portions of the charge that the judge instructed the jury in effect that there could be no recovery unless the defendant in causing the warrant to issue was "moved by malice." The matters alleged to have been erroneously omitted from the charge were merely elaborative of the instructions actually given to the jury, in so far as they bore on the non-liability of the defendant, and were collateral in so far as they related to mitigation of dam-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ages. In either case, in the absence of appropriate and timely written requests, the omission to charge was not sufficient cause for the grant of a new trial. *Savannah Electric Co. v. Jackson*, 132 Ga. 559, 64 S. E. 690; *Savannah Electric Co. v. Bennett*, 130 Ga. 597, 61 S. E. 529, and cases cited; *Savannah Electric Co. v. Crawford*, 130 Ga. 421, 60 S. E. 1056, and cases cited.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628–641; Dec. Dig. § 256.*]

3. REVIEW ON APPEAL.

The verdict was supported by the evidence, and there was no error in refusing to grant a new trial.

Error from Superior Court, Oconee County; C. H. Brand, Judge.

Action between J. J. Branch and Harry Bishop. From the judgment, Branch brings error. Affirmed.

B. E. Thrasher, F. C. Foster, Brown & Randolph, and R. S. Parker, for plaintiff in error. Cobb & Erwin, Geo. C. Thomas, and W. M. Smith, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(135 Ga. 106)

PETERSON v. CALHOUN.

(Supreme Court of Georgia. Sept. 21, 1910.)

(Syllabus by the Court.)

1. HOMESTEAD (§ 51*)—ESTABLISHMENT—SUFFICIENCY OF APPLICATION.

Where one as the head of a family, consisting of his wife and certain named minor children, filed on November 15, 1879, an application "to have laid off and set apart to be exempt from levy and sale as a homestead * * * on or out of one tract of land * * * containing four hundred acres known as the homestead whereon petitioner lives, a portion or the whole of said real estate, not to exceed the value of two thousand dollars in specie," and where in said application petitioner also prayed for the setting apart of certain personal property "not to exceed one thousand dollars in specie," attaching to the application as an exhibit a schedule of certain personal property and a list of his creditors, but not accompanying the application with a schedule containing a "description of all of his real and personal property," which petition was filed in the office of the ordinary on the date last above referred to, and where the county surveyor who laid off the homestead made a plat thereof, showing that it contained 525 acres, and, in an affidavit accompanying the plat, deposed merely that "the above [plat] represents the homestead of Malcolm D. Peterson [the applicant] surveyed on the 28th day of November, 1879, and that the same is not worth two thousand dollars specie," which affidavit and return of the surveyor was made the 1st day of December, 1879, and on the date last stated there was indorsed upon the schedule of personal property the following: "Passed upon and approved Dec. 1st, 1878 [1879?]. Phil. McRae, O. M. C."—and upon the plat of the realty the following: "Plat of the homestead of M. D. Peterson. Passed upon and approved Dec. 1st, 1879, by Phil McRae, Ody. M. C.," which papers and the indorsements thereon were duly recorded in the office of the clerk of the superior court—*held*, that the court did not err in the trial of a claim case in excluding the homestead papers above set forth,

together with the orders and returns thereon, when they were offered as the basis of the claim filed, as they did not show a valid homestead and exemption of the property claimed as exempt. Civ. Code 1895, §§ 2828, 2834, 2837.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 66; Dec. Dig. § 51.*]

2. VERDICT FOR PLAINTIFF PROPER.

Upon the exclusion of the homestead, a verdict for the plaintiff in execution necessarily followed, as is conceded by counsel for both parties.

Error from Superior Court, Montgomery County; J. H. Martin, Judge.

Action by W. P. Calhoun against N. H. Peterson. Judgment for plaintiff, and defendant brings error. Affirmed.

A. C. Saffold and W. M. Lewis, for plaintiff in error. M. B. Calhoun and Graham & Graham, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(135 Ga. 102)

WYNN & ROBINSON v. JONES.

(Supreme Court of Georgia. Sept. 20, 1910.)

(Syllabus by the Court.)

1. TRIAL (§ 253*)—CLAIMS BY THIRD PERSONS—TRIAL—INSTRUCTIONS.

Where, on the trial of a claim case, the claimant introduced, in connection with other evidence to support her contention that she was the owner of the property levied upon, a mortgage given by the defendant in execution to his vendor for the purchase money of a part of the property, which mortgage contained a clause retaining title in the vendor, and which had been transferred to the claimant, it was error for the court to charge the jury as follows: "In considering the question of fraud you look to the date of the papers; if the mortgage was transferred to the claimant prior to the date of the execution, the claimant would have a prior lien, and the property would not be subject," although the mortgage and the transfer thereof were of an older date than the judgment upon which the execution was based, there being some evidence from which the jury might have found that the mortgage was a part of a fraudulent scheme between the defendant and the claimant to defeat the collection of the debt due plaintiff in execution, as the charge complained of had the effect of excluding such testimony from consideration by the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613–623; Dec. Dig. § 253.*]

2. REVIEW ON APPEAL.

No error is made to appear in the exceptions to the other rulings of the court.

Error from Superior Court, Muscogee County; S. P. Gilbert, Judge.

Claim case between Wynn & Robinson and Annie Jones. From the judgment, Wynn & Robinson bring error. Reversed.

S. T. Pinkston, for plaintiff in error. W. H. McCrory, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur.

(135 Ga. 117)

TATUM et al. v. HAWKINS.

(Supreme Court of Georgia. Sept. 21, 1910.)

*(Syllabus by the Court.)***1. REQUESTS COVERED BY GENERAL CHARGE.**

The requests to charge, in so far as applicable under the pleadings and evidence, were covered by the general charge.

2. EXCEPTIONS WITHOUT MERIT.

The exceptions to rulings on the admissibility of evidence and to the charge of the court were without merit.

3. REVIEW ON APPEAL.

The evidence was sufficient to support the verdict, and the discretion of the judge in refusing to grant a new trial will not be disturbed.

Error from Superior Court, Muscogee County; S. P. Gilbert, Judge.

Action between Lou Tatum and others and J. H. Hawkins. From the judgment, Tatum and others bring error. Affirmed.

J. E. Chapman and G. Y. Harrell, for plaintiffs in error. A. W. Cozart and Wynn & Wohlwender, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(135 Ga. 117)

MONIAC CHEMICAL CO. v. KING & CLARK.

(Supreme Court of Georgia. Sept. 22, 1910.)

*(Syllabus by the Court.)***REVIEW ON APPEAL.**

No errors are shown in any of the rulings of the court below, nor in the portions of the charge excepted to; and there was sufficient evidence to authorize the finding of the jury.

Error from Superior Court, Charlton County; T. A. Parker, Judge.

Action between the Moniac Chemical Company and King & Clark. From the judgment, the Moniac Chemical Company brings error. Affirmed.

Wilson, Bennett & Lamdin, for plaintiff in error. H. F. Dunwoody and J. L. Sweat, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

(135 Ga. 120)

G. & L. BOTTLING WORKS v. MACON COCA COLA BOTTLING CO.

(Supreme Court of Georgia. Sept. 22, 1910.)

*(Syllabus by the Court.)***GROUND FOR NEW TRIAL INSUFFICIENT.**

None of the grounds of the motion for a new trial are sufficient to require a new trial.

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action between the G. & L. Bottling Works and the Macon Coca Cola Bottling Company. From the judgment, the G. & L. Bottling Works brings error. Affirmed.

John P. Ross, for plaintiff in error. Miller & Jones, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(135 Ga. 111)

LOUISVILLE & N. R. CO. v. GUDGER et al.

(Supreme Court of Georgia. Sept. 21, 1910.)

*(Syllabus by the Court.)***REVIEW ON APPEAL.**

The petition after amendment was not open to the objections made by demurrer. No error is shown in the court's instructions to the jury; and, there being sufficient evidence to authorize the finding in favor of the plaintiff, the judgment of the court below refusing a new trial will not be disturbed.

Error from Superior Court, Murray County; A. W. Fite, Judge.

Action between the Louisville & Nashville Railroad Company and R. M. Gudger and others. From the judgment, the railroad company brings error. Affirmed.

D. W. Blair and C. N. King, for plaintiff in error. W. E. Mann and C. L. Henry, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

(135 Ga. 103)

WILLIAMS et al. v. WAY.

(Supreme Court of Georgia. Sept. 21, 1910.)

*(Syllabus by the Court.)***1. WILLS (§ 116*)—WITNESSES—COMPETENCY—LEGATEES.**

If a subscribing witness to a will is also a legatee or devisee under the will, the witness is competent, though the legacy or devise to him shall be void. Civ. Code 1896, § 3275. It is not sufficient objection to the probate of a will in which devises to other persons are made that all of the subscribing witnesses are legatees under the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 287, 298; Dec. Dig. § 116.*]

2. REVIEW ON APPEAL.

There were no requests to charge. The portions of the charge complained of were not erroneous; nor was it error to omit to charge, as complained. The evidence was sufficient to support the verdict, and there was no error in refusing a new trial.

Error from Superior Court, Thomas County; R. G. Mitchell, Judge.

Action between Daniel Williams and others and Add Way, Jr. From the judgment, Williams and others bring error. Affirmed.

Fondren Mitchell and Branch & Snow, for plaintiffs in error. S. A. Roddenbery and Roscoe Luke, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(135 Ga. 108)

GEORGIA R. R. v. DANIEL.

(Supreme Court of Georgia. Sept. 21, 1910.)

*(Syllabus by the Court.)***1. VERDICT SUSTAINED BY EVIDENCE.**

There was sufficient evidence to authorize the finding by the jury in favor of the plaintiff.

2. APPEAL AND ERROR (§ 302*)—RESERVATION OF GROUNDS OF REVIEW—MOTION FOR NEW TRIAL.

This court will not pass upon the question of the admissibility of evidence where the ground in the motion for a new trial complaining of the admission of such evidence fails to show that the grounds for the exclusion of the evidence were urged before the trial judge when the evidence was offered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1747; Dec. Dig. § 302.*]

Error from Superior Court, Richmond County; H. O. Hammond, Judge.

Action by Nettie Daniel against the Georgia Railroad. Judgment for plaintiff, and defendant brings error. Affirmed.

Jos. B. & Bryan Cumming and Jas. M. Hull, Jr., for plaintiff in error. C. Henry and R. S. Cohen, for defendant in error.

BECK, J. This was a suit brought by Nettie Daniel to recover the value of the life of her husband, Columbus W. Daniel, who was run over and killed by a train of the defendant railroad, which was being operated on the Augusta Belt Line Railway, then controlled and managed by the defendant. The plaintiff's husband was a yard conductor in the employ of the Charleston & Western Carolina Railway Company. The track of the Belt Line railway where Daniel was killed was distant from the yard track of the Charleston & Western Carolina Railway Company 10 or 11 feet. The petition shows the following: At some time during the day on which he was killed, it became Daniel's duty as yard conductor to make up his train and to do certain shifting in front of McCoy's brickyard, which is located on the southeastern boundary of the city of Augusta. In front of McCoy's brickyard there appears in succession as you go from the brickyard north, first, a spur track, then a track of the Belt Line railway, and then about six parallel tracks. The Belt Line track and the nearest of the parallel tracks "almost meet in a point in front of McCoy's brickyard, where the two tracks diverge." On the day of the homicide, Columbus Daniel was engaged in directing the movement of a train of the Charleston & Western Carolina Railway from about McCoy's brickyard in the direction of the city of Augusta, and at a point where he was engaged in superintending the movement of the train the track upon which the train was being moved had such a curve that it was necessary for Daniel, in the discharge of his duty, to "take positions from which he could communicate with the

engineer of the train which he was directing between and on the tracks of the Charleston & Western Carolina Railway and the Belt Line tracks." While engaged in signaling his train from the position taken by him, and while facing his own train, with his back towards the Georgia Chemical Works, a train of the defendant railroad, consisting of an engine with a tender in front attached to two cars, going at a very rapid rate of speed, "negligently struck the said Columbus W. Daniel, the engine and two cars passing over his body," killing him. It is alleged that the defendant was negligent in running its train with the tender in front, thus preventing those on the engine from seeing whether any person was on the track: and in running the same at an unlawful rate of speed within the city limits, with no lookout on the tender or other precautions, and in failing to give warning to the deceased of the proximity of the train, and in that its engineer, or the fireman on its engine, failed to see the deceased on the track engaged in the performance of his duty of signaling trains, although the deceased could have been seen had the occupants of the engine been looking in the direction they were going, and exercising ordinary care. It was further alleged that the deceased was free from fault, and not guilty of any negligence. Upon the trial of the case the jury returned a verdict for the plaintiff for the plaintiff for the sum of \$7,500. A new trial was refused, and the defendant excepted.

1. While upon its face this case is exceedingly close, we are of the opinion that there was sufficient evidence to authorize a finding by the jury in favor of the plaintiff. Although the original petition may have been framed on the theory that the husband of the plaintiff was killed in the yard of the Charleston & Western Carolina Railway, and while occupying a position between a track in the yard and the Belt Line track, the petition was so amended, without objection so far as appears from the record, as to authorize the introduction of evidence to show that he was killed after taking a position on the Belt Line track and while giving signals from that position to direct the movement of the train which he was directing as yard conductor, and while he was engaged in the performance of his duty. And there was evidence which tended to prove, and which the jury were authorized to accept as establishing the fact, that in taking such a position on the track of the Belt Line the deceased was but doing that which other employes of the Charleston & Western Carolina Railway did continuously, one witness testifying that he had done the same thing "a thousand times," and that it was the "common practice of our men." Another witness testified that "very often employes of the Charleston & Western Carolina yards

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

...to go upon the Belt Line for the purpose of giving instructions and directions for the drilling of trains." It was also in evidence that the place at which the killing occurred was where the presence of people on the track was anticipated, and where one would look for people to be on the track. There was also evidence from which the jury would have been authorized to find that the engine which struck Daniel was running at a high and dangerous rate of speed (when the character of the place is considered), and that the engine was being run with the tender in front, without a lookout and without the giving of signals. We are of the opinion that, when all of the evidence which is most favorable to the plaintiff's contentions is considered (and it was for the jury to say whether that evidence presented the truth of the case), there was sufficient evidence to authorize a finding in favor of the plaintiff.

2. Complaint is made in the motion for a new trial of the admission of certain testimony, and certain reasons are stated to show that the evidence should have been excluded; but it does not appear that these grounds of objection were urged at the time of the admission of the testimony which plaintiff in error now insists it was error to admit. A mere statement that testimony was admitted over objection, and that this was error for certain stated reasons is not sufficient, where it does not appear that these reasons were urged before the trial judge when he ruled upon the question of admitting or repelling the evidence objected to. See *Andrews v. State*, 118 Ga. 1, 43 S. E. 852, and cases there cited.

Judgment affirmed. All the Justices concur.

(135 Ga. 95)

MCLELLAN et al. v. MCLELLAN.

(Supreme Court of Georgia. Sept. 20, 1910.)

(Syllabus by the Court.)

1. DEEDS (§ 75*)—EXECUTION THROUGH COERCION—RATIFICATION—INCONSISTENT REMEDIES.

A person cannot prosecute two inconsistent remedies. If a wife was coerced by her husband into making a deed to her brother-in-law, she could, at her option, repudiate the conveyance and proceed to have it canceled and to recover the land. If, instead of so doing, with full knowledge of the facts she elected to bring suit against a bank where certain funds had been deposited by her husband, claiming that such funds were the proceeds of the conveyance to her brother-in-law and belonged to her, and such suit was compromised by paying to her a portion of the amount sued for, this amounted to a ratification of the conveyance, and she could not thereafter successfully bring suit against one to whom the heirs at law of her brother-in-law had conveyed the land, seeking to repudiate the conveyance made by her and to recover the land. *Board of Education v. Day*, 128 Ga. 156, 163, 57 S. E. 359; *Dolvin v. American Harrow Co.*, 125 Ga. 699, 706, 54 S. E. 706; *Equitable Life Assurance Society v. May*, 82 Ga. 646, 9 S. E. 597; 15 Cyc. 259-262.

(a) The charge of the court which in substance hypothetically stated the facts set out in the preceding headnote, but merely instructed the jury that if such were the facts they could consider them along with other evidence in the case in determining the question of ratification, was error.

(b) And under the state of facts thus hypothetically stated, relative to the execution of the deed, if the wife received a part of the purchase money for the lot, knowing the source from which it was derived, and her husband, by her consent and authority, received the balance, this would also have amounted to a ratification of the conveyance.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 207; Dec. Dig. § 75.*]

2. CANCELLATION OF INSTRUMENTS (§ 51*)—PROCEEDINGS—INSTRUCTIONS.

The court erred in charging the jury as follows: "The relations between husband and wife are considered in law confidential, and you may consider that relation in passing upon the acts of the husband of Mrs. M. T. McClellan, as shown by the evidence, in arriving at what, if any, influence his relation to her had in respect to her own acts. The confidential relationship, if so established, would prevent the acquisition by one party, by influence produced by such relationship, of an adverse right to himself, as against the party so influenced; and this would apply to a third party who knew of the relationship, and of the undue influence, if any there be, if such party actually participated in the matters leading up to the acquisition of such adverse interest." This charge authorized the jury to find in favor of the wife, who sought to have the deed declared void, though the "third party" referred to, the grantee in the deed, had participated in no act amounting to coercion, or duress, or fraud, inasmuch as the "influence produced by such relationship" (that is, of husband and wife) might not have in it any element necessarily affecting the validity of the conveyance.

[Ed. Note.—For other cases, see *Cancellation of Instruments*, Cent. Dig. § 103; Dec. Dig. § 51.*]

3. TRIAL (§ 250*)—PROCEEDINGS—INSTRUCTIONS.

The effect of a conveyance by a wife of her separate estate to a creditor of her husband for the purpose of paying the latter's debts was not involved under the pleadings and evidence in this case, and the charge of the court upon that subject, though it correctly stated the law upon the question, should not have been given.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 584-586; Dec. Dig. § 250.*]

4. REVIEW ON APPEAL.

The other charges of the court complained of are not erroneous upon any of the grounds taken upon exception thereto.

5. APPEAL AND ERROR (§ 273*)—RESERVATION OF GROUNDS OF REVIEW—SUFFICIENCY OF EXCEPTIONS.

The exceptions to the rulings of the court upon the admissibility of evidence present no question for determination by this court, as they do not show what objections to the admission of the evidence were urged upon the trial of the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1620-1630; Dec. Dig. § 273; * *Trial*, Cent. Dig. §§ 256, 689, 690, 692.]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Mrs. M. T. McClellan against I. B. McClellan and others. Judgment for plaintiff, and defendants bring error. Reversed.

Lewis W. Thomas and C. L. Pettigrew, for plaintiffs in error. J. D. Kilpatrick, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur.

(125 Ga. 118)

AMERICAN INS. CO. v. McVICKERS BROS.

(Supreme Court of Georgia. Sept. 22, 1910.)

(*Syllabus by the Court.*)

INSURANCE (§ 623*)—ACTION ON POLICY—TIME FOR BRINGING—WAIVER.

An insurance policy provided that no action on it should be sustainable "unless commenced within six months after the date of the fire," and that "no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, and signed by the president, vice president, treasurer and general manager, or assistant secretary, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." The assured sued on the policy after the expiration of such six months. Amendments to the petition were offered, making, among other allegations, the following: After plaintiff employed an attorney, the general counsel of the defendant "insisted and persuaded the plaintiff's attorney to defer the matter of filing said suit, that he, the said attorney, had taken the matter up with the company, and said also that he had very great hopes of being able to adjust the matter without litigation, and also informed the attorney for plaintiff that he would give him notice in plenty of time to file his suit, and repeatedly declared to the plaintiff's attorney that plaintiff's attorney should not be hurt by the delay, and plaintiff's attorney, relying on these promises of the general counsel of the company, deferred filing suit until counsel for the defendant * * * finally told plaintiff to file suit. Plaintiff's counsel could and would have filed the suit at once when the matter was turned over to him, and it was turned over to him before the six months had expired from the date of the fire, but relied on the statement of the general counsel of the company in the general office in the city of Atlanta that they were making an effort to adjust the matter, and * * * that they were anxious to call the board of directors together and see if they could not settle the matter without litigation. Petitioner alleges that as a matter of fact the general counsel for the defendant in this case had charge of its entire legal business, and was directed by the president and secretary to look after the claim of plaintiff, and in looking after it and making these promises he was acting for the company and within the scope of his authority, and his declaration that the company was trying to adjust the matter and insisting that counsel for the plaintiff defer the filing of the suit until he could see that it was adjusted was the sole cause of the suit not being filed within the six months prescribed by policy." *Held*, that under the allegations in the amendment offered, the defendant was estopped from setting up the defense that the suit on the policy was not brought within the time prescribed

therein, and the court committed no error in allowing the amendments over objections of the defendant that they were insufficient in law, "because they sought to vary a written contract by parol, because they were not in accord with the declaration originally filed and were inconsistent therewith, because they sought to vary a written contract without setting up any sufficient reason therefor," and properly refused to dismiss the petition as amended on the ground that "it appeared on the face of the pleadings that the cause of action was barred." *McDaniel v. German Ins. Co.*, 134 Ga. 189, 67 S. E. 668; *Hartford Fire Ins. Co. v. Amos*, 98 Ga. 533, 25 S. E. 575; 1 *Clement on Fire Ins.* p. 399; 28 *Cent. Dig. Insurance*, §§ 1551, 1552, 1553; 4 *Cooley's Briefs on Ins.* p. 3989 et seq.; 3 *Cooley's Briefs on Ins.* p. 2514; 19 *Cyc.* 908; 2 *May on Ins.* § 488; 13 *Am. & Eng. Enc. of Law*, 390.

[*Ed. Note.*—For other cases, see *Insurance*, *Cent. Dig.* §§ 1551-1553; *Dec. Dig.* § 623.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by McVickers Bros. against the American Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Suit was brought on April 15, 1907, on a fire insurance policy on account of the destruction by fire on October 10, 1906, of the property on which the insurance was issued. The policy provided that no action on the policy should be sustainable "unless commenced within six months after the date of the fire, and not afterward." Upon motion to dismiss the petition because the suit was filed more than six months after the fire occurred, the plaintiff offered amendments, making, among other allegations, substantially the following: Soon after the fire the general counsel for the defendant, and the one holding the office of secretary and treasurer of defendant, "both being authorized to make a waiver and both being in charge of the office, made the only excuse for not adjusting and settling the policies that the board of directors had not met, and asked plaintiff to wait until the board of directors could get together, and plaintiff visited the office and talked to these gentlemen six or seven times, and each time they would put him off until the next week, begging him to wait until the board of directors could meet, * * * and plaintiff, being misled by these statements and believing from their statements that they were bona fide making an effort to pay his claim, deferred even turning the case over to an attorney." After plaintiff employed an attorney, the general counsel of the defendant "insisted and persuaded the plaintiff's attorney to defer the matter of filing said suit, that he, the said attorney, had taken the matter up with the company, and said also that he had very great hopes of being able to adjust the matter without litigation, and also informed the attorney for the plaintiff that he would give him notice plenty of time to file his suit, and

*For other cases see same topic and section NUMBER in *Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes*

repeatedly declared to the plaintiff's attorney that plaintiff's attorney should not be hurt by the delay, and plaintiff's attorney, relying on these promises of the general counsel of the company, deferred filing suit until counsel for the defendant * * * finally told plaintiff to file suit, that he would see that the company furnished him some blanks of the policies, and that he would still see if he could not settle the suit before trial term, and was in hopes that they could adjust the matter. Plaintiff's counsel could and would have filed the suit at once when the matter was turned over to him, and it was turned over to him before the six months had expired from the date of the fire, but relied on the statement of the general counsel of the company in the general office in the city of Atlanta that they were making an effort to adjust the matter, and * * * that they were anxious to call the board of directors together and see if they could not settle the matter without litigation. Petitioner alleges that, as a matter of fact, the general counsel for the defendant in this case had charge of its entire legal business, and was directed by the president and secretary to look after the claim of plaintiff, and in looking after it and making these promises he was acting for the company and within the scope of his authority, and his declaration that the company was trying to adjust the matter, and insisting that counsel for the plaintiff defer the filing of the suit until he could see that it was adjusted, was the sole cause of the suit not being filed within the six months prescribed by policy," and that the general counsel, after suit was filed, "approached the counsel for the plaintiff, and stated that he did not then intend to make any objection to the fact that the suit was not filed within the six months, and had no idea that he would make any such point, and filed his plea without making any point of this sort, but finally approached the attorney for plaintiff with an agreement and asked plaintiff's attorney to sign it, that, if he decided to file or make this point, he would not be precluded by not making it the first term of the court, and plaintiff's attorney signed this agreement, stating to him at the time and believing and still believing that the time of filing the suit, six months, had been waived by him, and that a plea of that sort would not avail him." Defendant is "estopped from claiming that the suit was not filed within the six months from the date of the fire. Petitioner further alleges that there is a stipulation in the policy that suit should not be filed within three months from the date of the fire, and that the conditions in the policy that suit should

be filed within six months from the date of the fire would only give plaintiff right to sue within three months from the time of right of action accrued, and that this time is so short as to be unreasonable, and renders that condition that plaintiff must sue in six months void. Said company through its agents above referred to claimed to your petitioners and their attorney all along up to the 15th day of April, 1907, that they were taking up the matter of loss, and seeking to call a board of directors together, and would probably settle the claim and at the time referred to in this paragraph, when they finally refused to pay same."

The policy contained the following provisions: "No suit, or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing requirements, nor unless commenced within six months after the date of the fire and not afterward. * * * No officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, and signed by the president, vice president, treasurer and general manager or assistant secretary, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." The defendant objected to the allowance of the amendments "because they were insufficient in law, because they sought to vary a written contract by parol, because they were not in accord with the declaration originally filed and were inconsistent therewith, because they sought to vary a written contract without setting up any sufficient reason therefor." After the amendments were allowed, the defendant "moved to dismiss the declaration as amended, because the same as amended was insufficient in law, as it appeared on the face of the pleadings that the cause of action was barred." The motion was overruled, and the defendant excepted to this, as well as to the allowance of the amendments.

Burton Smith and Lawton Nalley, for plaintiff in error. J. W. Wise and J. F. Go-lightly, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(135 Ga. 140)

ATLANTIC COMPRESS CO. v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. Sept. 23, 1910.)

*(Syllabus by the Court.)***1. CARRIERS (§ 153*)—EXEMPTION FROM LIABILITY FOR LOSS OF GOODS—EXPRESS CONTRACT.**

A compress company in possession of a certain number of bales of cotton belonging to another issued to the latter a receipt acknowledging receipt of the cotton "to be compressed and loaded for Central of Georgia. Subject to all the conditions of bill of lading of above-named carrier [a railway company] which may be issued in exchange for this receipt." "The form of the bill of lading alluded to in such receipt was well known" to the party receiving the receipt. The owner of the cotton obtained from the railway company in exchange for the receipt a bill of lading, one of the conditions of which was, "No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto, by * * * fire." For compressing and loading the cotton the railway company was to pay the compress company. Before the cotton was compressed and loaded, it was destroyed by fire while in possession of the railway company through its agent, the compress company. The freight was prepaid by the owner of the cotton. The railway company paid the owner the value of the cotton destroyed, and, to recover the amount thus paid, sued the compress company on a contract of the latter to indemnify the former against any liability to the owner of cotton lost or damaged after it was received by the compress company for compressing and before it was loaded by the compress company for shipment. *Held*, there was no express contract between the owner of the cotton and the railway company respecting the condition in the bill of lading wherein the latter was to be exempted from liability on account of the loss of the cotton by fire, and such condition was not binding on the owner.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 687-690; Dec. Dig. § 153.*]

2. INDEMNITY (§ 15*)—ACTION ON CONTRACT—SUFFICIENCY OF EVIDENCE.

Proof of loss of the cotton by fire and payment to the owner by the railway company for the value of the cotton made a prima facie case of liability of the compress company to the railroad company on the indemnity contract between them.

[Ed. Note.—For other cases, see Indemnity, Dec. Dig. § 15.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by the Central of Georgia Railway Company against the Atlantic Compress Company. Judgment for plaintiff, and defendant brings error. Affirmed.

King & Spalding and E. M. Underwood, for plaintiff in error. Lawton & Cunningham and H. W. Johnson, for defendant in error.

HOLDEN, J. The Central of Georgia Railway Company (hereinafter called the plaintiff) sued the Atlantic Compress Company (hereinafter called the defendant) on an indemnity contract, wherein the latter agreed to indemnify the former against any liability to the owner of cotton lost or damaged after it was received by the compress company

for compressing and before it was loaded by the compress company for shipment. One hundred and twenty-five bales of cotton received by the defendant from the owner to be compressed and loaded for the plaintiff were destroyed by fire after the bill of lading was issued to the owner by the plaintiff, in exchange for the receipt given the owner by the defendant, and while it was in the possession of the defendant as the agent of the plaintiff and before it had been compressed. The plaintiff paid the owner the value of the cotton, and sued the defendant to recover the amount thus paid. The case was submitted to the judge on an agreed statement of facts, and to his judgment in favor of the plaintiff for the full amount for which suit was brought the defendant excepted.

The defendant contends that the owner of the cotton made an express contract, whereby the plaintiff was exempted from liability to the owner for loss of the cotton by fire. The plaintiff makes the contrary contention. Unless the plaintiff was in law liable to pay the owners of the cotton on account of its destruction, the defendant would not be liable to reimburse the plaintiff for the amount so paid by the latter. Civ. Code 1895, § 2276, is as follows: "A common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold. He may make an express contract, and will then be governed thereby." Counsel have argued the case on the theory that the receipt of the compress company was given on its own account, and also on the opposing theory that it was given as agent of the railway company. In considering the question whether the conditions in the bill of lading created an exemption from liability in the event the cotton was destroyed by fire, let us first consider the receipt as having been issued by the defendant on its own account, and not as agent for the plaintiff. The bill of lading issued by the plaintiff had in it this condition: "No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto, by * * * fire," etc. The words "party in possession" are broad enough to cover the compress company, which, as agent of the railroad company, was in actual possession of the cotton when it was destroyed by fire. The receipt of the compress company acknowledged receipt of the cotton from the shipper "to be compressed and loaded for Central of Georgia. Subject to all the conditions of bill of lading of above named carrier, which may be issued in exchange for this receipt." Treating the receipt as that of the compress company on its own account, and assuming that the bill of lading became a part of the agreement between the compress company and the shipper, or that the receipt was given subject to conditions

of bill of lading that might be issued in exchange for it, or that the cotton was to be compressed and loaded subject to such conditions, one of which was that any party other than the railway company in possession of the property would not be liable for its loss by fire, the meaning of the receipt would be that should the cotton be lost by fire in the possession of the compress company after the receipt was given, and bill of lading issued, the compress company would not be liable therefor to the shipper. If the receipt was treated in this way and given the effect and meaning above referred to, no violence would be done to the provisions of Civ. Code 1895, § 2264, as the provision therein contained, that the common-law liability of a common carrier shall not be limited by any notice given, etc., but, in order to do so, there must be an express contract, only applies to common carriers, and the compress company is not a common carrier. The condition in a writing issued by the compress company, or in another writing made a part thereof, that the one to whom the writing was delivered would not hold the company liable for losses by fire might be binding on such person when it would not be binding if issued by a common carrier. If it is proper to treat the receipt in this way, and give it the meaning that the compress company was not to be liable to the shipper if the cotton was lost by fire before it reached its destination, this fact alone would not relieve the railway company from liability if the cotton was destroyed by fire. The railway company would not be relieved of liability to the shipper for loss of the cotton by fire while in its possession because the shipper had bound himself, with the knowledge of the railway company, not to hold another liable for the loss of the cotton by fire while in possession of the railway company. The railway company could not properly say to the shipper, "You should not hold me liable because you have agreed not to hold another liable." The railway company is not seeking to hold the compress company liable because of negligence of the latter, but on its indemnity contract with the railway company, to which the shipper was no party, and, as far as disclosed by the record, never knew there was such a contract. What has just been stated has been said on the theory that the receipt of the compress company was one given by it on its own account, not as an agent of the railway company. If the receipt be dealt with on the theory that the railway company was no party to it, and as plainly evidencing a contract by the shipper not to hold the compress company liable for loss of the cotton by fire occurring at any time before delivery at its destination, we do not think this fact would be sufficient to show that there was an express contract by the shipper that the railway company would be likewise relieved of liability, al-

though the receipt was delivered to the railway company in exchange for a bill of lading, and it was contemplated by the parties when the receipt was given that this should be done.

Nor would the facts in the record warrant the conclusion that there was an express contract regarding the exemption of the railway company from liability if the cotton was lost by fire if the compress company's receipt be treated as having been given by that company as an agent for the railway company. On this theory, it would simply be an exchange of the receipt of one agent of the railway company for a bill of lading from another agent. The main office of the receipt of the compress company on this theory would be to evidence from one agent of the railway company the number of bales of cotton for which the other agent of the railway company should give a bill of lading in exchange. While the receipt of the compress company and the bill of lading issued to the shipper were on forms in general use between shippers and the parties, it does not appear that the attention of the shipper was especially directed to the particular statements in them and gave his assent thereto, and neither the receipt nor the bill of lading was signed by the shipper. The mere fact that the receipt stated that the cotton was to be compressed and loaded, or that the receipt was given "subject to all the conditions of bill of lading" of the carrier, could not alone make the condition in the bill of lading a subject-matter of express contract, as every bill of lading issued and accepted by a shipper is for a shipment subject to the conditions in the bill of lading, except that the limitations on the common-law liability of the carrier are not binding unless made the subject of an express contract. Treating the receipt as that of the compress company as agent of the railway company, the statement in it is but a notice given and an entry on a receipt undertaking to do what the statute says cannot be done, to wit, limit its legal liability. The fact that one agent of a common carrier in giving a receipt for goods to be transported by the carrier and to be exchanged for a bill of lading enters a notice or makes an entry which of itself, or, taken in connection with the bill of lading to be issued in exchange for it, limits the legal liability of the carrier, is without effect so far as the shipper is concerned, unless he makes an express contract with reference to such condition.

The question of whether or not a bill of lading evidences a special contract between the carrier and the shipper within the provisions of Civ. Code 1895, § 2276, so as to make valid a limitation on the legal liability of the carrier contained in the bill of lading, is not determined by the fact that the ship-

ment is tendered by the shipper, and received by the carrier, subject generally to the conditions of the bill of lading which the carrier issues. Every shipment for which a bill of lading is issued to the shipper is subject to the legal conditions of the bill of lading which constitutes the contract of carriage, as well as a receipt for the goods, and the recipient of the bill of lading impliedly agrees thereto. But a shipment being governed by the ordinary legal conditions of a bill of lading is one thing, and an express assent by the shipper to a stipulation therein which limits the legal liability of the carrier, so as to make such a condition valid against the shipper when it otherwise would not be, is another and a different proposition. To give rise to the latter so as to bind the shipper, there must be an express assent on his part to the stipulation itself. He must evidence in some way an intention to be bound thereby. We do not see that the mere exchange of a receipt prepared by another for the carrier's bill of lading, although the shipper may be advised as to the form of the bill of lading customarily issued by the carrier in such instances, and although the receipt may contain the statement, "Subject to all the conditions of bill of lading of above-named carrier, which may be issued in exchange for this receipt," is an act on the part of the shipper showing an express assent by him to a stipulation in such bill of lading whereby the carrier undertakes to limit his legal liability. And we think the result is the same whether the receipt thus exchanged by the shipper be one given him by a third person who holds the goods as his bailee, or by an agent of the carrier (other than the one issuing the bill of lading), who holds them for the carrier. Under such circumstances, the receipt is primarily intended as an evidence of the shipper's right to the possession of the goods which are in the hands of another, and its exchange with the carrier for a bill of lading effects a surrender of the right of possession to the carrier, as a common carrier, for shipment, and no more affects the contract of carriage expressed in the terms of the bill of lading than would a physical delivery of the goods themselves and the taking of a similar bill of lading where no receipt had been previously issued therefor. One transaction calls no more attention to a limitation of liability than the other; for, as above stated, a shipment for which a bill of lading is given is subject to the general conditions of shipment and requirements of the bill of lading, and the shipper adds nothing to his implied acceptance of its terms by stating generally that he accepts it subject to its conditions. In neither of the instances above outlined are the facts such as to denote an express assent on the part of a shipper to limitations

on the liability of the carrier which the law treats as invalid in the absence of an express contract with respect thereto. The fact that the form of the bill of lading alluded to in the receipt was well known to the parties, and that the shippers themselves frequently filled out these forms and tendered them to the carriers for signature, and it was contemplated by all the parties that the railway company would so issue its bill of lading in lieu of the compress company's receipt, would not make the condition in the bill of lading an express contract between the shipper and the railway company.

The agreed statement of facts recites: "The rate of freight named in the bills of lading was the rate fixed by the Railroad Commission of Georgia, in effect at the time. * * * The classification of the Railroad Commission of Georgia contains only the one set of rates on cotton in bales, and does not contain any other set of rates on cotton in bales as under 'owner's risk.'" It appears from the record that the rate charged the shipper by the railway company was the maximum rate for a shipment of bales of cotton, and no reduced rate was given the shipper in this matter. The record does not show that the shipper got any reduced rate because the cotton was to be compressed, or that it could or would have refused to have carried it if it had not been compressed.

2. The cotton was burned after the bill of lading was issued by the railway company, and the agreed statement of facts shows that the cotton was destroyed "while in the possession of the Atlantic Compress Company as agent of the railway company, under the provisions of the contract between the two latter." It will be seen that the railway company, through its agent, the compress company, was in possession of the cotton when it was destroyed, after the railway company had issued its bill of lading to the shipper. Nothing remained to be done by the shipper before the cotton was to be transported. The record shows that the freight had been prepaid. There was no duty on the shipper to have the cotton compressed and loaded for shipment. The receipt of the compress company stated that it had received from the owner a specified number of bales of cotton "to be compressed and loaded for Central of Georgia." When this receipt was given, the cotton was in the possession of the compress company, subject to whatever disposition the owner saw fit to make of it. The compressing and loading was to be done by the railway company through its agents, the compress company, and under the contract between the two companies the former was to pay the latter for this work. The contract has in it the following statement: "Whereas, during the cotton season of 1905-1906, the railway company will accept uncompressed cotton for through

transportation, but, for convenience in forwarding same, desires that a portion thereof shall be compressed at said compresses of the compress company. * * * That, as and when requested by the railway company so to do, it will promptly receive and receipt for, unload from cars or wagons, shelter when practicable, compress and load on cars in the order of its receipt, or as may be otherwise instructed by the railway company, all cotton of such dimensions as to make it practicable to compress it to a density, as hereinbelow specified, intended for shipment over the lines of the railway company and its connections and tendered to the compress company for that purpose by the railway company or by shippers, and for such cotton as is so tendered by shippers it will issue to shippers tendering same one single certificate only covering each lot of cotton designated by one mark." When the cotton was destroyed, it was exclusively in the possession of the railway company, through its agent, the compress company, with nothing to be done by the shipper before it was transported by the railway company, and the latter held it at the time of its destruction in its capacity as a common carrier, and its liability as a common carrier had accrued. When it was shown that the cotton was destroyed after the liability of the railway company as a common carrier had accrued, the presumption was that the carrier was liable to the shipper on account of the loss of the cotton. The record does not show anything to rebut this presumption. Civ. Code 1895, § 2896, is as follows: "In all cases of bailment, after proof of loss, the burden of proof is on the bailee to show proper diligence." The record shows that the cotton at the time of its destruction by fire was in the actual possession of the compress company as bailee of the railroad company. The carrier was suing the compress company to recover from it by virtue of the contract of indemnity existing between them the amount the carrier had paid the shipper to make good the loss of the cotton. To authorize the recovery, it was only essential to show that in paying the shipper it had discharged a legal liability. It made a prima facie showing of liability on its part to the owner, and on the part of the defendant to the plaintiff on the indemnity contract, when it was proved that the cotton in the custody of the defendant as agent of the plaintiff, the latter having such possession as a common carrier, was destroyed; and, nothing appearing in the record to rebut the presumption of liability which the law raises under this state of facts, the court was authorized to render judgment holding the defendant liable to reimburse the plaintiff.

Judgment affirmed. All the Justices concur.

(135 Ga. 151)

SMITH v. MADDOX-RUCKER BANKING CO.

(Supreme Court of Georgia. Sept. 23, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 977*)—REVIEW—NEW TRIAL.

Where the verdict was not demanded by the law and evidence, the Supreme Court will not disturb the first grant of a new trial, though it was upon a single ground, nor will it determine whether the trial court was right in granting the motion on a special ground. This is a rule without an exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3863; Dec. Dig. § 977.*]

(Additional Syllabus by Editorial Staff.)

2. NEW TRIAL (§ 76*)—GROUNDS—EXCESSIVENESS OF VERDICT.

The trial judge, upon motion for a new trial containing the usual grounds, and a further general ground that the verdict is excessive, may set aside the verdict in a case of libel, slander, or other similar cases where the sole measure of damage is for the jury, when in his opinion the verdict is unreasonably large, though there is nothing in the record to show that it is the result of gross mistake or undue bias, and the rule applies in an action by a depositor against a bank for dishonoring a check drawn by him upon the bank against adequate funds out of which the bank should have paid it; the bank's refusal not being willful or malicious, but merely the result of mistake or negligence, and no special damages being shown.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 153-156; Dec. Dig. § 76.*]

Certified Question by Court of Appeals.

Action by N. K. Smith against the Maddox-Rucker Banking Company. A verdict for plaintiff was set aside, and plaintiff brought error to the Court of Civil Appeals. On certified questions. Questions answered.

The Court of Appeals certified to the Supreme Court the following questions:

"(1) Has the judge of a trial court, upon a motion for a new trial containing the usual grounds of a further general ground that the verdict is excessive, the power to set aside the verdict in a case of libel, slander, or in other similar cases in which the sole measure of the damage is the enlightened conscience of the jury, when in his opinion the verdict is unreasonably too large, and there is nothing in the record to show that the verdict is the result of gross mistake or undue bias?

"(2) Where the jury returns a verdict in a case of the kind mentioned above, and the trial judge sets it aside on the ground that in his opinion it is excessive, and it is the opinion of this court that the verdict is not so large as to raise the inference that it was the result of gross mistake or bias or prejudice, is it proper that this court reverse the judgment of the trial court awarding the first grant of a new trial on this ground alone, there being undisputed evidence tending to show that the plaintiff is entitled to recover in some amount (see Hol-

land v. Williams, 3 Ga. App. 636 [60 S. E. 331], and cases cited therein, and Brown v. Autrey, 78 Ga. 756 [3 S. E. 669], and cases cited)?

"(3) Is an action by a depositor against a bank for dishonoring a check drawn by him upon the bank against adequate funds, out of which the bank should have paid it, within the rule of damages and of discretion or lack of discretion (as the case may be found to be) referred to in the foregoing questions, the refusal of the bank not being willful or malicious, but merely the result of a mistake or simple negligence on its part, and no special damages being shown?"

R. B. Blackburn, for plaintiff in error.
Smith, Hammond & Smith, for defendant in error.

BECK, J. We are of the opinion that the rule announced in the case of Cox v. Grady, 132 Ga. 368, 64 S. E. 262, is comprehensive enough to embrace cases of the character of the instant case to which the certified questions relate. The ruling there announced answers in the affirmative the first and third questions, and requires an answer in the negative to the second question; and the scope of the discussion in the opinion and in the cases cited in the Cox Case render further argument unnecessary. We are satisfied with the reasoning in that case and in the case of Holland v. Williams, 3 Ga. App. 636, 60 S. E. 331. All the Justices concur, except LUMPKIN, J., disqualified.

(135 Ga. 96)

SMYTH v. NELSON et al.

NELSON v. SMYTH.

(Supreme Court of Georgia. Sept. 20, 1910.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER (§ 57*)—CONSTRUCTION OF OPTION CONTRACT.

The court committed no error in its construction of the legal effect of the writing attached to the petition as Exhibit A, and in holding that the evidence authorized a sale by the plaintiff of the residence lot referred to in such writing.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 57.*]

2. CONTRACT PROPERLY CANCELED.

Under the facts shown by the record, the court did not err in ordering that such writing be canceled.

3. EASEMENTS (§ 19*)—LIGHT AND AIR.

The court committed error in granting an injunction against the plaintiff, restricting her right to build on her residence lot referred to in the petition.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 56-58; Dec. Dig. § 19.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Margaret Smyth against C. K. Nelson, trustee for the congregation of St. Luke's Church, and others. From the decree both parties bring error. Reversed on

plaintiff's exceptions, and affirmed on defendants' exceptions.

R. R. Arnold and Van Aster Batchelor, for plaintiff. McDaniel, Alston & Black and Z. D. Harrison, for defendants.

HOLDEN, J. Mrs. Margaret Smyth filed a complaint against C. K. Nelson, as trustee for the congregation of St. Luke's Church, and the Protestant Episcopal Church in the Diocese of Atlanta, a corporation, which was the successor in Fulton county, "as regards the subject-matter of this litigation, of the Protestant Episcopal Church in the Diocese of Georgia." Along with other allegations, the petitioner made substantially the following: On April 25, 1904, she owned a certain piece of property in Atlanta, Ga., hereinafter referred to as the residence lot, and on that date executed a writing of which the following is a copy; the detailed description of the property being omitted: "Georgia, Fulton County. Having this day sold to the Rt. Rev. C. K. Nelson, as trustee for the congregation of St. Luke's Church, the property described as follows: [Here follows description of a lot on Peachtree street, Atlanta, Ga.]—and having been informed by Messrs. Lambert, De Saussure, Williams, and Harrison, acting as a committee of the vestry of said church, that, in procuring the purchase of said property to be made, they were influenced by the fact that I had made a codicil to my will bequeathing to the Diocese of Georgia, to be used as a residence of the bishop of Georgia, the lot adjacent to the property hereinbefore described, on which adjacent lot is located my residence: Now, therefore, in consideration of the foregoing premises, and of the sum of ten dollars paid by the said trustee, the receipt whereof is hereby acknowledged, I hereby agree and covenant with him, should I at any time be constrained by any cause to sell the said lot on which my said residence is located, the said trustee or his successor in the office of bishop shall have the option to buy the same at and for the sum of \$25,000.00 for the said diocese, to be used as a residence for its bishop. This paper is not intended and should not be construed to indicate any purpose on my part to revoke said codicil by selling my said residence; but on the contrary it means that said codicil shall stand, and that my residence will not be sold unless I shall be constrained by circumstances requiring said sale. Witness my signature hereto affixed, this April 25, 1904. [Signed] Mrs. Maggie Smyth."

The above writing was recorded in the office of the clerk of the superior court of Fulton county. At the date of its execution there was in existence a will of the plaintiff, in which she bequeathed her residence lot to the Protestant Episcopal Church in the

Diocese of Georgia, to be used as a residence for the bishop of Georgia. She did not by the writing undertake to make the will then in existence irrevocable, nor was there any suggestion by any one that she would by said writing abridge her rights testamentary in said premises. Petitioner's right to revoke the will is recognized in the writing. Circumstances were alleged by virtue of which it was averred she was constrained to sell the property, and on the 5th of May, 1909, she notified the trustee in writing of this fact and gave him the right to buy within a specified time for \$25,000, and this option was later extended. Defendants refused to avail themselves of the opportunity to purchase the property, and ignored the notice, and threatened prospective purchasers to follow the property in their hands should they buy from the plaintiff, and are using the writing to injure and vex petitioner in her enjoyment of the property and to prevent her from selling it. It was prayed that the defendants be required to surrender up the writing, and that the same be canceled, and that the defendants be barred from asserting or claiming any interest in the residence lot. Defendants denied the right of the plaintiff to have the writing canceled. They contended that under the writing the plaintiff had no right to sell the residence property and revoke the codicil to her will, unless she was constrained for financial reasons to sell the residence lot. Defendants prayed for relief which will be fully set forth in this opinion. The case was heard before the trial judge upon evidence taken by counsel and submitted to him. The plaintiff excepted to certain portions of the decree rendered by the court, and to other portions the defendants excepted.

1. Defendants excepted to that portion of the decree which is as follows: "It is ordered, adjudged, and decreed: (1) That the causes of constraint, as that term is used in the writing marked Exhibit A to the petition, do not refer alone to financial causes. The plaintiff's financial condition is not passed upon by the court in this cause, but the court finds that there are causes other than the plaintiff's financial condition which justify the cancellation of said Exhibit A. (2) That the said contract or writing marked Exhibit A be and it is hereby canceled, annulled, and held for naught, and is directed to be surrendered and canceled of record." A copy of the writing sought to be canceled (set out in full in the statement of facts) was attached to the petition, and is the "Exhibit A" referred to in the decision. The court committed no error in holding "that the causes of constraint as that term is used in the writing marked Exhibit A to the petition do not refer alone to financial causes." In one clause in the writing the plaintiff covenanted and agreed that, should she at any time "be constrained for any cause" to sell the residence lot, the trustee, or his suc-

cessor, should have the option to buy it at \$25,000. In the last clause preceding the attestation clause, it is stated that the lot would not be sold "unless I shall be constrained by circumstances requiring the sale." Evidently the words "constrained by any cause," and the words "constrained by circumstances requiring the sale," did not mean that she could not sell unless constrained to do so because her financial condition or estate was such as to constrain her to do so. It did not bind her not to sell unless compelled to sell to raise money with which to support herself. The court treated the effect of the writing as creating a binding obligation on the maker not to sell unless constrained to do so from some cause or circumstance requiring it. Conceding, without deciding, that such was its legal effect, the evidence was such as to authorize the finding by the court that the plaintiff was constrained to sell the residence lot from causes other than her financial condition, and the judgment of the court to this effect will not be disturbed. The record shows that the plaintiff gave to the defendants the option to buy the residence lot at \$25,000, and they declined to avail themselves of the right to purchase it at that price. The defendants claimed that no cause or circumstances existed constraining the plaintiff to sell the residence lot, and that therefore she had no right to do so, and notified one to whom the plaintiff sought to sell the property that, should he buy it, they would at the proper time claim it. Having found that the plaintiff had the right to sell under existing causes and circumstances, the court committed no error in ordering the writing canceled.

2. The plaintiff excepted to that portion of the decree which is as follows: "That the plaintiff is estopped by her conduct from erecting a building or any part thereof further westward or nearer the sidewalk line of Peachtree street on her lot referred to in the petition as her residence lot, than her building is now located, and she is enjoined from so doing." In their answer the defendants, among other allegations, made substantially the following: They were moved to purchase the lot on which the church building was erected at the sum of \$18,000 by reason of the fact that it was represented by the plaintiff that the residence lot would become the property of the diocese, under the will of the plaintiff bequeathing it as above stated. The church building was erected after the writing hereinbefore referred to was executed. When the church building was about to be erected, the plaintiff requested that it be erected back from Peachtree street on a line with the body of the residence of the plaintiff, and defendants, at a cost of about \$65,000, so erected the building about 50 feet from the sidewalk on Peachtree street because of such request, relying upon the writing above referred to and be-

believing that the residence lot would, in the course of time, by virtue of the contract, become the property of the diocese. The church lot is about 60 feet in width fronting on Peachtree street, and the church building covers the entire width of the lot, and the use to which the residence lot adjoining it on the north side would be put was a most important factor in determining the authorities of the church in purchasing the property and in erecting the church building where it was erected as hereinbefore set out. Defendants understood the language in the writing above referred to to mean that Mrs. Smyth would not sell the property voluntarily, and that she would have the right to sell it only when circumstances arose which required her to sell it against her will. The plaintiff frequently represented, outside of the contract, that it was her purpose to give the residence lot to the Protestant Episcopal Church in the Diocese of Georgia for a residence for its bishop.

Defendants contend that the facts above stated work an easement in favor of St. Luke's Church and the defendant Nelson, as trustee therefor, for a building line which prevented the erection of any part of a building on the residence lot nearer Peachtree street than the residence on the same was at the time located, and that these facts constitute an easement in their favor for light and air from the residence lot so as to prevent the exclusion thereof by the erection of any building on the same closer to Peachtree street than the residence on such lot as now located. One witness for the defendants testified that the authorities of the church recommending the purchase of the lot on which the church is erected were informed by the plaintiff that in a codicil to her will the residence lot had been given to the diocese to be used by it as a residence for its bishop, and by reason of such information the church was influenced to buy the church lot, it being known that the codicil was revocable, but Mrs. Smyth insisting that there was no intention to revoke it, and acting upon the assumption that there was no intention to revoke the codicil, except for the reason stated in the writing, such writing was drawn "to cover the conditions as I understood them to exist at that time, and to state them as fairly and as conclusively as I could, and in accordance, as I understood it, with Mrs. Smyth's purpose and desire. * * * I do not believe that the church would ever have been located on that lot, or that the lot would ever have been bought, had the committee thought it probable that the lot on the north side could have been" used so as to erect a building

towards Peachtree street farther than the residence of the plaintiff then located on the same. There was other evidence to the effect that the plaintiff requested the authorities of the church to locate the church as they did and that it was agreed between her and them that it should be so located. There was evidence that the writing referred to and the deed by the plaintiff to the lot on which the church was located were executed at the same time.

We think the court committed error in granting the injunction to which the plaintiff excepted. The fact that the defendants erected the church building back from Peachtree street on a line with the body of the residence of the plaintiff because of the facts shown by the record before us would not create in favor of the defendants any right which would prevent the plaintiff from erecting a building on her residence lot towards Peachtree street farther than her residence thereon was located at the time the church was built. The fact that the church was erected the same distance from the street that the residence of the plaintiff was located at the request of the plaintiff would not prevent the latter from erecting a building on the residence lot between the residence and the street. She made no contract not to erect a building on such portion of her residence lot, and, under any view of the effect of the writing, she had the right to sell the residence lot if at any time she should be constrained by circumstances or any cause to do so. There was nothing in the writing to restrict the use of the residence lot by any purchaser of it from her by way of erecting other buildings on it, if she was constrained to sell it as therein stated, and did sell it. If she sells the lot, as she has a right to do under the judgment of the court, the purchaser will obtain title to the entire lot with no restrictions on his right to erect buildings on it between the residence and Peachtree street because such buildings will tend to exclude air and light from the church lot across this portion of the residence lot. The fact that the defendants erected the church building on the lot they bought from the plaintiff on a line with the residence of the plaintiff because she requested them to do so, and because they relied on her not selling in the exercise of her rights under the writing signed by her, would not prevent her, or a purchaser from her, from erecting a building on it towards the direction of Peachtree street beyond the point where her residence was located when the church was erected.

Judgment reversed in the first case, and affirmed in the second. All the Justices concur.

(135 Ga. 130)

EMPIRE LIFE INS. CO. v. WIER.

(Supreme Court of Georgia. Sept. 22, 1910.)

*(Syllabus by the Court.)***1. INSURANCE (§ 185*)—LIFE INSURANCE—DIVIDENDS—CONSTRUCTION OF POLICY.**

A life insurance policy was issued on the 6th day of February, 1906. The annual premium specified to be paid was \$150.75, payable in advance on delivery of the policy, and thereafter on or before the 6th day of February in every year until premiums for 20 full years should have been paid, or until the prior death of the insured. The policy had attached as a part of it certain coupons bearing even date with the policy, one of which contained a stipulation that the company one year after date should pay to the insured the sum of \$150.75 "as a dividend guaranteed to be declared upon that day upon the policy above named, provided the insured is alive at that date, and the policy in force, and all premium notes and premiums due, including the one due upon that date, if any, shall have been paid, and provided the subsequent year's premium has been satisfactorily secured; provided, further, that this dividend coupon when earned may be used to pay any premium or other indebtedness to the company." Held that, under a proper construction, the dividend coupon "when earned" might be applied to pay any premium or other indebtedness to the company, but actual payment of the premium on the policy of insurance due February 6, 1907, is one of the conditions precedent to the earning of the dividend. And such payment does not result automatically by mere force of the contract, when, under the terms of the policy, there was nothing otherwise due to the insured which the company might appropriately have applied as payment of the premium.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 185.*]

2. INSURANCE (§ 665*)—LIFE INSURANCE—ACTION ON POLICY—EVIDENCE.

In a suit on a life insurance policy which contains provisions for forfeiture for nonpayment of premiums, where forfeiture is pleaded, and the uncontradicted evidence shows affirmatively that there was no payment of one of the premiums, unless payment resulted from a right of the insured to a dividend upon his policy of the character mentioned in the preceding headnote and a duty upon the part of the company to declare a dividend, and apply it to the premium due on the day the forfeiture was claimed to have occurred, a verdict against the company in favor of the assured was unauthorized by the evidence.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 665.*]

3. OTHER QUESTIONS NOT CONSIDERED.

It is unnecessary to deal with other questions presented in the bill of exceptions.

Error from Superior Court, Clarke County; C. H. Brand, Judge.

Action by Annie Wier against the Empire Life Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

Shackelford & Shackelford and Maynard & Hooper, for plaintiff in error. Cobb & Erwin, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(135 Ga. 128)

RUSH v. HOWKINS.

(Supreme Court of Georgia. Sept. 22, 1910.)

*(Syllabus by the Court.)***INSURANCE (§ 116*)—INSURABLE INTEREST—BUSINESS PARTNER OF INSURED.**

George W. Rush and J. S. Howkins formed a partnership to conduct an apriary. "The business was conducted by the said George W. Rush, as he knew and understood a bee culture enterprise, and was to manage and direct the cultivation of the bees and the maintenance of the apriary at West Savannah, Georgia." Each made application for insurance on his own life, and a policy for \$1,000 was issued on the life of each, payable to the other. The premiums on the policies were paid with funds of the partnership. The policy on the life of Rush was payable to "J. S. Howkins, business partner of insured." Rush died during the existence of the partnership, and at the date of his death the business had made a profit of \$104.94. Howkins collected the amount due on the policy on the life of Rush, and appropriated the same to his own personal use, for which amount thus collected the administrator of the estate of Rush sued Howkins. Held that, as the continuance of the partnership afforded a reasonable expectancy of advantage and benefit to Howkins, he had an insurable interest in the life of his copartner, and, as the beneficiary named in the policy issued on the life of such copartner, was entitled to receive and retain the entire proceeds thereof. Civ. Code 1895, § 2114; 1 Cooley's Briefs on Ins. 296; 25 Cyc. 706, 707; Conn. Mut. Life Ins. Co. v. Luchs, 108 U. S. 498, 505, 2 Sup. Ct. 949, 27 L. Ed. 800; 8 Am. & Eng. Enc. Law, 933 et seq., and 955; Morrell v. Trenton Mut. Life, etc., Ins. Co., 10 Cush. (Mass.) 282, 57 Am. Dec. 92. And see note on pages 95-98; 1 Bacon, Benefit Societies and Life Ins. § 251.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 158; Dec. Dig. § 116.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by H. H. Rush, administratrix of George W. Rush, against J. S. Howkins. Judgment for defendant, and plaintiff brings error. Affirmed.

Twiggs & Gazan, for plaintiff in error. O'Byrne, Hartridge & Wright, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(135 Ga. 90)

GARR et ux. v. WOOD.

(Supreme Court of Georgia. Aug. 13, 1910.)

*(Syllabus by the Court.)***ACTION (§ 50*)—MISJOINDER.**

Courts will not in one suit take cognizance of distinct and separate claims of different persons; but, where the damage as well as the interest is several, each party must in that case sue separately.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511-547; Dec. Dig. § 50.*]

Error from Superior Court, Butts County; E. J. Reagan, Judge.

Action by C. A. Garr and wife against W. J. Wood. Judgment of dismissal, and plaintiffs bring error. Affirmed.

C. A. Garr and Kittle Garr, his wife, brought an action against W. J. Wood. The material allegations were as follows: Defendant is a cotton factor and money lender, and does considerable business with farmers and others, "making advances on cotton and handling [it] for his customers for the purpose of selling the same at the best advantage, taking his pay in commissions." Prior to 1904 C. A. Garr was a farmer, engaged in running several farms in Butts county, and for about 10 years did business with the defendant, who, by straight dealing and apparent honesty, completely won his confidence. "Petitioner [C. A. Garr] would call on [defendant] for money from time to time to run petitioner's farms; and, when the cotton was gathered, petitioner would turn the same over to [defendant] as his cotton factor to hold or sell * * * from time to time, as the market would permit, or the necessity of petitioner would require, and a settlement was had whenever petitioner called for the same each year." In January, 1901, this petitioner, for the purpose of erecting a house on one of his farms, borrowed \$275 from the defendant, and, to secure the loan, gave him a mortgage on this farm. In the fall of 1904 C. A. Garr contemplated moving to Atlanta, and engaging in the grocery business, and under the advice of the defendant, who was his confidential friend as well as factor, he decided to settle a portion of his property on his wife and to use the remainder, or its income, in his proposed mercantile business. On December 10th of that year he executed and delivered to defendant a deed to a described tract of land, the title to which the grantee was to hold as security for the then existing indebtedness of the grantor to him, which indebtedness consisted solely of that to secure which the above mentioned mortgage had been previously given; and thereupon the defendant executed and delivered to Kittle Garr his bond for title, whereby he obligated himself to convey the title to this land to her when the debt of her husband to him should be paid. At this time the defendant had in his possession 26 bales of cotton which C. A. Garr had raised during that year and delivered to him, with instructions to hold the same until said Garr ordered it sold, it being understood and agreed that, when this cotton was sold, there would be a full and final settlement between them. C. A. Garr, being in easy financial circumstances, decided to hold this cotton until the next season, and so notified the defendant as his factor, who acquiesced therein, "stating that he would not insist on the immediate payment of the balance on said mortgage, but would be glad to carry it over and to advance petitioner C. A. Garr money on said

cotton if it were needed." In April, 1906, "when cotton was selling for about 11 cents, C. A. Garr went to Jackson, Ga., and requested defendant to sell said cotton and have a full settlement, and make his deed to petitioner Kittle Garr, conveying to her" the land embraced in the deed and the bond for title. Defendant agreed to do this, but stated that he was too sick to attend to business that day, but would on the next day "close up all pending matters relative to the sale of the cotton and the making of the deed to petitioner Kittle Garr." C. A. Garr then returned to Atlanta. In September, 1906, defendant informed C. A. Garr "that he had sold said cotton and sent by mail to [him] the above-described canceled mortgage, * * * and certain of petitioner's (C. A. Garr's) notes given for advancements on said 26 bales of cotton amounting to \$909. * * * Defendant furnished to C. A. Garr no account sales of said cotton nor any other data whereby said petitioner might understand the exact date of sale, the amount and price paid for said cotton, and the purchaser and number of bales sold. And defendant has continued to fail and refuse to properly account to petitioner C. A. Garr for the proceeds of said 26 bales of cotton, but has only delivered said petitioner by mail as aforesaid his notes and mortgage, amounting to \$1,184." In April, 1906, when C. A. Garr instructed defendant to sell the cotton, it was worth in the market at least \$1,500, "which was, at least, \$300 more than the advances made thereon to C. A. Garr by the defendant. Instead of conveying the land in question to petitioner Kittle Garr, defendant took possession of the same, and, when she urgently entreated him to convey it to her, he offered to purchase it from her, but she refused to sell the same to him, and again demanded that he comply with his obligation to convey it to her, which he failed and refused to do." Since then defendant has sold and conveyed the land to an innocent purchaser. The land is reasonably worth \$2,500, and the defendant, "having put it beyond his power to deed said land to petitioner Kittle Garr, he is due her said sum as the value thereof." Attached to the petition as exhibits were copies of the deed, the bond for title, the mortgage, and notes, referred to therein. One of these exhibits was a combination note and mortgage, the mortgage being on described land, which was dated January 5, 1901, for \$275, payable on or before December 1, 1901, to the defendant or bearer, upon which appeared the following entry: "The within mortgage having been paid in full, the Clerk of Butts Superior Court is hereby authorized to cancel the same of record. This Nov. 7, 1906. [Signed] W. J. Wood." This was followed by an entry of cancellation signed by the clerk. The defendant demurred to the petition, upon the grounds that it set forth no cause of

action, that there was a misjoinder of parties plaintiff, and that there was a misjoinder of causes of action, one cause of action being ex contractu and the other ex delicto. The court sustained the demurrer and dismissed the petition, whereupon the petitioners excepted.

F. Z. Curry and N. E. & W. A. Harris, for plaintiffs in error. Lane & Park and Y. A. Wright, for defendant in error.

FISH, C. J. (after stating the facts as above). In our opinion there was clearly a misjoinder of parties plaintiff, and for this reason the demurrer was properly sustained. There was also a misjoinder of causes of action, although both arose ex contractu, as each was distinct from the other and in favor of a different party. The husband's alleged cause of action was the indebtedness of the defendant to him arising out of their relations and dealings as principal and factor, which, it was alleged, would be shown by a fair and just accounting between them. The husband therefore needed to have an accounting between his factor and himself. The wife's alleged cause of action was the breach of the bond for title which the defendant had executed and delivered to her, and from the allegations of the petition it was not necessary, in order to show this breach, for her to have an accounting between the defendant and her husband. The wife was not legally interested in the debt alleged to be due by the defendant to her husband, and the husband was not legally interested in the alleged breach of the bond for title given to his wife by the defendant. The whole of the debt which the deed from the husband to the defendant had been given to secure had been paid, and therefore the condition upon which the defendant was to convey the title to the wife had occurred; but the combination note and mortgage which had been the written evidence of the existence of this debt had by an entry thereon signed by the defendant become the written evidence of its payment, and this evidence was in possession of the petitioners. There was no matter in this suit in which the petitioners had a common interest. While the wife might have needed the husband as a witness in her case, she did not need him as a party thereto; and there was no reason why the husband should join the wife as a party plaintiff in his suit against the defendant. "Courts will not in one suit take cognizance of distinct and separate claims of different persons; but, where the damages as well as the interest is several, each party injured must in that case sue separately." Civ. Code 1895, § 4946; Ga. Railroad Co. v. Tice, 124 Ga. 459, 52 S. E. 916.

Of course, the ruling here made does not adjudicate the question as to whether the

plaintiffs separately have a cause of action. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(135 Ga. 112)

STEWART v. MUNDY et al.

(Supreme Court of Georgia. Sept. 21, 1910.)

(Syllabus by the Court.)

1. ESTOPPEL (§ 98*)—ACTS OPERATING AS ESTOPPEL.

An attorney at law who signed his name as counsel for the plaintiff to a petition in a suit by the latter is not thereby estopped from assailing the truth of the averments made in such petition in a subsequent litigation wherein the attorney is a claimant of the property involved in the former litigation, and to which the plaintiff in *fi. fa.* in the claim case was not a party.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 290; Dec. Dig. § 98.*]

2. APPEAL AND ERROR (§ 1051*)—EXECUTION (§ 194*)—CLAIM OF THIRD PERSON—PROCEEDING TO ESTABLISH—ADMISSIBILITY OF EVIDENCE.

Where, upon the trial of a claim case, the plaintiff in *fi. fa.* contends that the defendant in *fi. fa.* bargained for the land levied upon from the owner and obtained title from him and from his heirs at law after his death, and the claimants contend that they obtained title from such heirs at law, it was not error requiring a new trial to admit in evidence in behalf of the claimants a deed purporting to convey the land to such owner, over objection of the plaintiffs that neither title nor possession was shown in the one making such deed.

(a) Upon the trial of the claim case, the record of a suit for damages to the property brought by such heirs at law against a municipal corporation and a railroad company, and the verdict and judgment therein for the defendant, were not admissible in behalf of the plaintiff in *fi. fa.* upon the ground that upon the trial of the claim case the claimants contended that the defendants in *fi. fa.*, who bargained for the land from the owner above referred to, had no equitable interest in or title to the property by reason of having paid and tendered to the latter and his heirs at law all the purchase money, and "one of the things pleaded and sought to be proven" by the railroad company in the suit for damages was that the plaintiffs therein had no right to recover because "a complete equitable title was in" one of the defendants in *fi. fa.* by reason of payment and tender of the purchase money to such owner and his heirs at law, and because, when they bought the property, the claimants had notice that there was a suit for damages to the property brought by the plaintiffs in the suit against the defendants therein, and that a verdict and judgment therein were rendered for the defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051; Execution, Dec. Dig. § 194.*]

3. REVIEW ON APPEAL.

In view of the entire charge, there was no error requiring a new trial in the charges complained of, nor in failing to charge as complained of in the absence of a written request to so charge. The evidence supported the verdict, and the court did not abuse his discretion in refusing a new trial.

Error from Superior Court, Polk County; Price Edwards, Judge.

Action between J. D. Stewart and W. W. Mundy and others. From the judgment, Stewart brings error. Affirmed.

W. H. Terrell and J. S. Gleaton, for plaintiff in error. John K. Davis, Bunn & Bunn, and Mundy & Mundy, for defendants in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(135 Ga. 115)

BURSON v. STONE & CO.

(Supreme Court of Georgia. Sept. 21, 1910.)

(Syllabus by the Court.)

1. PARTNERSHIP (§ 217*) — ACTIONS — EVIDENCE.

Burson, Stone, and Sharpe composed the mercantile partnership of Burson & Co., and Stone and Sharpe composed the mercantile partnership of Stone & Co. The office of Burson & Co. was in the place of business of Stone & Co., where the books of the former were kept by Stone, who looked after the office business of Burson & Co. Stone and Sharpe, without the knowledge or consent of Burson, took and lost, by speculation in cotton futures, money belonging to the firm of Burson & Co. The account for the purpose of speculation was kept in the office of a New York broker in the name of Stone & Co., and was kept in the office of Stone in the name of G. W. Burson & Co. There was evidence that Stone & Co., with the funds of that partnership, had previously speculated in the name of and for the benefit of such partnership, which received the profits made by the speculation. Stone delivered to Burson a note executed by him in the name of Stone & Co. for one-third of the amount of the money of Burson & Co. taken and lost as above stated, and upon his note Burson brought suit against Stone & Co. Held, the evidence was sufficient to authorize the jury to find that the speculation with the funds of Burson & Co. was for and on behalf of the firm of Stone & Co.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 217.*]

2. PARTNERSHIP (§ 78*)—LIABILITY OF PARTNERSHIP FOR ACTS OF PARTNERS.

Where Stone and Sharpe took the funds of Burson & Co. and deposited them to the credit of Stone & Co. with a New York broker, and speculated with such funds in the name of and for the benefit of the firm of Stone & Co., the latter firm would be liable to Burson & Co. for the amount of funds so used.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 126; Dec. Dig. § 78.*]

3. PARTNERSHIP (§ 236*)—BONA FIDE PURCHASERS.

If the partnership of Stone & Co. were so liable, a note for one-third of such funds given to Burson by Stone in the partnership name of Stone & Co. after its dissolution would bind such partnership, if Burson at the time the note was given had no notice, and was not chargeable with notice of the dissolution. Bank of Covington v. Cannon, 133 Ga. 779, 67 S. E. 83.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 236.*]

4. DIRECTED VERDICT IMPROPER.

The court committed error in directing a verdict in favor of the defendant Sharpe.

Error from Superior Court, Carroll County; R. W. Freeman, Judge.

Action by G. W. Burson, Sr., against Stone & Co. There was a directed verdict for defendant, and plaintiff brings error. Reversed.

Sid Holderness and Edgar Watkins, for plaintiff in error. J. O. Newell and W. F. Brown, for defendant in error.

HOLDEN, J. Judgment reversed. All the Justices concur.

(135 Ga. 94)

LEVY v. MAYOR, ETC., OF CITY OF BRUNSWICK.

MAYOR, ETC., OF CITY OF BRUNSWICK v. LEVY.

(Supreme Court of Georgia. Sept. 20, 1910.)

(Syllabus by the Court.)

1. DESCRIPTION OF LAND SUFFICIENT.

This was an action of ejectment in the fictitious form, and the description of the land sued for in the petition was sufficient.

2. ADVERSE POSSESSION (§ 85*)—JUDGMENT (§ 682*) — EVIDENCE — CONCLUSIVENESS OF JUDGMENT.

A certified copy of an application for partition of the premises in dispute and the judgment entered thereon within less than seven years from the institution of the action of ejectment, to which neither the plaintiff in ejectment nor any one claiming under him was a party, though the plaintiff in ejectment claimed under one of the parties to the partition proceeding by deed executed and duly recorded prior to the filing of the partition proceeding, was not admissible in evidence for the purpose of showing title out of the plaintiff, or as color of title, and was properly excluded on the ground of irrelevancy.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 85; * Judgment, Cent. Dig. §§ 1203-1205; Dec. Dig. § 682.*]

3. TAXATION (§ 810*)—ADMISSIBILITY OF EVIDENCE.

There was no error in ruling out evidence of the attorney of a former owner of the land that he returned it for taxation for such owner after its conveyance by him to the plaintiff in a suit by the latter against the city, which claimed title under tax sales against such former owner.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 810.*]

4. TAXATION (§ 814*)—EQUITABLE RECOVERY BY DEFENDANT.

If the plaintiff was entitled to recover from the city, the latter was not entitled to recover from the former, under equitable pleadings, the amount paid by such city at a marshal's sale under a tax s. fa. in its own favor, and at a sheriff's sale for state and county taxes, at which the city bought; such sales being invalid.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 814.*]

5. TAXATION (§ 814*)—EJECTMENT—EQUITABLE RECOVERY BY DEFENDANT.

Where a city claimed title to land, and for a time was in possession thereof, and subsequently a recovery in ejectment was had against the corporation, it was not entitled to have the court, under equitable pleadings, declare that city taxes of a certain amount might have been assessed on the land for certain years and to recover such amount against the plaintiff; no

assessment having in fact been made for such years for taxes on the land.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 814.*]

6. REVIEW ON APPEAL.

Under the evidence there was no error in overruling the motion for a nonsuit, or in directing a verdict for the plaintiff for the land. But it was erroneous to direct a recovery in favor of the defendant against the plaintiff for municipal taxes never assessed, but claimed by the city as the proper amount of taxes for certain years during which the city claimed title to the land.

7. REVIEW ON APPEAL.

No other assignment of error in either of the bills of exceptions requires a reversal.

8. REVIEW ON APPEAL.

There was no merit in the motion to dismiss the writ of error.

Error from Superior Court, Glynn County; T. A. Parker, Judge.

Action by L. N. Levy against the Mayor, etc., of the City of Brunswick. From the judgment, both parties bring error. Reversed in one case, and affirmed in the other.

Twitty & Reese, for plaintiff in error. Bolling Whitfield and Crovatt & Whitfield, for defendant in error.

ATKINSON, J. Judgment reversed, and affirmed in the second. All the Justices concur.

(135 Ga. 113)

ATLANTA & W. P. R. CO. v. JACOBS' PHARMACY CO.
JACOBS' PHARMACY CO. v. ATLANTA & W. P. R. CO.
(Supreme Court of Georgia. Sept. 21, 1910.)

(Syllabus by the Court.)

1. CARRIERS (§ 181*)—FAILURE TO PERFORM DUTY—ACTIONS—PLEADING.

When a plaintiff elects to bring an action against a railroad company for damages arising from a failure on its part to perform its duty as a common carrier, instead of suing on a contract of affreightment, it is not incumbent on him to set out the precise terms of such contract. *Louisville & Nashville R. Co. v. Cody*, 119 Ga. 371, 46 S. E. 429.

(a) In *Louisville & Nashville Railroad Co. v. Warfield*, 129 Ga. 473, 59 S. E. 234, one of the rulings made in the *Cody Case*, supra, was overruled; but the decision on the point dealt with in the above headnote was not overruled.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 569, 570; Dec. Dig. § 131.*]

2. CARRIERS (§ 150*)—LIMITATION OF LIABILITY FOR NEGLIGENCE.

By Civ. Code 1895, § 2264, it is declared that a common carrier "as such is bound to use extraordinary diligence. In cases of loss the presumption of law is against him, and no excuse avails him unless it was occasioned by the act of God or the public enemies of the state."

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 654-659; Dec. Dig. § 150.*]

3. CARRIERS (§ 150*)—LIMITATION OF LIABILITY FOR NEGLIGENCE.

Under Civ. Code 1895, § 2265, "in order for a carrier or other bailee to avail himself of the act of God or exemption under the contract as

an excuse, he must establish not only that the act of God or excepted fact ultimately occasioned the loss, but that his own negligence did not contribute thereto."

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 654-659; Dec. Dig. § 150.*]

4. CARRIERS (§ 150*)—LIMITATION OF LIABILITY FOR NEGLIGENCE.

Construing the sections above cited in connection with section 2276, it has been established that, as a general rule, a common carrier may relieve itself by express contract from its common-law liability as an insurer, but cannot relieve itself from liability for damages resulting from its own negligence. *Georgia Railroad & Banking Co. v. Keener*, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197; *Central of Georgia Railway Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170; *Southern Express Co. v. Hanaw*, 134 Ga. 445, 67 S. E. 944, and cases there cited, including *The Kensington*, 183 U. S. 263, 268, 22 Sup. Ct. 102, 46 L. Ed. 190, *Alabama Great Southern R. Co. v. Little*, 71 Ala. 611, and *Louisville & Nashville R. Co. v. McGuire & Co.*, 79 Ala. 395.

(a) The rulings in regard to limiting liability except for gross negligence in contracts for the transportation of live stock will not be extended so as to include the transportation of goods generally by common carriers. Moreover, such contracts in regard to live stock have been dealt with by statute. Civ. Code 1895, § 2313 et seq.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 654-659; Dec. Dig. § 150.*]

5. CARRIERS (§ 107*)—CARRIAGE OF GOODS—CARE REQUIRED.

The diligence required of a common carrier in regard to preserving goods in the course of transportation by him from loss by fire is not limited to avoid setting fire to such goods, but extends also to protecting and preserving them from destruction after a peril from fire has become apparent. *Richmond & Danville R. Co. v. White*, 88 Ga. 806, 15 S. E. 802.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 501-507; Dec. Dig. § 107.*]

6. CARRIERS (§ 121*)—CARRIAGE OF GOODS—LOSS DURING TRANSPORTATION—LIABILITY.

If the loss was caused by the wrong or fault of the shipper, without negligence on the part of the carrier, the latter will not be responsible; as, for instance, if the shipper or his agent should improperly pack the goods by reason of which breakage occurs.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 531-536; Dec. Dig. § 121.*]

7. CARRIERS (§ 181*)—CARRIAGE OF GOODS—LOSS DURING TRANSPORTATION—ACTIONS—BURDEN OF PROOF.

If a common carrier relies upon the defense that the loss was occasioned by the fault of the shipper or his agent, he must, as in the case where he relies upon the loss having occurred by the act of God or the public enemy, bring himself within the defense by negating contributing fault on his own part. *McCarthy v. Louisville & Nashville R. Co.*, 102 Ala. 193, 14 South. 370, 48 Am. St. Rep. 29; *Grey's Executor v. Mobile Trade Co.*, 55 Ala. 387, 23 Am. Rep. 729; *South & North Ala. R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578, 584; 4 *Elliott on Railroads*, § 1492.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 578; Dec. Dig. § 131.*]

8. CARRIERS (§ 121*)—CARRIAGE OF GOODS—LOSS DURING TRANSPORT—LIABILITY.

If a shipper is guilty of negligence in packing a car, and from breakage of certain of the goods a fire originates therein, and if, after knowledge by the carrier of the existence of the

fire, the condition is such that the goods may be preserved, or the fire extinguished, by the use of extraordinary care on his part, he will not be relieved from liability, if he is negligent in this regard, by setting up the original negligence of the shipper in loading the car prior to the beginning of the transportation.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 531-536; Dec. Dig. § 121.*]

9. CHARGE NOT GROUND FOR NEW TRIAL.

In the light of the pleadings and evidence, of the entire charge of the court, and of the note appended to the ground of the motion for a new trial on that subject, the charge complained of in reference to the measure of damages was not such as to require a new trial.

10. NEGLIGENCE (§ 12*)—CARRIERS (§ 137*)—APPEAL AND ERROR (§ 302*)—RESERVATION OF GROUNDS OF REVIEW—QUESTION FOR JURY—"EXTRAORDINARY DILIGENCE."

Except where a particular act is declared, either by statute or a valid municipal ordinance, to constitute negligence, the question as to what acts do or do not constitute negligence is for the determination of the jury; and it is error for the presiding judge to instruct them what ordinary care or extraordinary care requires to be done in a particular case. *Atlanta & West Point R. Co. v. Hudson*, 123 Ga. 108, 51 S. E. 29.

(a) Extraordinary diligence is defined as "that extreme care and caution which very prudent and thoughtful persons use" under like circumstances. Civ. Code 1895, § 2899. In determining what very prudent and thoughtful persons would do under certain circumstances, the situation and surrounding facts, including the existence of an emergency, if there was one, are to be considered.

(b) There was no error in refusing, upon request, to charge that if a conductor of a freight train ascertained that a car was on fire, and an emergency arose without negligence on the part of the defendant, and if the conductor in good faith took a certain course which he thought was that offering the best prospect of saving the goods from destruction, although the course so taken was a mistake, and another course might have been better, "such a mistake is not chargeable to the defendant as an act of negligence."

(c) In the brief of counsel for plaintiff in error it was urged that, if this request was not properly worded, the court should, nevertheless, have charged on the doctrine of emergency; but the motion for new trial contains no such assignment of error as that the court failed entirely to charge on the subject, the only complaint being that the court declined to charge as stated in the written request.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 14; Dec. Dig. § 12.* *Carriers*, Cent. Dig. §§ 594, 595; Dec. Dig. § 137.* *Appeal and Error*, Cent. Dig. §§ 1744-1752; Dec. Dig. § 302.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2627, 2628.]

11. APPEAL AND ERROR (§ 1006*)—REVIEW—SECOND VERDICT FOR PLAINTIFF.

No other ground of the motion for a new trial requires a reversal. This being the second verdict found in favor of the plaintiff, the evidence being sufficient to sustain the finding, and the presiding judge having approved it, this court will not interfere.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3951-3954; Dec. Dig. § 1006.*]

12. CROSS-BILL—DISMISSED.

The judgment complained of in the main bill of exceptions being affirmed, the cross-bill is dismissed.

Error from Superior Court, Coweta County; R. W. Freeman, Judge.

Action by the Jacobs' Pharmacy Company against the Atlanta & West Point Railroad Company. Judgment for plaintiff, and defendant brings error; plaintiff filing cross-exceptions. Judgment affirmed on main bill of exceptions, and cross-bill dismissed.

Dorsey, Brewster, Howell & Heyman and W. G. Post, for plaintiff in error. John L. Hopkins & Sons and W. C. Wright, for defendant in error.

PER CURIAM. Judgment affirmed.

(135 Ga. 131)

HARRIS v. P. H. & W. D. BRANDON et al.
(Supreme Court of Georgia. Sept. 22, 1910.)

(Syllabus by the Court.)

1. EVIDENCE (§ 434*)—PAROL EVIDENCE—FRAUD.

In a suit upon a promissory note given in part payment of the purchase of timber upon several lots of land, where the contract for the sale and purchase is in writing, signed by the vendor and purchaser, and where the defendant pleads that he was ignorant of the numbers of the lots and relied upon the plaintiff for their correct designation, and that the plaintiff fraudulently omitted from such writing one of the lots which was intended to be conveyed, although he had pointed out the timber on that lot, indicating it as a part of the timber sold, and that as a consequence the consideration has failed to that extent and the defendant has sustained damages because thereof, which plea contains no prayer for the reformation of the contract, held that, as the defendant was claiming and had actually enjoyed the fruits of the contract relative to a part included in the sale, he cannot insist upon a defense depending upon a parol contract of a date anterior to the writing, by virtue of which a part of the land so alleged to have been omitted from the written contract because of fraud of the maker or mistake on his part was to have been included, without first praying for a reformation of the contract.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2005-2020; Dec. Dig. § 434.*]

2. REVIEW ON APPEAL.

The court erred in admitting in evidence the parol agreement and understanding in reference to the sale of the timber anterior to the execution of the written contract, and in his charge to the jury in reference thereto.

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Action between R. C. Harris and P. H. & W. D. Brandon and others. From the judgment, Harris brings error. Reversed.

Neel & Neel, for plaintiff in error. Thos. W. Milner & Son, for defendants in error.

BECK, J. Judgment reversed. All the Justices concur.

(87 S. C. 101)

ALL v. WILLIAMS.

(Supreme Court of South Carolina. Oct. 6, 1910.)

VENUE (§ 32*)—BRINGING ACTION IN WRONG COUNTY—REMEDY.

Though an action to recover personal property should, under Code Civ. Proc. 1902, § 144, be brought in the county where the property is at the time the action is brought, yet, it having been brought elsewhere, the remedy is not by demurrer to the jurisdiction, but by motion to transfer the case; section 147 providing that the court may change the place of trial when the county designated therefor in the complaint is not the proper county.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 32.*]

Appeal from Common Pleas Circuit Court of Barnwell County; T. S. Sease, Judge.

Action by J. H. C. All against James A. Williams. From a judgment overruling a demurrer, defendant appeals. Affirmed.

S. G. Mayfield, for appellant. James M. Patterson, for respondent.

WOODS, J. In this action, brought in Barnwell county, for the recovery of possession of two mules, the plaintiff alleged in his complaint that the defendant "with a high hand and wanton spirit took and forcibly carried away said mules to the county of Bamberg, where the defendant resides." The defendant interposed the following demurrer: "The defendant, by his attorney, for the purpose of objecting to the jurisdiction of the court, appears and respectfully shows unto the court by demurrer: (1) That defendant, as shown by the affidavit hereto attached, is not a resident of the county of Barnwell, but is a resident of the county of Bamberg. (2) That defendant demurs to the jurisdiction of the court, and will move the court to dismiss said complaint." The demurrer having been taken up for consideration by consent, and having been overruled by the circuit judge, the defendant appeals on this ground: "Because his honor erred in overruling defendant's demurrer, it appearing upon the face of the pleadings that the defendant resides in the county of Bamberg, and that the property has been removed from the county of Barnwell."

The action should have been brought in the county of Bamberg, where the mules, the subject of the action, were at the time of the commencement of the action. Code Civ. Proc. 1902, § 144. Nevertheless, demurrer on the ground that the court of common pleas for Barnwell county had no jurisdiction of the subject of the action was not available to the defendant; for, while that court did not have jurisdiction to try the action, it did have jurisdiction, under section 147 of the Code of Civil Procedure of 1902, to order a change of the place of trial to Bamberg county. *Steele v. Exum*, 22 S. C. 276; *Rafeld v. A. C. L. Ry.*, 86 S. C. 324, 68 S. E. 631. It fol-

lows, therefore, that the remedy of the defendant was not by demurrer for want of jurisdiction, but by motion to transfer the case to Bamberg county.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(87 S. C. 87)

ILER v. JENNINGS.

(Supreme Court of South Carolina. Oct. 3, 1910.)

1. CORPORATIONS (§ 121*)—NATURE AND FORM—COMPLAINT—ALLEGATIONS.

A complaint which alleges that plaintiff purchased from defendant certain shares of corporate stock at a stated price, and that at the time of the purchase defendant represented to plaintiff that the corporate assets and liabilities on a date prior to the sale were as specifically stated, and that defendant represented to plaintiff that the condition of the corporation was better at the time of the sale than on the date stated, that the representations were made to effect the sale and that plaintiff relied on them, and was thereby induced to purchase said stock, and that said representations were an express warranty of the condition of the corporation, and were untrue and misleading, states a cause of action upon an express warranty, and not on an implied warranty, nor for fraud in the sale.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.*]

2. APPEAL AND ERROR (§ 171*)—ADHERENCE TO THEORY BELOW.

Where an action is based on the breach of an express warranty, exceptions based on any other theory of the case are not well taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1069, 1161-1165; Dec. Dig. § 171.*]

3. SALES (§ 261*)—"WARRANTY"—WHAT CONSTITUTES.

Any distinct assertion or affirmation of quality made by the owners to effect the sale of a chattel, and which does effect it, is a warranty, whether the word "warranty" is used or not.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 727-735; Dec. Dig. § 261.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7396-7405; vol. 8 p. 7833.]

4. SALES (§ 260*)—EXPRESS WARRANTY—SCIENTER.

In an action for breach of an express warranty, it is not necessary to allege or prove scienter.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 719-726; Dec. Dig. § 260.*]

5. CORPORATIONS (§ 120*)—SALE OF STOCK—WARRANTY—SCIENTER—EFFECT.

Where a seller makes an affirmation as to the financial condition of a corporation, and stock therein is bought on the strength of it, the absence of any scienter on the part of the seller does not affect the purchaser's right to recover for breach of the warranty.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 495, 504; Dec. Dig. § 120.*]

6. CORPORATIONS (§ 121*)—SALES OF STOCK—WARRANTY—BREACH—ACTION—INSTRUCTION.

Where it appeared that the seller of corporate stock referred the purchaser to the bookkeeper for information as to the status of the business, and that the statement given was

affirmed by the seller to be correct according to the books, and that the purchaser relied thereon to his prejudice, the instruction that the jury should find for the seller if he merely stated that the books of the company showed that condition was erroneous.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 506; Dec. Dig. § 121.*]

7. CORPORATIONS (§ 120*)—EXPRESS WARRANTY—WHAT CONSTITUTES.

The statement as to the financial condition of a corporation affirmed by a director as being correct with the books to induce the purchase of stock is an express warranty if relied upon by the purchaser.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 495, 504; Dec. Dig. § 120.*]

Appeal from Common Pleas Circuit Court of Greenwood County; C. C. Featherstone, Judge.

Action by A. S. Her against J. P. Jennings. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Grier & Park, for appellant. T. P. Cothran and Tillman & Watson, for respondent.

JONES, C. J. This suit was brought to recover damages for breach of warranty in the sale by defendant to plaintiff of 35 shares of the capital stock of the Gambrell Hardware Company, and was tried before Hon. C. C. Featherstone, special judge, and a jury, at Greenwood, S. C., resulting in a verdict for defendant.

The complaint alleged substantially: That on the 26th day of October, 1907, and prior thereto, the defendant Jennings was a director in the Gambrell Hardware Company, a corporation under the laws of this state, and doing business at Greenwood, S. C., and was actively employed in the business. That on October 26, 1907, plaintiff purchased of defendant 30 shares of the capital stock of the Gambrell Hardware Company of the par value of \$100 per share, paying therefor \$3,900. That, at the time of said purchase, defendant represented to plaintiff that the assets of the corporation on April 1, 1907, were as follows: Accounts due, \$4,418.39, Farmers' warehouse stock, \$100, cash on hand, \$87.51, merchandise stock on hand, \$24,850.09, total assets, \$29,455.99. And that its liabilities on that day were as follows: Capital stock paid in, \$15,700; Farmers' & Merchants' Bank overdraft, \$752.30; bills payable, \$5,416.41; due on merchandise, \$4,490.05; gain, net, \$3,097.23—\$29,455.99. That defendant represented to the plaintiff that the condition of the corporation was better at the time of the negotiation than on April 1, 1907. The said representations were made for the purpose of effecting a sale of said stock to plaintiff, that plaintiff relied thereon, and was thereby induced to purchase and did purchase said stock. That, instead of said corporation having a surplus of over \$3,000 at the time of the purchase

as represented, there was a deficit of about \$3,000, and that said representations were untrue and misleading. That said representations were an "express warranty" by defendant to plaintiff that the condition of the said corporation and its assets and liabilities were as represented. That, at the time of said representations, defendant was a director in said corporation, and actively engaged in the management of its business, and knew or ought to have known the condition of said corporation, and plaintiff, relying upon defendant's means of knowledge and said representations, was induced to purchase said stock. That, immediately before the purchase and sale of said stock pending the negotiations for the same, the defendant expressly warranted the value of the stock and the condition of the said corporation. That the conditions of said warranty have been broken, and plaintiff has suffered damage on account thereof in the sum of \$2,000. That upon discovery that said representations were untrue plaintiff offered to return said stock and demanded a return of the purchase price, and that the sale be rescinded, and that defendant refused.

One of the questions raised by appellant is as to the nature of the action. We are satisfied with the ruling of the circuit court that it is an action upon an express warranty. This is manifest from the language of the complaint. Moreover, the record shows that, when the court inquired of counsel for plaintiff whether the suit was for breach of an express warranty, counsel answered, "Yes, sir; and the misrepresentations of a director in this concern as to the condition of the concern at the time the plaintiff bought the stock—that is, actual misrepresentations. We don't charge that Mr. Jennings did it intentionally or willfully, but we take the position that where a man is in that position—any man—and makes a statement as being true, he must know it is true." This was not an action based upon fraud or deceit, nor an action upon an implied warranty, and the court correctly restricted the issues on the trial and in his charge to the case as one upon an express warranty. Hence all exceptions based upon any other theory of the case are not well taken.

In Bryce v. Parker, 11 S. C. 337, the court quotes with approval from 1 Pars. on Contracts, § 580: "Any distinct assertion or affirmation of quality made by the owner during a negotiation for the sale of a chattel which it may be supposed was intended to cause the sale and was operative in causing it will be regarded either as implying or constituting a warranty." And again: "It is certain that the word 'warrant' need not be used, nor any other of precisely the same meaning. It is enough if the words actually used import an undertaking on the part of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the owner that the chattel is what it is represented to be or an equivalent to such undertaking." In *Shippen v. Bowen*, 122 U. S. 581, 7 Sup. Ct. 1285, 30 L. Ed. 1172, the Supreme Court of the United States declared that "an affirmation of the quality or condition of the thing sold (not uttered as matter of opinion or belief) made by the seller at the time of sale for the purpose of assuring the buyer of the truth of the facts affirmed, and inducing him to make the purchase if so received and relied on by the purchaser, is an express warranty." It is a well-settled rule that, in actions upon an express warranty, it is not necessary to allege or prove a scienter. Hence in considering this case, if defendant made any direct affirmation as to the quality or condition of stock sold by him, which was untrue, it may be assumed that he was ignorant of the falsity, and honestly believed the statement to be true.

With this preliminary, we proceed to consider what we regard the vital questions presented by the exceptions. The court instructed the jury: "If Mr. Jennings here did not warrant that stock, if he simply referred Mr. Iler to the bookkeeper to get a statement, and Mr. Iler got that statement and bought upon his own book, why Mr. Jennings is not liable for it." And again, in response to defendant's request, the court instructed the jury as follows: "The plaintiff's action is based upon an alleged express warranty by the defendant that the financial condition of the company at the time the plaintiff bought the stock was as alleged in the complaint. This he must prove to the satisfaction of the jury by the greater weight of the evidence. If the jury believe from the evidence that the defendant merely stated that the books of the company showed that condition, their verdict must be for the defendant." To which the court added: "Now you see, gentlemen, right there it comes back to that question of warranty—what were these statements? What did they amount to? Were they intended to be a statement that the statement was correct, and did Mr. Iler act upon it?" We do not think this modification or anything in the general charge operated to cure what we regard as erroneous in the instruction: "If the jury believe from the evidence that the defendant merely stated that the books of the company showed that condition, their verdict must be for the defendant." The plaintiff testified that, when he asked defendant about the worth of the stock, defendant referred him to the bookkeeper for a statement, that he immediately went to the bookkeeper and received from him the written statement of the assets and liabilities of the corporation (introduced in evidence as Exhibit A, and showing condition of the corporation to be as the complaint alleged it was represented to be by defendant); that, when he received this statement, he

carried it back to defendant where he was standing at the showcase in the storeroom, and that defendant said that the statement showed the true condition of the stock when it was taken, and that the business was in better condition than at the time that was taken; that defendant was a director of the corporation, and was a clerk working in the store, and that he relied upon the statements of Mr. Jennings, believing them to be true.

John M. Major, the bookkeeper, who was brother-in-law to plaintiff, testified that defendant asked him to take plaintiff back to the office and show him the statement of the business; that he gave plaintiff a copy of the statement (Exhibit A), and that defendant went back to the front of the store with the statement, and had some conversation with defendant; that the statement showed the stock to be worth about 119 at that time. This witness testified that Mr. Gambrell, the president, manager, and treasurer of the corporation, died about April 1, 1908, and at that time a new inventory was taken, and it was discovered that the stock of merchandise which was put down as \$24,850.09 on April 1, 1907, footed up only \$18,651.65, an error of \$6,198.44. This error was the result of mistake or design on the part of Mr. Gambrell, who used an adding machine in adding up the stock inventories. This witness testified that defendant participated in taking the stock to the extent only of taking the stock in the crockery department, as to which no error was found except in the failure to add in certain items, which diminished to some extent the statement of stock in that department. The fact of the error in stating the amount of the merchandise stock on April 1, 1907, was also testified to by the expert, J. R. Nichols, who ascertained the error by an examination of the books of the company, who also stated that the book value of the stock on April 1, 1907, was \$65.96 a share.

Defendant testified that, when plaintiff asked him as to the value of the stock, he told him: "Mr. Iler, these stock books will show it is worth about 119, but so far as making a statement as to what the stock is worth, or anything about the condition of the business, I won't do it. I will refer you to your brother-in-law, John Major, who is bookkeeper, and he can give you more information about it than I can. He knows more about the business. He has been in here all the time as bookkeeper, and knows the hardware business better than I do. I don't know anything about it. * * * I told him at the time he could get a statement from Mr. Major and referred him to Mr. Major, and I told Mr. Major myself to let Mr. Iler have a statement and any information he wants about the business. He is thinking of buying my stock." Defendant further testified that, when plaintiff came

back after applying to Mr. Major, he had the statement. When asked whether he stated to plaintiff that the statement he got from Mr. Major was absolutely correct, he answered: "I might have done so—the statement was correct so far as taking from the books was concerned. I did not state to him that it was a correct statement of the stock taken. I would not have ventured to do such a thing because I didn't do it all myself. I might have stated to him that was a correct copy of the books. I don't remember even doing that." When asked what he said to plaintiff about the value of the stock, defendant replied: "I told him I thought the books would show about 119½, but not to take my word for anything. * * * 'Go to your brother-in-law, John Major, and get all the information you want and I will tell him to show you the books,' and I did so." He testified that at that time he knew nothing of any error in the statement, and believed it to be absolutely correct, and only learned of the error after the death of Mr. Gambrell. When asked later on if he did not tell plaintiff that the books would show the stock was worth 119, he answered: "My words were I thought the books would show the stock was worth 119. Those are my words exactly."

In view of the foregoing testimony, it was harmful error to give the instructions stated above.

The jury may have inferred from the testimony that, when defendant referred plaintiff to the bookkeeper of the corporation of which defendant was director and salesman, he intended and expected that the bookkeeper would do as he did, give plaintiff the written statement of the condition of the corporation. A delivery of the statement under such circumstances may well have been considered by the jury the same as if defendant had delivered it with his own hand in response to plaintiff's inquiry as to the worth of the stock. Such use of a statement of the corporate business by a director negotiating a sale of his stock therein could not be regarded as other than a direct affirmation of its correctness, and, if it was delivered for the purpose of assuring the buyer of the truth of the facts therein stated and to induce him to purchase and the buyer purchases in reliance thereon, there is an express warranty.

Having reached the conclusion that there should be a new trial on the above ground, we do not deem it necessary to consider the exceptions based upon the ground that the undisputed facts show that defendant not only caused such written statement to be given to plaintiff, but actually affirmed its correctness in words.

The judgment of the circuit court is reversed, and the cause remanded for a new trial.

87 S. C. 32

GILLESPIE BROS. v. PAGE et al.
GOODALE v. SAME

(Supreme Court of South Carolina. Sept. 27, 1910.)

1. SALES (§ 353*)—ACTION FOR VALUE—PLEADING.

Allegations in a suit against an individual and a railway company that plaintiffs delivered ties to defendants, that defendants received, unloaded, and used the ties on the railroad, but only a specified sum had been paid, and that "they" were indebted to plaintiffs in a specified sum, was not bad as to the individual defendant as omitting to allege an express contract between him and plaintiffs.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 985-1004; Dec. Dig. § 353.*]

2. PLEADING (§ 8*)—ALLEGATIONS—NATURE.

An allegation of indebtedness is an allegation of fact.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

Appeal from Common Pleas Circuit Court of Chesterfield County; J. C. Klugh, Judge.

Consolidated actions by Gillespie Bros. and by S. O. Goodale against J. W. Page and another. Judgments for plaintiffs, and defendant Bennettsville & Cheraw Railroad Company appeals. Affirmed.

Stevenson, Matheson & Stevenson, for appellants. W. P. Pollock and Edward McIver, for respondents.

HYDRICK, A. J. The allegations of the complaint in this case are identical, so far as the issue involved is concerned, with those in the case of S. O. Goodale against the same defendants. The cases were therefore heard together both in the circuit court and in this court, and the same decision applies to both. The complaint set out two causes of action. The railroad company demurred for misjoinder of causes of action on the ground that the second cause of action set out does not affect all the parties to the action, and requires different places of trial. The force of the objection depends upon whether the plaintiff has in the second cause of action stated a cause of action against both defendants. If so, the objection is untenable. The allegations of the second cause of action are as follows: "That on or about the 4th day of July, 1907, and subsequently, the plaintiffs furnished and delivered unto the defendants f. o. b. cars at Patrick, S. C., billed to J. J. Heckart, an agent or officer of the defendant Bennettsville & Cheraw Railroad Company, 5,800 cross-ties for use in the construction and repair of the said railroad, which said ties were reasonably worth the sum of one thousand and four hundred and fifty dollars (\$1,450.00), and the said defendants received the same, unloaded same, and used them in the construction and repair of the said railroad. That the said defendants have only paid unto the plaintiffs on account thereof the sum of \$500.25, and

they refuse to pay any further sums, and they are indebted to the plaintiffs on account thereof in the sum of \$949.75."

The contention of appellant is that no cause of action is alleged against the defendant Page, because there is no allegation of an express contract between him and plaintiffs, and the facts are not alleged from which a promise to pay will be implied.

We deem it necessary to point to only one allegation of the complaint to show that the demurrer was properly overruled. After the previous allegations that the ties had been furnished and delivered to the defendants, and that they had received and used them and had paid only a certain amount on account thereof, it is further alleged "that they (that is, Page and the railroad company) are indebted to plaintiffs on account thereof" in the amount sued for. The allegation of indebtedness is an allegation of fact. *Miller v. George*, 30 S. C. 526, 9 S. E. 659; *Greene v. Tally*, 39 S. C. 333, 17 S. E. 779.

Orders affirmed.

(87 S. C. 96)

BANK OF SALUDA v. FEASTER et al.

(Supreme Court of South Carolina. Oct. 4, 1910.)

1. PLEADING (§ 20*)—ALLEGATIONS IN THE ALTERNATIVE.

An allegation in the alternative in a pleading as a general rule is bad; but it is sometimes permissible, when from the nature of the case the party pleading cannot fairly know with certainty which of two conditions exists, either of which would sustain his defense.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 43; Dec. Dig. § 20.*]

2. PLEADING (§ 8*)—CONCLUSIONS—ALLEGATIONS OF FACTS.

When the answer requires the allegation of notice to plaintiff, and it is permissible to state, in the alternative, that plaintiff had or ought to have had the knowledge which would defeat his recovery, the facts relied on to constitute knowledge should be alleged, otherwise there would be but an expression of defendant's opinion as to an inference that ought to be drawn from undisclosed facts.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

3. PLEADING (§ 367*)—MOTION TO MAKE MORE CERTAIN.

Ordinarily the remedy for the defect of an answer in alleging that plaintiff had or ought to have had the knowledge which would defeat his recovery without allegation of the facts is by motion to make more definite and certain.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1173-1193; Dec. Dig. § 367.*]

4. PLEADING (§ 364*)—STRIKING OUT IRRELEVANT MATTER.

Where the answer alleges that from certain facts plaintiff was chargeable with notice, and the facts have no tendency to support the inference, the allegation is properly stricken out as irrelevant.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1173-1174½, 1176; Dec. Dig. § 364.*]

5. BILLS AND NOTES (§ 337*)—BONA FIDE PURCHASER—NOTICE.

That plaintiff, indorsee of a check given by F. to M., held a chattel mortgage on a mule given by A., did not tend to show notice to it that the check was fraudulently procured by M. in the sale to F. of a junior mortgage on the mule.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 818; Dec. Dig. § 337.*]

6. APPEAL AND ERROR (§ 1042*)—HARMLESS ERROR.

Striking out of a defense an allegation of notice to plaintiff which would defeat recovery, if error, was harmless; the allegation being made in better form in another defense.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4111; Dec. Dig. § 1042.*]

7. BILLS AND NOTES (§ 370*)—BONA FIDE PURCHASER—DEFENSES.

Failure of consideration for a check and consequent undertaking of the drawer to stop payment is no defense to an action by the indorsee of the check who is not charged with notice of such failure.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 963; Dec. Dig. § 370.*]

8. BILLS AND NOTES (§ 335*)—BONA FIDE PURCHASER.

That plaintiff, before paying anything for a check as indorsee, had notice of want of consideration for it, is a defense.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 817; Dec. Dig. § 335.*]

9. PLEADING (§ 34*)—SEPARATE DEFENSES.

As against the allegation in a separate defense in an action on a check that plaintiff, before paying anything for it as indorsee, had notice that it was without consideration, it cannot be assumed that it was meant to be alleged that such notice was to be inferred from the same facts alleged in another defense as notice, but insufficient to constitute it.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 67; Dec. Dig. § 34.*]

10. BILLS AND NOTES (§ 363*)—INDORSEMENT OF CHECK FOR COLLECTION—RECOVERY BY INDORSEE.

An indorsee for collection of a check can recover thereon only such part of the amount thereof as he advanced to the payee before receiving notice of want of consideration therefor.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 790, 791; Dec. Dig. § 363.*]

Appeal from Common Pleas Circuit Court of Saluda County; R. C. Watts, Judge.

Action by the Bank of Saluda against L. R. Feaster and another. From an order, defendants appeal. Affirmed in part, and reversed in part.

Barrett Jones, for L. R. Feaster. Geo. Bell Timmerman, for Citizens' Bank of Batesburg. Thurmond & Ramage, for respondent.

WOODS, J. This appeal is from an order of Hon. R. C. Watts, circuit judge, striking out certain paragraphs of the answers of the defendants as sham and irrelevant. The complaint alleges that on the 15th December, 1909, the defendant L. R. Feaster made his check on the defendant Citizens' Bank of Batesburg for \$226.67, payable to the order of B. Matthews; that thereafter B. Matthews for value duly indorsed the check to the

plaintiff, Bank of Saluda; that notice was immediately given to the defendant bank of the indorsement of the check to the plaintiff bank; that, when the check was drawn and the notice given, Feaster had on deposit in defendant bank funds sufficient to pay the check; that the defendant bank afterwards allowed Feaster to withdraw his funds; that the check was duly presented and payment refused; and that the check was duly protested and notice of nonpayment given to Feaster. The answers of the two defendants are practically the same; and hence it will be necessary to set out for consideration only the defenses of the defendant bank which the circuit judge ordered struck out as sham and irrelevant. For a second defense the defendant bank alleged that Feaster gave the check in payment of a chattel mortgage over a mule, said to have been executed by one Joe Artemus, under the false and fraudulent representation that the mule was free from incumbrance, whereas there was, in fact, a senior mortgage on the mule held by the plaintiff bank, under which the mule was seized the day after the check was given; and "that the plaintiff knew, or ought to have known, of the foregoing conditions before it parted with any money or valuable thing for said check, if it ever did, which is denied." An allegation in the alternative, as a general rule, is bad, but it is sometimes permissible when from the nature of the case the party pleading cannot fairly be expected to know with certainty which of two conditions exist, either of which would sustain his action or defense. When, in such a case, the allegation of notice is necessary, and it is stated in the alternative form that the plaintiff had, or ought to have had, the knowledge which would defeat his recovery, the facts relied on to constitute notice should be alleged; otherwise, the allegation in such form is hardly anything more than the expression of the defendant's opinion as to an inference that ought to be drawn, it may be without any facts leading to it. The remedy, however, for a defect of that sort is ordinarily by motion to make more definite and certain.

In this case it seems to us that the pleader meant to say that from the facts alleged the plaintiff was chargeable with notice that the check was procured by fraud. If so, then the allegation was properly struck out as irrelevant, for, if the allegations be assumed to be true, they have no tendency to support the inference of notice. The fact that the plaintiff bank held a chattel mortgage on a mule given by Joe Artemus did not tend to show notice that a check given by Feaster to Matthews was fraudulently procured in the sale of a junior mortgage on the same mule. But even if it be assumed that the allegation of notice was intended to be entirely independent of the other allegations, and that it was properly pleaded in the alternative, the order of the circuit judge

should not be reversed on this point, because the same allegation of notice is made in better form in the statement of the fourth defense of the answer, and a judgment of the circuit court should not be reversed or modified for error which has done no harm. While an order striking out allegations of a pleading is appealable, it is of great importance to the prompt administration of justice that appeals on immaterial questions of this sort should not be encouraged.

The sixth defense set up is also entirely without substance. The allegation here is that payment of the check was refused because Feaster had undertaken to stop payment for want of consideration consisting in the failure of Matthews, the drawee, to carry out his agreement to assign the chattel mortgage on the back thereof. This is no defense to the action of the plaintiff as indorsee, for there is no charge of notice to the plaintiff of the alleged failure of consideration before it became indorsee of the check for value.

The fourth defense is as follows: "It is alleged upon information and belief that, before plaintiff ever parted with anything of value for the said check referred to in the complaint, it had due and adequate notice that the said check was without consideration, and that the same would not be paid, and when it parted with anything of value for said check, if it did, which is denied, it did it at its own risk." Here is an allegation that the defendant, before paying anything for the check as indorsee, had notice of want of consideration, and therefore did not stand in the position of a bona fide indorsee for value without notice. If entire want of consideration and notice of it to the plaintiff before indorsement for value be proved, there can be no recovery. *McCaskill v. Ballard*, 8 Rich. Law, 470; *Loan & Savings Bank v. Farmers' & Merchants' Bank*, 74 S. C. 210, 54 S. E. 364, 114 Am. St. Rep. 991. This allegation is made in the statement of a separate defense, and the court cannot assume that the defendant meant to allege that the notice of want of consideration was to be inferred from the fact that plaintiff was the holder of a mortgage on the same property senior to that for the purchase of which the check was given.

The fifth defense was also substantial. It is thus set out: "That plaintiff was duly and adequately notified on the 17th day of December, 1909, that the said check referred to in the complaint was procured by fraud, and that it was without a good and valuable consideration, and it is alleged upon information and belief that, at the time of the said notice, the plaintiff had parted with only a small part of the proceeds of the said check, if any, but that said check was placed in the hands of plaintiff by the said B. Matthews for collection, the proceeds of which were to be placed to his credit in plaintiff bank when collected, and, the check not having been plaintiff's, it is not now, nor was it

at the time of receiving the notice aforesaid, out of any money or the loser by said transaction." This allegation means, as we understand it, that plaintiff was an indorsee for collection, and, when it received notice of the alleged want of consideration for the check, had advanced to the payee only a small sum, if anything. This is a statement of a good defense which, if established by evidence, would prevent the plaintiff's recovery of any amount beyond that advanced by plaintiff as indorsee before notice of the want of consideration. It may be that the plaintiff has a right to an order requiring the defendant to make the fourth and fifth defenses more definite and certain by alleging the manner in which notice was given to the plaintiff of want of consideration for the check; but that point is not before us.

The judgment of this court is that the order of the circuit court be affirmed as to the second and sixth defenses of the answer of the Citizens' Bank, and the second and fifth defenses of the defendant L. R. Feaster, and that the order of the circuit court be reversed as to the fourth and fifth defenses of the answer of the Citizens' Bank, and the third and fourth defenses of L. R. Feaster.

(87 S. C. 236)

MONTGOMERY v. SOUTHERN POWER CO.

(Supreme Court of South Carolina. Oct. 4, 1910.)

1. TRESPASS (§ 43*)—PLEADING—VARIANCE.

In an action against an electric company for trespass, there was no material variance between an allegation of a trespass beyond a right of way limited to 80 feet and evidence of a trespass by the cutting of timber in excess of what was reasonably necessary for the construction and maintenance of defendant's line; the contract granting only an easement necessary to the proper operation of the line.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 43.*]

2. TRESPASS (§ 40*)—DAMAGES.

In an action against an electric company for trespass, under an agreement granting it a right of way over plaintiff's land to the extent reasonably necessary to maintain its line, an allegation of wanton or willful negligence in cutting trees was unnecessary; the cutting beyond the right of way granted showing a trespass.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 40.*]

3. TRESPASS (§ 46*)—SUFFICIENCY OF EVIDENCE.

In an action against an electric company for trespass in cutting timber outside of the right of way granted by plaintiff, evidence held insufficient to show an intentional or willful trespass.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 123-127; Dec. Dig. § 46.*]

4. EVIDENCE (§ 474*)—COMPETENCY OF OPINION EVIDENCE.

In an action against an electric company for trespass in cutting timber outside of the right of way granted by plaintiff, testimony of a witness, who had made an examination and testified that he would know how to make the

estimate about as well as any one else, as to the amount of timber cut, was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2219; Dec. Dig. § 474.*]

Gary, J., dissenting, and Hydrick, J., dissenting in part.

Appeal from Common Pleas Circuit Court of Lancaster County; Ernest Moore, Special Judge.

Action by Mary A. Montgomery against the Southern Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Osborne, Lucas & Cocks and John T. Green, for appellant. J. Harry Foster, for respondent.

WOODS, J. The plaintiff by her deed of conveyance granted to the defendant an easement "to go in and upon that tract of land, situated in said county and state, bounded by lands of W. K. Pylor, Dr. W. M. Crawford estate (et al.), and to construct and maintain in, upon, and through said premises in a proper manner, with poles, towers, wires, and other necessary apparatus and appliances, a line for the purpose of transmitting power by electricity, together with the right at all times to enter upon said premises for the purpose of inspecting said lines and making necessary repairs and alterations thereon, together with the right to cut away and keep clear of said lines all trees and other like obstructions that may, in any way, endanger the proper operation of the same." As the consideration, the defendant by the same deed agreed to pay \$250 and "to cut and cord all timber, except such trees as may be selected by Mary A. Montgomery for milling purposes, those to be cut into lengths named by owner."

This paper meant that the defendant should have a right of way over the land to the extent reasonably necessary to the construction and operation of its line, to be used in transmission of power by electricity. The defendant entered upon the land and cut out a way for its line. Thereupon the plaintiff brought this action for damages, alleging that the defendant had agreed that the right of way should be limited to 80 feet; that the failure to express this agreement in the conveyance was due to the fraud and misrepresentation of the defendant as to the purport of the paper; that the defendant in a reckless, wanton, and willful manner had cut through the plaintiff's woods an opening varying in width from 50 to 100 feet beyond the 80 feet right of way which the plaintiff had agreed to convey. The defendant by its answer set up the deed of conveyance of the right of way above recited, denying that it had been procured by fraud or misrepresentation, and alleged that no injury had been done to the land beyond that authorized by the grant from the plaintiff. The defend-

ant appeals from a judgment of \$500 in favor of the plaintiff.

The exception assigning error in the admission of evidence as to a parol agreement at variance with the written agreement of the right of way was taken under a misapprehension; for the court held the plaintiff bound by the written contract, and, whenever objection was made, either excluded or struck out all testimony offered for the purpose of showing that the right of way was to be limited to 80 feet.

The position was taken on the motion for nonsuit that there was a fatal variance between the allegations of the complaint and the evidence, in that the allegation was of a trespass beyond a right of way limited to 80 feet, and the evidence offered by the plaintiff was of a trespass by the cutting of timber in excess of what was reasonably necessary for the construction and maintenance of defendant's line for the transmission of power by electricity. The position is not well taken. That which gave character to the action was the allegation in the complaint of defendant's trespass on the land of the plaintiff by cutting more of the timber than was authorized by the contract. The difference between the pleadings and the proof as to the extent of the cutting which was authorized by the contract was a mere detail, having no effect except to reduce the damage recoverable. The variance was not such as to change materially the issue presented by the pleadings, or to subject the defendant to surprise or other disadvantage.

The defendant further contended on the motion for nonsuit that the plaintiff could not in this action recover actual damages without proof of willfulness or wantonness, because there was no allegation of negligently cutting trees beyond the right of way granted. The unsoundness of this position is made evident by observing that the complaint would have stated a cause of action if it had contained no charge either of negligence or willfulness or wantonness, and merely alleged that the defendant had cut the plaintiff's timber beyond the right of way granted. Obviously no degree of care could save the defendant from liability for the value of any of plaintiff's timber cut without her consent. No allegation of negligence, therefore, was essential to the recovery of compensatory damages. *Baldwin v. Postal Co.*, 78 S. C. 419, 59 S. E. 67. As there was evidence of at least an unintentional trespass beyond the right of way, a nonsuit as to the entire case was properly refused.

We are unable, however, to agree with the circuit judge that there was evidence of a willful or wanton trespass, and are of the opinion that there should have been a nonsuit as to the cause of action for punitive damages. These facts appear from the evidence on behalf of the plaintiff. *L. B. Sloop*,

the agent of the defendant, who acquired for it the grant from the plaintiff, put a number of men to work cutting out the way for the line. According to the survey the width of the way cut by these men ranged from 100 to 207 feet, and was in several places greater than was necessary to protect the defendant's towers and wires from falling timber. But there was no evidence of willfulness or wantonness on the part of the cutters.

The contention of plaintiff's counsel that like evidence was held sufficient to carry the case to the jury on the issue of willfulness and wantonness in *Faris v. American Tel. Co.*, 84 S. C. 102, 65 S. E. 1017, is not well founded. There the trespass was committed when the agent of defendant in charge knew that he had not obtained the requisite signatures to the paper under which the defendant entered, the subordinate agent in charge of the cutting paid no attention to a warning that the company had no right whatever to cut the trees, and no measurements or other precautions were taken, although the special and great value of the trees to the church for shade and beauty, as well as association, was so evident that the mind even of a careless man could not have failed to advert to the duty to take careful measurements, so as to spare all valuable trees not endangering the wires and poles. The facts are very different in this case. Indeed, evil intent and wanton disregard of plaintiff's rights were practically disproved by the testimony of Hugh Montgomery, plaintiff's son, who testified that he complained to the men that they were cutting a way unnecessarily wide; that they referred him to Mr. Sloop, the man in charge; that he saw Mr. Sloop, and "he got after the hands about it, and told them not to cut any more." This evidence leads to the inference of negligence in not providing more careful supervision of the cutters; but it leads away from any inference of intentional or wanton wrong, and shows a purpose to respect and guard the rights of the plaintiff. We think, therefore, that the circuit judge erred in not holding that the defendant could be held liable only for actual damages.

The defendant was not allowed by the court to elicit from its witness N. B. Cousar his estimate of the number of trees unnecessarily cut in opening the right of way. This evidence was clearly competent and important. The witness did not claim to be specially expert in making such estimates. But he had made an examination, and testified that he would know how to make the estimate about as well as any one else. In cases like this the quantity of timber destroyed must necessarily be ascertained by estimate, and the estimates of practical men of affairs are admissible. *Virginia-Carolina Chemical Co. v. Kirven*, 57 S. C. 445, 35 S. E. 745, *Dent v. South-Round Ry. Co.*, 61 S. C. 329, 39 S. E. 527; *Perry v. Jefferies*, 61 S. C.

292, 39 S. E. 515; Wofford v. Clinton Cotton Mills, 72 S. C. 346, 51 S. E. 918.

We think that the judgment of the circuit court should be reversed, and the cause be remanded to that court for a new trial; but, the court being equally divided, the judgment of the circuit court is affirmed.

GARY, A. J., dissents.

HYDRICK, J. (concurring and dissenting). I concur in the opinion of Mr. Justice WOODS, except upon the two points upon which the conclusion is reached that the judgment of the circuit court should be reversed. There was testimony that the usual width of the right of way required for defendant's purposes was 80 feet, with the right to cut any trees beyond that width tall enough to endanger its wires. L. B. Sloop and J. P. King, agents of defendant, both testified that they instructed the servants of defendant set to cut out the right of way through the plaintiff's land, to clear a way 80 feet wide, and Mr. King said he told them that he would designate the trees beyond the 80 feet which should be cut. When plaintiff's son called the attention of the cutters to the fact that they were cutting beyond the 80 feet, and objected to it, he was told that they were cutting according to the directions of Mr. Sloop, and they continued to cut beyond the 80 feet, notwithstanding his objection, until they were afterwards stopped. True, when Mr. Sloop came, and his attention was called to the unnecessary cutting, and objection made, he ordered the cutters to stop, which, as to that particular matter, leads away from the inference of an intentional disregard of the plaintiff's rights on the part of Mr. Sloop. But the cutters were also the servants of defendant, for whose acts the defendant is liable, and this testimony tends to show that they cut unnecessarily and beyond the 80 feet, after their attention had been called to the fact, and objection made. This testimony was clearly sufficient to warrant a reasonable inference of a reckless disregard by them of the rights of the plaintiff. Moreover, the testimony shows that the cutting through plaintiff's land was continued three or four weeks, and that once a week either Mr. Sloop or Mr. King went there to see after the work and pay off the hands. Now, as the usual right of way cut out was only 80 feet, and as their instructions had been to cut out only 80 feet through plaintiff's lands, and, as the testimony shows that a way averaging 150 feet was actually cut out, and in some places as much as 200 feet, I think the conclusion would not be unreasonable that they (Sloop and King) must have seen and known the extent of the unnecessary cutting, and their failure to stop it evinced that degree of carelessness from

which an inference of indifference to the plaintiff's right might reasonably be drawn. I think, therefore, there was no error in refusing to nonsuit plaintiff's demand for punitive damages, and in submitting that issue to the jury.

I agree that the testimony of the witness Cousar was competent, and should have been admitted. But the defendant practically had the benefit of it; for the witness did testify to the facts from which his opinion as to the extent of the unnecessary cutting was drawn, and, besides, defendant had an abundance of testimony upon the same point from other witnesses. In fact, there was scarcely any difference upon that point between the witnesses for the plaintiff and those for the defendant. I think, therefore, the error was not prejudicial, and is not of sufficient consequence to call for a reversal of the judgment.

For these reasons, I dissent from the judgment of reversal.

(86 S. C. 470)

MORDECAI v. CANTY et al.

(Supreme Court of South Carolina. Aug. 2, 1910. On Rehearing. Sept. 29, 1910.)

1. APPEAL AND ERROR (§ 1008*)—REVIEW—FINDINGS.

Findings of fact by the circuit court in an action at law are not reviewable in the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3965; Dec. Dig. § 1008.*]

2. WILLS (§§ 52, 163, 288*)—CONTEST—BURDEN OF PROOF.

When the formal execution of a will is admitted or proved, a prima facie case is made out warranting probate, and generally the burden is then on contestant to prove fraud, undue influence, incapacity, or other objection to the will, and this burden remains on him to the end.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 101, 388, 651; Dec. Dig. §§ 52, 163, 288.*]

3. WILLS (§ 263*)—PROBATE—PARTIES.

Civ. Code 1902, § 2491, providing that probate of a will in common form shall be good unless some one interested to invalidate the will gives notice, etc., and that all persons who would have been entitled to distribution of the estate if the decedent had died intestate shall be summoned, does not preclude making as parties to a probate proceeding beneficiaries under a prior will though they are not heirs; and an executor is entitled to make them parties to avoid independent litigation with them.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 608-614; Dec. Dig. § 263.*]

4. PARTIES (§ 51*)—BRINGING IN—JUDICIAL POWER.

When jurisdiction of a subject-matter is conferred on a court, the power to bring before it all necessary and proper parties for the determination of the matter follows as an incident to jurisdiction.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 80; Dec. Dig. § 51.*]

5. WILLS (§ 374*)—PROBATE—APPEAL—SUBMISSION OF ISSUES TO JURY.

On appeal from a decree of the probate court in probate proceedings, it was not error to

refuse a trial de novo before a jury until after the appeal was heard, since it might have appeared on hearing the appeal that only questions of law were involved.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 840; Dec. Dig. § 374.*]

6. WILLS (§ 374*)—PROBATE—APPEAL—SUBMISSION OF ISSUES TO JURY.

Where it appeared on appeal from a decree of the probate court in probate proceedings that the case was decided on a question of law without considering the facts, though issues of fact were involved, it was discretionary with the circuit court to order a trial de novo before a jury, instead of reversing the judgment and remanding the case to the probate court for new trial.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 840; Dec. Dig. § 374.*]

7. WILLS (§ 358*)—PROBATE—APPEAL—DECISIONS REVIEWABLE.

No appeal lies to the Supreme Court from an order of the circuit court on appeal from a decree of the probate court in probate proceedings refusing a trial de novo before a jury.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 822; Dec. Dig. § 358.*]

8. WILLS (§ 391*)—PROBATE—APPEAL—DISPOSITION.

Where it appeared on appeal from a decree of the probate court in probate proceedings that the case was decided on a question of law without considering the facts, though issues of fact were involved, the circuit court could order a new trial in the probate court in order that the parties might have the judgment of the court of the original jurisdiction, before whom the witnesses were examined, on the issues of fact.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 863; Dec. Dig. § 391.*]

9. WILLS (§ 163*)—PROBATE—UNDUE INFLUENCE—EVIDENCE.

In proceedings to probate a will devising the entire estate to an executor, he could show that he filed with it a declaration of trust in favor of others to rebut the presumption of improper inducement arising from proof of the procuring by a party of the will under which he takes an interest.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 396; Dec. Dig. § 163.*]

10. WILLS (§ 114*)—WITNESSES—EFFECT OF ATTESTATION.

The fact that one attests a will as a witness implies an opinion on his part that testator has testamentary capacity.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 277-279; Dec. Dig. § 114.*]

11. WILLS (§ 114*)—TESTAMENTARY CAPACITY—WITNESSES.

Where nothing appears to the contrary, witnesses to a will may assume that testator is sane, and has testamentary capacity.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 277-279; Dec. Dig. § 114.*]

On Rehearing.

12. WILLS (§ 288*)—CONTEST—EVIDENCE.

Contestants of a will can rely entirely on evidence introduced by proponent.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 651; Dec. Dig. § 288.*]

13. APPEAL AND ERROR (§ 1195*)—INTERMEDIATE APPEAL—REMARKS BY JUDGE—CONCLUSIVENESS.

Where a circuit judge on appeal from a decree of the probate court in probate proceedings did not undertake to pass final judgment on the facts and granted a new trial, his remarks in

passing on exceptions as to the sufficiency of the testimony are not res judicata.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4061-4665; Dec. Dig. § 1195.*]

Appeal from Common Pleas Circuit Court of Charleston County; S. W. G. Shipp, Judge.

Petition by T. Moultrie Mordecai, executor, against Michael V. Canty and others to probate a will. From the decree of the circuit court on appeal from probate court, defendants Elizabeth F. O'Neill and another appeal. Affirmed.

Logan & Grace, for appellants. Mitchell & Smith, Miller, Whaley & Bissell, and Geo. H. Moffett, for respondents.

HYDRICK, J. Two papers, each purporting to be the last will of Michael C. O'Neill, were admitted to probate in common form in the probate court of Charleston. By the first, which bears date September 5, 1907, legacies are given to Mary and Elizabeth O'Neill, James and Henry Corbett, St. Francis Xavier Infirmary, the trustees of the College of Charleston, Walford Johnson, and the residue to Edmund Kemble and J. W. O'Connell. By the second, which bears date September 19, 1907, the whole estate is given to T. Moultrie Mordecai, who is named executor, with full power of sale and disposition at his discretion. The executor filed with this will, when it was admitted to probate, a declaration of trust, bearing date September 19, 1907, which contained the following recital: "Whereas, Michael C. O'Neill has this day made a will devising his entire estate to me, and appointing me sole executor thereunder: Now, therefore, I declare that subject to the payment of his debts, and the legacies and annuities hereinafter mentioned, I hold the said estate in trust for William Henry Corbett and James Corbett, of New York City, N. Y." Following this recital a number of gifts and annuities are provided for. Upon the petition of Michael V. Canty, alleging that he is an heir of testator and interested to invalidate both wills, the executor of the will of September 19th was ordered to prove the same in due form of law. He filed his petition containing the usual allegations, and also an allegation of the probate, in common form, of the will of September 5th. The beneficiaries under the will of September 5th and the heirs of testator were made parties. Mary and Elizabeth O'Neill and Kemble and O'Connell answered, denying the validity of the will of September 19th, and St. Francis Xavier Infirmary answered, admitting the validity thereof. The other respondents do not appear to have answered. On motion of attorneys of Mary and Elizabeth O'Neill, the names of all respondents, except those alleged to be heirs of testator, were stricken from the records as improper parties. The

three subscribing witnesses to the will of September 19th were examined. They testified that, at the suggestion of Mr. Mordecai, Mr. O'Neill acknowledged the paper to be his will and requested them to witness it, and they proved the formal execution thereof. The declaration of trust was proved and offered in evidence, but excluded on the ground that it was not a part of the will, not having been referred to therein, and was therefore irrelevant at that stage of the case. The court ruled, however, that it might become admissible in reply to the evidence against the will. On close of petitioner's testimony, Mary and Elizabeth O'Neill moved to dismiss the proceeding, and to have the will of September 19th adjudged not to be the last will of testator on the ground that a prima facie case had not been made out in favor of said will. The motion was based on numerous grounds, which raised, however, practically only two points: (1) That the witnesses to the will had not ascertained, and were therefore ignorant of and could not testify to the testamentary capacity of the testator. (2) Because it appeared in evidence that the relation of client and attorney existed between the testator and executor; that the will was in the handwriting of the executor's partner; that it was signed by testator's mark, without any explanation of why he did not sign his name, though he could write; that it was executed in the private office of the executor, no one being present, except the executor, the testator, and the witnesses, who were the executor's private clerks; that its date appeared to have been altered, and the witnesses were unable to fix the date of execution; that another will of only a few days anterior date was in existence; and that the executor was the sole beneficiary—that these facts and circumstances, one or more in combination, raised such a presumption against the validity of the will as destroyed the prima facie case made by proof of formal execution, and shifted the burden to proponent to prove testamentary capacity and intention. The probate court overruled all the grounds except the first. As to the others, the court said that having excluded the declaration of trust, which was evidently offered for the purpose of showing that the executor took no beneficial interest under the will, and having held that it might become admissible in reply to evidence against the will, it would stultify itself, if it sustained the motion on these grounds. As to the first, the court held that under the authority of *Heyward v. Hazard*, 1 Bay, 335, the failure of the witnesses to ascertain the mental capacity of the testator and give evidence thereof was fatal to the will. Thereupon a formal decree, adjudging the will propounded not to be the last will of testator, was entered.

From this decree, the executor and Mary and Elizabeth O'Neill and St. Francis Xavier Infirmary appealed to the circuit court. The executor's exceptions were numerous, but

they really assigned only three grounds of error: (1) In sustaining the motion on the ground stated. (2) In excluding the declaration of trust. (3) In striking out the parties named as beneficiaries under the will of September 5th. The appeal of the Infirmary also alleged error in striking out said parties. Mary and Elizabeth O'Neill presented numerous exceptions, but, in one form or another, they involved only the point that the probate court erred in not sustaining the second ground of their motion, as it is above stated. They also served notice that they would move the circuit court for a trial de novo in that court, and for the submission to a jury therein of an issue of will or no will.

Upon the call of the case in the circuit court, the motion for a trial de novo therein before a jury was pressed, but the court declined to pass on the motion until the appeal was heard. Having heard the appeal, the circuit court reversed the judgment of the probate court, and remanded the case for a new trial, holding that the probate court erred (1) in striking from the record as improper parties the beneficiaries under the will of September 5th; (2) in holding that the failure of the witnesses to ascertain the testamentary capacity of the testator and give evidence thereof was fatal to the will; and (3) inferentially, as will be seen by the quotation from the circuit decree below, in excluding the declaration of trust. The court further held that the probate court did not err in refusing to sustain the motion to dismiss the proceeding and declare the will invalid on the other grounds urged by the appellants. The disposition of these grounds by the circuit court was as follows: "I have carefully considered the other grounds of the motion to dismiss, and I am satisfied with the reasoning of the judge of probate, and think that he properly refused to dismiss the proceedings on these grounds. It was contended before the judge of probate, and also in the argument before me, by contestants, that the will should be set aside because it appeared that the will left the entire estate to Mr. Mordecai, between whom and the testator there had existed the relation of attorney and client; that the will was in the handwriting of one of Mr. Mordecai's law partners, and was witnessed by three of the clerks or stenographers in Mr. Mordecai's office. It is very true that the law looks with jealousy upon the dealings of an attorney with his client, and will require, upon the part of the attorney, the utmost good faith and fair dealing; but I think the judge of probate properly refused to set aside the will upon the above grounds, and especially in the light of the declaration of trust, filed with the probate court when the will was first offered for probate. Certainly the law puts no constraint upon the power of a person to dispose of his property as he sees proper. He may give it to a

stranger, or to one having no claim upon him, if he sees proper. *Lee v. Lee*, 4 McCord, 195, 17 Am. Dec. 722. The contestants upon another trial will have full opportunity to show any want of good faith, unfair dealings, undue influence, or any other ground that they can why the will should not stand, but certainly they have failed to bring out facts sufficient on the cross-examination of witnesses for petitioner, or from the will itself, to set it aside without other proof." From this decree Mary and Elizabeth O'Neill appealed. The grounds of their appeal are too numerous and lengthy to set them out in full. They present the following assignments of error: (1) In not holding that the probate court erred in refusing to sustain their motion on the other grounds urged by them; (2) in holding that the beneficiaries under the will of September 5th are proper parties to this proceeding; (3) in refusing their motion for a trial de novo before a jury in the circuit court; (4) in not specifically passing upon the admissibility of the declaration of trust; (5) in not sustaining the ruling of the probate court on the ground upon which it was based.

The grounds, other than the one sustained by the probate court, upon which appellants urged that the will should be declared invalid, involved a consideration of certain facts, which they alleged appeared in evidence, and the weight and sufficiency of those facts and of the inferences and presumptions properly arising therefrom. This being a law case, the findings of the circuit court upon questions of fact are not reviewable in this court. In *re Solomon's Estate*, 74 S. C. 189, 54 S. E. 207; *Thames v. Rouse*, 82 S. C. 43, 62 S. E. 254. These grounds involved also a question of law: Whether, on proof of the facts and circumstances therein mentioned, the burden shifted to the proponent of the will to prove affirmatively testamentary capacity. Without undertaking to review the cases, the effect of the decisions of this court upon that question is that, when the formal execution of a will is admitted or proved, a prima facie case is made out; and, as a general rule, subject to some exceptions, the burden is then on the contestants to prove fraud, undue influence, incapacity, or other ground of objection to the will, and this burden remains upon them to the end. *Hobby v. Bobo*, reported in a note to *McKnight v. Wright*, 12 Rich. Law, 247; *Black v. Ellis*, 3 Hill, Law, 73; *Scarborough v. Baskin*, 65 S. C. 558, 44 S. E. 63; *Thames v. Rouse*, 82 S. C. 40, 62 S. E. 254.

Appellants contend that section 2491, Code 1902, provides who shall be made parties to such proceedings. That section does provide that, upon the filing of a petition to prove a will in due form of law, "all such persons as would have been entitled to distribution of the estate, if the deceased had died intestate, shall be summoned to answer the petition." While such persons are by the lan-

guage of the statute made necessary parties, there is nothing in the language of the statute to indicate an intention that other persons who may be interested in contesting a will shall not be made parties. The first two lines of the section seem to indicate the contrary: "Probate in common form shall be good, unless some person or persons interested to invalidate the said paper as a will shall give notice to the judge of probate," etc. This language seems to indicate an intention that any person interested to invalidate a will, whether an heir or not, may give the notice to require it proved in due form of law. The beneficiaries of an older will may be more interested to invalidate a later will than the heirs. It is a fundamental and universal principle of law that no man shall be concluded by a judgment until he has had his day in court. The beneficiaries under the will of September 5th were interested to invalidate the will of September 19th, and their rights would not have been concluded by the judgment unless they had been made parties. The executor had the right to have them made parties, to the end that he might not be compelled to litigate with them the same question which he had litigated with the heirs. It is not necessary to look for any statute conferring power on the probate court to make them parties. When jurisdiction of a subject-matter is conferred upon a court, the power to bring before it all necessary and proper parties for the determination of the matter follows as an incident to the jurisdiction.

There was no error in refusing the motion for a trial de novo before a jury until after the appeal was heard for the reason that it might have appeared on hearing the appeal that only questions of law were involved, and, in that event, there would have been no issue for a jury. Having discovered from a consideration of the appeal that issues of fact were involved, the court might in its discretion have ordered a trial de novo before a jury, instead of reversing the judgment and remanding the case to the probate court for a new trial. That might have been the better course; for, as said in *Myers v. O'Hanlon*, 12 Rich. Eq. 203-204: "In truth, the validity of a contested will is tried and determined practically in the court of common pleas. The primary decree of the ordinary in such controversies is regarded by the parties as comparatively immaterial. It is upon the appeal to the law courts that the actual contest, the substantial trial, really occurs." *Prater v. Whittle*, 16 S. C. 41. But that was a matter resting in the sound discretion of the circuit court whose order as to that matter is not appealable. *Lamley v. Railroad*, 77 S. C. 319, 57 S. E. 1104; *Jones v. Woodside Cotton Mills*, 83 S. C. 565, 65 S. E. 819, and cases cited. The circuit court unquestionably had the power to reverse the judgment and order a new trial. *Stark v. Hopson*, 22 S. C. 42; *Ex parte White*, 33 S.

C. 442, 12 S. E. 5. The fact that the probate court had decided the case on a question of law without considering the facts was a sufficient reason for ordering a new trial in that court, in order that the parties might have the judgment of the court of original jurisdiction, before whom the witnesses were examined, upon the issues of fact.

The circuit court held, inferentially, at least, that the declaration of trust was admissible; for in passing upon appellants' exceptions the court said, "I think the judge of probate properly refused to set aside the will upon the above grounds, and especially in the light of the declaration of trust," which shows clearly that the court held that the declaration of trust should have been admitted. It was competent and relevant because it tended to rebut the presumption which appellants contend arises from proof of the procuring by a party of a will under which he takes an interest. We are not called upon here to discuss the circumstances under which such a presumption does arise, or the force and effect which it should have. That depends upon the circumstances. *Tomkins v. Tomkins*, 1 Bailey, 92, 19 Am. Dec. 656; *McKnight v. Wright*, 12 Rich. Law, 247; *Hobby v. Bobo*, 12 Rich. Law, 247, note. In *McKnight v. Wright* such a declaration, though made long after the execution of the will, was admitted, though it does not appear that its admissibility was questioned.

The fifth assignment of error cannot be sustained. In the case of *Heyward v. Hazard*, 1 Bay, 344, which was relied upon by the probate judge to sustain his ruling, it is said: "The third requisite (in the execution of a will) is the attestation. The true construction of law under this head had always been that the act called the attention of the witnesses to the situation of the testator himself; and this particularly relates to his sanity. The witnesses are not called upon by the act to attest the mere factum of signing, but the capacity of the testator. The business, then, of the persons required by the statute to be present at executing a will, is not barely to attest the corporeal act of signing, but to try, judge, and determine whether the testator is compos to sign; that is, of a sound mind, as every will, upon the face of it, imports. And upon every controversy the heir at law or other person interested has a right to a proof of sanity from every one of them whom the statute has placed around the testator. There is no security but the witnesses and their integrity." The language above quoted was used by the judges in their charge to the jury in a case in which the validity of a will was in question. At that time the judges were allowed to advise the juries as to the weight which should be given the testimony. It appeared that the testator was subject to fits of insanity, occasioned by hard drinking, but, after these fits were over, he regained his senses. The witnesses to the

will all testified that at the time of its execution he was "perfectly in his senses." The witnesses contra testified to his conduct and appearances at other times. The judges were evidently trying to impress upon the jury the weight which they should give the testimony of the witnesses to the will who gave evidence of testator's condition at the time of its execution, for they charged the jury further: "The three witnesses to the will all swear positively that he was perfectly in his senses the day it was signed; and there is nothing to impeach in the least their credibility." So that, when the circumstances under which the language above quoted was used are considered, it loses much of its force in establishing a general principle of law applicable to all cases. But, while the language quoted does indicate the duty of persons called upon to witness a will, and the right of the parties to their opinion, it does not go to the extent of holding that, if they fail in the performance of that duty, and are unable to give any opinion as to the sanity of the testator, the will must therefore be rejected. Nor do the later decisions of the court sanction such a proposition. The mere fact of attesting a will should be and is taken by the law to be tantamount to an expression of opinion on the part of the witnesses that the testator is possessed of testamentary capacity; for certainly no credible person of intelligence would attest such an instrument, if he knew or had reasonable cause to believe that testamentary capacity was wanting. In this sense the witnesses are to "try, judge, and determine" whether the testator is capable. But surely, where nothing appears to the contrary, the witnesses may rely and act upon the general presumption of sanity and testamentary capacity. *Kinloch v. Palmer*, 1 Mill, Const. 225; *Lee v. Lee*, 4 McCord, 183, 17 Am. Dec. 722; *Verdier v. Verdier*, 8 Rich. Law, 135; *Black v. Ellis*, 3 Hill, Law, 73; *Welch v. Welch*, 9 Rich. Law, 136; *Hobby v. Bobo*, 12 Rich. Law, 247, note. In *Black v. Ellis* two of the witnesses were dead. The third gave positive evidence of an utter want of testamentary capacity. Yet the will was established upon evidence allunde of capacity. In *Verdier v. Verdier* two of the witnesses were dead and their signatures were proved. The third recognized his signature, but had no recollection of the transaction. Held the will was sufficiently proved. In *Kaufman v. Caughman*, 49 S. C. 165, 27 S. E. 18, 61 Am. St. Rep. 808, this court said: "It is not incumbent upon the proponent of a will to prove in the examination in chief the fact of the testator's sanity by taking the opinion of the subscribing witnesses on that point. When proponent proves the formal execution of a will, including the attestation and subscription of the witnesses, as required by law, a presumption of testamentary capacity arises, since every adult is presumed sane until the contrary appears, and since witnesses

when they attest and subscribe a will as such, not only attest the fact of the testator's signing, but also the testator's sanity."

Judgment affirmed.

GARY, A. J., concurs in the result.

On Rehearing.

PER CURIAM. The appellants entirely misconceive the ruling that, after a prima facie case had been made out in favor of the will by proof of its formal execution, the burden was upon them to prove fraud, undue influence, incapacity, etc., in supposing that the court held that in sustaining that burden they could not rely solely upon the testimony of the witnesses examined by the proponent, but must themselves necessarily have introduced testimony. Of course, the contestants of any will in any case may, if so advised, rely entirely upon the testimony of the witnesses and other evidence introduced by the proponent.

As none of the exceptions questioned the propriety of the circuit judge's making any findings of fact, this court did not consider that question; but, as he did not undertake to pass a final judgment on the facts, but granted a new trial, his remarks in passing on the exceptions, as to the sufficiency of the testimony, are not res judicata. *Stark v. Hopson*, 22 S. C. 46.

No principle of law or question of fact having been overlooked or disregarded, the petition is dismissed, and the stay of remittitur revoked.

(87 S. C. 103)

CARTER v. BARNES.

MILEY v. GOODWIN.

(Supreme Court of South Carolina. Oct. 6, 1910.)

1. CONSTITUTIONAL LAW (§ 225*)—STOCK LAW—CONSTITUTIONALITY.

Civ. Code 1902, § 1509, subd. 5, exempting a certain portion of Colleton county from the operation of the general stock law, is unconstitutional, as imposing the additional burden on the citizens of that portion of building a certain fence.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 681, 682; Dec. Dig. § 225.*]

2. CONSTITUTIONAL LAW (§ 225*)—STOCK LAW—CONSTITUTIONALITY—"SECTION."

In Civ. Code 1902, § 1509, subd. 5, the provision that the citizens of Colleton county exempted from the operation of the general stock law under "this section" shall build a certain fence, the words "this section" refer to subdivision 5, so as to render it alone unconstitutional, as imposing an additional burden, and not to the whole of section 1509, as the Legislature could not have intended the citizens of the other portions of the county, also exempted by other subdivisions, to help build a strictly local fence.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 681, 682; Dec. Dig. § 225.*]

For other definitions, see Words and Phrases, vol. 7, p. 6382.]

3. STATUTES (§ 183*)—CONSTRUCTION—INCONGRUITY—LEGISLATIVE INTENT.

Regardless of how plain the meaning of words used in a statute may be, yet the courts will not follow that meaning, if it is manifestly contrary to the intent of the Legislature, but will construe the statute so as to carry its intention into effect.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 261; Dec. Dig. § 183.*]

4. ANIMALS (§ 50*)—STOCK LAWS.

Civ. Code 1902, § 1509, providing for exemptions in Colleton county from the operation of the general stock law, will not be considered as repealed by Act April 24, 1906 (25 St. at Large, p. 363), providing that an election should be held to determine whether the exemptions should be continued, in the absence of a showing that the election was held.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 50.*]

5. ANIMALS (§ 50*)—STOCK LAWS.

So, also, it was not repealed where, before any election was held, the statute authorizing the election was repealed.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 50.*]

Appeal from Common Pleas Circuit Court of Colleton County; S. W. G. Shipp, Judge.

Actions by A. L. Carter against Willie Barnes and by J. B. Miley against B. B. Goodwin. Judgment for defendants in each case, and plaintiffs appeal. Reversed.

Padgett, Lemacks & Moorner, for appellants.
Howell & Gruber, for respondents.

WOODS, J. The facts of this litigation are thus stated in the record: "This was a claim and delivery proceeding, commenced by the plaintiff against the defendant, for the recovery of four pigs, before P. J. Wilson, Esq., magistrate, in April, 1909. The property sought to be recovered was owned by the plaintiff, and was taken up by the defendant while roaming at large upon the lands of the defendant. The defendant seized the same under the provisions of the general stock law; the defendant's farm, whereon the said hogs were seized, lying partly within the county of Colleton and partly within the county of Bamberg, the boundary line separating the said counties running through the defendant's farm. The hogs were seized on that portion of the defendant's farm lying within the county of Colleton, and within the territory embraced in subdivision 1 of section 1509 of the Code of Laws of 1902." The appeal depends on the single question whether subdivision 1 of section 1509 of the Civil Code of 1902, relating to exemptions from the general stock law in Colleton county, is constitutional. The magistrate, holding the subdivision to be constitutional, entered judgment in favor of the plaintiff. The circuit judge came to the opposite conclusion, and reversed the judgment of the magistrate.

Section 1509 of the Civil Code of 1902 provides: "The following portions of Colleton county are exempted from the opera-

tions of article 1 of this chapter relating to the general stock law." Then follow five subdivisions of the section, each exempting a different portion of the county. Subdivision 1, which covers the territory in which the pigs here sued for were taken up, is as follows: "All that portion of Colleton county bounded north by the Edisto river, south to the Little Salkahatchie and Combahee rivers, east by Charleston & Savannah Railway and west by the Barnwell line on the Edisto river, and running thence to the Little Salkahatchie river along the said Barnwell line." Standing alone, there could be no doubt of the constitutionality of this exemption. *Goodale v. Sowell*, 62 S. C. 524, 40 S. E. 970; *Brown v. Tharpe*, 74 S. C. 207, 54 S. E. 363; *Sanders v. Donnelly*, 86 S. C. 94, 67 S. E. 1070. But subdivision 5 of section 1509 imposes the unequal burden of building and maintaining a fence, and it is conceded that by the imposition of this burden subdivision 5 was made unconstitutional. *Sanders v. Venning*, 38 S. C. 502, 17 S. E. 134; *Sanders v. Donnelly*, *supra*.

The contention of the respondent is that the unconstitutional burdens imposed by subdivision 5 are not limited to the territory therein described, but apply to all the exemptions of section 1509, and that therefore there is no statutory exemption from the operation of the stock law of force in Colleton county. This position is clearly untenable. We quote so much of subdivision 5 as is necessary to make clear the point involved. "All that portion of Colleton county formerly known as St. Paul's parish, and so delineated on the old plats of the state, is exempted from the operation of the general stock law, as enacted in article 1 of this chapter: Provided, this section shall not apply to that portion of said parish lying below a line running from the upper line of Stephen Barnwell's plantation at or near Wilton Bluff, on Pon Pon river, to a point on Toogoodoo creek at or near Toogoodoo Bridge and down said creek to where the same enters into the North Edisto river: Provided, further, that the citizens of the territory exempted under the provisions of this section shall build a fence from the said point on Pon Pon river to the said point on Toogoodoo creek, separating the portion above described from the portion exempted under the provisions of this section, and construct a proper gate at said Toogoodoo Bridge to prevent the passage of animals. Said fence to be kept up to the height of four and one half feet."

The word "section," when used in the Civil Code, usually means the divisions of the Code designated and numbered as sections; but beyond the least doubt the word here used refers to the subdivision of the section in which it is found, and not to the whole of section 1509. Any other construction would require that the court attribute to the General Assembly obviously incongruous

legislation. There are five different parts of Colleton county exempted under the five subdivisions of section 1509. The fence required in subdivision 5 for St. Paul's parish has no relation to any of the other exempted parts of the county. In saying, under subdivision 5, "that the citizens of the territory exempted under this section" should build a fence having only local value, it is impossible that the General Assembly meant to impose any part of the burden of building and maintaining the fence on the citizens of the other four exempted portions of the county entirely separate from St. Paul's parish. Without more detailed analysis it is enough to say that the context clearly indicates that the words "this section," as used in subdivision 5, refer to the subdivision, and not to the whole of section 1509. That the court should give them this limited and plainly intended meaning, rather than that which they usually have, there can be no doubt. The subject has been recently discussed in *Stackhouse v. Board of Commissioners*, 86 S. C. 419, 68 S. E. 561, where the rule was thus stated: "However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning, when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature, or would defeat the plain legislative intention, and, if possible, will construe the statute so as to escape the absurdity and carry the intention into effect."

The most casual inspection of section 1509 shows that the several exemptions of different portions of Colleton county from the operation of the stock law are quite independent of each other. The different subdivisions providing for these exemptions separately have little connection with each other, and one may stand as a complete enactment, expressive of the legislative will, although another may be unconstitutional. The unconstitutionality of subdivision 5, therefore, does not affect the validity of subdivision 1.

The next contention is that the whole of section 1509 was repealed by the statute of 1906 (25 St. at Large, p. 363) providing that an election should be held on a day to be designated by the supervisor of the county to determine whether the exemption existing under section 1509 should be continued. There is nothing before the court to indicate that the election was ever held, and manifestly the status fixed by previous legislation continued until changed as a result of such election. As we understand, the fact is no election was ever held under the act of 1906; and in 1907 another statute (25 St. at Large, p. 768) was passed repealing the law authorizing the election. This being so, the valid exemptions provided for by section 1509 remain until altered by statute.

It is the judgment of this court that the judgment of the circuit court be reversed.

(153 N. C. 104)

HILLIARD v. NEWBERRY et al.

(Supreme Court of North Carolina. Sept. 29, 1910.)

1. INDEMNITY (§ 15*)—DAMAGES PREREQUISITE TO AN ACTION.

Action on a strict indemnity obligation will not lie till damage is suffered.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 36-47; Dec. Dig. § 15.*]

2. INDEMNITY (§ 15*)—CONTRACTS—DAMAGE—ACTION.

Where a contract is made not alone to indemnify plaintiff but also to perform a particular obligation, an action will lie on the breach of such obligation, though no damages have been suffered.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 36-47; Dec. Dig. § 15.*]

3. INDEMNITY (§ 6*)—CONTRACT—WHAT CONSTITUTES.

A bond to indemnify plaintiff against any damage he may suffer by reason of a mortgage on land, which was also a promise to pay a certain sum by a certain date, was not strictly a contract of indemnity.

[Ed. Note.—For other cases, see Indemnity, Dec. Dig. § 6.*]

4. EVIDENCE (§ 441*)—ORAL EVIDENCE—ADMISSIBILITY.

A bond was given to indemnify obligee for any damage he might suffer by reason of a mortgage, and was also a promise to pay a certain sum by a certain date. Held that, in the action on failure of payment, obligor could not show an oral agreement whereby the time for payment could be extended.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2030-2047; Dec. Dig. § 441.*]

5. INDEMNITY (§ 10*)—ACTION—NOTICE OF DAMAGES.

Where a bond was given to indemnify obligee for any damage he might suffer by reason of a mortgage, and was also a promise to pay a certain sum by a certain date, notice of damage need not be given obligor as a prerequisite to an action for failure of payment.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 20; Dec. Dig. § 10.*]

Appeal from Superior Court, Carteret County; Peebles, Judge.

Action by W. H. Hilliard, administrator, against A. O. Newberry and others. Judgment for plaintiff, and defendants appeal. Affirmed.

The action was instituted on February 2, 1910, and the complaint of plaintiff's duly verified, contained allegations to the effect: That on 27th day of January, 1908, plaintiff's intestate and defendant A. O. Newberry dissolved partnership theretofore existent between them. Defendant A. O. Newberry buying out the interest of the intestate, and in payment for such interest conveyed to plaintiff's intestate three tracts of land on which there was a mortgage, duly registered and now held by codefendant M. Hahn. This mortgage, annexed to and made part of the complaint, showed that it was given to secure a sum of money, on which there was a balance now due and owing to defendant Hahn as stated. That at said time, in order to secure the intestate against said mortgage

debt, the defendant A. O. Newberry executed and delivered to intestate his note under seal as follows: "\$3,000.00. On or before the first day of January, 1909, I promise to pay to Y. Z. Newberry \$3,000 with interest from date at the rate of 6 per cent. per annum for value received. This note is given to secure Y. Z. Newberry against any loss which might arise from the amount now due Meyer Hahn, and with the understanding that if this note is paid when due it shall be returned as though never given. Given under my hand and seal, this 27th day of January, 1908. A. O. Newberry. [Seal.]" That there was a balance due on said mortgage which defendant had failed to pay. That, before bringing this action, plaintiff administrator had demanded payment and settlement of said note and mortgage of defendant A. O. Newberry, and he had failed to pay same. Replying to defendant's answer, there was further allegation to the effect that A. O. Newberry was insolvent and incumbering his property by specific liens thereon to different persons, and that judgment on the note was necessary to the preservation and protection of plaintiff's rights under the contract, etc. Defendant A. O. Newberry answered, admitting the dissolution of partnership and purchase of the assets, the conveyance of the realty in part payment and the execution of the note declared on, and admitted, further, that the mortgage had not been paid, and that a balance was still due thereon. Denying liability, defendant further alleged and claimed in effect: (1) That the obligation was strictly one of indemnity, and that no action thereon arose to plaintiff until he had suffered actual loss or damage by reason of the mortgage. (2) That no definite time was set for paying off the mortgage, and that it was understood and agreed at the time the note was given that, if A. O. Newberry was not in a position to pay the mortgage debt when due, he was to be at liberty to obtain an extension thereon from Hahn, and have the benefit of same in respect to the plaintiff's present claim. That defendant had obtained such extension and was gradually paying off the mortgage, and there was no likelihood that plaintiff would ever suffer damage by reason thereof. (3) That no notice of loss or damage actually suffered had been given before action brought. On perusal of the pleadings and motion duly made the court gave judgment for plaintiff on the note to be discharged on "production and surrender of said mortgage duly paid and satisfied of record," or on payment of amount due thereon principal and interest to plaintiff and costs of present action, and defendant excepted and appealed.

Abernathy & Davis, for appellants. D. L. Ward, Moore & Dunn, Guion & Guion, and Loftin, Varser & Dawson, for appellee.

HOKE, J. (after stating the facts as above). On the question presented, the authorities are to the effect that, when a collateral obligation is in strictness one of indemnity, an action at law will not lie unless and until some actual loss or damage has been suffered, but, when the obligation amounts to a binding agreement to do or refrain from doing some definite, specific thing materially affecting the rights of the parties an action will presently lie for breach of such an agreement, and no damage need be shown. Even on a bond of strict indemnity, however, while an action at law would not lie until damage suffered, our own decisions under the old system were to the effect that a person could invoke the aid of the equity courts when the facts disclosed that such action was required for the preservation and maintenance of his rights under the contract. *Burroughs v. McNeill*, 22 N. C. 297. Recurring to the principle first stated in 16 A. & E. p. 179, it is said: "Where the promisor has undertaken to do a particular act or make a specific payment as well as to indemnify the promisee, the contract is broken, and a recovery for such breach may be had as soon as the time for doing such act or making such payment has arrived, and the promisor has failed to perform his obligations, and in such case it is no defense that the promisee has not been damaged." And in *Pingrey on Suretyship and Guaranty* the author, in speaking to the question (section 182) says: "It is settled that no action can be maintained by the surety upon an implied promise, if the principal has made default, without first making payment of the debt, except where the principal has broken his promise to do or refrain from doing some particular act or thing or to save the surety from some charge or liability. Thus where the maker of a note agrees with the surety to pay the amount of the note to the payee on a given day, but makes default, the surety can recover from his principal without first making payment of the note. In like manner, where a partnership is dissolved by one partner leaving the firm with the debts outstanding, and a new firm agrees with the outgoing partner to pay the debt of the old partnership and save him harmless from any costs, trouble, or liability on the account of the same, upon default of the new firm, the partner who withdrew can recover against the new firm without first paying such debts. When an obligation to do a particular thing or to pay a debt for which the covenantor is liable, or to indemnify against liability, is broken, the right of action is complete upon the principal's failure to do the particular thing he agreed to perform or to pay the debt or discharge the liability. If the contract be one of indemnity simply, and nothing more, then damages must be shown before the party indemnified is entitled to recover; but, if there be an affirmative contract to do a certain act or

to pay a certain sum or sums of money, then the surety can sue the principal before paying the debt to the creditor." And the authorities cited fully support this statement of the doctrine, many of them being on facts very similar to those presented in the present case. *Dorrington v. Minnick*, 15 Neb. 397-403, 19 N. W. 456; *Wilson v. Stilwell*, 9 Ohio St. 467, 75 Am. Dec. 477; *Lathrop v. Atwood*, 21 Conn. 117; *Kohler, Extr'x, v. Matlage*, 72 N. Y. 259; *Hall et al. v. Nash*, 10 Mich. 303; *Loosemore v. Radford*, 9 M. & W. Exchequer, 656. In *Wilson v. Stilwell*, supra, the digest appears in the official reports as follows: "Where S., a retiring member of a firm, took from his late partner, T., a bond, with W. as surety thereon, conditioned that T. would pay all the debts of the late firm, which condition was broken, held (1) that S., without having first paid any of said debts, or been otherwise specifically damaged, is entitled to recover on said bond against the obligors therein, to the amount of such debts remaining unpaid. (2) In such action, it is proper that the creditors of the firm should be made parties, and that the court should, in the judgment, authorize the application of the amount recovered to the payment of the debts of the firm in discharge of the judgment." And in *Loosemore v. Radford* the doctrine is stated in the headnote as follows: "The plaintiff and defendant being joint makers of a promissory note, the defendant as principal and the plaintiff as his surety, the defendant covenanted with the plaintiff to pay the amount to the payee of the note on a given day but made default. Held, in an action on the covenant, that the plaintiff was entitled, though he had not paid the note, to recover the full amount of it by way of damages."

In the present case, while the note sued on was undoubtedly given to secure plaintiff's intestate from any loss or liability by reason of the mortgage, it contained, further, the promise to pay a definite sum by a stated time, and we concur with the judge below in the opinion that, under the authorities cited and the principle established and sustained by them, the plaintiff was entitled to judgment.

And we agree with his honor also in the position that no valid defense is set up in defendant's answer, and no issue raised in bar of plaintiff's demand. As heretofore stated, the obligation sued on is not in strictness one of indemnity simply, but contains in addition a positive promise to pay a definite sum, and at a specified time, and entitles the plaintiff to judgment according to the tenor of the bond. The claim that there was a contemporaneous oral agreement to the effect that the time could be further extended is in direct contradiction to the written stipulation of the agreement, and under several recent decisions of the court such a position was not open to defendant. *Woodson v. Beck*, 151 N. C. 145, 65 S. E. 751;

Walker v. Cooper, 150 N. C. 129, 63 S. E. 681; Walker v. Venters, 148 N. C. 388, 62 S. E. 510; Mudge v. Varner, 146 N. C. 147, 59 S. E. 540; Bank v. Moore, 138 N. C. 529, 51 S. E. 79.

On the question of notice raised by defendant, it will be observed that there is no denial in the answer "that, before bringing this suit, plaintiff administrator demanded payment and settlement of the note and mortgage," but the allegation is "that, before bringing this suit, defendant had not been notified of any loss or damages suffered by plaintiff." The position of defendant in regard to the necessity of notice before action brought applies to collateral obligations strictly of indemnity, and has no bearing when the suit is on an obligation which contains in addition binding stipulations to do or refrain from doing specific things and on breach of which, as we have endeavored to show, neither actual loss nor the notice of it is required. An examination of the authorities relied on by defendant here, notably Cox v. Brown, 51 N. C. 100, Sherrod v. Woodard, 15 N. C. 360, 25 Am. Dec. 714, and others, will disclose, too, that even on bonds of indemnity strictly the failure to give notice was held not to affect a plaintiff's cause of action at all, but only his right to presently sue without first making demand, and, in cases of that character, a demand is generally waived by an answer denying any and all liability on part of defendant. The doctrine last referred to was approved by this court in a recent case (Smith v. French, 141 N. C. 1, 53 S. E. 435), and its application would in any event deprive defendant of defense on that ground.

There is no error, and the judgment below is affirmed.

Affirmed.

(153 N. C. 101)

TAYLOR et al. v. CARMON et al.

(Supreme Court of North Carolina. Sept. 29, 1910.)

MORTGAGES (§ 256*)—ASSIGNMENT—DEFENSES.

Under the statute authorizing the assignment of things in action, and allowing the assignee to sustain a demand therefor in his own name, but providing that such action shall be without prejudice to any set-off or other defense existing at the time of or before notice of the assignment, an assignee of mortgages, the mortgagor having no notice of the assignment, held the same subject to any set-off or other defense in the mortgagor's favor against the mortgagee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 678-681, 688; Dec. Dig. § 256.*]

Appeal from Superior Court, Craven County; Peebles, Judge.

Action by Mary L. Taylor and others against M. W. Carmon, administrator of George Wilcox, and another. Judgment for plaintiffs, and defendants appeal. No error.

Guion & Guion, for appellant Meadows Moore & Dunn, for appellant Carmon. W. D. McIver, for appellees.

HOKE, J. The court has carefully considered the record and testimony presented, and finds no reversible error to appellant's prejudice.

It appears that plaintiff, having executed three mortgages on her land, one to T. Burke for \$300 acquired by George W. Wilcox, intestate of defendant Carmon, one to Wilcox himself for \$221, and the third to said Wilcox for \$190, instituted this action, alleging that the two mortgages made direct to Wilcox were for accommodation of said intestate and without valuable consideration, and that all of them had been much more than paid and satisfied by certain personal property delivered by plaintiff to said Wilcox for the purpose in the course of the dealings between them and to an amount of not less than \$1,000. Defendant Carmon, administrator of George Wilcox, answered, denying payment and denying the other allegations, and averring that the amounts secured by said mortgages were still due, and alleged that plaintiff owed other sums to her intestate to an amount of \$380. Defendant Jane Meadows, administratrix of J. A. Meadows, answered, denying plaintiff's allegations, and alleged, further, that said mortgages had been acquired by her intestate for full value and were held by him to secure certain sums due from George Wilcox, and that no part of same had been paid. The cause was referred according to the course of practice of the court, and the referee made report finding that the amounts secured by the mortgages were due and unpaid, and that over and above said amounts there was a small balance still due from plaintiff to the intestate, Wilcox.

The court sustained several exceptions to said report, and on issues raised by specific exceptions, the jury further rendered the following verdict:

"(1) Was the Burke bond and mortgage of \$300 paid to George S. Wilcox before notice of transfer? Answer: No.

"(2) What amount have plaintiffs paid on the Burke \$300 note and mortgage? Answer: \$150.

"(3) What is the value of the personal property received and had by George S. Wilcox from plaintiffs as alleged in the complaint? Answer: \$801.16."

On this verdict and the rulings of the court sustaining plaintiff's exceptions to the report, and which together substantially reversed the conclusions of the referee, the court gave judgment that the sum established in plaintiff's favor to the extent required should be applied in the discharge and satisfaction of the mortgages, and that plaintiff have and recover the remainder of

said amount of defendant Carmon, administratrix of Wilcox. There is no evidence in the record that plaintiff had either knowledge or notice of the assignment and transfer of these mortgages to J. A. Meadows, the intestate, nor is there any claim or evidence tending to show that said Meadows was a holder in due course of the notes which the mortgages were given to secure, and while our statute authorizes the assignment of things in action, allowing the assignee to sustain a demand therefor in his own name, the law also provides as follows: "In the case of an assignment of a thing in action the action by the assignee shall be without prejudice to any set-off or other defense, existing at the time of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due." Revisal 1908, § 400. The mortgages therefore were held by the intestate, Meadows, subject to any set-off or other defense existing in plaintiff's favor against the intestate Wilcox, and the sum of \$801.16, established by the verdict to the extent required, was properly applied to their satisfaction. This being true, the many exceptions noted to the rulings of the court on the question of the transfer of these mortgages to J. A. Meadows become immaterial. As heretofore stated, there is no sustainable objection shown to the validity of the trial. The only one that could be seriously urged was to the exclusion of certain items of charge against plaintiff appearing on the books of intestate, Wilcox. The judge below finds that these books were never offered in evidence, and, if it were otherwise, the proof concerning them was very far from meeting the conditions required for the admission of entries in a party's own favor.

There is no error, and the judgment below must be affirmed.

No error.

(153 N. C. 116)

MITCHELL v. SEABOARD AIR LINE RY.
(Supreme Court of North Carolina. Sept. 29, 1910.)

1. RAILROADS (§ 382*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.

A deaf person, familiar with train schedules, who stepped from behind a box car and started across the main track of a railroad in front of a fast-coming train, without looking for it, or without heeding its approach, and endeavored to rush across in front of it, when there was a space of eleven feet between the car and the main track, and a glance along the track would have disclosed the train, was guilty of contributory negligence, barring recovery.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1297-1304; Dec. Dig. § 382.*]

2. NEGLIGENCE (§ 136*)—NONSUIT—CONTRIBUTORY NEGLIGENCE.

While contributory negligence is a matter of defense, it is proper to nonsuit plaintiff on

his own evidence when such defense is thereby fully made out.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 286; Dec. Dig. § 136.*]

Appeal from Superior Court, Franklin County; Cooke, Judge.

Action by Cornelius Mitchell against the Seaboard Air Line Railway for personal injury. From a judgment on a verdict for plaintiff, after motion for nonsuit was overruled, and exception thereon taken, defendant appeals. Reversed.

Murray Allen, for appellant. Spruill & Holden, for appellee.

BROWN, J. All the evidence tends to prove that plaintiff, a deaf and dumb negro man, was struck by fast passenger train No. 66 while crossing defendant's tracks at Youngsville; that plaintiff spends much of his time around defendant's station there and is familiar with train schedules. The evidence is plain to the effect that plaintiff stepped from behind a box car and started across track in front of a fast-coming train without looking, or, if he did look, he did not heed the approach of the train, and endeavored to rush across in front of it. There was 11 feet space between the box car and the main line track, and a mere glance of the eye along the track would have discovered the train. To enter on a track and attempt to cross it under such circumstances is such contributory negligence as bars recovery.

This has been decided so often that it should be considered as settled. Cooper v. Railroad, 140 N. C. 209, 52 S. E. 932, 3 L. R. A. (N. S.) 391; Royster v. Railroad, 147 N. C. 350, 61 S. E. 179; Daily v. Railroad, 106 N. C. 801, 11 S. E. 320; Beach v. Railroad, 148 N. C. 153, 61 S. E. 664; Trull v. Railroad, 151 N. C. 340, 66 S. E. 586; Champion v. Railroad, 151 N. C. 197, 65 S. E. 917. It is also equally well settled that, while contributory negligence is a matter of defense, it is proper to nonsuit plaintiff upon his own evidence when the proof of such defense is thereby fully made out. Strickland v. Railroad, 150 N. C. 4, 63 S. E. 161; Baker v. Railroad, 150 N. C. 562, 64 S. E. 506.

The motion to nonsuit is allowed.

Reversed.

(153 N. C. 83)

WHITEHEAD et al. v. WEAVER et al.
(Supreme Court of North Carolina. Sept. 29, 1910.)

DEEDS (§ 136*)—CONSTRUCTION—ESTATES CREATED.

A deed to D. and E., his wife, provided: "To have and to hold to them, the said D. and wife for life, and the life of each of them, and after the death of the survivor, then to the living sister and the children of the deceased sister or sisters of said E., in fee, and in the event of the death of the living sister of the said E. without issue before the death of the said D.

and wife, and both of them, then the whole of said land shall go to the children of the other sister in fee. The purpose of this deed is to vest the title of said land in said D. and wife for their joint lives, then in the survivor for life, and then in W. and the children of P. deceased, and if at the death of said D. and wife or the survivor, the said W. shall be dead without issue, then to the children of the said P. in fee simple." Held that, there being eight children of P., the conveyance vested an undivided one-ninth interest in each of them and W., and, on the death of W. after the life tenancy ceased, her undivided one-ninth descended to her children.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 431-433; Dec. Dig. § 136.*]

Appeal from Superior Court, Wilson County; Gulon, Judge.

Action by Elizabeth Whitehead and others against Mary Eliza Weaver and others. From the judgment, defendants appeal. Reversed.

Both parties claim under a deed from S. A. Woodard, January 21, 1884, to Jesse P. Dixon and wife Elizabeth for 400 acres. The habendum is as follows: "To have and to hold, to them, the said Jesse P. Dixon and wife, for life, and the life of each of them, and after the death of the survivor, then to the living sister and the children of the deceased sister or sisters of the said Elizabeth Dixon, in fee, and in the event of the death of the living sister of the said Elizabeth Dixon without issue living at her death, before the death of the said Jesse P. Dixon and wife, and both of them, then the whole of the said land shall go to the children of the other sister in fee. The purpose of this deed is to vest the title of the said land in the said Jesse P. Dixon and wife for their joint lives, then in the survivor for his or her life, and then in Polly Whitehead and the children of Penina Dixon, deceased, and if at the death of the said Dixon and wife, or the survivor, the said Polly Whitehead shall be dead without issue living at her death, then to the children of the said Penina Dixon in fee simple." Jesse P. Dixon and wife are dead. Polly Whitehead had since died, leaving three children, these plaintiffs. The defendants are the eight "children of Penina Dixon." The clerk adjudged that Polly Whitehead was seised of one-ninth undivided interest in the land. The judge reversed this, and held that she was owner of an undivided one-half, and the defendants appealed.

Daniels & Swindell, for appellants. Pou & Finch and Murray Allen, for appellees.

CLARK, C. J. The conveyance of the remainder to "Polly Whitehead and the children of Penina Dixon, deceased," vested such remainder in fee in them as tenants in common an undivided one-ninth interest to each; there being eight children of Penina Dixon. Upon the death of Polly Whitehead, who

died after the life tenancy ceased, her undivided one-ninth descended to her three children, the plaintiffs herein.

In *Helms v. Austin*, 116 N. C. 752, 21 S. E. 556, a deed to "Sarah Staton and her children" was held to convey a fee simple to said Sarah and children as tenants in common. This was cited and approved in *Darden v. Timberlake*, 139 N. C. 182, 57 S. E. 895. In *King v. Stokes*, 125 N. C. 514, 34 S. E. 641, the words "Unto Alfred May during the term of his natural life, and after his death to his wife, the said Ida Eugenia, and her children," were held to confer a remainder upon said wife and children as tenants in common. In *Gay v. Baker*, 58 N. C. 344, 68 Am. Dec. 229, the conveyance in trust for a woman and her children was held to make the mother and children tenants in common. The same construction was held as to a devise in *Moore v. Leach*, 50 N. C. 88; *Hunt v. Satterwhite*, 85 N. C. 73; *Hampton v. Wheeler*, 99 N. C. 222, 6 S. E. 236. In *Silliman v. Whitaker*, 119 N. C. 89, 25 S. E. 742, it was held that a devise to "S. and her children, if she shall have any," vested the title in S. and her children as tenants in common.

The ruling below that the devise carried a half interest to Polly Whitehead must be reversed.

(153 N. C. 117)

PERRY v. SEABOARD AIR LINE RY. CO.
(Supreme Court of North Carolina. Sept. 29, 1910.)

1. VENUE (§ 4*)—"LOCAL ACTION"—TRANSITORY ACTION.

A local action as distinguished from a transitory action is one where the principal facts on which it is founded are of a local nature, or which could have arisen only in some particular county.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 3; Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4202, 4203; vol. 8, p. 7708.]

2. VENUE (§ 5*)—LOCAL ACTIONS.

Actions to recover damages for injuries to land are local in their nature.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 9; Dec. Dig. § 5.*]

3. VENUE (§ 5*)—"INJURY TO REAL PROPERTY"—BURNING TIMBER.

The negligent burning of timber on land is an injury to real property within the meaning of Revisal 1905, § 419, providing that actions for injuries to real property must be tried in the county in which the subject of the action or some part thereof is situated, notwithstanding Act 1905, c. 367, amending such section (Code, § 192), and providing that actions against railroads may be tried in the county where plaintiff resided at the time the cause of action arose.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 9; Dec. Dig. § 5.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3619-3621.]

Appeal from Superior Court, Wilson County; D. L. Ward, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index.

Action by C. L. Perry against the Seaboard Air Line Railway Company. From an order denying a motion for change of venue, defendant appeals. Reversed.

Murray Allen, for appellant. Daniels & Swindell, for appellee.

WALKER, J. This action was brought in the superior court of Wilson county to recover damages for an injury to land situated in the county of Bladen. Plaintiff alleged that the defendant had negligently started a fire near its track, which spread over his land and burned the timber thereon. The defendant demanded in writing, as required by Revisal 1905, § 425, that the case be removed for trial to the proper county; that is, to the county of Bladen. This motion, called a demand in the statute, was refused, and the defendant appealed.

With regard to their venue, actions are divided into local and transitory. A local action is one where the principal facts upon which it is founded are of a local nature—an action, in other words, the cause of which could have arisen only in some particular county. Actions to recover damages for injuries to land are classified as local in their nature, because, generally speaking, the wrongful act or the damage to the land could only have been done in the county where the land, or some part thereof, is situated. 22 Enc. of Pl. & Pr. 776. Revisal, § 419, provides as follows: "Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial in the cases provided by law: (1) For the recovery of real property or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property." The negligent burning of timber on land is an injury to real property within the meaning and intent of that section (Railway v. Foster, 107 Ind. 430, 8 N. E. 264; Railway v. Weak, 81 Tenn. 148), and by its provisions an action to recover damages for such an injury should be tried in the county where the injury was committed, and, where it is brought elsewhere, the court will remove it for trial to the proper county upon application duly made. We have recently so decided in a case similar to this one. *Cooperage Company v. Lumber Company*, 151 N. C. 455, 66 S. E. 434. But the plaintiff contends that by Act 1905, c. 367, amending Code, § 192 (Revisal, § 424), it is provided that actions against railroads may be tried in the county where the plaintiff resided at the time the cause of action arose, and therefore that the action was properly brought in Wilson county and should be tried there, and he relies on *Propst v. Railroad*, 139 N. C. 397, 51 S. E. 920, to support his contention. The cause of action in that case was transitory, not local, in its

nature, as is the cause of action in this case, and the meaning of the proviso to section 424 is that actions against railroads, where not otherwise provided, shall be brought as therein prescribed. This is clear from the language of section 424. It is provided in the preceding sections where actions shall be tried, having reference to the nature of the causes of action, and without reference to the character of the defendant as being a natural or artificial person, and then provision is made for the trial of actions against public officers, executors, and administrators, domestic and foreign corporations. It is then provided by section 424 that in "all other cases" the action shall be tried as therein specified, with a different provision as to actions against railroads. We held in *Propst v. Railroad* that the proviso applied to all railroads, whether resident or nonresident, and we necessarily referred to an action of the kind then under consideration. It was not intended to decide, and we did not decide, that the proviso repealed section 419 or even modified it. The expression, "in all other cases," *ex vi termini*, excludes the idea that the Legislature intended the proviso to apply to an action against a railroad for the recovery of land, or any injury thereto, so that such an action will not be subject to the provisions of Revisal, § 419. When an action is brought for the recovery of real property, or any estate or interest therein, or for injuries thereto, the place of trial is determined by the nature of the cause of action, which is local, and not by the fact that one of the parties, the defendant, happens to be a railroad, and therefore it can make no difference who the parties are, whether natural or artificial persons. The proviso of section 424 is restricted to the kind of actions to which that section applies, and was not intended to except actions against railroads from the provisions of sections 419 and 420. In the case of *McCullen v. Railroad*, 146 N. C. 568, 60 S. E. 506, decided in 1908, it was conceded in the opinion that an action for a penalty must be brought in the county where the "cause of action or some part thereof arose," under section 420 of the Revisal. This would not be so unless the proviso to section 424 is to be construed as we have said in this case it should be. We held, it is true, in *Propst v. Railroad*, that it embraced railroad corporations, foreign and domestic, and to that extent created an exception to section 423 relating to such corporations, as to all causes of action coming within the provisions of section 424, to which it is an amendment, and this is so because the language of the amendment was so comprehensive as to take in both foreign and domestic railway corporations. The language of the opinion must be read with reference to the particular nature of that action, which was brought to recover damages for an injury to the person.

This appeal was properly taken from the order refusing to change the place of trial. *Connor v. Dillard*, 129 N. C. 50, 39 S. E. 641.

The court erred in refusing to grant the application for a removal of the case to the proper county for trial.

Reversed.

(153 N. C. 600)

STATE v. MAY.

(Supreme Court of North Carolina. Sept. 29, 1910.)

1. CRIMINAL LAW (§ 753*)—TRIAL—DIRECTION OF VERDICT.

The refusal to direct a verdict of not guilty is proper where the evidence is not all in.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 753.*]

2. CRIMINAL LAW (§ 683*)—TRIAL—SCOPE OF EVIDENCE IN REPLY.

In a trial for an affray, one of defendants against whom his codefendant and witnesses had testified was entitled to testify in rebuttal, not having been confronted with such witnesses; he having rested before any evidence which he cared to impeach was introduced against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1615-1617; Dec. Dig. § 683.*]

Appeal from Superior Court, Franklin County; Peebles, Judge.

Walter May was convicted of an affray, and appeals. Error.

W. M. Person and W. H. Yarborough, for appellant. The Attorney General, for the State.

CLARK, C. J. This was an indictment for an affray, and the defendant May alone was found guilty, and appeals.

The state introduced one witness and rested. The defendant May, whose name appeared first in the bill of indictment, without introducing evidence, moved the court to direct a verdict of not guilty. This was refused, the court saying that the evidence was not all in. In this there was no error. The defendant Jackson then produced evidence, much of which tended to incriminate May. When Jackson rested, the defendant May offered himself and others as witnesses in rebuttal of the evidence offered for Jackson. The court was of an opinion that he had no right to do so, and refused to allow said May to testify himself or put on other witnesses. In charging the jury the court said: "The state further contends that you should believe that part of the evidence offered by Jackson in which the witnesses testified that May struck Jackson with his stick willingly, and that you should be satisfied beyond reasonable doubt from that evidence that the defendant May is guilty." And further: "If you find from all the evidence beyond a reasonable doubt that either or both of the prisoners are guilty, you should say so." If the evidence offered by

Jackson had been used only to acquit him, the defendant May would have no ground to complain; but Jackson's evidence was competent against May, and was so used by the prosecution, and was submitted to the jury by the judge to be considered against him. It was therefore error not to permit May to reply to this evidence. He had not been "confronted" with these witnesses. It is true that, as to new matter brought out by May, the defendant Jackson, in turn, would have been entitled to a reply. But this anomaly is due to the fact that the testimony of the defendants in an affray is usually hostile to each other. Indeed, in trials for an affray the solicitor usually relies upon the testimony of the defendants to convict each other.

The conduct of a trial is largely left to the discretion of the presiding judge. But when the state relied upon the evidence offered by the defendant Jackson to convict May, the latter had a right to offer evidence in reply to evidence with which he had not been confronted when the state rested. When the defendant May rested, no evidence which he cared to impeach had been introduced against him, and there was nothing which he cared to contradict. Hence he rested and waited for further evidence. "Where, on the trial of four defendants indicted for an affray, three of them testified, and the fourth, their antagonist, was called in his own behalf, the other defendants had the same right to impeach him on cross-examination as if he had been a witness instead of a codefendant." *S. v. Goff*, 117 N. C. 735, 23 S. E. 355.

Error.

(153 N. C. 110)

NEWBY et al. v. EDWARDS.

(Supreme Court of North Carolina. Sept. 29, 1910.)

1. EJECTMENT (§ 110*)—INSTRUCTIONS.

In a suit by an heir to recover property claiming it to have been transferred to her intestate, Julia A. Edwards, while defendant claims that it was transferred to intestate's unborn child, Julia O. Edwards, who was never born, the court's instruction that if intestate was sometimes called Julia Caroline, and sometimes called Julia Ann, then the finding must be that the conveyance was to intestate and not to her unborn child, as the middle name is of no importance, and the law presumes that the conveyance was intended to be made to a living person and not to one not in existence, was erroneous, as making the case turn on the fact that intestate was sometimes called different names, whereas the issue was who was the grantee; the middle name being important where the question of identity arose thereon.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 110.*]

2. TRIAL (§ 253*)—INSTRUCTION—IGNORING EVIDENCE OF THE BENEFIT OF TESTIMONY.

The instruction was also erroneous as depriving defendant of the benefit of his testimony

explaining why the conveyance was not to intestate, but was to her unborn child.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

3. TRIAL (§ 253*)—INSTRUCTION—IGNORING ISSUES.

The instruction was also erroneous as depriving defendant of the benefit of the argument that intestate was one of the grantors in the conveyance, and would not likely have attempted to deed property to herself.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

4. NAMES (§ 14*)—MIDDLE NAMES—QUESTIONS OF IDENTITY.

The consideration of a person's middle name becomes of importance in a question of identity.

[Ed. Note.—For other cases, see Names, Dec. Dig. § 14.*]

5. TRIAL (§ 140*)—QUESTION FOR THE JURY.

In a suit by an heir to recover property, claiming it to have been deeded to intestate, the credibility of defendant's statement that the property was deeded to intestate's unborn child was a matter for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

Appeal from Superior Court, Craven County; Peebles, Judge.

Ejectment by Polly Newby and others against Shade Edwards. Judgment for plaintiffs, and defendant appeals. New trial.

These issues were submitted:

"(1) Is feme plaintiff the owner on fee simple and entitled to the possession of the lands described in the complaint? Answer: Yes.

"(2) Does defendant wrongfully withhold the possession of the land from the plaintiff? Answer: Yes.

"(3) If so, what damages, if any, is plaintiff entitled to recover of the defendant for wrongfully withholding possession of the land from feme plaintiff? Answer: \$2.50 for whole rent, \$4.16 for plaintiff."

Simmons, Ward & Allen, for appellant. W. D. McIver, for appellees.

BROWN, J. The feme plaintiff claims the land in controversy as the heir at law of Julia, the deceased wife of defendant, Shade Edwards, who died intestate without having given birth to a child.

The land was purchased by defendant from W. G. Brinson, and conveyed by a deed dated February 11, 1891, wherein said Brinson, Shade Edwards, and his wife, Julia A. Edwards, are grantors and Julia C. Edwards grantee. Defendant Shade Edwards testified that he was married to Julia A. Edwards in 1875, and lived with her for 24 years; that he had never heard her called by any other name than Julia A. Edwards; that he purchased this land from W. G. Brinson; that prior to this purchase he had made over most of his property to his wife, Julia A. Edwards, as he was a drinking man, and was afraid that he might incur his property

while under the influence of whisky; that he and his wife agreed that they would have the lot described in the complaint deeded to their unborn child, supposed to be in esse; that he paid the purchase money and was advised by Brinson that, in order to have the deed made to an unborn child, it must be named, and that thereupon he and his wife agreed upon the name of Julia C. Edwards; that his wife, Julia, died, and no child was ever born to them. It further appears that thereafter the heirs of Brinson executed a deed, dated September 23, 1907, to defendant for the land. Plaintiff Polly Newby is one of the three heirs at law of defendant's deceased wife. There is much other evidence in the record introduced by both parties unnecessary to refer to.

The seventh assignment of error is as follows: The court erred in charging the jury: "If you are satisfied by the greater weight of the evidence that Julia, the wife of Shade, sometimes called Julia Caroline and sometimes called Julia Ann, you will answer the first issue, 'Yes,' for the plaintiff is the owner in fee simple, entitled to possession of the land described in the complaint, because the Supreme Court says the middle name is no important part of anybody's name, and the law presumes where there was a living person to take that land that that person was intended instead of somebody that had no existence." The exception must be sustained. It is true that in certain cases the initial of the second Christian name is unimportant, but this is only in such cases where the identity is certain. If there is any question as to the identity of the person, the initial or "middle name" becomes very important. *Patterson v. Walton*, 119 N. C. 500, 26 S. E. 43; *Gibbs v. Fuller*, 66 N. C. 116; *State v. Best*, 108 N. C. 747, 12 S. E. 907; *Stevens v. West*, 51 N. C. 50; 29 Cyc. 264 et seq.; 5 Words and Phrases, p. 4660; *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197. The instruction appears to us to make the case turn exclusively upon the proposition that defendant's wife was sometimes called Julia Ann and sometimes Julia Caroline; whereas the real point in the case is as to who was the grantee in the deed of February 11, 1891, defendant's wife, Julia, or their unborn child then supposed to be in its mother's womb. If the former, then plaintiff is entitled to recover a one-third interest in the lot. If the latter, then plaintiff takes nothing by her writ. This instruction further deprives defendant of the benefit of his entire testimony explaining why the Julia C. Edwards, the grantee in the deed, was not his deceased wife. It further deprives defendant of a very potent argument to the effect that the deed to Julia C. Edwards was executed by Julia A. Edwards, the wife, and that it is not likely that she would be grantor and grantee in the same deed, and engaged in the

legal anomaly of making a deed to herself. The credibility of defendant's statement and its reasonableness is a matter for the jury. The matter involved is essentially one of fact, to be determined by the jury under proper instructions.

New trial.

(153 N. C. 120)

ROBERSON v. GREENLEAF JOHNSON LUMBER CO.

(Supreme Court of North Carolina. Sept. 29, 1910.)

1. CORPORATIONS (§ 503*)—MAINTENANCE OF OFFICE WITHIN STATE.

As required by Acts 1901, c. 2, § 49 (Revisal 1905, § 1179), every corporation must maintain its principal office in some county within the state, which fixes its residence for the purpose of suing and being sued, even though its charter permits it to have its principal office at a place out of the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1935-1939, 1942-1946; Dec. Dig. § 503.*]

2. CORPORATIONS (§ 503*)—DOMESTIC CORPORATIONS—WHERE THEY MAY BE SUED.

A domestic corporation can be sued in the same venue as an individual, except railroads, under Revisal 1905, § 424, providing that they may be sued either in the county where the cause of action arose or in the county where plaintiff resided at the time the cause of action arose.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1935-1939, 1942-1946; Dec. Dig. § 503.*]

3. CORPORATIONS (§ 503*) — ACTIONS — VENUE — "PRINCIPAL PLACE OF BUSINESS" — "PRINCIPAL OFFICE."

The phrase "principal place of business," as used in Revisal 1905, § 422, providing that the principal place of business of a domestic corporation shall be its residence for purposes of suing and being sued, is synonymous with the words "principal office," as used in Revisal 1905, §§ 1137, 1176, 1179, respectively providing that, in the formation of a corporation, the location of the principal office in the state must be set forth in the certificate of incorporation, that the board of directors may change the principal office, and that the meeting of stockholders shall be at the principal office in the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1935-1939, 1942-1946; Dec. Dig. § 503.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5559, 5560.]

4. CORPORATIONS (§ 503*) — ACTION—VENUE—STATUTE.

Revisal 1905, § 422, providing that, for the purpose of suing and being sued, the place of business of a domestic corporation shall be its residence, does not change Revisal 1905, § 424, establishing the venue of actions in certain cases, nor deny plaintiff's right to sue a domestic corporation in the county in which he resides, except as to certain causes of action whose venue is fixed by other statutory provisions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1935-1939, 1942-1946; Dec. Dig. § 503.*]

5. DEATH (§ 36*)—ACTION—VENUE.

An action for wrongful death of an employé against the employer, a domestic lumber corporation, operating a private steam railroad for

transporting its product, may be instituted in the county where the administratrix resided at the commencement of the action, and where she and the intestate resided when the cause of action arose, irrespective of whether the defendant is a railroad company or not, within the proviso to Revisal 1905, § 424.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 51; Dec. Dig. § 36.*]

Appeal from Superior Court, Martin County; Gulon, Judge.

Action by H. A. Roberson, administratrix, against the Greenleaf Johnson Lumber Company. From the denial of a motion for change of venue, defendant appeals. Affirmed.

The plaintiff instituted this action against the defendant, a corporation, in Martin County, to recover damages for the negligent killing of her intestate, J. W. Roberson, while in the service of the defendant. The injuries resulting in immediate death of Roberson were received by him in Warren county. His honor found the following facts: "That the plaintiff administratrix and her intestate were residents of the county of Martin at the date of the alleged death of intestate. That the Greenleaf Johnson Lumber Company is a corporation engaged in the lumber business, with its principal office and place of business in Warren county, and in connection with its lumber business is engaged in running and operating a steam railroad for the transportation of its own logs and lumber only, and neither equipped for nor engaged in the transportation of passengers thereon; said road being operated under and by virtue of the special acts of the General Assembly, Private Acts 1889, chapter 27." Whereupon his honor denied the motion for a change of venue, and the defendant excepted, and appealed to this court.

Winston & Matthews, for appellant.

MANNING, J. While section 3 of the act incorporating the defendant (Priv. Laws 1889, c. 27) provides that Norfolk, Va., shall be the place of its principal office, this court held in *Simmons v. Steamboat Company*, 113 N. C. 147, 18 S. E. 117, 22 L. R. A. 677, 37 Am. St. Rep. 614: "It has been held, without reference to any express provision of law or specific requirement of the charter, that it is the duty of a corporation to keep its principal place of business, its books and records, and its principal officers within the state which incorporates it, to an extent necessary to the fullest jurisdiction and visitatorial power of the state and its courts, and the efficient exercise thereof in all proper cases which concern said corporation." While at the time of that decision—1893—there was no statute specifically imposing such duty upon a corporation created under the laws of this state, it was held that there was "a general system of legislation" im-

posing such duty. But Acts 1901, c. 2, § 49, now section 1179, Revisal 1905, specifically requires that "every corporation shall maintain a principal office in this state, and have an agent in charge thereof, wherein shall be kept the stock and transfer books for the inspection of all who are authorized to see the same, and for the transfer of stock," and the same act, now section 1176, Revisal, provides the method to be pursued to change the location of the principal office from one place in the state to another in the state. Although a domestic corporation may be authorized to maintain an office at some point beyond the state, at which some corporate meetings may be held, under our present statutes the corporation is not absolved from the duty of maintaining a principal office in some county in this state, which fixes its residence in such county for the purpose of suing and being sued. *Garrett v. Bear*, 144 N. C. 23, 56 S. E. 479.

The words "principal place of business," as used in section 422, Revisal, must be regarded as synonymous with the words "principal office," as used in sections 1137, 1176, 1179, and other sections of the Revisal. The purpose of section 422, Revisal, was not to change the provisions of section 424, Revisal, or to deny to a plaintiff the right to bring his action against a domestic corporation in the county in which he resides, except, of course, in those causes of action where the venue for trial is particularly fixed by other sections of the Revisal, such as sections 419, 420, 421, Revisal. *Propst v. Railroad*, 139 N. C. 397, 51 S. E. 920. The sole purpose of this section was to remedy a defect in our statute law, as construed in *Cline v. Manufacturing Co.*, 116 N. C. 837, 21 S. E. 791, and *Farmers' State Alliance v. Murrell*, 119 N. C. 124, 25 S. E. 785, in which cases it was held that a domestic corporation had no residence, within the meaning of section 424, Revisal (Code, § 192), although it had a principal office or place of business in the state, and, being without a legal residence in any particular county in the state, it could be sued, to its great inconvenience and loss, by a nonresident in any county designated in the summons. This defect was remedied, and a domestic corporation can be sued in the same venue as an individual, except railroads, under the proviso of section 424, Revisal.

His honor also finds that the intestate, at the time the injury was received resulting in his death, was a resident of Martin county, and that the plaintiff, his administratrix, was a resident of the same county at the commencement of the action. It is immaterial, in determining the proper venue of this action, to decide whether the defendant is a "railroad," within the meaning of that word as used in the proviso to section 424. Revisal; it being alleged that the plain-

tiff, an employé, was negligently killed on defendant's lumber road, because, if a "railroad" (as that word is applied in *Blackburn v. Lumber Co.*, 151 N. C. 361, 67 S. E. 915, and cases cited), Martin county was the residence of the plaintiff and her intestate at the time the cause of action accrued, and, if not a "railroad," then the action was properly brought in that county, as the plaintiff resided therein at the commencement of the action.

We think his honor properly denied the motion of defendant to change the venue, and his judgment is affirmed.

(153 N. C. 96)

JOHN L. ROPER LUMBER CO. v. HUDSON
et al.

(Supreme Court of North Carolina. Sept. 29, 1910.)

1. WILLS (§ 434*)—FOREIGN WILL—EVIDENCE.

A will of a citizen of another state, executed and probated in such state, it having been executed substantially according to the laws of North Carolina, and probated substantially according to its form, and thereafter filed and probated in proper form in North Carolina, is admissible in evidence, under Revisal 1905, § 3133.

[Ed. Note.—For other cases, see *Wills*, Dec. Dig. § 434; * *Evidence*, Cent. Dig. § 1416.]

2. ESTOPPEL (§ 22*)—ACCEPTANCE AND SATISFACTION OF MORTGAGE.

H. and his privies are estopped to assert that he had not conveyed land to R., he having accepted a mortgage thereof from R., reciting that it was the "land deeded to me * * * this day by H.;" R. having thereafter for several years been in possession of the land, and having then deeded it to D., and shortly thereafter H. having made the entry on the record of the registration of the mortgage: "This mortgage is discharged by the mortgagor giving a deed to D., the present owner of the mortgage and notes described therein."

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 27-51; Dec. Dig. § 22.*]

Appeal from Superior Court, Jones County; Peebles, Judge.

Civil action by the John L. Roper Lumber Company against Sam Hudson and others. From a judgment on a verdict for plaintiff, defendants appeal. Affirmed.

The issues, with the responses of the jury, were as follows:

"(1) Is the plaintiff the owner of the lands described in the complaint? Ans. Yes.

"(2) Did the defendant, E. T. Bender, trespass on said lands? Ans. Yes.

"(3) What damages is plaintiff entitled to recover of the defendant E. T. Bender? Ans. \$23.53½."

The defendant Sam Hudson died pending the action and before trial, and his widow and son, his only heir at law, were made parties. It was admitted that the trespasses charged against Bender were committed by him as agent of Sam Hudson. In deraigning

title the plaintiff offered a paper purporting to be the last will and testament of W. T. Dixon, who died domiciled in Baltimore, Md., where his will was admitted to probate by the decree of the Orphans' court of that city. It was attested by three witnesses, and the proof of its execution was taken by the register of wills of that court in a form substantially similar to the method prescribed by the statutes of this state. An exemplified copy of the will and probate was offered for probate in Jones county, but it was improperly done. The will was probated in Baltimore on August 25, 1904, and filed in the clerk's office of Jones county November 18, 1908. When his will, as recorded in Book of Wills of Jones County, was offered in evidence, upon objection by defendants, his honor permitted the clerk nunc pro tunc to order its probate in proper form, and it was received in evidence over defendant's objection. The plaintiff also offered a mortgage deed duly recorded in Jones county, dated October 4, 1883, by Randolph Harris and wife to Samuel Hudson, conveying the land in controversy to secure an indebtedness evidenced by notes aggregating \$700. After describing the land, the mortgage contained this language: "It being all of the Thomas Hall tract of land deeded to me in a deed made to me this day by S. Hudson." The plaintiff proved and offered the following writing on the margin of the book of registration of the mortgage: "This mortgage is discharged by the mortgagor giving a deed to W. T. Dixon and Bro., the present owners of the mortgage and notes described therein. May 6, 1889. Samuel Hudson. Witness: J. A. Smith, Reg." The deed from Randolph Harris to W. T. Dixon & Bro. was offered in evidence, dated April 19, 1889, and was registered on May 21, 1889. The plaintiff offered declarations of Samuel Hudson tending to show a recognition of Dixon's title, which were admitted over defendant's objection. No deed from Samuel Hudson was offered in evidence. The defendants offered evidence of deeds antedating any of the deeds offered by plaintiff, placing the title in Samuel Hudson, the last one dated March 19, 1871. The plaintiff offered evidence tending to show possession by Harris from the date of his purchase to his sale to Dixon, and then by tenants of Dixon to his death, and by other mesne holders of the title to the plaintiff and its possession up to the bringing of this action. The acts constituting the alleged trespass were admitted. The defendant offered evidence to show that Hudson was indebted to Dixon and transferred notes sufficient to secure his indebtedness, and that the indebtedness was paid by the proceeds of the sale of lumber cut from the land. The evidence was excluded, and defendants excepted. Judgment was rendered upon the verdict for plaintiff, but the right of dower of the widow of Samuel Hudson was preserved. The defendants excepted and appealed.

Moore & Dunn and Loftin, Varner & Dawson, for appellants. Simmons, Ward & Allen, Thos. D. Warren, and P. M. Pearsall, for appellee.

MANNING, J. One of the exceptions seriously argued before us was to the admission in evidence of the will of W. T. Dixon. We have carefully examined the record and certification of its probate in the orphans' court of Baltimore, the court having jurisdiction to admit wills and testaments to probate, and, though the pages of the manuscript exemplified copy are not orderly arranged, yet an examination discloses every fact required by section 3183, Revisal 1905, to entitle the will to be admitted to probate and record in this state. *Roscoe v. Lumber Co.*, 124 N. C. 42, 32 S. E. 889. The older decisions, as *Drake v. Merrill*, 47 N. C. 368, do not apply, for the reason that the statutes are not the same. The will was executed according to the laws of this state, and the probate substantially made according to our form, and that fact appears in the certified probate or exemplification of the will. We cannot sustain this exception.

The plaintiff, admitting the title to have been in Samuel Hudson and producing no deed from him, offered evidence which it contends amounts to an estoppel upon his heir at law and his agent, who claim title under Samuel Hudson. The other defendant is the widow of Hudson, who claims no title to the fee in the land, but who is entitled to her dower therein. The question presented by these exceptions is: Do the facts proven, taken together or singly, amount to an estoppel? These facts are that Samuel Hudson took a mortgage from Randolph Harris, in which was the recital, "It being all of the Thomas Hall tract of land deeded to me in a deed made to me this day by S. Hudson," and that thereafter, for several years, said Harris was in the actual possession of said land; that he conveyed the land to Dixon for the consideration of \$700 on the 19th April, 1889, and in a few days thereafter—on May 6, 1889—the said Samuel Hudson made the following entry on the record of the registration of the mortgage: "This mortgage is discharged by the mortgagor giving a deed to W. T. Dixon & Bro. the present owners of the mortgage and notes described therein." And after that time the evidence tended to show that Hudson recognized the title to be in Dixon. The mortgage by Harris to Hudson was a conveyance to him of the legal title. "In some of the states a mortgage is held by statutory regulation or judicial construction to be simply a lien, leaving the legal estate in the mortgagor. In North Carolina and many other states the common-law prevails, and the mortgage deed passes the legal title at once, defeasible by subsequent performance of its conditions." *Hinson v. Smith*, 118 N. C. 508, 24 S. E. 541; *Williams v. Teachey*, 85 N. C. 402; *Mod-*

lin v. Insurance Co., 151 N. C. 35, 65 S. E. 605, and cases cited. And this is true, notwithstanding the statute has prescribed simple methods of acknowledgment of satisfaction which restores the legal title in the mortgagor other than by deeds of defeasance. In *Smith v. Fuller*, 152 N. C. 9, 67 S. E. 48, it is held by this court that the entry of satisfaction on the margin of its registration by the proper person is conclusive of the fact of the discharge of the mortgage and its satisfaction as to strangers to the mortgage. In *Fort v. Allen*, 110 N. C. 183, 14 S. E. 685, this court in discussing estoppels by recitals in deeds quotes with approval the following language of *Henderson, C. J.*, in *Brinegar v. Chaffin*, 14 N. C. 108, 22 Am. Dec. 711: "Recitals in a deed are estoppels when they are the essence of the contract; that is, where, unless the facts recited exist, the contract, it is presumed, would not have been made." It is inconceivable, unless it were true, that Hudson would have accepted a deed from Harris for land claimed by him, Hudson, containing a recital that he, Hudson, had conveyed the same land on the same day to Harris, and accepted it as security for \$700, evidently the whole or a part of the purchase price. It is evident that the conveyance from Hudson to Harris was the basis of the contract, and without such a conveyance it is fair to assume the mortgage deed would not have been made. "Such, we think, is the necessary inference to be drawn from the recital in the deed." This inference is made conclusive by the fair interpretation of the entry of satisfaction of the mortgage deed. From that it is evident that Hudson had previously assigned the notes secured by the mortgage to Dixon, and recognized the discharge of those notes and the satisfaction of the condition of the mortgage by the deed of conveyance from Harris to Dixon. Harris settled the notes by making a deed to the land, and Hudson was satisfied. *Raby v. Reeves*, 112 N. C. 688, 16 S. E. 760; 2 *Herman on Estoppel and Res Adjudicata*, §§ 636, 917. In 2 *Herman on Estoppel*, § 926, the principle is thus stated: "Where a person takes from another a mortgage of lands, the record title which is in himself at the time such mortgage is executed, and in good faith assigns such mortgage, and it is foreclosed, neither such mortgagee nor his representatives or privies can set up such prior title in him to defeat the mortgage." *Rogers v. Cross*, 3 Chand. (Wis.) 34; *Carver v. Jackson*, 4 Pet. 1. 83-88, 7 L. Ed. 761. In that action Samuel Hudson was the original defendant. He died pending the suit, and his widow and only heir at law were made parties. They claim as privies to the title of Samuel Hudson—not by any adverse or paramount title. And we think it is clear from the authorities cited they are estopped, as Samuel Hudson was estopped, by the recitals

in the deed, by the entry on the record of satisfaction of the mortgage deed as a recognition of Harris' title and his conveyance to Dixon & Bro. of the land. The right of the widow of Samuel Hudson to dower is preserved to her in the judgment of his honor. Having carefully examined the other exceptions taken at the trial, we do not think they can be sustained.

Finding no reversible error, the judgment is affirmed.

No error.

(153 N. C. 90)

VICK v. TRIPP et al.

(Supreme Court of North Carolina. Sept. 29, 1910.)

1. JUDGMENT (§ 681*)—PARTIES CONCLUDED.

A judgment partitioning land, an interest in which had been devised to one for life, with remainder to another, is a nullity as to the latter, he not having been a party to or considered in the proceedings.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1202; Dec. Dig. § 681.*]

2. ESTOPPEL (§ 27*)—JOINDER IN DEED.

There having been devised to S., for life, with remainder to T., a quarter interest in lands, and S. having acquired another quarter interest therein from R., partition proceedings were had, to which T. was not a party, and certain tracts were allotted to S. After S. had deeded one of such tracts to defendant, she executed to B. a deed of another of them, reciting that the land was allotted to S. in such proceedings, in which deed T. joined. *Held*, that the joinder of T. in the deed was at most a recognition by him that the tracts set apart to S. were the two shares in the partitioned land, one of which had been acquired from R. and the other devised to S. for life with remainder to T., thus avoiding another proceeding for partition, and did not estop him to claim an undivided interest as remainderman, at least in the land deeded to defendant, and was not an election to treat as his share as remainderman the land deeded to B.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 63-67; Dec. Dig. § 27.*]

3. LIFE ESTATES (§ 11*)—WASTE BY TENANT FOR LIFE.

A life tenant of land cannot authorize her grantee thereof to commit waste as against the remainderman.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. § 42; Dec. Dig. § 11.*]

4. TENANCY IN COMMON (§ 26*)—WASTE.

A tenant in common of land cannot as against his co-tenant commit such waste as is destructive of the estate, and not within the usual legitimate exercise of the right of enjoyment thereof.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 68, 69; Dec. Dig. § 26.*]

Appeal from Superior Court, Pitt County; Peebles, Judge.

Civil action by Thomas A. Vick against Joshua Tripp, Jr., and others. From an adverse judgment, plaintiff appeals. Reversed.

T. R. Cherry died in the spring of 1890, in Pitt county, leaving a last will and testament, which was duly admitted to probate. After

bequeathing all his household and kitchen furniture and all other personal property in his house to his wife, Sallie A. Cherry, he devised all the balance of his estate to his four surviving children, to wit, T. A. Cherry, R. D. Cherry, Mrs. Maggie S. James, and Lillian Cherry. The balance of his estate consisted of several town lots and several parcels of farm lands, including the land involved in this controversy. Subsequently T. A. Cherry died in 1891, leaving his last will and testament, which was duly admitted to probate in Pitt county, in which he devised all his estate to his mother, Sallie A. Cherry, "to have and to hold her life-time and to use for her benefit exclusively, at her death to Thomas Argall Vick," and, if he should die under 21 years, then other disposition was made. Thomas Argall Vick is the plaintiff, and was a nephew of T. A. Cherry. Subsequently, also, to the death of T. B. Cherry, R. D. Cherry, a son and devisee of the testator, T. R. Cherry, conveyed his undivided interest to his mother, Sallie A. Cherry, by deed duly recorded. Still later a special proceeding for partition was brought in the superior court of Pitt county by J. B. Cherry, S. A. Cherry, Lillie Cherry, Maggie James, and her husband, D. L. James, against Thos. J. Jarvis, H. E. Daniel, and another. J. B. Cherry, one of the plaintiffs in the partition proceeding, was a tenant in common with the testator, T. R. Cherry. The plaintiff Thomas Argall Vick, being at that time an infant of tender years, was not made a party, plaintiff or defendant, to said proceeding nor was any guardian ad litem or next friend appointed for him, nor any process served upon him or his name mentioned in the petition. The petition alleged that the plaintiffs were tenants in common, seised in fee and in possession of the lands and lots described, among them the land in this controversy. As a result of, and by the judgment of, the court in that proceeding begun in 1895, three lots were set apart to, and allotted to, Sallie A. Cherry, to wit, a storehouse and lot in Greenville, a lot in Greenville containing $3\frac{1}{2}$ acres, and the farm containing $192\frac{1}{2}$ acres, the land admitted to be in the possession of the defendant. It was admitted that the storehouse and lot at the date of the partition was worth twice as much as the other two parcels of land. On September 25, 1897, Sallie A. Cherry sold and conveyed the land in controversy to Henry Sheppard, and it has by mesne conveyances come to the possession of the defendant Tripp. At the date of these deeds the plaintiff was an infant, and did not join therein. Sallie A. Cherry died December 30, 1903, and this action was commenced April 21, 1909. On July 21, 1905, the plaintiff, then being of age, joined Sallie A. Cherry in a deed for the storehouse and lot, which in the description these words are used: "Which was allotted to the said S. A. Cherry in the division

of the lands of T. R. Cherry and Company, as recorded in the clerk's office of Pitt county, in the record of the division of lands in Book 2, page 163, to which reference is hereby made." The plaintiff sues to be let into possession with the defendant, as tenants in common, entitled to an undivided one-half interest, for an accounting for rents, and timber cut and sold. The court intimated upon the foregoing facts: "(1) That plaintiff could not ratify the partition proceedings as to the quantity of land allotted to S. A. Cherry and repudiate it as to the quality of the estate. (2) That his joining in the deed to the store lot with S. A. Cherry was an election to take it as his share of the lands. (3) That, if he had not signed the deed to the store lot, the plaintiff had the right in equity to compel S. A. Cherry to take the two tracts conveyed to her as her share of the common property, and that the plaintiff, having by signing the deed to the store lot deprived defendant of this means of protecting himself, was in equity and good conscience estopped from claiming any interest in the locus in quo." To this intimation of his honor, plaintiff, having excepted, submitted to a nonsuit and appealed to this court.

W. F. Evans and Harry Skinner, for appellant. Jarvis & Blow, for appellees.

MANNING, J. As an adjudication of the right, title, or interest of the plaintiff in the common property, the judgment of the court in the special proceedings was a nullity. The plaintiff was not a party to that proceeding in name or by service of process, nor did any one pretend to appear for or represent him. It is contended, however, that he is effectually concluded and estopped by that judgment as if he were a party thereto, because 10 years thereafter he joined Mrs. S. A. Cherry—one of the parties to that proceeding—in a deed to one Brown, conveying one of the lots allotted to Mrs. Cherry, and because reference to that proceeding is made in the deed for a more particular description of the lot. But the deed to the locus in quo was made by Mrs. Cherry several years before the deed to Brown, and while the plaintiff, it seems from the evidence, was an infant. So that it is now contended that the plaintiff is estopped by a judgment entered in a proceeding to which he was not a party, and by a deed to which he was not a party and of which he had no knowledge, solely because he joined in the deed to Brown. It would seem that the fact that the plaintiff joined with Mrs. Cherry in the deed to Brown was, at least, an assertion of claim by him to an interest in the land conveyed and a recognition of such claim by Mrs. Cherry and the grantee. Otherwise, his joinder was wholly unnecessary. The defendants were strangers to that deed; they assert no title under it. If we concede that the recital in the descriptive clause was a recognition of the special proceedings, and

could be held an estoppel upon plaintiff to deny the existence of the special proceedings and the conclusiveness of its effect, it could be taken advantage of only by the grantee in that deed, or those claiming under him. This is discussed in *Lumber Co. v. Hudson* (at this term) 68 S. E. 1065. In *Johnston v. Case*, 132 N. C. 795, 44 S. E. 617, Walker, J., speaking for this court, said: "It must be conceded that the description in one deed may be referred to in another deed for the purpose of identifying and making more certain the lines and boundaries of the land which is intended to be conveyed (*Everitt v. Thomas*, 23 N. C. 252; *Reed v. Reed*, 93 N. C. 462; *Davidson v. Arledge*, 88 N. C. 326; *Hemphill v. Annis*, 119 N. C. 514 [26 S. E. 152]), provided, as is said in the last case cited, the language used points so clearly to the explanatory deed or instrument as to make it possible to identify it, and provided, further, that the deed to which reference is made is produced at the trial." This is undoubtedly the ordinary purpose, but it may, in exceptional cases, in conjunction with other facts, constitute an estoppel upon the grantor as well as the grantee. The other facts in this case all tend to contradict, instead of supporting, an estoppel against the plaintiff, and would seem to limit the reference to the special proceedings to the purpose of aiding in the description of the lot. We do not think the doctrine of election applicable to or decisive of this case. This "doctrine rests on the maxim that he who asks equity must do it, and means that, where two inconsistent rights are presented to the choice of a party by a person who manifests a clear intention that he shall not enjoy both, he must accept or reject one or the other; in other words, that one cannot take a benefit under an instrument and then repudiate that instrument." *Fetter on Equity*, 51; *Tripp v. Nobles*, 136 N. C. 99, 48 S. E. 675, 67 L. R. A. 449; *Norwood v. Lassiter*, 132 N. C. 52, 43 S. E. 509, in which case several illustrations are given of the application of this doctrine. The facts of this case certainly do not disclose any of the circumstances essential to the application of the doctrine to the plaintiff, certainly to the extent that will in any way inure to the benefit of the defendants. At the most, it can be said that the joinder of the plaintiff in the deed containing the references to the special proceedings was only a recognition by him that the lots set apart to Mrs. S. A. Cherry in that proceedings were the shares of R. D. Cherry and T. A. Cherry as tenants in common in the lands devised under the will of T. R. Cherry, and the effect of this would be simply to avoid another proceeding for partition. Accepting this as the limit of conclusiveness

upon plaintiff of the recital the deed executed by him with Mrs. Cherry, the plaintiff would be tenant in common of an undivided one-half interest in the other parcels of land allotted to Mrs. Cherry, and as the defendants have, by the deed of Mrs. Cherry, become the owners in fee of her interest, it must follow that the plaintiff is entitled to be admitted into possession of the locus in quo as tenant in fee of an undivided one-half interest, and to an accounting for the rents and profits since Mrs. Cherry's death, and for the timber sold. The life tenant, Mrs. Cherry, could not by her deed authorize her vendee to commit waste, nor could the defendant Tripp as tenant in common of an undivided one-half interest commit such waste as "is destructive of the estate, and not within the usual legitimate exercise of the right of enjoyment of the estate." *Dodd v. Watson*, 57 N. C. 48, 72 Am. Dec. 577; 17 Am. & Eng. Enc. 671; *McPherson v. McPherson*, 33 N. C. 391, 53 Am. Dec. 416; *Roberts v. Roberts*, 55 N. C. 131. Nor can we see, as intimated by his honor, how plaintiff's joining with Mrs. Cherry in the deed to Brown, with its reference to the special proceedings, was a ratification by him, not only of the land set apart to Mrs. Cherry as the part she was entitled to under the deed of R. D. Cherry and the will of T. A. Cherry—her only sources of title to any interest—but also that she was the owner in fee thereof and that he, the plaintiff, became divested of all interest devised to him under the will of T. A. Cherry. We cannot perceive any element of ratification in this act further than we have already suggested as its ultimate limit. If we concede that plaintiff's act was a recognition of the partition proceedings to the extent of the allotment to Mrs. Cherry as the shares of R. D. Cherry and T. A. Cherry, the plaintiff, upon the death of Mrs. Cherry, became entitled as tenant in common to an undivided one-half interest in the lands so allotted; the other tenants in common being those claiming under Mrs. Cherry as the assignee of R. D. Cherry. This tenancy in common extended to each separate tract, unless, as in the case of the lot sold to Brown, the plaintiff had joined in a deed conveying it. This must be true regardless of, and unaffected by, the value of any particular tract. There has been no partition by deed or otherwise between those claiming under Mrs. Cherry, as the assignee or vendee of R. D. Cherry, and the plaintiff, as the devisee of the fee of the interest of T. A. Cherry under his will. For the reasons given, the judgment of nonsuit will be set aside and the action further proceeded in accordance with the rights of the parties.

Reversed.

(3 Ga. App. 234)

HANSFORD v. NATIONAL BANK OF TIFTON.**NATIONAL BANK OF TIFTON v. HANSFORD.** (Nos. 2,536, 2,537.)

(Court of Appeals of Georgia. Sept. 28, 1910.)

*(Syllabus by the Court.)***NONSUIT PROPERLY GRANTED.**

Plaintiff did not prove the allegations of his petition as laid, and the court did not err in granting a nonsuit.

Error from City Court of Tifton; R. Eve, Judge.

Action by J. D. Hansford against the National Bank of Tifton. Judgment of nonsuit, and plaintiff brings error, defendant filing cross-exceptions, affirmed on main bill of exceptions, and cross-bill dismissed.

C. C. Hall, Claude Payton, and C. E. Hay, for plaintiff in error. Hendricks & Christian and Fulwood & Murray, for defendant in error.

HILL, C. J. Judgment affirmed on main bill of exceptions. Cross-bill of exceptions dismissed.

(3 Ga. App. 291)

TUGGLE v. BANK OF CAVE SPRING.
(No. 2,515.)

(Court of Appeals of Georgia. Sept. 28, 1910.)

*(Syllabus by the Court.)***1. NAMES (§ 10*)—BILLS AND NOTES (§§ 123, 459*)—EXECUTION OF NOTE IN ASSUMED NAME—RIGHTS OF HOLDER.**

Where one executes for his own benefit a promissory note on which he secures money from the payee for himself, giving no indication that he is acting for another, and in fact acting solely for himself, and the payee deals with him as principal, under the impression that the name signed to the note is in fact the name of the party for whose benefit it is made and the money advanced, the note is the individual contract of the one who makes it, although he may sign to it a fictitious name or the name of another person. In such case it is not necessary for the payee or holder of the note to resort to equity to reform the contract, but he can bring suit on the note against the party who really made the contract.

[Ed. Note.—For other cases, see Names, Cent. Dig. § 7; Dec. Dig. § 10;* Bills and Notes, Cent. Dig. §§ 260-267, 1424-1433; Dec. Dig. §§ 123, 459.*]

*(Additional Syllabus by Editorial Staff.)***2. WITNESSES (§ 140*)—COMPETENCY—TRANSACTIONS WITH DECEASED PERSONS.**

In an action against an administratrix on a note executed by decedent in the assumed name of another, where both the petition and the undisputed evidence negated any liability of the person whose name was used on the note, such person was not an incompetent witness as to his transactions with decedent; he having no interest in the result of the action.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 140.*]

Error from City Court of Polk; F. A. Irwin, Judge.

Action by the Bank of Cave Spring against M. L. Tuggle, administratrix, of W. R. Tug-

gle. Judgment for plaintiff, and defendant brings error. Affirmed.

Mundy & Mundy, for plaintiff in error. Bunn & Bunn, for defendant in error.

HILL, C. J. The Bank of Cave Spring brought suit against the administratrix of W. R. Tuggle on two promissory notes, one for \$25 and one for \$100, each signed "H. B. Tuggle." The petition alleges that W. R. Tuggle, the defendant's intestate, borrowed the money from the bank for his individual use and executed the notes to the bank for that purpose; that in making the notes W. R. Tuggle was not the agent for H. B. Tuggle, and in no wise represented H. B. Tuggle, although he used his name thereon, and that H. B. Tuggle had no interest in the money or in the execution of the notes and had no knowledge of the transaction; that the bank did not know W. R. Tuggle by name; that he was introduced to the cashier of the bank as "Mr. Tuggle," and that he made the contract with the bank solely for his individual use; that he signed the name of H. B. Tuggle to both notes without any authority from H. B. Tuggle, and that the bank or its cashier thought that W. R. Tuggle was in fact H. B. Tuggle at the time. It is insisted that under these facts the two notes in question were the individual contracts of W. R. Tuggle, and not of H. B. Tuggle, and could have been enforced against W. R. Tuggle during his lifetime, and that after his death his estate was liable thereon. A general demurrer was filed on the ground that the allegations set forth no cause of action against W. R. Tuggle, deceased, and therefore none against his administratrix, the defendant. The demurrer was overruled, and this is one of the errors assigned. The jury found a verdict for the plaintiff for the full amount of the suit, principal, interest, and attorney's fees, and the defendant's motion for a new trial was overruled.

The controlling question in the case, made both by the demurrer and the assignments of error in the motion for a new trial, is whether or not, under the facts as alleged and clearly proved as alleged, the administratrix of W. R. Tuggle was liable on the notes. We think that, under the allegations which were conclusively proved by the evidence, there can be no doubt that the notes sued on were the individual contracts of W. R. Tuggle, and not of H. B. Tuggle. There was no evidence whatever that in making these notes and in borrowing the money W. R. Tuggle acted as agent for H. B. Tuggle, or that H. B. Tuggle had any interest whatever in the execution of the notes or in the money borrowed thereon. When one executes a promissory note for the purpose of raising money thereon for his own individual benefit, and there is no indication whatever of any

undisclosed principal for whom he is acting in the execution of the note, and the payee of the note deals with him as the principal maker of the note, under the belief that the name signed to the note is his individual name, the party who thus makes the note and secures the money thereon is liable on the note, although he may have signed to the note a fictitious name or the name of another person. It is a general principle of law that one in the transaction of business may use a purely artificial name, or assume the proper name of some other natural person, and the party who thus adopts a fictitious name or who uses the name of the other person will be held liable on the contracts, where the evidence clearly shows that the name is artificial, or that the name of the other person was used without his authority, and that only the party using it is interested in the transaction of the business and in the contract so made. As stated in 29 Cyc. 207, "without abandoning his real name a person may adopt any name, style, or signature wholly different from his own name, by which he may transact business, execute contracts, issue negotiable paper, and sue and be sued." *Pease v. Pease*, 35 Conn. 181, 95 Am. Dec. 225. See, also, cases cited in 36 Century Digest, 3208.

It is insisted by the plaintiff in error that the common-law suit could not be brought on the notes in question, but that it was necessary to go into a court of equity to have the notes reformed, and that the city court of Cedartown had no equitable jurisdiction for this purpose. We do not agree with this contention. It was not necessary to have these two contracts or notes reformed. Under the undisputed evidence, the two notes are enforceable as the contracts of W. R. Tuggle, and the fact that he signed the name of H. B. Tuggle thereto is wholly immaterial. If he had signed any other name under the same facts, being himself exclusively interested in the contracts and the sole beneficiary of the money received on the contracts, he would be liable thereon. It would put the bank in this case to an unnecessary delay and expense to go into a court of equity to seek any reformation of these contracts because they are shown by the undisputed evidence to be the contracts of W. R. Tuggle, and not H. B. Tuggle.

It was objected that H. B. Tuggle was allowed to testify that he did not sign the notes or authorize W. R. Tuggle to sign his name thereon; that he had no knowledge that the notes were executed; that he had never himself been to the bank at Cave Spring or made any loan on notes at the bank; and that, before his death, W. R. Tuggle had admitted to him that he himself had secured on two notes, one for \$25 and one for \$100, money from the bank. It is in-

sisted that, as H. B. Tuggle was interested in the result of the litigation and W. R. Tuggle was deceased, he was incompetent to testify. Not only the allegations of the petition, but the undisputed evidence, negative any liability in any event of H. B. Tuggle on the notes, and therefore we do not think that he was an incompetent witness, for in no contingency did he have any interest in the result of the litigation, and he was not a party to the contracts sued on. But, exclusive of this evidence, it is indisputably shown that W. R. Tuggle did execute the notes without the authority of H. B. Tuggle, without the knowledge of H. B. Tuggle, without an intimation of any agency for H. B. Tuggle, and solely for his own benefit, and he secured the money on the notes and used it exclusively in his own business. In other words, without regard to the testimony of H. B. Tuggle, the evidence as a whole demanded the verdict that was rendered, and, even if any error of law was committed, it was wholly immaterial.

Judgment affirmed.

(8 Ga. App. 297.)

SMITH v. STATE. (No. 2,659.)

(Court of Appeals of Georgia. Sept. 28, 1910.)

(*Syllabus by the Court.*)

ESCAPE (§ 5*) — ESCAPE FROM MUNICIPAL CHAIN GANG—AIDING "ESCAPE."

The crime of escaping from a chain gang where municipal or misdemeanor convicts are worked is an act continuous in its nature, and is not finally completed until the convict is retaken. A person who knowingly assists a convict to "escape" from such a chain gang, or to elude the officers after he has once gotten away and prior to his recapture, is punishable under section 315 of the Penal Code of 1895.

[Ed. Note.—For other cases, see *Escape*, Cent. Dig. § 6; Dec. Dig. § 5.*

For other definitions, see *Words and Phrases*, vol. 3, pp. 2460-2463.]

Error from City Court of Columbus; G. Y. Tigner, Judge.

Robert Smith was convicted of aiding a prisoner to escape from a chain gang, and brings error. Affirmed.

Wynn & Wohlwender, for plaintiff in error. T. H. Fort, Sol., for the State.

POWELL, J. The defendant was convicted of violating section 315 of the Penal Code of 1895, which provides: "If any person shall aid or assist, or attempt to aid or assist, a prisoner to escape, so confined or imprisoned, he shall be guilty of a misdemeanor." The expression, "so confined or imprisoned," refers to section 314 of the Penal Code of 1895, which provides: "If any person shall be convicted of an offense below the grade of felony, and shall escape from the chain gang or other place of confinement, or imprisonment for the violation

of any municipal, county or state laws, and be thereafter retaken, he shall be guilty of a misdemeanor." The evidence discloses that, while the chain gang of the city of Columbus was being worked upon the streets, one of the convicts escaped, and that later in the day he met the defendant and asked for an ax. The defendant furnished the ax, and the convict, in the defendant's presence, cut off from his person the shackles which he was wearing pending his service in the chain gang, and by this the convict was able finally to make good his escape.

There are several sections of the Penal Code which relate to rescue and escapes. Some of these sections relate to rescue and escapes from the personal custody of officers; others to escapes from places of confinement, using the word "confinement" in a broader sense than the mere limits of prison walls. As to escapes from the personal custody of officers, the offense is complete whenever the prisoner gets entirely away. So long as the pursuit is in progress and the fleeing prisoner is in sight of the officers or posse, the escape is not complete; but when he outruns them, or successfully eludes them and gets away, the escape is complete, and thereafter the offense of aiding an escape cannot attach to that particular transaction. Cf. *Perry v. State*, 63 Ga. 402 (3). We think (though it is not without some doubt, and only after considerable study of the question, that we have come to this conclusion) that the rule as to escaping from a chain gang is different. Where convicts are being worked upon a chain gang, they are not, at least during working hours, usually confined within any special walls or bounds of imprisonment. Often the confinement is constructive, rather than actual, especially in the case of a trusty. This would seem to justify giving to the word "escape" a broader meaning when applied to chain gangs than when applied to prisons generally or to the custody of officers.

It may also be noticed that section 314 of the Penal Code of 1895, quoted above, seems to make the retaking of the prisoner a part of the crime. This apparent absurdity came about through the process of codification. By an examination of the several acts upon which the Code section is based, it will be seen that the provision was that, if a prisoner should escape from the chain gang and be retaken, he should thereafter be indicted and punished as for a misdemeanor. We think that the object of framing the statute in this particular language was to make the crime of escaping from a chain gang a continuous act, never finally completed so as to start the running of the statute of limitations in the prisoner's favor until the time of a recapture, with the consequent result that a convict absenting him-

self from the chain gang and from the officers with the intention essential to an escape (that is, being absent otherwise than on some temporary mission consistent with his relationship as a convict), is to be considered as committing a violation of the statute from the time of his leaving until the time of his recapture. Therefore any one who knowingly aids a convict, or attempts to aid him, either to get away from the chain gang or to stay away, is guilty of violating section 315 of the Penal Code of 1895.

We think that the words, "so imprisoned," found in section 315 of the Penal Code of 1895, were inserted, not with the view of making it criminal to aid a convict only while he was actually in prison, but merely with the view of relating section 315 to section 314, and of distinguishing the aiding of the escape of a misdemeanor or municipal convict from the other offenses provided for in section 316, of aiding felony convicts to escape—the latter being a higher offense. We have, therefore, come to the conclusion that the transaction in the present case was criminal, and punishable under section 315 of the Penal Code of 1895.

Judgment affirmed.

(8 Ga. App. 295)

FORD v. ATLANTIC COAST LINE R. CO.
(No. 2,558.)

(Court of Appeals of Georgia. Sept. 28, 1910.)

(Syllabus by the Court.)

1. CARRIERS (§ 408*)—LOSS OF BAGGAGE—ACTIONS—SUFFICIENCY OF PLEADING.

The allegations of the petition as amended were sufficient to show a cause of action, and the court erred in dismissing it on demurrer.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1561; Dec. Dig. § 408.*]

(Additional Syllabus by Editorial Staff.)

2. CARRIERS (§ 397½*)—CARRIAGE OF PASSENGERS—LIABILITY FOR BAGGAGE.

Carriers of passengers are liable for baggage as common carriers, except when destroyed by the act of God or the public enemy.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1519-1528; Dec. Dig. § 397½.*]

3. CARRIERS (§ 408*)—CARRIAGE OF PASSENGERS—UNREASONABLE DELAY IN DELIVERING BAGGAGE—LIABILITY.

Where a carrier unreasonably delays a trunk, and the passenger is thereby deprived of his wearing apparel, or necessary property for his use, contained in the trunk, the measure of damages is the value of the use of the wearing apparel or other property so delayed, during the delay in delivering it to him.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 408.*]

4. CARRIERS (§ 408*)—UNREASONABLE DELAY IN DELIVERING BAGGAGE—NOMINAL DAMAGES.

In an action by a passenger against a carrier for unreasonably delay in delivering his baggage, in the absence of proof of special damages from being deprived of the use thereof, plaintiff may recover nominal general damages.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 408.*]

Error from City Court of Camilla; H. C. Dasher, Jr., Judge.

Action by Lizzie Ford against the Atlantic Coast Line Railroad Company. Judgment of dismissal, and plaintiff brings error. Reversed.

Cox & Peacock and Davis & Merry, for plaintiff in error. Spence & Bennet and Pope & Bennet, for defendant in error.

HILL, C. J. Lizzie Ford brought suit against the Atlantic Coast Line Railroad Company to recover damages for delay in delivering to her a trunk containing the wearing apparel of herself and two of her infant children. She alleged that she was a passenger on the line of the defendant company and had checked her trunk to the point of her destination, and that a reasonable time for the delivery to her of her trunk would have been 1 day, but it was unreasonably delayed for 11 days. Her petition as amended alleged that the trunk contained all the wearing apparel of herself and two minor children who were with her, and that by reason of the negligence of the defendant company in not safely transporting the trunk to its destination and delivering it to her upon demand she was tortiously deprived of the use of the clothing and wearing apparel of herself and of her children for a period of about 11 days, and that she was unable to buy additional clothing and extra wearing apparel as a substitute for that contained in her trunk, greatly to her inconvenience, injury, and damage. In her original petition she alleged that, because of the deprivation of the wearing apparel, she and her children were forced to go without a change of clothing for 9 days, and during this time the clothing which she and her children wore became so soiled and filthy as to be indecent, and, being so far from home and among strangers, it caused her "great physical uncomferture and mental anguish and pain." She laid her damages in the sum of \$500. The court sustained a general demurrer and dismissed her petition, and this judgment is the error assigned.

It is well settled in this state that carriers of passengers are liable for baggage as common carriers; that is, they are liable for baggage at all events, except when destroyed by the act of God or the public enemy. *Dibble v. Brown*, 12 Ga. 224, 56 Am. Dec. 460; 3 *Hutcheson on Carriers*, § 1241. It is insisted by learned counsel for the railroad company that plaintiff cannot recover damages resulting because of "physical uncomferture and mental anguish and pain" due to the wearing of soiled clothes by herself and children. It is conceded that she could recover damages for the loss of her trunk, or for injury to the trunk or its contents, or for its unreasonable delay and detention, but that "physical uncomferture and

mental anguish and pain," and inconvenience on account of her not having the use of her wearing apparel that was in the delayed trunk, were not elements of damage for which she would have the right to recover.

We are inclined to think that a passenger whose trunk has been unreasonably delayed, and who is thereby subjected to inconvenience resulting from the loss of wearing apparel, and is compelled to suffer physical discomfort by reason of its loss, would be entitled to damages upon proper proof, if the damages that are inflicted could be estimated in dollars and cents. Certainly the physical discomfort and inconvenience of having one's clothing lost would be an element of damage in contemplation of the parties to the contract of transportation, when the trunk was received for shipment from the passenger by the railroad company. It has been held that a passenger could recover the value of the use of his wearing apparel or property contained in a lost trunk, or in a trunk which has been unreasonably delayed, due to delay in delivery. We think that the measure of damages, where a trunk has been unreasonably delayed and a passenger deprived of his wearing apparel or necessary property for his use contained in the trunk, would be the value of the use of the wearing apparel or other property so delayed, during the delay in delivering it to him. The rule for the measurement of damage in such case must be the value of the clothing or property for use by the plaintiff during the time he was deprived of such use by the tortious conduct of the defendant. *Southern Ry. Co. v. Wood*, 114 Ga. 163, 39 S. E. 922; *Gulf, Colorado, & Santa Fé R. Co. v. Vancil*, 2 Tex. Civ. App. 427, 21 S. W. 303; 3 *Sutherland on Damages*, § 955; *Fairfax v. N. Y. Central & Hudson River R. Co.*, 73 N. Y. 172, 29 Am. Rep. 119.

In the absence of proof of special damages, the plaintiff might recover nominal general damages. The petition as amended set forth a cause of action, and the court erred in dismissing it on demurrer.

Judgment reversed.

(8 Ga. App. 313)

ALLEN v. LOTT-LEWIS CO. (No. 2,165.)
(Court of Appeals of Georgia. Sept. 28, 1910.)

(Syllabus by the Court.)

ESTOPPEL (§ 94*)—TO CLAIM TITLE TO PROPERTY SOLD AS ANOTHER'S.

The judgment rendered was in accord with the law and evidence. The decision is controlled by the ruling in *Wall Lumber Co. v. Lott-Lewis Co.*, 5 Ga. App. 604, 63 S. E. 637. One who, without interposing any claim or otherwise objecting, stands by and sees his property sold as the property of another, is estopped from thereafter asserting his right. Nor has he any property in the fund realized from such a sale which he can convey to a third person.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 276-284; Dec. Dig. § 94.*]

Error from City Court of Tifton; R. Eve, Judge.

Claim action between P. A. Allen and the Lott-Lewis Company. From the judgment, Allen brings error. Affirmed.

J. J. Murray and R. S. Foy, for plaintiff in error. Jas. H. Price and Fulwood & Murray, for defendant in error.

RUSSELL, J. This was a contest for certain funds in the hands of the sheriff as the proceeds of a lot of lumber. The Lott-Lewis Company brought the rule against the sheriff to require him to pay the money over to them on their sawmill supply man's lien for supplies furnished one Brady, the proprietor of the sawmill which manufactured the lumber, and Allen, the plaintiff in error, intervened, setting up a claim to the fund. In brief, Allen's intervention sets up that the lumber which was sold under Lott-Lewis Company's lien as the property of the sawmill man, Brady, did not belong to Brady at all, but was, at the time of the sale, the property of the W. M. Wall Lumber Company, all of whose rights were thereafter purchased by Allen. It appears to be agreed that Allen stands in the shoes of the W. M. Wall Lumber Company. He has, then, the same right to the fund in the hands of the sheriff that Wall would have; but he certainly can have no better right than Wall would have had if he had not put Allen in his place. For this reason we think the decision of the court below was properly controlled by the ruling in Wall Lumber Co. v. Lott-Lewis Co., 5 Ga. App. 604, 63 S. E. 637, and that the fund was properly applied to the lien in favor of the Lott-Lewis Company.

According to the testimony of the claimant himself, he (Allen) originally bought the lumber in question from Brady and sold it to W. M. Wall, doing business as Wall Lumber Company. This was before the foreclosure of the Lott-Lewis Company's lien, and without any notice of any lien. The lien *fi. fa.* was levied, and the lumber was sold under a "short order." The Wall Lumber Company took no steps to prevent the sale. It filed no claim to the lumber. On the contrary, the lumber was purchased at the sale by the witness (the plaintiff in error) for Wall, and his right as claimant of the fund depends upon the fact that Wall was unable to repay him the amount of money which, acting for Wall, he had bid at the sheriff's sale, otherwise than by transferring to him Wall's claim to the fund, in satisfaction of the debt. In the Wall Case, *supra*, we held that Wall was estopped from claiming, because he bought at the "short order" sale. This being true, he cannot convey to Allen a right to claim. But, aside from this, there is no view of the case in which Allen could claim the fund after the sale. The

money realized at the sale must be treated as belonging to the defendant, Brady. Even if Wall and Allen had not estopped themselves from claiming the lumber by bidding for their own property, and thus waiving any title they might have had therein, they could not claim the fund. Their recourse would be to proceed against the purchaser for the property or its value.

Judgment affirmed.

(8 Ga. App. 285)

BLOSSER CO. v. DOONAN. (No. 2,195.)

(Court of Appeals of Georgia. Sept. 28, 1910.)

(Syllabus by the Court.)

1. ERRONEOUS DIRECTED VERDICT.

The court erred in directing the jury to find the verdict in favor of the plaintiff, merely submitting to the jury the question of the amount of the plaintiff's recovery. Under the evidence submitted, there was an issue as to the nature of the custom sought to be established, as well as to whether such a custom in fact existed, and it was issuable whether a new contract of bailment was made by the parties at the conclusion of the original contract.

2. BAILMENT (§ 12*)—GRATUITOUS BAILMENT—ESSENTIALS OF RELATION.

While a gratuitous bailee is required to use some care and diligence for the safe-keeping of property intrusted to him, he must assent to the bailment, either expressly or impliedly, before the relationship of bailor and bailee will be established, with its consequent liabilities.

[Ed. Note.—For other cases, see Bailment. Cent. Dig. §§ 37-41; Dec. Dig. § 12.*]

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action between the Blosser Company and J. T. Doonan. From the judgment, the Blosser Company brings error. Reversed.

Kontz & Austin, for plaintiff in error. Jerome Moore, for defendant in error.

PER CURIAM. Judgment reversed.

(8 Ga. App. 285)

SISTERS OF ORDER OF ST. JOSEPH v. FARRELL HEATING & PLUMBING CO. (No. 2,182.)

(Court of Appeals of Georgia. Sept. 28, 1910.)

(Syllabus by the Court.)

NEW TRIAL (§ 108*)—GROUNDS—NEWLY DISCOVERED EVIDENCE.

Under the peculiar circumstances of this case, the assumption of liability by the defendant being the leading point at issue, the court erred in refusing to grant a new trial upon the grounds of newly discovered evidence. The matters brought to the attention of the court, while in a sense impeaching, are also susceptible of being considered as substantive proof, probably leading to a different result on another trial. Besides, the matter referred to went to the fairness of the trial itself.

[Ed. Note.—For other cases, see New Trial. Cent. Dig. §§ 226, 227; Dec. Dig. § 108.*]

Error from City Court of Washington; W. D. Tutt, Judge.

Action between the Sisters of the Order of St. Joseph and the Farrell Heating & Plumbing Company. From the judgment, the Sisters of the Order of St. Joseph brings error. Reversed.

F. H. Colley and W. A. Slaton, for plaintiff in error. J. M. Pitner, Jno. A. Boykin, and Geo. M. Du Bose, for defendant in error.

RUSSELL, J. Judgment reversed.

(8 Ga. App. 281)

J. E. BRICE & CO. v. WHITEHURST & HILLIARD. (No. 2,381.)

(Court of Appeals of Georgia. Sept. 28, 1910.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 65*)—PROCEEDINGS TO PROCURE—DISCRETION OF COURT.

Where a judge, passing on a motion for a new trial, did not originally try the case, his discretion is not as broad as it would be otherwise; but he still has discretion to grant a new trial, where the evidence preponderates against the verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 130; Dec. Dig. § 65.*]

2. SALES (§ 480*)—CONDITIONAL SALE.

Where a vendor sells personal property, reserving title to secure the purchase price, and the vendee, with the vendor's consent, sells the property to a third person, who assumes the payment of the balance of the purchase price to the original vendor, the latter cannot recover in trover the property from the third person without offering to put him in statu quo.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 480.*]

3. NEW TRIAL PROPERLY GRANTED.

On the material issue as to whether or not the plaintiffs knew of and consented to the sale of the property by the original purchaser to the defendants, the evidence preponderates against the verdict, and therefore the judge did not err in granting a new trial.

Error from City Court of Nashville; R. Eve, Judge.

Action between J. E. Brice & Co. and Whitehurst & Hilliard. From the judgment, J. E. Brice & Co. bring error. Affirmed.

J. P. Knight, for plaintiffs in error. Hendricks & Christian, for defendants in error.

RUSSELL, J. Judgment affirmed.

(8 Ga. App. 286)

MUMFORD v. SOLOMON. (No. 2,213.)

(Court of Appeals of Georgia. Sept. 28, 1910.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 208*)—REVIEW—MOTION FOR NEW TRIAL—DISCRETION OF COURT.

The cases in which the discretion of the judge of the superior court in the first grant of a new trial upon certiorari will not be disturbed are those in which there is some conflict in the evidence, and not those in which the decision is controlled wholly by law.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 816; Dec. Dig. § 208.*]

2. PLEADING (§ 104*)—PLEA TO JURISDICTION. Pleas to the jurisdiction must be pleaded in person.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 213-217; Dec. Dig. § 104.*]

3. ACTION (§ 27*)—FORM—ACTION EX CONTRACTU.

Where, in an action brought upon a bond, the plaintiff asks for nothing more than the express damage which the bond covenants he shall receive in the event there is a breach, the action is ex contractu.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 160-196; Dec. Dig. § 27.*]

4. RELEASE (§ 27*)—APPEARANCE (§ 19*)—PRINCIPAL AND SURETY (§ 148*)—JURISDICTION—WAIVER OF OBJECTION.

A creditor may release a surety without affecting the liability of the principal; and it is of no concern to the principal what consideration moved the plaintiff to release his surety.

(a) A plea to the jurisdiction is one of personal privilege, and when a surety waives service and appears in court without protesting the jurisdiction, it is to be assumed that the court has jurisdiction of his person.

(b) Jurisdiction of the surety gives jurisdiction of the principal.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 53-56; Dec. Dig. § 27.* Principal and Surety, Cent. Dig. § 134; Appearance, Cent. Dig. §§ 79-90; Dec. Dig. § 19.* Principal and Surety, Cent. Dig. § 413; Dec. Dig. § 148.*]

5. REVIEW ON APPEAL.

The certiorari should have been dismissed.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by W. E. Mumford against W. G. Solomon and another. Judgment for plaintiff as reversed on certiorari, and he brings error. Reversed.

W. G. Solomon, Jr., had obtained a judgment in a justice's court against W. E. Mumford, and upon this judgment he sued out a garnishment. T. C. Dickson became surety for Solomon upon the garnishment bond. The garnishees answered that their indebtedness to the defendant was for wages as a laborer, and upon the trial of a traverse of the answer the judgment was in favor of the garnishees. Thereupon Mumford brought suit in a justice's court of Fulton county upon the garnishment bond, against Solomon as principal and Dickson as surety. A second original was served upon Solomon in Bibb county, and, though Dickson was not served, he afterwards waived service, in consideration of a release from liability promised him by Mumford. Solomon filed a plea to the jurisdiction, which was verified by his attorney, and he also filed general and special demurrers. The justice of the peace rendered a judgment in favor of Mumford against Solomon for \$30 principal and costs of suit. Solomon thereupon sued out a writ of certiorari, which was sustained by the judge of the superior court; and the writ of error challenges the correctness of the latter judgment. The evidence for the plaintiff was to the effect that he had been put to the expense of \$30 for attorney's fees. by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

reason of the process of garnishment which was sued out by the defendant Solomon; and there was no evidence other than the plaintiff's upon this subject. The bond which was the basis of the suit was conditioned for the payment by the principal of all costs and damages that might be sustained by Mumford in consequence of the garnishment, in the event that the money sought to be garnished was not subject to garnishment.

Hines & Jordan, for plaintiff in error. C. B. Rosser, Jr., for defendant in error.

RUSSELL, J. (after stating the facts as above). We think the judge of the superior court erred in sustaining the certiorari.

1. This case does not come within the class of cases where the first grant of a new trial upon certiorari falls within the discretion of the judge, and where such discretion will not be disturbed. Those cases in which the judge may, in his discretion, grant a first new trial are those in which there is a conflict in evidence, and in which the decision is not plainly controlled by the law. In the present case nothing is involved but a pure question of law.

2. The justice of the peace properly struck the plea to the jurisdiction. It was not verified by the defendant, but by his attorney. The Code (Civ. Code 1895, § 5081) requires pleas to the jurisdiction to be "pleaded in person"; and for this reason, not only the original plea, but also the several amendments thereto, were insufficient.

3. This left the principal defendant without any defense before the court, and the question then arises whether the court had jurisdiction of the principal defendant by reason of its jurisdiction of the subject-matter and of the person of the surety, Dickson. It is insisted that the action sounds in tort, and that therefore the justice's court had no jurisdiction of the subject-matter. This contention would have been sustained if the plaintiff's suit had not been on the bond, but had asked for punitive damages, or, in fact, for any damages accruing to the defendant other than the express items of damages specified in the bond itself. In this case, however, the plaintiff asked for nothing more than the damages which the bond covenanted he should receive in the event there was a breach. The plaintiff's right to recover does not arise ex delicto, but arises ex contractu. It is not an action for a wrong the plaintiff may have suffered by reason of any bad faith of the plaintiff independent of the covenant, but it is an action for a breach of covenant as expressed in the bond. See *Fourth National Bank v. Mayer*, 96 Ga. 728, 24 S. E. 453.

4. It is contended, however, that even if the action is not one in tort the court had

no jurisdiction of the person of Solomon. It is also insisted that, though the plaintiff had the right to sue the principal on the bond in the county of the surety's residence, yet by reason of the release of the surety and the failure to effect service upon him there could be no recovery against the principal in Fulton county. The principal cannot derive any advantage from the fact that the plaintiff agreed to release the surety; and the surety (who alone can object to the lack of service upon himself) does not make any point in his own behalf, or offer any objection thereto. Whether his waiver of service was sufficient for all purposes or not, it was certainly sufficient to give the court jurisdiction of his person, unless the surety himself raised the point.

The plea to the jurisdiction is one of personal privilege, and when the surety waived service without protesting the jurisdiction, it was to be assumed that the court had jurisdiction of the surety. This carried with it, under section 4078 of the Civil Code of 1895, jurisdiction of the person of the principal. And even though the plaintiff had released the surety in consideration of his acknowledgment of service, this was of no concern to the principal. The release of the surety does not affect the principal; and there is a broad difference between jurisdiction and liability. The justice court evidently declined to enter judgment against the surety, because it thought his defense of release was sustained; but, in order to pass upon this question, it was necessary that the court should have had jurisdiction of the person of the surety, and it did have such jurisdiction. We think, therefore, there can be no question that the court had jurisdiction both of the subject-matter and of the person of the surety.

5. The evidence sustained the judgment of the justice court, because the evidence that the plaintiff had assumed a liability of \$30 for attorney's fees was not disputed. The certiorari should have been dismissed.

Judgment reversed.

(8 Ga. App. 284)

HIRSCH v. J. S. SCHOFIELD'S SONS CO.
(No. 2,032.)

(Court of Appeals of Georgia. Sept. 28, 1910.)

(Syllabus by the Court.)

1. NONSUIT ERRONEOUS.

The plaintiff proved his case as laid, and it was error to award a nonsuit.

2. SALES (§ 445*)—ACTION FOR BREACH OF CONTRACT—SUFFICIENCY OF EVIDENCE.

According to the evidence for the plaintiff, he purchased borings and turnings from a pile of such material which appeared to be merchantable, to be loaded and shipped by the defendant to a buyer to whom the plaintiff had sold them. If the plaintiff had seen the car after it was loaded by the defendant, and after full oppor-

tunity for inspection had accepted it, a nonsuit might have been proper, because he would have waived all defects discoverable by ordinary care. But there was no proof that the car of material shipped by the defendant was taken from the pile which the plaintiff saw at the time of the purchase, and, from the testimony in behalf of the plaintiff as to the character of the turnings and borings he saw and as to the nature of merchantable turnings and borings in general, considered in connection with the testimony as to the very different character and the much inferior quality of the shipment received by the plaintiff's customer, the jury would have been authorized to infer that the scrap iron which was shipped was obtained from a different pile and was entirely distinct from the material actually purchased by the plaintiff, or that dirt and refuse had been added to that which he did see.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1303-1308; Dec. Dig. § 445.*]

3. SALES (§ 442*)—BREACH OF WARRANTY—MEASURE OF DAMAGES.

Where a plaintiff shows a breach of either an express or an implied warranty, profits not dependent upon speculative contingencies, but which can be shown to be certain, fixed in amount, and the direct fruit of a valid contract, reasonably to be anticipated from the breach, are recoverable, where it appears that the loss of the profits is due solely to the defendant's breach of his contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284-1301; Dec. Dig. § 442.*]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by Jacob Hirsch against J. S. Schofield's Sons Company. Judgment of nonsuit, and plaintiff brings error. Reversed.

Fengin & Urquhart, for plaintiff in error. Hardeman, Jones & Johnston, for defendant in error.

RUSSELL, J. Judgment reversed.

(8 Ga. App. 299)

ATLANTA SKIRT MFG. CO. v. JACOBS.
(No. 2,015.)

(Court of Appeals of Georgia. Sept. 28, 1910.)

(Syllabus by the Court.)

1. BANKRUPTCY (§ 426*)—DISCHARGE—LIABILITIES DISCHARGED.

A discharge in bankruptcy does not release a bankrupt from liability for obtaining property by false pretenses or false representations.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 426.*]

2. BANKRUPTCY (§ 437*)—OBTAINING GOODS IN VIEW OF INSOLVENCY—EVIDENCE.

It was for the jury to determine whether the circumstances adduced, even though they were slight, were sufficient to carry conviction of the existence of fraud perpetrated by false pretenses, and it was error to direct a verdict.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 437.*]

3. SALES (§ 43*)—FRAUDULENT REPRESENTATIONS.

A false representation may consist in the purchasing of goods with no present purpose of paying for them, and in contemplation of a fraudulent insolvency.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 86-92, 97-100; Dec. Dig. § 43.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Atlanta Skirt Manufacturing Company against M. B. Jacobs. There was a directed verdict for defendant, and plaintiff brings error. Reversed.

Horton Bros. & Burress, for plaintiff in error. Mayson & Johnson and W. D. Ellis, Jr., for defendant in error.

RUSSELL, J. The Atlanta Skirt Manufacturing Company sued Jacobs in a justice's court on three promissory notes, and by consent of all parties the cases were appealed to the superior court and consolidated. Jacobs' defense to the notes was his discharge in bankruptcy. To avoid this discharge the plaintiff relied on section 17 of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]) as amended in 1903 (Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 [U. S. Comp. St. Supp. 1909, p. 1310]), which provides as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * are liabilities for obtaining property by false pretenses or false representations." In support of this avoidance the plaintiff proved that for several years prior to the bankruptcy, and prior to the giving of the notes, Jacobs had been running an account with it, and had from time to time given his notes for balances due. Some of the notes involved in this suit were given about 30 days before the failure, which was involuntary. It was estimated by the plaintiff and his witnesses that at that time the stock of goods in the defendant's shop was only about one-fifth as valuable as it was 30 days before, when some of the goods represented by the notes were purchased. The schedule in bankruptcy showed liabilities of \$15,634.35, and assets aggregating approximately \$13,000. It was admitted that the notes were properly scheduled. Jacobs made no positive representation or statement as to his condition at the time he purchased the goods from the plaintiff. The goods were sold by the latter on the faith of past dealing, and on the confidence based on the appearance of prosperity indicated by the large size of the stock. There were, however, other circumstances from which it could be inferred that very soon after these goods were bought the defendant "made way" with a part of his stock of goods otherwise than in the due course of trade.

1. The judge directed a verdict for the defendant. In our opinion this was error. A discharge in bankruptcy does not release a bankrupt from liability for obtaining property by false pretenses or false representations. It is true that in order to avoid the discharge it was incumbent on the plaintiff to show that the liability upon the notes survived in spite of the discharge, because

the notes represented the purchase price of goods obtained by false pretenses or false representations.

2. But the duty of weighing the various facts and circumstances introduced upon the issue, and of determining whether they could reasonably support the conclusion that the goods were obtained with a fraudulent intent, was at last one for the jury. Fraud is not to be presumed, but slight circumstances may suffice to carry conviction of its existence.

3. A false representation may consist in the purchasing of goods with no present purpose of paying for them, and in contemplation of a fraudulent insolvency. To buy goods without a present intention to pay is a false representation of one's intention. Therefore to buy goods without a present intention to pay will avoid a discharge. Of course, ordinarily, promises to perform some act in the future will not amount to fraud in legal acceptance, although subsequently broken without excuse. This is especially true of a promise to pay money. Otherwise any breach of contract would amount to fraud. But the intent with which a promise, which has been violated, was made, is for the jury. There was before the jury a combination of facts and circumstances (which we have not recited above) from which the jury might have inferred that the goods were bought by the defendant with such a purpose. It was at least significant that the number of the identical skirts sold by the plaintiff, found in the defendant's store, was multiplied after the discharge in bankruptcy.

Judgment reversed.

(8 Ga. App. 315)

SOUTHERN RY. CO. v. ATLANTA SAND & SUPPLY CO. (No. 1,808.)

(Court of Appeals of Georgia. Sept. 6, 1910.
Upon Rehearing, Sept. 29, 1910.)

(Syllabus by the Court.)

1. REGULATION OF CARRIERS.

The controlling questions in this case have been certified to the Supreme Court and answered at length. It is deemed unnecessary for this court to go into an elaboration of the facts or points; but reference is had to the decision of the Supreme Court. 68 S. E. 807.

(Additional Syllabus by Editorial Staff.)

Upon Rehearing.

2. APPEAL AND ERROR (§ 918*) — REVIEW — AMENDMENT TO PLEADING.

Where a party at the trial term tenders an amendment to his pleading without the affidavit required by statute, the court's refusal to allow the amendment cannot be reviewed, unless it affirmatively appears that the judge refused

the amendment upon its merits, and not upon the technical ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3710; Dec. Dig. § 918.*]

3. APPEAL AND ERROR (§ 919*) — REVIEW — AMENDMENT TO PLEADINGS.

Where there is a failure to verify a pleading filed as matter of right and the court strikes it, it will be presumed that the court struck it for some matter affecting the merits, because, the failure to verify being a matter of form, it would be waived, unless specially objected to by the opposite party. But where a party tenders an amendment which may be rejected unless presented in a certain form and the amendment states matters good in substance, but is deficient in form, it will be presumed that the court's refusal thereof is for lack of form.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3718; Dec. Dig. § 919.*]

4. PLEADING (§ 382*) — GENERAL DENIAL — MATTERS PROVABLE.

Matter which is equally available for defense, whether the allegations of the petition be true or not, cannot be received in evidence under a general denial equivalent in effect to the old plea of general issue.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1280-1294; Dec. Dig. § 382.*]

Hill, C. J., dissenting.

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by the Atlanta Sand & Supply Company against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Case certified to the Supreme Court and questions answered (68 S. E. 807), and judgment affirmed on rehearing.

McDaniel, Alston & Black, for plaintiff in error. Moore & Pomeroy and W. W. Hood, for defendant in error.

HILL, C. J. Judgment reversed.

Upon Rehearing.

RUSSELL and POWELL, JJ. In the original opinion the judgment was reversed because the trial court erred in rejecting certain evidence offered by the defendant, tending to show that notwithstanding that it had failed to furnish cars in compliance with the plaintiff's demand, under rule 9 of the Railroad Commission, the failure was occasioned by facts and circumstances which, under the decision of the Supreme Court in answer to the certified question presented to them in this case, would have excused it for not so doing. In the motion for rehearing the point is made that the defendant's original answer contained only a denial of the paragraphs of the plaintiff's petition in which was set up a violation of the rule through the failure of the defendant to furnish cars upon certain given dates and for a designated period thereafter, and that, as this rejected evidence tended to support only these matters of justification or avoidance, it was not admissible under the original plea. They say further that, while the defendant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

in the court below (the plaintiff in error here) did tender an amendment setting up these additional matters of defense, the court disallowed it. In the record before us one of the exceptions is to the disallowance of this amendment. The ground on which the court refused to allow it does not appear from the record; the recital being merely that on motion of the plaintiff the court overruled and disallowed the amendment. The amendment was not tendered until the trial term, and was not accompanied by the affidavit required by the statute in cases where an amendment is offered after the first term. To our minds, therefore, the case is squarely controlled as to this feature by *Columbus Show Case Co. v. Brinson*, 128 Ga. 437, 57 S. E. 871. We cannot reverse the judgment of the lower court for refusing to allow an amendment to the pleading at the second term, where this affidavit is not filed, unless it affirmatively appears that the judge refused the amendment upon its merits, and not upon the technical ground. Where there is a failure to verify pleadings which are filed as a matter of right, the rule is different from where it is where a party merely tenders an amendment as to which he must secure the consent of the court before it can be filed as part of the record. In the former case (where, say, a plea is regularly filed, but not verified, and the court on motion strikes it), it would be presumed that the court struck it for some matter affecting the merits, because, the failure to verify being merely a matter of form, it would be waived, unless specially objected to by the opposite party. But where a party tenders an amendment which the law says may be rejected unless presented in a certain form, and the amendment states matters good in substance, but is deficient for lack of form, it will be presumed that the court refused it on the ground on which he had the right to refuse it, namely, the lack of form. We are clear that the matters contained in the amendment cannot be shown under the general denial contained in the original answer. They were purely matters of justification or avoidance. They did not tend to deny any one of the particular facts upon which the plaintiff relied, but merely attempted to negative liability under the law by showing additional facts which would exculpate the defendant from the apparent liability. The original answer contained no hint that the defendant would attempt to show at the trial matters which would tend to defeat the plaintiff's right to recover, notwithstanding they (the plaintiffs) proved to the letter every allegation of fact contained in their petition. Matter which is equally available for defense, whether the allegations of the petition be true or not, cannot be received in evidence under a general denial equivalent in effect to the old plea of general issue. It is our opinion, therefore, that this court was in error in reversing the judgment of the

lower court for the exclusion of this evidence. The rehearing having been granted, it is hereby ordered that the judgment hitherto rendered be vacated, and that the judgment of the lower court be affirmed.

HILL, C. J. dissents.

HILL, C. J. (dissenting). I cannot concur in the opinion of the majority of the court. I think the decision of the court as heretofore rendered is right, and should be adhered to. The suit was to recover damages against the railroad company for a violation of rule 9 of the Railroad Commission of the state. At the appearance term the defendant filed a plea of general issue, and at the trial term it filed an amendment to the plea, which was disallowed by the court, and exceptions pendente lite were preserved. At the conclusion of the evidence, the court directed a verdict for the plaintiff. The writ of error challenges the constitutionality of rule 9 on various grounds, and also the correctness of the ruling of the trial judge in disallowing the amendment to the plea and in subsequently, on the trial of the case, excluding from evidence testimony offered by the defendant tending to show that it had not violated that rule, and was not indebted to the plaintiff in any sum on account of its failure to comply with its request to deliver the cars. This court certified to the Supreme Court the constitutional questions made, and also certified to the Supreme Court the question whether as a matter of law the defendant railroad company in defense to the action could set up certain matters to prove that it was not at fault in not furnishing the cars requested by the plaintiff, these matters of defense being covered by the amendment to the plea, which was disallowed by the court, and being also embraced in the testimony which was excluded from evidence by the court. The Supreme Court answered the questions certified to it, sustained the constitutionality of the rule in question, and also held that some of the defenses set up by the defendant and offered to be proved by it were valid and sufficient under the law. It is not necessary in this place to set out the defenses which the Supreme Court holds could be made by the railroad company in such case. Reference is had to the decision of the Supreme Court on that question as reported in 135 Ga. —, 68 S. E. 807 et seq. As the trial court had expressly disallowed the amendment setting up the defenses, and had subsequently rejected the testimony which was offered under the plea of general issue (for the amendment had been rejected when the testimony was offered), this court in a brief headnote reversed the ruling of the trial court in excluding the evidence which the Supreme Court held would, if proved, have constituted a valid and sufficient defense to the suit. I think the judgment of this court was a necessary corollary

to the decision of the Supreme Court on the question as to the sufficiency of the defense which the railroad company attempted to establish by the testimony which was excluded from evidence by the trial court. In my opinion this court should have gone further in its decision, and should have also held that the trial court erred in disallowing the amendment to the plea. But, regardless of the question whether the amendment to the plea was properly or improperly disallowed, I think that the testimony which was excluded by the trial judge set up matters of defense to the plaintiff's cause of action, and was admissible under the general denial of liability filed by the defendant company. In other words, I do not think that the amendment which the court disallowed was essential to the introduction of the evidence which the Supreme Court held would constitute a good defense, and which this court held that the latter court erred in rejecting.

My associates think that the amendment was properly disallowed because of the absence of the affidavit required by section 5057 of the Civil Code of 1895, as amended by the act of 1897 (Acts 1897, p. 35). Of course, the omission of this affidavit furnishes a reason for refusing to allow an amendment offered at the trial term, of which notice was not given by the original plea or answer. They insist that the record does not disclose upon what ground the trial judge based his judgment refusing to allow the amendment, and, as the omission of the affidavit was the only legal reason which he could have had for such refusal, they assume that his reason for so ruling was the fact that the amendment was not perfected by the statutory affidavit. I think it perfectly clear from the record that the trial court did not exclude the amendment because of the absence of the statutory affidavit referred to. I think the court treated this technical requirement of the law relating to the form of the affidavit as having been waived by the plaintiff, and that the amendment was disallowed because the allegations therein set up no defense to the suit. The record does not show that any specific objection to the amendment was made by the plaintiffs because of the absence of the affidavit. On the contrary, it shows inferentially that this formal defect was waived. It cannot be denied that the defect in question is amendable. *Ward v. Frick Company*, 95 Ga. 804, 22 S. E. 899; *Rodgers v. Caldwell*, 122 Ga. 279, 50 S. E. 95. And I think it also clear that, if the plaintiff does not object to the form of an amendment on this ground, he must be taken to have waived it. It seems to me that the plaintiff should be held to have waived this defect, if he does not specifically object to the answer on that ground, and allows the question raised by the proposed amendment to be considered and decided on the merits. It would be unfair to the defendant not to afford him an

opportunity to amend by an objection as to the form of the proposed amendment. In the case of *Ward v. Frick Company*, supra, it was held: "It being, under the pleading act of 1893 [Acts 1893, p. 56], the duty of the judge of the superior court at each regular term to call all cases on the appearance docket, and hear and determine all objections made to the sufficiency of petitions and pleas, it is incumbent upon plaintiffs to make at that term their exceptions to pleas filed. Consequently, where to an action upon an unconditional contract in writing a plea was filed at the first term, which set forth a good defense, but was not sworn to by the defendants, and no objection was then made to it because of this defect, the plaintiff will be held to have waived the same so far as the term is concerned; and if, at a subsequent term, he moves to strike the plea because of such defect, the court should then allow the defendant to complete the plea by a proper verification." In the case of *Rodgers v. Caldwell*, supra, it is held that where a plaintiff verifies his petition in conformity with the provisions of Civ. Code 1895, § 4965, the omission of the defendant to likewise verify a plea interposed by him is an amendable defect which can be taken advantage of by the plaintiff only at the appearance term of the case. Section 4965 of the Civil Code, supra, is mandatory. It says that the defendant shall verify his plea or answer, where the plaintiff files a petition accompanied by an affidavit that the facts stated therein are true to the best of his knowledge and belief; and, under the act of 1897, the court can allow an amended answer or plea without the affidavit, if within its discretion it sees proper to do so. And yet, under section 4965 of the Civil Code, if the plaintiff does not object to the form of the plea at the first term, he is held to have waived it; and by analogy it would seem to follow that when the amendment to the answer or plea is offered by the defendant, if the plaintiff does not object to the amended plea or answer because of the omission of the affidavit required by the act of 1897, it would be a waiver of the formal defect. In 22 Encyclopedia of Pleading and Practice, p. 1052, the general rule on this subject is stated as follows: "It is usually held that the fact that a pleading is not properly verified, as required by statute, is not sufficient to oust the court of its jurisdiction, but is merely an irregularity, and that as such the objection may be waived if not raised at the proper time and in the proper manner, and cannot be raised for the first time after issue joined or on appeal."

Here it is perfectly apparent that the objection to the form of the amended answer was not made when the amendment was offered. If it had then been made, the amendment could have been perfected, and doubtless would have been perfected by an amendment with the required statutory affidavit.

In the original brief filed by the defendant in error in this court the point was not made that the amendment was defective because of the absence of the affidavit. It was first made in a supplemental brief. The action of the court below in rejecting the amendment rebuts the assumption that it was rejected because of the failure to have the proper verification. The order disallowing the amendment is as follows: "This amendment overruled and not allowed. Let the copy be filed, however." If the objection to the plea was one of form, would the court have required that such defective plea be preserved in the files of the case? On the contrary, if the amendatory answer or plea had been filed before the ruling of the court, would not the court have ordered that this defective plea be stricken from the files? 22 Enc. of P. & P. 1047. It is perfectly clear to my mind that the trial judge considered the plea on its merits and disallowed it because in his opinion it set up no defense to the suit. Not only does the record clearly show that in the trial court the amendment was objected to on its merits and ruled upon on its merits, but the record made by this court, and by the Supreme Court in its instructions on the questions certified to it, all lead to the same conclusion. As before stated, the learned counsel for the defendant in error in this court in their original brief and argument ably and elaborately contested the merits of the answer as proposed by the amendment. In the brief or argument, there was no hint that the amendment was disallowed because no affidavit was attached as required by the act of 1897. This court certified the question as to whether the allegations of the amendment set up a valid and sufficient defense, and the Supreme Court considered the defense as made by the amendment on its merits, and ruled that some of the matters of defense set out were sufficient and some were insufficient. It would seem that the learned and able counsel would not have put this court and the Supreme Court to the labor and trouble of considering questions purely of an academic character, but would have insisted that the question was eliminated from the case and the amendment was rejected because of the absence of the statutory affidavit. So far as I am individually concerned, I am unwilling to encourage a consumption of the valuable time of this court and of the Supreme Court by holding in effect that counsel can engage in useless and unnecessary discussions of legal questions and invoke a decision thereon when the questions are not properly before the court, or, after arguing a case on the merits and obtaining a decision on the merits, to subsequently change base and on a formal technicality obtain an advantage not contemplated by the original argument. I therefore think that the trial court erred in rejecting the amendment. I think that the record clearly shows that the omission of the affidavit to the amendment as required by

the act of 1897 was waived by the conduct of the plaintiff or his counsel, and that the whole record from the trial court to the Supreme Court shows conclusively that the matters of defense set up by the amended answer were considered solely on their merits, and that the only logical conclusion from the decision of the Supreme Court is that it set up a valid defense, and the court erred in disallowing it.

But I think that the proposed testimony which the Supreme Court held would have constituted a good defense, and the question of which this court held was error, was admissible regardless of the amended answer. In my opinion it was admissible and pertinent evidence under the general denial of liability contained in the original plea or answer. The suit was for a violation of rule No. 9 of the Railroad Commission. The charge against the company was in effect that it was at fault in the violation of this rule, and that this fault on its part had resulted in damage to the plaintiff, and it claimed the liquidated damages fixed by the rule. The defendant in the original plea denied that it was guilty of any of the wrongs charged against it by the plaintiff; in other words, it denied that it had violated rule No. 9 of the Commission, or was at fault. When the Railroad Commission made the rule, it certainly contemplated that there might be some excuse or exculpation for the failure of the railroad company to comply with its terms. These excuses were necessarily a part of the rule itself, and were in the mind of the commission when the rule was promulgated, and these excuses should be considered as an essential part of the rule as plainly so as if they were written by express terms therein. The Supreme Court in this case has stated specifically that some of these excuses offered to be proved by the defendant constituted a defense, and it does seem to me that the general denial of the violation of the rule, a denial of the charge that the defendant was at fault, all tend to "disprove the plaintiff's cause of action," and evidence would be admissible even without a special or affirmative plea to that effect. There was no necessity to plead excuses or defenses which inhere in and are a part of the rule as contemplated by the commission and ruled as implied by the Supreme Court. In other words, where the plaintiff asserts that the defendant has violated the rule and is at fault and has damaged him on account of the violation, a denial of the violation and of such fault on its part would be sufficient pleading to admit testimony in evidence in support of the defense, and no other pleading would be necessary. The defendant in this case denied the charge that it had violated the rule of the commission or was at fault, and offered to show certain excuses as proof that the rule was not violated. Why should it be necessary to assert by an affirmative

plea these excuses if they are lawful and inhere in the rule? Certainly these excuses are defenses. It was so held by the Supreme Court, and, if they are defenses, they tend "to disprove the plaintiff's cause of action," and, under section 5053 of the Civil Code, they are admissible without any special plea. They are in no sense matters of confession and avoidance, but are strictly matters of denial and defense. *Richmond & Danville R. Co. v. Bulce*, 88 Ga. 181 (4), 14 S. E. 205; *Price v. Bell & Son*, 88 Ga. 740, 15 S. E. 810; *Bliss on Code Pleading*, § 327.

(8 Ga. App. 303)

WILLIAMS v. EMPIRE MUT. ANNUITY & LIFE INS. CO. (No. 2,077.)

(Court of Appeals of Georgia. Sept. 28, 1910.)

(Syllabus by the Court.)

1. INSURANCE (§§ 137, 141, 349, 372*)—EVIDENCE (§ 408*)—PAYMENT OF FIRST PREMIUM—WAIVER—CONDITION SUBSEQUENT—WAIVER OF FORFEITURE.

If a policy of life insurance, which on its face acknowledges the receipt of the first premium, is (without fraud, accident, or mistake) delivered to the insured by the company or its authorized agent, and the first premium is not in fact paid in cash, it will be conclusively presumed that the company intended to waive the payment of the first premium in cash and to extend credit to the insured. But the acknowledgment of the receipt of the premium, as contained in the face of the policy, may be explained by showing that, contemporaneously with the delivery of the policy, the insured executed his promissory note, payable to the company, for the premium, and that, by the terms of the policy, failure to pay the premium note at maturity would forfeit the policy. In such a case the insurance would become effective upon the delivery of the policy, subject to forfeiture for breach of the condition subsequent, namely, the nonpayment of the note; but, like other forfeitures for failure to comply with condition subsequent, the company may waive the forfeiture arising from failure to pay the note.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 231-245, 253-262, 891, 895-902, 941; Dec. Dig. §§ 137, 141, 349, 372;* *Evidence*, Cent. Dig. § 1835; Dec. Dig. § 408.*]

2. INSURANCE (§ 392*)—FORFEITURE FOR NONPAYMENT OF PREMIUM—WAIVER.

Where, in such a case, the company takes a note for the premium, and it is provided in the policy that if the note is not paid at maturity the policy shall be void, but the note represents the premium for an entire year, the company, by insisting upon the payment of the note in full after its maturity, will be held to have waived its right to forfeit the insurance during the year, especially where the note is an interest-bearing obligation. The law, following equity, will not allow the company either to collect or to assert its right to collect a full year's premium out of the insured, and yet declare the policy void at an earlier date.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1069; Dec. Dig. § 392.*]

3. INSURANCE (§ 349*)—EVIDENCE (§ 418*)—PAROL EVIDENCE—VARYING SEALED INSTRUMENT—FORFEITURE FOR NONPAYMENT OF PREMIUMS.

Where, however, a company allows a policy acknowledging receipt of the first premium to be

delivered to the insured by its agent, under an arrangement whereby the company extends the credit for the insurance premium to the agent, and the agent, to protect himself, takes from the insured a promissory note, under seal, payable to the agent personally, the company will not be allowed to declare the policy forfeited for the nonpayment of the note given by the insured to the agent, under a clause in the policy which provides that if a note be taken for the premium, and the note be not paid at maturity, the policy shall be void, although the agent transferred the note of the insured to the company in payment or as security for the company's account against the agent for the amount of the premium.

(a) Where a sealed instrument is payable to a designated person, it is not permissible to show by aliunde testimony that in the transaction the payee was acting as agent for a third person, so as to make the liability of the payor a liability to that third person, instead of a liability to the person designated as payee.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 897; Dec. Dig. § 349;* *Evidence*, Cent. Dig. §§ 1906-1911; Dec. Dig. § 418.*]

4. INSURANCE (§ 664, 669*)—ACTION ON POLICY—ADMISSIBILITY OF EVIDENCE—WAIVER OF FORFEITURE—INSTRUCTIONS.

It is error to give an instruction which is wholly irrelevant to the issues between the parties and unsupported by the evidence. Proof that a notice was sent to the insured calling upon him to pay a premium, or notifying him when the next premium is due, may be admitted, to show a waiver of forfeiture on the part of the insurance company, even though it does not appear that the insured actually received such notice.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1637; Dec. Dig. §§ 664, 669.*]

5. WITNESSES (§ 141*)—COMPETENCY—TRANSACTION WITH DECEDENT.

The agent of a corporation primarily is not incompetent to testify as a witness in behalf of the corporation concerning communications between himself, as such agent, and another, since deceased, whose assignee or transferee is the opposite party to the case, even though such latter party be insane.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 576-579; Dec. Dig. § 141.*]

6. WITNESSES (§ 140*)—COMPETENCY—TRANSACTION WITH DECEDENT.

A person not a party to the suit, but who is interested in its result, is not competent to testify as to transactions or communications with an insane or deceased person in an action brought by the assignee or transferee of the insane or deceased person, although, as agent of the corporation, he might be generally competent as a witness, if he were not personally interested in the result of the suit.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 615; Dec. Dig. § 140.*]

7. CONTRACTS (§§ 278, 316*)—INSURANCE (§ 392*)—FORFEITURES—NATURE—RECALL OF WAIVER.

A forfeiture occurs, if it results at all, immediately upon a breach of the condition of the contract on which it is based; and, forfeitures not being favored in law, a waiver of the forfeiture once made cannot be recalled. The demand for payment in full of a future premium subsequent to the breach of a condition which would have entitled the insurer to insist upon a forfeiture of the contract will be held to be a waiver of the forfeiture, and be treated as an acknowledgment that the delinquent policy hold-

er is still entitled to the benefits conferred by his contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1459; Dec. Dig. §§ 278, 316;* Insurance, Cent. Dig. § 1069; Dec. Dig. § 392.*]

8. INSURANCE (§ 392*)—FORFEITURE FOR NON-PAYMENT OF PREMIUM NOTE.

In case a note is accepted in payment of the premium upon a policy of insurance, and in the policy it is stipulated that failure to pay such note at maturity will void the contract, the retention of the note and an attempt to collect it in full after its maturity is a waiver of the right of forfeiture. An insurance company which takes a note for a premium may, upon default in the payment of the note, forfeit the policy of insurance, if the contract so stipulates; but it cannot forfeit the policy and collect the entire note.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1069; Dec. Dig. § 392.*]

9. INSURANCE (§§ 186, 349*)—FORFEITURE FOR NONPAYMENT OF PREMIUM NOTE—ACCEPTANCE OF AGENT'S LIABILITY INSTEAD OF PREMIUM—RIGHT TO GIVE CREDIT FOR PREMIUMS.

If the agent of the insurance company, who is not authorized to accept anything but cash in payment of a premium, takes a note for the first premium, and thereby becomes personally liable to the company for the cash, and the company holds him individually responsible for the amount of the premium, the nonpayment of the note does not forfeit the policy. An insurance company has the right to accept the assumption of personal liability on the part of its agents in lieu of the payment of a premium in behalf of another, to the same extent that it must look to its authorized agent to deliver or pay over to the company premiums actually paid to him in cash. An insurance company, in the absence of any provision to the contrary in its charter, may extend credit in the payment of insurance premiums, and such credit may be extended to an agent, who has assumed the payment of a premium in behalf of the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 396-398, 891, 895-902; Dec. Dig. §§ 186, 349.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by George W. Williams, guardian, against the Empire Mutual Annuity & Life Insurance Company. Judgment for defendant, and plaintiff brings error. Reversed.

Hines & Jordan, for plaintiff in error. Maynard & Hooper and Perry S. Pearson, for defendant in error.

RUSSELL, J. 1. William Harrison Williams secured a policy of insurance with the Empire Life Insurance Company, dated August 5, 1905, and was given a receipt for the first annual premium on the policy, which stipulated that the regular premium up to the 5th day of August, 1906, was paid. The receipt contained a stipulation that, to be valid, it must be signed by the president or secretary and countersigned by an authorized agent of the company. It was countersigned on August 9, 1905, by Langford, Jones & Co., agents. The date upon which the secretary signed the receipt does not appear. On August 3, 1905, William H. Williams executed and delivered a note for \$39.70, pay-

able to the order of Langford, Jones & Co. This note was not paid at its maturity on December 1, 1906. Thereafter it was sent to the Bank of Soperton for collection, and was in the hands of this bank at the time that Williams, the insured, met his death, in the latter part of July, 1906. George W. Williams, as guardian for Roy Williams, the beneficiary of the policy, who was a brother of the insured, and who is non compos mentis, brought suit upon the contract of insurance. The insurance company defended upon the ground that the first annual premium was never paid by the insured, or by any one for him; that a note was given for the first annual premium, which was never paid, and that by the terms of the policy the failure to pay the note at maturity operated to forfeit the policy; and that, on account of the forfeiture, the policy was not in force at the time of the death of William Harrison Williams, the insured. The company admitted a prima facie case in behalf of the plaintiff, and took upon itself the burden of establishing its freedom from liability. The jury found in favor of the defendant, and the plaintiff excepts to the judgment refusing a new trial.

The first question which arises in the case is the determination of the relation which the receipt bears to the policy. Is it independent of or a part of the contract of insurance? The view of the other members of the court on this question is stated in the first headnote; personally, the writer goes further. Nothing is better settled than that receipts generally are subject to explanation or denial as evidence of payment, and that parol evidence is competent for this purpose. If the receipt in this case cannot be considered a part of the contract, then the instruction of the judge, of which complaint is made, was correct, because no one is estopped by a receipt, for it is such a writing as is subject to be varied or explained by the party executing it. But inasmuch as the payment of the first premium is an essential prerequisite to the creation of a contract of insurance, and the defendant admits in its answer that the contract was entered into and executed as alleged by the plaintiff, it seems to me that the receipt becomes a part of the contract. As such, it is not subject to be varied by parol, and consequently I think that the judge erred in charging the jury that they were to determine whether or not the first premium was in fact paid. Of course, the antecedent evidence upon that subject was inadmissible; but that point is not made in the first exception, and will be dealt with later. I think that, where a policy of life insurance acknowledges receipt of the premium, proof that it has not been paid will not be permitted. We all agree that, upon the ground of public policy, the insurer should not be permitted, after the

mouth of the insured has been forever sealed by death, and perhaps the only means of proving to the contrary has thus been destroyed, to assert that he entered into a contract with the deceased without any consideration. Such a rule would remove every guaranty that the beneficiaries of a policy would be paid, and put a premium upon frauds.

We do not mean to hold that the insurance company may not show that the policy was not in fact delivered, or that the insured came into possession of the contract wrongfully and fraudulently; but where it is admitted that a contract of insurance was, in the regular course of its business, delivered to the insured, it is to be conclusively presumed that the evidence of the insurance company's obligation was executed and delivered upon a consideration which the company at least deemed sufficient. An admission that the contract was made is incompatible with the assertion that the first premium, upon the payment of which the existence of the contract depends, was not paid in some way. The exact point does not seem to have been decided in this state, but in Illinois, New Jersey, Missouri, and North Carolina the question now before us has, we think, been correctly ruled. See *Illinois Central Insurance Co. v. Wolf*, 37 Ill. 354, 87 Am. Dec. 251; *Teutonia Life Insurance Co. v. Mueller*, 77 Ill. 22; *Germania Fire Insurance Co. v. Muller*, 110 Ill. App. 190-193; *Teutonia Life Insurance Co. v. Anderson*, 77 Ill. 384; *Massachusetts Benefit Life Association v. Sibley*, 158 Ill. 411, 42 N. E. 137; *Basch v. Humboldt Mutual Co.*, 35 N. J. Law, 429-431; *Dobyns v. Bay State Benefit Association*, 144 Mo. 95, 45 S. W. 1107; *Kendrick v. Mutual Benefit Life Ins. Co.*, 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592; *Grier v. Mutual Life Insurance Co.*, 132 N. C. 542, 44 S. E. 28. Furthermore, the evidence is uncontradicted in this case that the note was taken in payment of the premium, not by the insurance company, but by Langford, Jones & Co., if the consideration of the note was the amount required to pay the premium. The note was dated August 3d. The date of the receipt was August 9th. The note was not payable to the insurance company, or even to Langford, Jones & Co., as agents. It is admitted that Langford, Jones & Co. are indebted to the company for moneys representing premiums on policies of insurance written by them, and the fact that a note was taken by Langford, Jones & Co., and by them indorsed, is evidence that it was in the first instance payable to them individually, and the testimony shows that it not infrequently happened that premiums were charged to them. If the note was taken by the insurance company upon Langford, Jones & Co.'s indorsement merely as partial payment to the company of amounts collected by that firm upon premiums, including that of Williams, then there would be no

legal significance, so far as a waiver of the forfeiture is concerned, in an effort of the company to collect the note through the Bank of Soperton. The effort of the insurance company to collect the note would not be evidence of any waiver of the forfeiture, but merely evidence of the insurance company's desire to collect the note, which they had purchased, or held as collateral from the original payees. This, however, would establish the fact that Williams paid the premium, or at least that Langford, Jones & Co. paid it for him. On the other hand, if the note was intended to be made payable to the insurance company, then the effort to collect it after its maturity was a waiver of the right to forfeit the policy for the non-payment of the note, as it was stipulated in the policy that the insurance company had a right to do, for reasons which we will point out further on in this opinion.

2. It is complained that the judge erred in charging the jury upon the right given the insured by the policy to reinstate himself upon certain conditions therein named, for the reason that it was irrelevant to any issue raised by the pleadings, and therefore any instructions upon the subject of reinstatement were necessarily misleading and confusing to the jury. We think this point is well taken. The issues between the parties were three: (1) Was the note given by the insured to the company in payment for the first premium? (2) Did the agents agree to assume and pay this premium? (3) Even if the note was payable to the company, was there a waiver of the forfeiture of the policy? These were the only issues, and it was therefore immaterial whether there was any provision for reinstatement or not. The plaintiff did not insist that he had taken the proper steps to be reinstated. Counsel for the defendant insists that the provision with regard to the reinstatement of the policy is immaterial, in view of the fact that by the terms of the policy the company is continually notifying its policy holders to reinstate, and this, taken in connection with the sending out of the notice of the second year's premium, is explanatory of the policy of the company and that the sending of the notice as to the second premium is simply for the purpose of continuing invitation and directing the attention of the insured to the reinstatement provision. In regard to this it is only necessary to say that there is nothing in the notice sent out which would sustain this view of the case. The notice simply requested the payment of the second premium; and, from the fact that no reference was made to any failure on the part of the insured to pay the first premium, it is necessarily corroborative of the plaintiff's contention that the first premium had been paid by Langford, Jones & Co., acting for the insured. The instruction to the jury to determine and consider whether the insured received the notice with reference to the second premium is like-

wise irrelevant to any issue presented in the pleadings, because the forfeiture of the policy, if waived by the sending of the notice at all, was completely waived by the action of the insurance company, and not dependent upon any affirmative action on the part of the insured. No act on the part of the insured could create a waiver of the company's right to forfeit the policy. This waiver was necessarily dependent upon some act on the part of the insurer.

It is insisted that the court erred in permitting W. W. Reed, a witness for the defendant, to testify, over the objection of the counsel for plaintiff: "The agents took a note from the insured. * * * It was forwarded by the agents to the company. The company took that [the note] simply as an extension of time that the agents granted that party for an extension of time for the settlement of that claim." The objection to the testimony was that the witness was incompetent to testify to transactions with the insured, who was dead, the plaintiff being insane, and that it could not prove a contract with the insured, who was dead, which would render the policy sued on void; said witness being the secretary of the company at the time of said transaction, and now its president. Under section 5269 of the Civil Code of 1895, the witness Reed was not incompetent, either by reason of the fact that the maker of the note was dead, or that the plaintiff in the case was insane. The witness did not purport to testify to any transaction or communication either with the deceased or with the party who was insane. Even if he had testified to a transaction or communication with the deceased, the evidence would have been admissible, under the rulings in *Cody v. First National Bank*, 103 Ga. 789, 30 S. E. 281, and *Holston v. Southern Railway Co.*, 116 Ga. 656, 43 S. E. 29, in which it was held that the agent of a corporation is competent to testify as to transactions with a deceased party, even though the personal representative of the decedent is the adverse party to the corporation.

We think the court erred in overruling the objection to the testimony of the witness S. E. Jones, for the reason that he had a personal interest in the result of the suit. Civ. Code 1895, § 5269, par. 4. If the jury found in favor of the plaintiff, Jones would necessarily be liable to the insurance company for the amount of the note, either as money collected from the deceased and not paid over to the company, or as indorser upon the note, which he took without authority of the company, instead of collecting the premium. If the jury found in favor of the defendant, Jones would not be liable, according to the undisputed testimony, for a greater amount than the proportionate part of the premium from August 3d to December 1st, even if he was liable for anything. And the testimony of Jones, to which the objection was

offered, concerned his transaction with the deceased, of whom the plaintiff was the transferee or assignee, and as to whom, therefore, the plaintiff stood in the same relation as if he had been his legal representative.

Conceding that the jury had a right to find that there had been no payment of the first premium, either by the deceased or by any one in his behalf, the insurance company had the right, under the terms of the policy, to forfeit the contract upon the failure of Williams to pay his note at maturity, and waived its right by sending the note to the bank, and leaving it there, and attempting to collect it, as the evidence shows, some months after the forfeiture could have been insisted upon. The company clearly waived its right to insist upon the forfeiture, by attempting to collect the note, instead of returning or attempting to return it to the maker, because as we held in *Arnold v. Empire Insurance Co.*, 3 Ga. App. 685, 60 S. E. 470, an insurer cannot in any case insist upon a forfeiture and at the same time retain a note taken in payment of an unpaid premium, upon the nonpayment of which the forfeiture depends. This would be getting something for nothing. A waiver, when once made, cannot be recalled, because the law does not look with favor upon forfeiture of insurance policies, and will seize upon any circumstances which indicate an election to waive a forfeiture.

But not only does the attempt to collect the note after the insurer might have insisted upon a forfeiture of the policy indicate a waiver of its right on the part of the insurer, but the sending of the notice as to the second premium must be taken as proof of the fact that the delinquent policy holder was acknowledged by the company to be entitled to all the benefits conferred by his contract. In the present case, although the note for the first premium had been past due since December 1, 1905, the company still recognized that Williams was insured by it, and that the past-due note had been taken in lieu of the cash, because on July 19, 1906, only 15 days before the second premium would be due, the company mailed him the following premium notice:

"Take Notice.—Your annual premium on policy No. 7194 will be due August 5, 1906, as follows: Premium, \$39.70, on or before which date payment must be made to the home office of the company. If the premium is paid quarterly, the amount will be \$——, or if semiannually \$——.

"[Signed] William W. Reed, Secretary.

"Note.—Premiums are payable to the company at its office in Atlanta, and no payment of the same shall be valid if paid to an agent or any other person whatsoever, unless such person is possessed of and turns over to the payee a receipt, signed by the president, and countersigned by himself, as evidence of payment to him. According to the policy con-

tract, members must pay their premiums on or before the day on which they fall due, and in the event of their failure to do so their policy of insurance shall be deemed forfeited and of no effect, except where otherwise expressly stipulated in the policy."

Now, if the company elected to forfeit the policy, as it had the right to do when the note was not paid on December 1st (for the forfeiture occurred immediately upon the failure of the insured to pay the note, according to the terms of the policy—*Washburn v. Union Central Life Ins. Co.*, 143 Ala. 485, 38 South. 1011), then it could not consistently notify the deceased on July 19, 1906, over 7 months after the note became due, that his annual premium would be due on August 5th following, and especially call the insured's attention to the fact that his policy would be deemed forfeited if that premium was not paid on or before August 5th. There was no claim, so far as appears from the evidence, that this notice was sent by mistake, and there is no other evidence which indicates that, if the payment of the premium had been tendered, it would not have been accepted. It is apparent to us, therefore, that no construction can be placed upon this evidence other than that the company had elected to waive its right to forfeit the policy after the nonpayment of the note, and the case is controlled by the ruling of this court in *Farmers' Mutual Association v. Elliott*, 4 Ga. App. 342, 61 S. E. 493, in which we held: "Even if, under the by-laws of a benevolent fraternal association or assessment insurance society, no affirmative action is necessary in order to enforce the forfeiture of a policy of insurance for nonpayment of dues or assessments, as the case may be, the subsequent demand for the payment of such dues or assessments is a waiver of the forfeiture, and an acknowledgment that the delinquent policy holder is still entitled to the benefits conferred by his contract with the association." In that case the insurer was a fraternal association, and not a regular insurance company; but this would not affect the rule, and, even if there was no other error in the judgment refusing a new trial, we should feel constrained to reverse the judgment because the verdict of the jury was contrary to the evidence in this respect. The evidence in regard to the sending of the notice is undisputed. It was sent three days before the insured was killed. It may not have been received by him; but certainly an insurer is estopped from asserting that he was attempting to collect a premium, due at a future date, upon a contract which he had a right to declare void, had declared to be void, and which was, therefore, utterly worthless. No one who has entered into a contract should be permitted to blow both hot and cold, and least of all should this privilege be allowed to life insurers, because

in most instances the contingency upon which the liability of the insurance company depends leaves the beneficiaries of the deceased illy prepared to enforce their rights.

In any view of the evidence in this case, the nonpayment of the first premium, if not waived, was not satisfactorily established. And inasmuch as the defendant had the burden of establishing the fact of the nonpayment of the premium, in order to rebut the plaintiff's prima facie right of recovery, the evidence was not sufficient to authorize the verdict rendered in its favor. If the agents of the company, without authority, took the insured's note, instead of collecting the amount of the premium in money, and the amount thus represented was chargeable to the agents, and was charged to them by the company with the agents' consent, then the insured's premium was paid, and there was no default. If, on the other hand, the note was accepted by the company, after its indorsement by the agents, as an extension of the time within which the payment of the premium might be made, as contended by the defendant, the right to forfeit the policy was waived, so that in either event the defendant failed to show any reason why the policy should be adjudged to have been forfeited. Consequently the judge erred in refusing to grant a new trial.

Further, the note in this case was under seal, and the doctrine is well established that in sealed instruments it cannot be shown that the parties were acting merely as agents, when the agency is not disclosed. The note was payable to Langford, Jones & Co., and not to the company.

Judgment reversed.

(8 Ga. App. 325)

SOUTHERN RY. CO. v. ANSLEY.

(No. 2,375.)

(Court of Appeals of Georgia. Sept. 28, 1910.
On Petition for Rehearing, Sept. 29, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1026*)—HARMLESS ERROR.

Mere error does not require the grant of a new trial. To set aside a verdict which is sustained by evidence, the error of which complaint is made must be shown to have been injurious to the complaining party, or at least appear to have affected some of his rights.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4029, 4080; Dec. Dig. § 1026.*]

2. APPEAL AND ERROR (§ 1041*)—HARMLESS ERROR—REFUSAL OF AMENDMENT.

Where the plaintiff in an action for damages placed his right to recover upon a statute of Alabama, it was not error harmful to the defendant to refuse at the second term to allow an amendment to the answer, setting forth that the train upon which the plaintiff was employed, and upon which he was injured, was engaged in interstate commerce, and that therefore the defendant, if liable at all, was liable under the provisions of the act of Congress approved April

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

22, 1908 (Act April 22, 1908, c. 149, 35 Stat. 65, [U. S. Comp. St. Supp. 1909, p. 1171]), generally known as the employer's liability act. Even if this act of Congress, as to such a case, superseded the statute of Alabama, and even though the amendment would have been good if filed at the appearance term as a dilatory plea, it did not set up any substantive defensive matter affecting the merits; and as the rights of the plaintiff as an employé were greater, and the liabilities of the defendant as an employer were less, under the statute of Alabama (Code 1907, § 3910) than under the statute of the United States, the refusal of the amendment could not by any possibility have injured the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106-4109; Dec. Dig. § 1041.*]

3. APPEAL AND ERROR (§ 1041*)—HARMLESS ERROR—REFUSAL OF AMENDMENT.

Even if the statute of the United States had been applied by the court, and the jury instructed accordingly, the verdict in favor of the plaintiff would have been demanded. Under the provisions of the federal employer's liability act, the evidence demanded the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106-4109; Dec. Dig. § 1041.*]

4. PLEADING (§ 103*) — DILATORY PLEAS — TIME.

Dilatory pleas must be filed at the first term.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 208-212; Dec. Dig. § 103.*]

(Additional Syllabus by Editorial Staff.)

5. REMOVAL OF CAUSES (§ 26*)—DIVERSE CITIZENSHIP.

Where both parties are nonresidents of the state, the action cannot be removed to the federal court on the ground of diverse citizenship.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 60; Dec. Dig. § 26.*]

6. PLEADING (§ 35*)—SURPLUSAGE.

If plaintiff alleges a cause of action, though pleading the laws of another state, which would be good under the laws of Georgia, which embraces statutes of the United States passed in pursuance of the United States Constitution, the judge may disregard as mere surplusage any statement as to the law which may have been pleaded merely as basis for admission of proof as to the nature of a foreign law clearly not applicable to the case.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 76-80; Dec. Dig. § 35.*]

7. APPEAL AND ERROR (§ 1033*)—RIGHT TO COMPLAIN.

One cannot complain of an error which is favorable to him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

8. STATUTES (§ 279*)—FOREIGN STATUTES.

The federal employer's liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]), not being a foreign law, is not required to be pleaded or referred to in the declaration.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 378; Dec. Dig. § 279.*]

On Petition for Rehearing.

9. PLEADING (§ 101*)—"DILATORY PLEA."

The test as to whether a plea is dilatory or goes to the merits is that if defendant, upon establishing the facts, can defeat plaintiff's cause of action in whole or in part, or can obtain any substantial relief against plaintiff, the plea is

not dilatory; but if the effect of sustaining the plea is not to deny or diminish defendant's liability on the cause of action asserted, or to obtain other substantial relief, against plaintiff, but merely to defeat his action as presently laid, and leave him an unimpaired right to sue again, the plea is dilatory.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 101.*]

For other definitions, see Words and Phrases, vol. 3, p. 2065.]

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by F. H. Ansley against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

McDaniel, Alston & Black, Maddox, McCamy & Shumate, and Geo. A. H. Harris & Son, for plaintiff in error. Arnold & Arnold and Seaborn & Barry Wright, for defendant in error.

RUSSELL, J. F. H. Ansley sued the Southern Railway Company for damages, and recovered a verdict for \$11,000.

No evidence was introduced, except in behalf of the plaintiff; and it thus appeared, without dispute in the testimony, that in a head-end collision between two of the defendant's trains of cars the plaintiff, who was an engineer, and who was engaged at his post of duty, received injuries as a result of which he lost his leg and was permanently disabled from carrying on the occupation of an engineer. According to the testimony with reference to the value of the plaintiff's services, the verdict was not excessive.

The several grounds of the motion for a new trial, and the exceptions pendente lite to the refusal of the judge to allow an amendment to the defendant's plea, and his refusal to sustain the demurrer to the plaintiff's petition, which are insisted upon, present really but one important point: Is the plaintiff entitled to recover, in view of the fact that his case was expressly based upon the statute of Alabama, and that the trial was had under the Alabama statute, and the jury were instructed solely with reference to the application of the Alabama law to the evidence?

Conceding that the employer's liability act, approved April 22, 1908 (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]), superseded section 3910 of the Code of Alabama of 1907, which was expressly pleaded by the plaintiff in his petition, we are nevertheless of the opinion that the defendant's writ of error does not present such a case as would entitle it to a reversal of the judgment refusing a new trial, and that the defendant cannot justly complain of the court's refusal to allow it to amend its answer. The writer confesses that he has not reached this conclusion without difficulty, because it would indeed be quite anomalous, as is strongly urged by counsel, to allow a plaintiff to sue upon one cause of action and to

recover upon a different one. Nor do we rule that this can be done. We do hold, however, that the evidence sufficiently conforms with the material portion of the declaration to legally authorize a recovery. Paramount to every other consideration is the rule which requires that injury shall concur with error before the finding of a jury in a case should be set aside.

We bear in mind the rulings in *Exposition Cotton Mills v. W. & A. R. Co.*, 83 Ga. 441, 10 S. E. 113, and *Bolton v. Georgia Pacific R. Co.*, 83 Ga. 659, 10 S. E. 352. These rulings, however, we deem to have been overruled and disapproved, or at least greatly limited, by the rulings of the Supreme Court in *Ellison v. Ga. R. Co.*, 87 Ga. 691, 13 S. E. 809, and *City of Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318. In the *Anglin Case*, supra, the Supreme Court held that new and distinct averments of negligence may be made, so long as they are descriptive of the same wrong originally pleaded in the declaration. In the opinion delivered in behalf of the court by Chief Justice Simmons (page 793 of 120 Ga., page 321 of 48 S. E.) it is said: "So long as the facts added by the amendment, however different they may be from those alleged in the original petition, show substantially the same wrong in respect to the same transaction, the amendment is not objectionable as adding a new and distinct cause of action. Persuaded of the correctness of the above views, we feel constrained to overrule so much of the decisions of the following cases as is in conflict therewith: *Central R. Co. v. Wood*, 51 Ga. 515; *Skidaway S. R. Co. v. O'Brien*, 73 Ga. 655; *Henderson v. Central Railroad*, 73 Ga. 718; *Cox v. Murphy*, 82 Ga. 623 [9 S. E. 604]; *Georgia R. Co. v. Roughton*, 109 Ga. 604 [34 S. E. 1026], and also so much of any other cases as conflicts with the ruling now made. This puts this court back in line with its earlier decisions." The court, therefore, in the *Anglin Case*, overruled, without specially naming them, many cases which conflict with it in principle.

The first question which arose in this case was upon the refusal of the judge to allow the defendant to amend his answer so as to set up that the plaintiff's cause of action, if he had any, was dependent upon the federal employer's liability act, approved April 22, 1908. We are of the opinion that, had this amendment been filed as a dilatory plea, at the appearance term, it should have been allowed, and might have been a good plea. But as the amendment was not filed until a term subsequent to the appearance term, it cannot be treated as a plea in abatement, and it is not apparent how the defendant was hurt, if hurt at all. The plea, which in substance alleged that the defendant, though it might be liable to the plaintiff for the particular wrong or injury for which he was suing, was not liable for the reason assigned

in the plaintiff's petition (the Alabama law) but for another reason (the federal act), and which did not set up any fact which on the merits of the transaction would or should, in legal contemplation, diminish the liability or change the rules of evidence, was a dilatory plea. In no true sense can it be considered as a plea to the merits, and all dilatory pleas of whatever nature must be filed at the first term of the court. If the plea had set up anything which would have diminished the defendant's liability to the plaintiff, it would be different, for then it could be considered as a plea to the merits. If the defendant was not deprived of any right (no matter how inconsequential it might be) by the refusal of the court to allow the amendment, it would seem to be useless to order another trial, in order that the same finding may be had upon the facts; for under the testimony a finding in behalf of the plaintiff was inevitable.

It is argued that the right of removal is a valuable right. Agreed. But the defendant could not have removed this case to the United States court, even if the amendment had been allowed, because the plaintiff is a citizen of Alabama, and the Southern Railway Company is also a nonresident of this State. The parties, therefore, being both nonresidents of Georgia, the action could not be removed on the ground of diverse citizenship. It is clear, also, that the defendant did not lose the right of removal by reason of the nonallowance of the amendment, because the petition to remove should have been filed at the first term. Furthermore, the defendant was not hurt, because by the terms of the Alabama statute the right of the plaintiff to recover was narrower than that conferred by the federal statute, which the defendant endeavored to set up, and the consequent liability of the defendant was greater. Under the Alabama statute the plaintiff's recovery could be defeated or diminished by proof of the fact that the plaintiff contributed to the result. Under the United States statute the recovery, if any, would be apportioned in proportion to the plaintiff's negligence. Therefore, so far from the defendant being injured by the refusal of the court to allow the proposed amendment, it seems to us the ruling really benefited the defendant. After a careful consideration of every phase of the case, we are unable to conceive how the plaintiff could have been injured by the refusal of the court to allow its amendment. Suppose that the defendant had proved that the train was engaged in interstate commerce. If the amendment had been allowed, the plaintiff might still have been entitled to recover something under the federal employer's liability act, even if the defendant proved that the plaintiff was negligent. Under the Alabama statute, if the plaintiff had been shown to have contributed to his own injury, he could not recover at all. While it

is not permissible to amend a declaration setting up the common-law liability of the carrier by asking a recovery upon its statutory liability, we think that, where the plaintiff proceeded upon a statute of Alabama, the court was entitled to enter judgment, regardless of whether that statute was superseded or not, because, under the evidence, the defendant was plainly liable under the statute of the United States, which our courts are bound to enforce, under the express terms of the Constitution of this state.

To the writer's mind there is great force in the argument of learned counsel for the plaintiff in error that this method of procedure will tend to allow the plaintiff to sue upon one cause of action and then to recover upon a totally different cause of action, thus taking the defendant completely by surprise. However, I agree that under the trend of modern jurisprudence the real question, when the pertinency of an amendment is raised, is as to the identity of the transaction involved in the litigation. If the plaintiff sets forth a cause of action (though pleading the laws of another state) which would be good under the laws of this state (and statutes of the United States passed in pursuance of the Constitution of the United States are in fact the supreme law of this state), then, upon the facts showing the plaintiff to be entitled to a recovery against the defendant, the judge may administer the law as he knows it to be, and may disregard as mere surplusage any statement as to the law which may have been pleaded merely as basis for the admission of proof as to the nature of a foreign law clearly not applicable to the case. It is to be borne in mind that the statutes of foreign jurisdictions are pleaded solely for the purpose of admitting them in proof; the court not being presumed to know the statutes of a foreign jurisdiction, which are administered by comity only. Should it appear in any case that a foreign statute which has been pleaded has been superseded or repealed, and if it should further appear that—omitting all reference to the foreign law and justly treating it as surplusage—the plaintiff has set forth a substantial cause of action under the controlling law, he should not be denied his rights or delayed in their enforcement merely because of the presence of this surplusage.

It is insisted, however, that the case was tried upon the theory that the plaintiff's rights were predicated upon the statute of Alabama, and the charge of the court shows that the judge conceived that the case was properly based upon the law of Alabama, and the liability of the defendant governed thereby. In our opinion this does not alter the case. In *Cabaniss v. State*, 68 S. E. 849, this court held that a new trial was not required, although the trial proceeded as if

the defendant was charged with a felony, when he was only guilty of a misdemeanor; and in *Spence v. State*, 7 Ga. App. 825, 68 S. E. 443, we held that, the jury having found the defendant guilty of voluntary manslaughter, and a finding for a higher offense being demanded by the evidence, he had no cause for complaint, although the judge did not instruct the jury upon the subject of voluntary manslaughter, or treat it as applicable to the facts of the case. In the present case, if, as alleged by the defendant in its proposed amendment, the train upon which the plaintiff was employed as an engineer was in fact engaged in interstate commerce, then, under the evidence, the plaintiff's recovery was fully authorized by the provisions of the federal employer's liability act, and a finding in accordance with both the law and the facts should not be set aside, unless the complaining party was deprived of some right, and, by reason of the loss of this right, was in some degree at least injuriously affected. We have shown that the defendant was not deprived of the right of removal by the court's refusal to allow its amendment, and that it could not have been injuriously affected by reason of the fact that it was subjected to greater liability under the terms of the federal statute than that imposed by the law of Alabama. In fact, if there had been any evidence tending to show that the plaintiff contributed to his own injury, the court's application of the law of Alabama would have been beneficial to the defendant; and nothing is better settled than that one cannot complain of an error which is favorable to him.

Under our view of the case, the verdict established the liability of the defendant in an amount within the bounds of the evidence, and was authorized by the federal employer's liability act, as one of the laws of Georgia, which (not being a foreign law) was not required to be pleaded or referred to in the declaration. The plaintiff in error complains that the statute of the United States was not applied. We cannot know it was not applied. In our view, even if it cannot be presumed that the statute of the United States was applied by the jury (unwittingly, perhaps, or intuitively, if you prefer), yet the fact remains that the evidence, and the very law for the application of which the plaintiff in error calls, demanded the verdict. Although the judge did not charge the jury upon the liability of the defendant as measured by the employer's liability act, why should the case be tried again to reach the same inevitable result, with the aid of proper instructions, as the jury has already attained without them? To do so would in our judgment be an inexcusable addition to the law's delay. Especially is this true when the defendant did not plead this merely dilatory matter at the first term. While the law allows dilatory matters to be

pleaded, they must be pleaded promptly. Civ. Code 1895, § 5058.
Judgment affirmed.

On Petition for Rehearing.

PER CURIAM. The plaintiff in error says that the court should not have given any weight to the point that the amended plea, though dilatory in nature, was not offered at the first term, because the objection on which the court disallowed it was that "the same set up no defense to plaintiff's action," and, therefore, the fact that it was not filed at the first term was waived. Cf. Wright v. Jett, 120 Ga. 995, 48 S. E. 345.

To make our ruling clearer, and to test the sufficiency of the point now presented, let us look again to what the amendment to the plea set up, and to the purpose for which it was offered, as disclosed on its face. It set up that the plaintiff at the time of his injury was an engineer on a train engaged in interstate commerce, "within the terms of the act of Congress, approved April 22, 1903, regulating the liability of common carriers when engaged in the carriage of such interstate commerce." The purpose of the plea (i. e., whether it was offered as a dilatory plea or as a plea to the merits) is disclosed in the next paragraph, with which the amendment concludes, as follows: "Wherefore defendant says there is no right of action under the allegations of the petition." Plainly, the plea was not offered as a dilatory plea, but as a plea to the merits—not as a plea to the jurisdiction of the court, or to the form of the plaintiff's action, but as a defense to the cause of action itself. In the course of our opinion we have endeavored to show that the plea did not set up anything which could defeat the plaintiff's cause of action, that it merely went to the form or manner in which the plaintiff had sued, that it was in substance and effect a dilatory plea, whether tested by the pleadings or the proof, and that the court committed no reversible error in striking it.

We did intimate that, if it had been filed at the first term as a dilatory plea, it might have been well taken—that is to say, it might have been sufficient (if the facts set up therein were proved) to have caused the plaintiff's action as pleaded to abate, so that he would have been put to the necessity of amending or of suing over. We understand that the test as to whether a plea is dilatory or goes to the merits is this: If the defendant, upon establishing the facts, can defeat the plaintiff's cause of action in whole or in part, or can obtain any substantial relief against the plaintiff, the plea is not dilatory, but is a plea to the merits. On the other hand, if the effect of sustaining the plea is not to deny or diminish the defendant's liability on the cause of action asserted, or to obtain other substantial relief

against the plaintiff, but is merely to defeat the plaintiff's action as presently laid, and to leave him with an unimpaired right to sue over again in some other form or way, or in some other court on the same cause of action, the plea is dilatory. For instance, pleas which allege that the plaintiff has sued in the wrong court, or that proper parties have not been joined, or that parties or causes of action have been misjoined, or that the defendant has not been legally served, or that the plaintiff has sued without complying with some statutory prerequisite, such as paying the costs in advance where such payment is required, or that the plaintiff has sued before his debt is due, or any other such matter which does not negative the idea that the defendant is liable to the plaintiff in the cause of action, are dilatory pleas, and must be filed at the first term.

As we attempted to show in the original opinion, the fact that the plaintiff was a servant engaged in interstate commerce did not tend to deny or to diminish the defendant's liability to him upon the very cause of action he was asserting, and did not give the defendant any other substantial right against him which it could not assert under the pleas already filed in the case. The defendant by the amendment to its plea in effect merely asserted that the plaintiff should not be allowed to proceed with his suit as it was laid in his petition, but should be required to amend (if amendment were permissible) or to sue over again, in another way or in another court, on the identical cause of action. The objection that the plea "set up no defense to the plaintiff's action" was, therefore, as we see it, well taken; and the court did not err in sustaining the objection.

Rehearing denied.

(8 Ga. App. 301)

GREEN v. RHODES. (No. 2,036.)

(Court of Appeals of Georgia. Sept. 28, 1910.)

(Syllabus by the Court.)

1. AFFIDAVITS (§ 12*)—JURAT—CONCLUSIVE-NESS OF RECITALS.

The statement of a jurat that the affidavit to which it is attached was duly sworn to is only prima facie true. It is to be presumed in every case that the officer who signed a jurat does his duty. But the presumption in favor of a properly executed jurat is not conclusive. The fact as to whether the alleged affiant was sworn or not sworn may properly be inquired into, and the statement of the jurat may be shown to be false.

[Ed. Note.—For other cases, see Affidavits, Dec. Dig. § 12.*]

2. CHATTEL MORTGAGES (§ 271*)—FORECLOSURE—AFFIDAVIT—SUFFICIENCY.

Where it is shown that no oath was in fact administered to one who apparently swore to an affidavit made to foreclose a chattel mortgage, and it does not appear from any statement of the alleged affiant, made at the time he affixed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

his signature to the alleged affidavit, that he intended expressly to affirm the truth of the statements contained in the affidavit, the mere fact of signing the affidavit, without more, is not sufficient to dispense with the administration of the requisite oath, and the paper thus signed is not a proper substitute for the affidavit required by law.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Dec. Dig. § 271.*]

3. REVIEW ON APPEAL.

There being no valid affidavit to foreclose the mortgage, the court erred in not sustaining the affidavit of illegality. The case is controlled by the ruling in *Britt v. Davis*, 130 Ga. 74, 60 S. E. 180.

Additional Syllabus by Editorial Staff.

4. AFFIDAVITS (§ 12*)—JURAT—EFFECT.

The officer who signed the jurat to an alleged affidavit is competent to testify that the affidavit was not sworn to.

[Ed. Note.—For other cases, see *Affidavits*, Dec. Dig. § 12.*]

Error from City Court of Waynesboro; S. Burney, Judge pro hac.

Action by W. E. Rhodes against Juett Green. Judgment for plaintiff, and defendant brings error. Reversed.

Isaac S. Peebles, Jr., for plaintiff in error. Phil P. Johnston and J. H. Porter, for defendant in error.

RUSSELL, J. In the court below the plaintiff in error filed an affidavit of illegality to the foreclosure of a chattel mortgage. While there is more than one ground of the affidavit of illegality, only one was insisted upon. This was to the effect that the mortgage had never in fact been foreclosed, nor any affidavit for foreclosure made, for the reason that what purported to be the affidavit made for that purpose was not really sworn to. It purported to be the affidavit of F. L. Scales, the plaintiff's attorney, made in Burke county, Ga., and the jurat was signed: "Frank S. Palmer, N. P. ex-off. J. P." On the trial Frank S. Palmer was introduced as a witness by the plaintiff in error, and the record states that he testified that "he was a notary public and ex officio justice of the peace of Burke county, Ga., and that Mr. F. L. Scales came to him in December, 1908, and told Palmer that he had a paper that he wanted Palmer to sign; that Palmer looked at the paper, and saw that it was an affidavit for the foreclosure of a mortgage; that F. L. Scales signed it, and that Palmer signed it in his presence; that no oath was administered, nor anything said about the truth of the statements contained in the paper. Nothing was said except that he wanted Palmer to sign the paper. Mr. Scales then signed it, and the witness subscribed his name to it. Witness understood that he [Mr. Scales] was making an affidavit, and that he [Mr. Scales] was swearing to the contents of the paper he signed." The trial judge excluded this testimony, on objection by the plaintiff's counsel, upon the ground that the

witness could not be heard to attack his own acts as a judicial officer, and thus the writ of error raises two questions: (1) Whether the magistrate could properly testify that what was in appearance an affidavit had not in fact been sworn to; and (2) if the testimony had not been excluded, what should have been its effect?

We are of the opinion that the testimony of the officer who signed the jurat was competent, and should not have been excluded. It is insisted that the exclusion of this testimony was proper on grounds of public policy, and as coming within the terms of section 5150 of the Civil Code of 1895, because it would be more unjust and productive of evil to hear the truth (if truth it be) than to forbear the investigation. The case of *Britt v. Davis*, 130 Ga. 74, 60 S. E. 180, affords a precedent (if not authority upon the point) that an investigation may be made into the truthfulness of the statements of a jurat. It is true that in that case it was not the officer who signed the jurat, but the purported affiant, who was the witness. We see no reason why, in the pursuit of truth, there should not be an investigation of the circumstances attending a purely ministerial act, even though he who performs it be a judicial officer. There might be a difference of opinion as to the validity or legal sufficiency of what the magistrate did to accomplish the designed effect, but no moral taint.

But, even if a magistrate or a judge acted corruptly, we know of no reason why he might not voluntarily testify thereto. If he did not wish to avail himself of the constitutional protection against self-incrimination, and yet wrong had been done, the truth which he alone could divulge might afford the only means of reparation. We have been unable to find any case in the reports of the Supreme Court in which it has been ruled in express terms that a magistrate may dispute the statements of his jurat; but, as we have already said, the *Britt Case*, supra, is a physical precedent authorizing an investigation into the truthfulness of the statements of the jurat, and we see no reason why in such an investigation the magistrate could not be permitted to swear that no oath was in fact administered as he would be allowed to swear, in sustaining his act, that the witness was duly sworn. In *Cox v. Stern*, 170 Ill. 442, 48 N. E. 906, 62 Am. St. Rep. 385, it was held that a properly executed jurat or certificate is not conclusive, but may be shown to be false, and if it be shown that the jurat is false, and that no oath was in fact administered, the instrument would not be an affidavit. And in *Smith v. Johnson*, 43 Neb. 754, 62 N. W. 217, it was held that the statement that the affidavit was sworn to might be rebutted. The jurat is not a necessary part of an affidavit.

It would seem that the rule which was applied without question in the Britt Case, supra, to the testimony of the affiant, applies to every other person who knows the facts, including the subscribing officer.

The remaining question is sufficiently covered by the headnotes. The case is fully controlled by the decision of the Supreme Court in Britt v. Davis, supra, in which Justice Lumpkin discusses the subject at length. The illegality should have been sustained. Judgment reversed.

(8 Ga. App. 288)

SMITH v. MADDOX-RUCKER BANKING CO.

MADDOX-RUCKER BANKING CO. v. SMITH.

(Nos. 2,293, 2,294.)

(Court of Appeals of Georgia. Sept. 28, 1910.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 76*)—EXCESSIVENESS OF VERDICT—DISCRETION OF COURT.

The trial judge has the discretion of granting a new trial on the ground that the verdict is excessive, when his mind and conscience disapprove the verdict as rendered, though the verdict is not so large in amount as to carry conviction of bias and prejudice on the part of the jury, and though the case is one in which the only measure of damage is the enlightened conscience of the jury.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 153-156; Dec. Dig. § 76.*]

2. APPEAL AND ERROR (§ 1145*)—DISPOSITION OF CAUSE—EFFECT OF AFFIRMANCE OF MAIN BILL OF EXCEPTIONS.

Ordinarily, when the judgment on the main bill of exceptions is affirmed, the cross-bill is dismissed; but this result does not follow when the effect of the affirmance on the main bill is to require a new trial, and the cross-bill presents matters likely to be up for ruling on that trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1145.*]

3. BANKS AND BANKING (§ 140*)—POSTDATED CHECK—NATURE.

A postdated check (i. e., a check dated at a time in future) is not subject to payment or acceptance until the time of its date arrives. If it be presented at a time in advance of its date, the drawee, even if he has funds on hand sufficient to pay it, cannot pay it, or retain the fund to pay, as against other checks or drafts presented and payable prior to the time the check bears date. The drawer of a postdated check does not undertake to have the funds in the drawee's hands to meet it before the time at which the check bears date arrives.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 395, 404; Dec. Dig. § 140.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by M. K. Smith against the Maddox-Rucker Banking Company. A verdict for plaintiff was set aside, and a new trial granted, and plaintiff brought error to the Court of Appeals; defendant filing cross-exceptions. Questions were certified to the Supreme Court. On remand after answers

to questions (68 S. E. 1031). Judgment affirmed on both main and cross bills of exceptions.

R. B. Blackburn, for plaintiff in error. Smith, Hammond & Smith, for defendant in error.

POWELL, J. Smith sued the bank for general damages resulting to him from the wrongful protest of two checks drawn by him on his bank account. Smith had a deposit account with the defendant bank, and on April 7, 1905, he had a sum to his credit. On that day he drew a check for \$140, payable to an insurance company, but dated it 30 days ahead. This check came into the bank on April 17th, and was charged to his account. In the meantime he drew other checks, not sufficient, however, to have overdrawn his account if the postdated check for \$140 had not been charged in; but his account did become apparently overdrawn by the charging in of this check, and when the two checks in question came in they were protested for lack of funds. The point is that the check of \$140, being dated May 15, 1905, should not have been charged to his account prior to that date and the two checks that were protested should have been paid.

The jury found in favor of the plaintiff a verdict for \$400. The defendant filed a motion for a new trial, containing several grounds. The judge granted a new trial, stating in his order that he granted it on two of the grounds only, the first and third. The first ground is that the verdict is excessive. We need not set out the third ground. It related to a request to charge. We may say, in passing, that we see no reason for granting a new trial on that ground. The plaintiff sued out a bill of exceptions, complaining of the grant of a new trial. The defendant filed a cross-bill, complaining that the court should have granted it on all the grounds, and not merely on the first and third.

In this court the plaintiff in error contended that as the sole measure of damage was the enlightened conscience of the jury, subject only to the legal limitation that the verdict should be temperate in amount (no special damages or malice being shown), the trial judge had no right to grant even the first new trial on the ground that the verdict was excessive, it not being so large as to indicate bias or prejudice on the part of the jury. This court held in Holland v. Williams, 3 Ga. App. 636, 60 S. E. 331, that, even in cases where the enlightened conscience of the jury is the only measure of damage, the trial judge has the right to grant one new trial as a matter of discretion, and that it is his duty to do so if his mind and conscience disapprove of the amount found, even though it be not so large as to suggest bias or prejudice on the part of the jury.

Counsel for the plaintiff in error called our attention to the fact that our decision was in conflict with the decision of the Supreme Court in *Brown v. Autrey*, 78 Ga. 756, 3 S. E. 669. Seeing that this was so, but believing that our decision was in accordance with a long line of decisions rendered by the Supreme Court, both prior and subsequent to the case of *Brown v. Autrey*, we certified the question to the Supreme Court. That court has filed instructions approving the holding of this court in the case of *Holland v. Williams*, supra. It follows that the main bill of exceptions is without merit.

Ordinarily, when the judgment on the main bill of exceptions is affirmed, the cross-bill is to be dismissed; but under the decision of the Supreme Court in the case of *Thornton v. Travelers' Ins. Co.*, 116 Ga. 121 (1), 42 S. E. 287, 94 Am. St. Rep. 99, this result does not follow where the effect of the affirmance on the main bill is to require a new trial, and the matters in the cross-bill will likely arise on that trial. Hence we pass on the questions presented in the cross-bill.

A postdated check (i. e., a check dated at a time in future) is not subject to payment or acceptance until the time of its date arrives. If it be presented at a time in advance of its date, the drawee, even if he has funds sufficient to pay it, cannot pay it, or retain the fund to pay it, as against other checks or drafts presented prior to the time the check bears date. The drawer of the postdated check does not undertake to have the funds in the drawee's hands to meet it before the time at which the check bears date arrives. *Joyce*, *Defenses to Commercial Paper*, § 490, and authorities there cited.

Judgment affirmed on both the main and the cross-bill of exceptions.

(135 Ga. 104)

INTERNATIONAL HARVESTER CO. OF AMERICA v. ADAMS.

(Supreme Court of Georgia. Sept. 21, 1910.)

(Syllabus by the Court.)

PLEADING (§ 420*)—EVIDENCE (§§ 317, 471*)—SALES (§ 347*)—ACTION FOR PRICE—INSTRUCTIONS—DEMURRER—SUFFICIENCY—HEARSAY—OPINION EVIDENCE.

Certain notes were given for the purchase money of an engine known as an International gas or gasoline engine bought of the payee by the maker of the notes. In the contract of purchase a written guaranty by the seller provided: "The International gas or gasoline engines are warranted to be well made, of good material, and durable with proper care. The rate horse power is guaranteed on every International engine when leaving the factory; the break test showing a greater horse power than rated. The International engines are warranted for one year from date of purchase. If within this time a part prove defective, a new part will be furnished at our factory on receipt of part showing defect." Suit was brought on the notes by the payee, and the defendant pleaded a breach of

the warranty and a failure of consideration. Held:

(1) Where the court sustained several grounds of a special demurrer of the plaintiff to several allegations in the answer of the defendant, "with privilege to defendant to amend his plea and answer in such form as to cure the defects therein specified," and several amendments offered for this purpose were allowed by the court over a general objection of the plaintiff "that the defects complained of had not been cured by said amendments," there was no error in overruling the objections and allowing the several amendments where any one, or any part, of either of the amendments, was allowable and cured any of the specified defects.

(2) A witness in behalf of the defendant, after having testified that the horse power of his engine was 9.7, testified as follows: "I do not know and cannot swear what horse power my engine is, only from trying it, and comparing it with other engines. I have known 8 or 10 different ones, and am only comparing it with other engines, and I did not know the horse power of those engines with which I compared it, only by what they claimed." It was error to admit such testimony, over the objection of the plaintiff that it was hearsay.

(3) It was error to admit testimony of a witness for the defendant: "I don't know anything about gasoline engines. From my knowledge of machinery and the usage and custom in this country, and from my knowledge of machinery in general and my past experience, I am satisfied that a 10 horse power engine would pull this 70-saw gin of Mr. Adams"—over objection of the plaintiff "that the evidence was opinionative, that the witness had not qualified as an expert, and confessed ignorance of gasoline engines, and did not know the conditions under which the gin testified concerning was operated by defendant."

(4) It was error to admit testimony of a witness for defendant: "A 10 horse power engine would pull that [defendant's] gin. This is not a 10 horse power engine [referring to the engine in dispute]. If I shall judge by the work it is doing, not that I am qualified to say it was not, but according to my judgment, it is not. I am not an expert as to machinery. It is a fact that my testimony about this horse power is only by getting comparison from what I have seen of other engines that were said to be of a certain horse power. Therefore I am judging that horse power by what they told me, and not by actual measurement made by myself"—over objection of the plaintiff "that said evidence was hearsay, based upon statements made by others as to horse power of other engines used in comparison of work done, that said evidence was opinionative, and witness had not qualified as an expert."

(5) It was error to admit testimony of a witness for the defendant: "If this engine [the engine in dispute] reached us [the defendant, witness' father, and him] in the same condition that it was when it left the factory, I will swear that it would not under the break test show a greater horse power than 10 horse power, when it left the factory. I only swear to that fact by comparison with other engines. I know what other engines are rated at; what their horse power is rated at. That is what somebody said. All the testimony that I gave to Mr. Boykin's [counsel for defendant] questions has been based upon comparison with other engines which are said to have a certain horse power"—over objection of the plaintiff, "because the evidence of the witness was based upon hearsay testimony, because he swore as to horse power of the engine in dispute by comparing same with other engines the horse power of which he did not know, merely 'understood' or 'heard' or 'were rated' at so much horse

power, that the testimony was not a statement of fact, but a conclusion of the witness, that the evidence was opinionative, and the witness had not qualified as an expert."

(6) The court charged the jury as follows: "On the other hand, if you find that the plaintiff company contracted to sell and did ship to the defendant a certain gasoline engine which was not well made and was not of good material, and was not durable with careful and proper use and gear, or if you find that the engine was not of a 10 horse power when geared to properly adjusted and set up machinery, and you find that the engine by reason of not being well made, or not having been made of good material, or was not durable with due care and caution in its operation, or you find that by reason of the construction of the engine that it would not develop in operation and use a 10 horse power with proper handling, you would not be authorized to find for the plaintiff, but, if you find such to be the facts of the case, you would be authorized to find that the consideration of the notes sued on has failed, and you would be authorized in that instance to find for the defendant." This charge was error and subject to the criticism made that "the error herein complained of being in the court's directing the jury, under this charge that, however slight might have been the failure of the company, this movant, to comply with its part of the contract, either as to furnishing a 10 horse power engine, or machinery that was durable or of good material, the defendant would be allowed the benefit of entire failure of consideration, and excluding from the consideration of the jury all idea of partial failure of consideration."

(7) In view of the entire record, there was no error requiring a new trial with respect to the matters complained of in any of the other assignments of error.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 420; Evidence, Cent. Dig. §§ 1174-1192, 2149-2185; Dec. Dig. §§ 317, 471; Sales, Cent. Dig. § 967; Dec. Dig. § 347.*]

Error from Superior Court, Screven County; B. T. Rawlings, Judge.

Action by the International Harvester Company of America against C. D. Adams. Judgment for defendant, and plaintiff brings error. Reversed.

White & Lovett, for plaintiff in error. H. A. Boykin, for defendant in error.

HOLDEN, J. Judgment reversed. All the Justices concur.

(135 Ga. 205)

SAVANNAH ELECTRIC CO. v. WEST.

(Supreme Court of Georgia. Sept. 30, 1910.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

There was no error in overruling the demurrer. The evidence supported the verdict, and no error appears requiring a new trial.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action between the Savannah Electric Company and Florence West. From the judgment, the Electric Company brings error. Affirmed.

Osborne & Lawrence, for plaintiff in error. Twiggs & Gazan, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(135 Ga. 132)

REGISTER et al. v. CHAMBLISS.

(Supreme Court of Georgia. Sept. 23, 1910.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The charge excepted to was not erroneous. The evidence supported the verdict, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action between Marion Register and others and I. G. Chambliss. From the judgment, Register and others bring error. Affirmed.

Alexander & Gary, for plaintiffs in error. W. D. Bule, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(135 Ga. 173)

MOSS v. HALL et al.

(Supreme Court of Georgia. Sept. 28, 1910.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

There was no error in the ruling upon the admissibility of the evidence. The charge of the court was not subject to the criticisms made upon it. The verdict was supported by the evidence, and there was no error in overruling the motion for new trial.

Error from Superior Court, Greene County; D. W. Meadow, Judge.

Action between R. L. Moss, Jr., and J. S. Hall and others. From the judgment, Moss brings error. Affirmed.

Park & Park, for plaintiff in error. Jas. D. Davison, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(135 Ga. 167)

GEORGIA RY. & ELECTRIC CO. v. MEETZE.

(Supreme Court of Georgia. Sept. 28, 1910.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

No material error appearing in those portions of the charge excepted to nor in the rulings of the court complained of, and the evidence being sufficient to support the verdict, the judgment of the court below is affirmed.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by M. Z. Meetze against the Georgia Railway and Electric Company. Judgment

for plaintiff, and defendant brings error. Affirmed.

Rosser & Brandon and Colquitt & Conyers, for plaintiff in error. Horton Bros. & Burress, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(135 Ga. 186)

BOYD v. BOYD et al.

(Supreme Court of Georgia. Sept. 30, 1910.)

(Syllabus by the Court.)

1. SETTING ASIDE JUDGMENT—PETITION.

Under the ruling in *Ford v. Clark*, 129 Ga. 292, 58 S. E. 818, the allegations of the petition contained sufficient grounds to set aside the judgment complained of, and the court committed no error in overruling the demurrer.

2. SUFFICIENCY OF EVIDENCE.

The evidence submitted was sufficient to authorize the court to set aside the judgment.

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Action by Mary Boyd and others against L. B. Boyd. Judgment for plaintiffs, and defendant brings error. Affirmed.

G. H. Prior and J. G. Collins, for plaintiff in error. H. H. Dean, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(135 Ga. 167)

SPEIGHTS v. ROSS.

(Supreme Court of Georgia. Sept. 24, 1910.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

No error is made to appear in the rulings of the court complained of, and there was sufficient evidence to support the verdict.

Error from Superior Court, Putnam County; H. G. Lewis, Judge.

Action between Emily Speights and Isaiah Ross. From the judgment, Speights brings error. Affirmed.

Greene F. Johnson, for plaintiff in error. W. F. Jenkins & Son and Z. D. Harrison, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(135 Ga. 162)

MARTIN v. MARTIN.

(Supreme Court of Georgia. Sept. 24, 1910.)

(Syllabus by the Court.)

1. EVIDENCE (§ 568*)—VALUE OF PROPERTY.

On the trial of an issue involving the value in bulk of a stock of merchandise and books of account and choses in action, the opinions of witnesses as to the value of the property were not conclusive upon the jury. *Bonds v. Brown*,

133 Ga. 451, 66 S. E. 156; *Jennings v. Stripling*, 127 Ga. 778 (3), 56 S. E. 1026, and citations; *Minchew v. Mahunta Lumber Co.*, 5 Ga. App. 154, 62 S. E. 716.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2392; Dec. Dig. § 568.*]

2. REVIEW ON APPEAL.

Under the evidence in this case it could not be said that the only verdict that could have been rendered was one for the plaintiff for the particular amount found in his favor.

3. APPEAL AND ERROR (§ 977*)—NEW TRIAL—DISCRETION OF COURT.

This being the first grant of a new trial, the discretion of the trial judge in granting it will not be disturbed. *Williams v. Brogdon*, 133 Ga. 691, 66 S. E. 788.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3863; Dec. Dig. § 977.*]

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Action between G. W. M. Martin and W. T. Martin. From the judgment, G. W. M. Martin brings error. Affirmed.

H. H. Dean and C. R. Faulkner, for plaintiff in error. W. B. Sloan, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(135 Ga. 157)

MCKINNEY v. DANIELS et al.

(Supreme Court of Georgia. Sept. 24, 1910.)

(Syllabus by the Court.)

1. INTERPLEADER (§ 11*) — GROUNDS — CONFLICTING CLAIMS.

A party indebted upon a note representing the balance of the unpaid purchase money for certain lands in this state, to which he held bond for title, can maintain an equitable petition in the nature of a bill of interpleader against two foreign administrators with the will annexed of the deceased payee, where each of the two administrators claims that he is the rightfully appointed administrator with the will annexed, and entitled to collect the money due on the notes, and the petitioner cannot, without reasonable apprehension of danger, determine which of the two claimants of the fund is rightfully entitled thereto, upon offering to pay the fund in controversy into the registry of the court, that it may be awarded to the successful one of the parties required to interplead. A petition alleging these facts is not open to general demurrer, although petitioner prays for the affirmative relief of a judgment decreeing the title to the land purchased as aforesaid to be in him, upon the payment of the balance of the unpaid purchase money.

[Ed. Note.—For other cases, see *Interpleader*, Cent. Dig. §§ 13-34; Dec. Dig. § 11.*]

(Additional Syllabus by Editorial Staff.)

2. INTERPLEADER (§ 16*)—NATURE OF "BILL OF INTERPLEADER."

A bill in the nature of a "bill of interpleader" is one where complainant seeks relief of an equitable nature concerning the fund or subject-matter in the suit, in addition to the interpleader of conflicting claimants, and complainant is not required, as in strict interpleader, to be an indifferent stakeholder without interest in the subject-matter; but the facts on which he relies must entitle him to equitable rather than legal

relief, and he cannot, under the guise of a bill in equity, litigate a purely legal claim.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 38; Dec. Dig. § 16.*]

For other definitions, see Words and Phrases, vol. 1, pp. 788-790.]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by Rosa Daniels against A. T. McKinney and another. From an order overruling a demurrer, defendant McKinney brings error. Affirmed.

Rosa Daniels filed her equitable petition against A. T. McKinney and Hill Montague, wherein she alleged that she purchased certain real estate in Bibb county, Ga., from Ida McKinney Long, and paid a portion of the purchase price, leaving due and unpaid \$1,100, represented by three certain notes signed by Rosa Daniels and payable to Ida M. Long, or order; that Ida McKinney Long died in Richmond, Va., where she then lived, and had in her possession at the time of her death the three notes above referred to; that she left surviving her a husband, then residing in Richmond, and an infant child, who is still in life; that Hill Montague, shortly after the death of Mrs. Long, was appointed administrator of her estate by proceedings in the proper courts of Virginia; that A. T. McKinney, the other defendant, who was a brother-in-law of Mrs. Long, probated, in Trigg county, Ky., an alleged will of Ida M. Long, and was appointed administrator with the will annexed of Mrs. Long; that said McKinney had received the three notes above referred to, and had them in his possession at the time of his appointment as administrator of Mrs. Long; that Hill Montague, upon learning of the proceedings taken by McKinney, did himself, by proceedings in the Virginia courts, obtain letters of administration with the will annexed upon the estate of Mrs. Long, in addition to his previous appointment as administrator upon her estate; that, since their respective appointments as administrator in Virginia and Kentucky, each of the defendants has repeatedly demanded of her the payment of the three notes, each insisting that he alone is the legal administrator and that the appointment of the other was wholly illegal and void; that each of them has repeatedly notified petitioner not to pay over to the other the amount due on the notes, threatening that if she did so she would be required to pay the same the second time; that McKinney contends that his appointment in Trigg county, Ky., is legal, and that that county was the home of Mrs. Long at the time of her death, and that he is actually in possession of the property composing her estate in Trigg county, Ky., including the said notes; that Montague contends that Mrs. Long was a citizen of Virginia and resident of Richmond at the time of her death, and

that the notes were assets of her estate at the time of her death, and that they were unlawfully taken in possession and removed to Kentucky by McKinney; and that McKinney, claiming to be the administrator with the will annexed, commenced suit on the notes in the city court of Macon to recover the principal, interest, and attorney's fees provided for in the notes. Attached to the petition was an affidavit that the petitioner was not in collusion with either defendant. She prayed that the defendants be required to interplead, that McKinney be enjoined from further prosecuting his suit in the city court, that a decree be rendered determining the rights of the defendants with respect to the fund in controversy, and providing for the complete protection of petitioner by so framing the decree as to protect her in the payment of the balance of the purchase money, and also requiring the proper party to execute to her good and sufficient titles to the land bought by her from Mrs. Long, as described in the bond for title attached to the petition as an exhibit, or by providing that the decree shall itself constitute such good and sufficient titles in petitioner. McKinney filed a general demurrer, insisting that the petition was without equity, "because the plaintiff had a complete and adequate remedy at common law, because whatever defense she may have she could set up in the city court, because the petition makes out no cause for interpleader and seeks other and affirmative relief, because plaintiff has not paid into court the money that she admits to be due, and because her petition shows affirmatively that she has no defense to the suit which she seeks to enjoin."

Hardeman, Jones, Callaway & Johnston, for plaintiff in error. Miller, Jones & Miller, W. E. Martin, Jr., and Jno. R. L. Smith, for defendants in error.

BECK, J. (after stating the facts as above). Inasmuch as the petitioner in this case seeks affirmative equitable relief, the petition might be open to criticism if she were relying upon the petition in the case purely as a bill of interpleader. But we are of the opinion that the petition contains all of the allegations essential to a bill in the nature of a bill of interpleader and to the maintenance of the petition. "A bill in the nature of a bill of interpleader is one in which the complainant seeks some relief of an equitable nature concerning the fund or other subject-matter in dispute, in addition to the interpleader of conflicting complainants. The complainant is not required, as in strict interpleader, to be an indifferent stakeholder, without interest in the subject-matter. It is essential, however, that the facts on which he relies entitle him to equitable, as distin-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

guished from legal relief. He is not permitted, under the guise of a bill in equity, to litigate a purely legal claim or interest in the subject-matter." 5 Pomeroy's Eq. Jur. § 60. It is manifest that there reasonable grounds of doubt as to which one of the two claimants of the fund joined as defendants in this petition is entitled to demand and receive payment of the same. And while in the petition it is alleged that at the time of her death the payee in the notes was living in the state of Virginia, and that an administrator upon her estate was appointed by the proper court in Virginia, it also appears that McKinney, who is the codefendant of the Virginia administrator in this petition, duly probated a will of Mrs. Long, the payee of the notes, in the proper court in the state of Kentucky, and at the time had actual possession of the personal property belonging to the estate of Mrs. Long in Kentucky, including the notes representing the fund in controversy. Can it be said, under these circumstances and the others set forth in the statement of facts, that the petitioner could pay the fund in controversy to McKinney, who has already instituted a suit against petitioner in the city court of Macon, without the danger, probable and to be reasonably apprehended, of being forced to pay it again to Montague, the Virginia administrator? Is not the question of the rightful possession of the notes, and the question as to whether Montague or McKinney has the legal right to administer that part of the estate of Mrs. Long which is represented by the notes sued on, a question to be settled between the Virginia and the Kentucky administrators?

It seems to us that an affirmative answer to this question is demanded. We can hardly conceive of a debtor, who does not deny her indebtedness, and who is seeking to pay the amount thereof to the rightful holder of the written evidence of the debt, being placed in a more perplexing situation than that of the petitioner. And, further, inasmuch as, upon the payment of the balance of the purchase money of the land which she bought from Mrs. Long, she would have been entitled, had Mrs. Long lived, to a deed conveying the property to herself, and as neither of the defendants in this case is in a position at present to convey the land, so far as appears from this record, we think this fact is another ground for the maintenance of the petition, so that the proper court, in its final judgment, may render a decree which will, of itself, be record evidence of at least a perfect equitable title to the land in the petitioner upon her payment of the balance of the purchase money for the same. While the offer to pay the fund due into court, as made in the petition, might have been open to special demurrer,

we do not think that a defective allegation of readiness and willingness to pay that fund into court was a ground of general demurrer; and, the petition stating as a whole an equitable cause of action, the general demurrer was properly overruled.

Judgment affirmed. All the Justices concur.

(186 Ga. 188)

SCOTTISH UNION & NATIONAL INS. CO.
v. COLVARD et al.

(Supreme Court of Georgia. Sept. 30, 1910.)

(Syllabus by the Court.)

1. INSURANCE (§ 397*)—FORFEITURE—WAIVER.

If there was any breach of the stipulation in the policy prohibiting any change in the title, interest, or possession of the assured, the insurance company was estopped from claiming a forfeiture on that ground by reason of the fact that its adjuster, with full knowledge of the facts giving rise to such claim of forfeiture, demanded of and caused the assured to incur trouble and expense in furnishing an estimate of a builder showing the value of the property insured and destroyed by fire.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1078; Dec. Dig. § 397.*]

2. INSURANCE (§ 606*)—SUBROGATION.

Where a policy on the property of a mortgagor is made payable to the lender as his interest may appear, and the insurance company by separate agreement with the lender is obligated to pay the latter notwithstanding it may deny liability to the assured, with the right under such agreement to be subrogated to the rights of the lender against the assured, and pays the lender with a denial of liability to the assured, but is in fact at the time liable to the assured, the payment to the lender operates at the time it is made to extinguish pro tanto the debt of the assured to the lender; and in a suit wherein it is sought to obtain against the assured a judgment on her notes transferred by the lender to the insurance company in consideration of such payment, the assured may plead the fact of payment, notwithstanding a failure to furnish proofs of loss, or to commence suit on the policy within the time prescribed therein, the payment to the lender having been made before the expiration of such time.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1509; Dec. Dig. § 606.*]

(Additional Syllabus by Editorial Staff.)

3. INSURANCE (§ 397*)—FIRE INSURANCE—CONSTRUCTION OF PROPERTY "APPRAISAL"—"EXAMINATION."

A fire policy provided that the insurer should not be held to have waived any provision or condition of the policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination therein provided for. Held, that the "appraisal" and "examination" did not cover acts of the assured's appraiser in demanding of and causing assured to incur trouble and expense in furnishing an estimate of the builder showing the value of the property insured and destroyed by fire.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1078-1082; Dec. Dig. § 397.*]

For other definitions, see Words and Phrases, vol. 1, p. 463; vol. 3, pp. 2534, 2535.]

Lumpkin, J., dissenting in part.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by William F. Tait against J. M. Colvard, executrix of Mrs. L. F. McCroskey, in which the Scottish Union & National Insurance Company, was made a party defendant. From the judgment, the insurance company brings error. Affirmed.

Willis M. Everett, for plaintiff in error. Anderson, Felder, Rountree & Wilson, for defendants in error.

HOLDEN, J. Mrs. L. F. McCroskey (hereinafter called the assured) executed to the Security Investment Company (hereinafter called the lender) three promissory notes, of \$1,000 each, to secure a loan from that company to her on a farm, with a dwelling thereon, owned by her. While the loan was in force, Mrs. McCroskey insured the dwelling for \$1,500 with the Scottish Union & National Insurance Company (hereinafter called the insurer, or insurance company). By the terms of the policy any loss thereunder was made payable to the lender, for itself, or as agent for its assigns. One of the provisions of the loan agreement was that the borrower should keep the property insured for the benefit of the lender. The insurance company was under an agreement (which was made independent of the policy between the insurance company and what was termed the "Association," the latter representing certain lenders, including the lender in the instant case) that, so far as the lender was concerned, the policy should not be invalidated by any act or neglect of the insured, "nor by any defect in or any change in title, occupation, or ownership of said property." This agreement further provided that whenever the insurance company should pay to the lender any sum for loss or damage under the policy, "and shall claim that, as to the mortgagor or owner, no liability therefor existed, the said insurance company shall, to the extent of such payment, be subrogated to all the rights of the said Association under all securities held by it as collateral as to the mortgage debt."

In July, 1903, the buildings covered by the insurance were destroyed by fire. Some preliminary negotiations (not necessary to be detailed here, but which will be adverted to later on) were had between the insurer and the assured relative to an adjustment of the loss. Afterwards the adjuster of the insurer learned that there had been a contract between the insured and a third person, by virtue of which the latter was placed in possession of the property prior to the fire. He wrote to the attorney for the insured to ascertain the nature of the contract, whereupon the latter replied in effect that the contract was not one violative of any provision in the policy relating to change of title, interest, or possession. The policy contained a provision that it should be void in the event "any change, other than by the

death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) * * * by voluntary act of the insured, or otherwise." The letter of the attorney above referred to was forwarded by the adjuster to the insurance company, which replied that the policy was void as to the insured by reason of breach of the above-quoted condition, but that the insurer was obligated by reason of its contract with the lender to pay it the amount of the loss, and directed that this be done and an assignment to the extent of the payment be taken from the lender, subrogating the insurer to the lender's rights against the insured to that extent. This correspondence was had during September and October next succeeding the fire in July. On December 26, 1903, the insurer took from the lender an instrument of this character, wherein the lender acknowledged receipt of \$1,500 as the full amount of the policy, and recited that, as the insurer claimed no liability existed as to the assured, the lender assigned to the insurer "all its [the lender's] rights under said mortgage and all securities held by it as collateral to the mortgage debt to the extent of said payment to them of fifteen hundred (\$1,500) dollars, priority being given the debt due" to the lender.

In December, 1906, William F. Tait, as transferee of one of the \$1,000 loan notes and of the half interest in another, brought suit against the executrix of the estate of Mrs. McCroskey, the insured, to recover the amount of principal and interest due thereon to him. In answer thereto, the defendant set up the execution of the three notes, for \$1,000 each, to the Security Investment Company, heretofore mentioned, the payment by the insurer to the lender of \$1,500, and that, instead of crediting her with the \$1,500 thus paid, the lender had unlawfully and against her protest transferred one of the notes and one-half of another to the insurer, and insisted that each of the outstanding loan notes, those in the hands of the plaintiff and those transferred to the insurer, was entitled to a credit of one-half of principal and one-half of interest, and prayed that the insurance company be made a party to the suit. The latter, having been made a party, filed its answer, claiming that it was entitled to collect the notes transferred to it in full, having paid full value therefor, and denied that it was in any way liable to the defendant on account of the insurance policy heretofore mentioned. By amendment the insurance company asserted that it was not liable on the policy, because the insured, before the fire occurred, had made a contract of sale of the property and the purchaser had gone into possession, thereby violating the stipulation in the policy that it should be void if any change in the title, ownership, or possession of the insured took place by the voluntary act of the insured, and further cou-

tended that it was not liable because the defendant had neither furnished the company with proof of loss as provided in the policy, nor commenced an action thereon within 12 months from date of fire, as also provided. The case was submitted to the judge as the trier of both law and fact. His decision was adverse to the contentions of the insurance company, and it excepted.

1. One of the contentions of the executrix of the assured is that, if there was any forfeiture of the policy worked by the alleged contract of sale changing the title, interest, or possession of the assured with respect to the property destroyed by fire, the insurance company has waived such forfeiture and was estopped from asserting the same. The assured died in the spring of 1903, and the fire occurred on July 27th next thereafter. The executrix qualified in September. The letters which we will now refer to were all written in 1903. On September 20th the adjuster wrote to the attorney for the assured that he had just learned that the assured had made a sale of the property to a Mrs. Davis after the policy was issued, and wished to know the facts regarding such sale. On September 30th the attorney wrote to the adjuster in regard to the nature of the contract, and that no such contract was made as vitiated the policy. This letter was sent by the adjuster to the insurance company, and its agency superintendent wrote the adjuster on October 17th, that the contract between the assured and Mrs. Davis forfeited the policy, and the proper thing to do was to pay the lender and take from the latter a transfer of the obligation of the assured to the lender, in accordance with the contract referred to in the statement of facts existing between the insurance company and the lender. In this letter it was stated: "After this, you can settle with the assured, or not, upon such terms as you deem best." On November 2d the agency superintendent wrote to the adjuster, directing him to make a settlement with and take a transfer from the lender and close the matter up. On November 11th a copy of this letter was sent to the attorney for the executrix of the assured, by a representative of the lender. On November 14th the adjuster wrote to the executrix as follows: "Your letter of the 9th inst. received. I wrote you some time ago, and also Mr. Crafts, asking that you send me a builder's estimate of the property. Kindly give this your attention, and we will act promptly." On November 20th the adjuster wrote to the attorney for the executrix that the last-mentioned letter had been returned to him, presumably from lack of proper address; that he was anxious to have the executrix comply with his request for a builder's estimate, and asked that the attorney write for him to the executrix about the matter, closing the letter with the following statement: "You are no doubt familiar with the terms of insurance policies,

and know that we have a right to call upon the assured for this." On December 8th the attorney of the executrix sent the adjuster "an estimate made by the builder," giving the value of the property burned. On December 9th the adjuster wrote to the attorney, acknowledging receipt of the builder's estimate, and stating that it varied from another which he had; that it varied in one particular, in that it estimated the value of the property at \$1,720, whereas the one he had estimated it at \$2,650. This letter closed with the statement: "I am satisfied that Mrs. Colvard had better have Mr. Horne go over his figures again, as the three-fourths clause is in the policy, and may come up in connection with this loss, and I do not wish this to play any part in the adjustment." On December 31st the adjuster wrote to the attorney that he appreciated his kindness in the matter and would not trouble him further in regard to it; and on January 5, 1904, the adjuster wrote the attorney that he had completed the adjustment of the matter with the agent of the lender, and would settle with him the full amount of the policy, provided the lender would consent to one requirement of its agent. This letter closed with the statement: "It is therefore, in all probability, unnecessary for you to trouble yourself further in regard to it."

Conceding, without deciding, that the contract of the assured with Mrs. Davis worked a forfeiture of the policy, we think that the conduct of the adjuster of the insurance company, after having knowledge of such facts as, according to the contention of the insured, worked the forfeiture, estopped the insurer from claiming such forfeiture, if there was any. After such knowledge was obtained by the insurance company, it wrote to the adjuster that the company should pay the lender according to its agreement with the lender, and after this "settle with the assured or not upon such terms, as you deem best." The adjuster then wrote to the executrix of the assured and her attorney to have a builder make an estimate of the value of the property burned, that he had a right to require this under the terms of the policy, and that upon receipt of such estimate he would act promptly in regard to the matter. While it does not appear from the record that the executrix incurred any expense for the service rendered by the builder in making the estimate, it is fair to presume that such expense was incurred; and we think the insurance company was estopped from asserting a forfeiture of the policy, if any right to do so existed, where, after it had knowledge of the facts which it contended worked the forfeiture, it required the assured to incur trouble and expense in having an estimate of the value of the property destroyed made by a builder, and did not in connection with such request inform the assured that it expected to insist on such forfeiture. The adjuster, at the time of making

such request and causing the executor of the assured this trouble and expense, had authority from the company to disregard the forfeiture, if he saw fit, and settle with the assured upon such terms as he deemed best; and his dealing with the assured as above outlined, looking to an adjustment, without any reservation of the right to claim a forfeiture, might fairly justify the executrix in believing that it was his intention to forego the forfeiture and settle the loss under the terms of the policy. In this connection, see 3 Cooley's Briefs on Ins. §§ 2733, 2739. Unless such conduct on the part of the adjuster caused her to believe that a forfeiture, if any existed, would not be insisted upon, it is not fair to presume that the executrix would have incurred the expense and trouble of furnishing a builder's estimate of the property burned. It does not appear that any agent of the insurance company had the agent of the lender to send to the attorney for the insured the letter to the adjuster from the insurer claiming that the contract with Mrs. Davis and the owner worked a forfeiture of the policy, nor does it appear that the insurer, or its agents, ever notified the executrix of the assured, or her attorney, before or at the time of the payment to the lender, that any forfeiture of the policy was claimed.

The policy provided: "This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for." The conduct of the adjuster hereinbefore set forth involved "no proceeding on its part relating to the appraisal or to any examination" referred to in the policy. The "appraisal" and "examination" referred to in the above-quoted provision of the policy refer to matters other than that of an estimate of the builder of the value of the property destroyed, which was requested by the adjuster.

2. Having determined that the insurance company was estopped from insisting that there was any forfeiture of the policy, and as the company was compelled to pay the lender in any event, payment by the insurance company to the lender operated as a payment on the debt of the insured to the lender, and operated at that time to discharge, to the extent of the payment, the debt of the assured to the lender. The payment was a conclusive admission of loss, and the company is in no position to contend that the payment it made should not thus operate because proofs of loss were not furnished. The requirement in the policy that suit be commenced thereon within 12 months from the date of the fire has no application in this case, holding, as we do, that the payment by the insurance company

to the lender was an extinguishment pro tanto of the debt of the assured to the lender. It was a settlement of the policy as far as concerned the assured, as well as the lender, and no suit by the assured on the policy was necessary. It follows that the assured, in a suit wherein the insurance company sought to enforce against her the notes transferred to it by the lender, could interpose in defense thereof a plea of payment, as she did in this case. See 4 Cooley, Briefs on Ins. p. 3917.

Judgment affirmed. All the Justices concur, except

LUMPKIN, J. (dissenting). I concur in the principle stated in the second headnote. I do not think the facts of the case can be declared as matter of law to work an estoppel on the insurance company.

(135 Ga. 150)

SOUTHERN RY. CO. v. HIXON.

HIXON v. SOUTHERN RY. CO.

(Supreme Court of Georgia. Sept. 23, 1910.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 153*)—PROCEEDINGS TO PROCURE—IRREGULAR ORDER—JURISDICTION.

A motion for new trial was presented to the judge in due time during the term at which the trial was had, and an order was passed declaring that: "The foregoing motion for a new trial is read and approved. Let it be filed, and let respondent show cause before me at —, on the — day of —, 1908, why the verdict and judgment should not be set aside and a new trial granted as prayed. As there is not sufficient time during the present term to file a brief of the evidence introduced on the trial of the case, it is further ordered that the movant have until the hearing of this motion, whenever had, to present and have approved the brief of the evidence, and that he have five days thereafter in which to file the same in the office of the clerk of the superior court. If for any reason this motion should not be heard at the time and place named, it is ordered that it be heard at such time and place as may be convenient to court and counsel, either party having the right to call up the same for a hearing upon ten days' notice to the opposite party." Held, that the failure to specify in the order with greater particularity the time and place at which the motion for new trial should be heard was irregular, but not sufficient to defeat the jurisdiction of the court at the next term to approve the brief of evidence and render judgment on the merits of the motion for new trial. In this connection, see *Clements v. Ladden*, 132 Ga. 430, 64 S. E. 460; *Eady v. Atlantic Coast Line R. Co.*, 129 Ga. 363, 58 S. E. 895. There was no error in refusing to dismiss the motion.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 153.*]

2. NEW TRIAL (§ 152*)—PROCEEDINGS TO PROCURE—AMENDED GROUNDS—APPROVAL.

Where an amendment to a motion for new trial excepted to certain parts of the judge's charge to the jury, quoted from the approved charge, thus making the exceptions separate grounds of the motion for new trial, such amended grounds were sufficiently approved by the order, which recited: "The foregoing amendment is examined, and the recitals of fact there-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in are true. The same is allowed and ordered filed as an addition to the original motion for new trial in this case." *Stephens v. State*, 118 Ga. 762, 45 S. E. 619; *Tifton, Thomasville & Gulf Ry. Co. v. Chastain*, 122 Ga. 250, 50 S. E. 105.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 282; Dec. Dig. § 152.*]

8. SUFFICIENCY OF EVIDENCE.

The evidence was not of such character as to demand a finding that the plaintiff was not entitled to recover in any amount whatever.

4. REVIEW ON APPEAL.

While the portions of the charge complained of were not in all respects accurate, they did not furnish grounds for a new trial in behalf of the plaintiff in error.

5. EXCESSIVE VERDICT.

Under the evidence on the subject of the value of the deceased child, the verdict was excessive in amount.

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by John Hixon against the Southern Railway Company. Judgment for plaintiff, and defendant brings error; plaintiff filing cross-exceptions. Reversed on the main bill of exceptions, and affirmed on the cross-bill.

Maddox, McCamy & Shumate, for plaintiff in error. W. E. Mann and W. C. Martin, for defendant in error.

ATKINSON, J. Judgment reversed on the main bill of exceptions, and affirmed on the cross-bill. All the Justices concur.

(135 Ga. 135)

CALE v. DAVIS.

(Supreme Court of Georgia. Sept. 30, 1910.)

(Syllabus by the Court.)

MARRIAGE (§ 60*)—PROCEEDINGS TO ANNUL—JURISDICTION.

In 1908 a petition addressed to the superior court was filed in a county of this state, alleging in substance as follows: The plaintiff has now, and for over one year prior to the filing of the petition has had, his residence in said state and county. The defendant resides outside of the limits of the state, somewhere in the state of South Carolina; her exact location being unknown to the plaintiff. On a named date a marriage ceremony was performed between the plaintiff and the defendant. At the time of the ceremony the plaintiff was so drunk that he was deprived of reason, did not understand the nature and quality of his act, and was unable to consent to the marriage contract. "Shortly after the said ceremony plaintiff repudiated said marriage, and since that time has never lived with defendant as man and wife." No children have been born of the union. The plaintiff prayed "that said marriage be declared and adjudged null and void, and that he be forever released and discharged from any and all obligations and duties arising from said pretended marriage, and for such other relief as to the court may seem meet and proper in the premises." Service was made by publication. There was no appearance for the defendant. A verdict was found by one jury "in favor of the annulment of said marriage," and a decree was entered declaring the marriage to be null and void, and that the plaintiff and defendant be dis-

solved from any duties or liabilities arising therefrom. At the same term a motion to set aside the verdict and decree was made, on the grounds that there was no jurisdiction in the court to entertain the suit, treating the action as one, not for divorce, but for annulment, the jurisdiction being in South Carolina, and also that the proceeding for the annulment of the marriage was in law a suit for divorce, and the decree was void because it was based on one verdict, whereas the Constitution requires two verdicts at successive terms for the granting of divorces. The motion was granted, and the judgment or decree was set aside. *Held*, that this was not error.

[Ed. Note.—For other cases, see *Marriage*, Dec. Dig. § 60.*]

Beck and Holden, JJ., dissenting.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action between H. T. Cale and I. M. Davis. From the judgment, Cale brings error. Affirmed.

Austin Branch, Geo. T. Jackson, and Archibald Blackshear, for plaintiff in error. Wm. H. Fleming, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except BECK and HOLDEN, JJ., who dissent.

(135 Ga. 123)

MELTON v. HUBBARD.

(Supreme Court of Georgia. Sept. 22, 1910.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE (§ 278*)—SEPARATION AGREEMENT.

A valid agreement may be made between husband and wife, contemplating an immediate separation, for a separate allowance to the wife for her support. *Chapman v. Gray*, 8 Ga. 341; *Sumner v. Sumner*, 121 Ga. 1, 48 S. E. 727.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1046-1053; Dec. Dig. § 278;* *Contracts*, Cent. Dig. §§ 515, 517.]

2. HUSBAND AND WIFE (§ 281*)—SEPARATION AGREEMENT—RIGHT OF ACTION BY WIFE'S EXECUTOR.

In such an agreement, where the husband promises to pay a lump sum for the wife's support, payable in installments, and the wife dies before all the installments are paid, her executor may sue for the unpaid installments as they severally mature.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1061; Dec. Dig. § 281.*]

3. HUSBAND AND WIFE (§ 281*)—SEPARATION AGREEMENT—RIGHT OF ACTION BY WIFE'S EXECUTOR.

The plaintiff cannot include, in a suit to recover past-due installments, any installment which matured after the filing of the suit.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1061; Dec. Dig. § 281.*]

4. SPECIAL DEMURRERS WITHOUT MERIT.

Other than as indicated in the third head-note, the special demurrers are without merit.

5. HUSBAND AND WIFE (§ 278*)—SEPARATION AGREEMENT—VALIDITY—PROMOTION OF SEPARATION.

Under the ruling in *Chapman v. Gray*, 8 Ga. 341, the contract sued on is not void, as being promotive of a separation and dissolution of the marital relation, and there was no error

in refusing to dismiss the petition on general demurrer.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1046-1053; Dec. Dig. § 278; Contracts, Cent. Dig. §§ 515, 517.]

Atkinson, J., dissenting.

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by P. C. Hubbard, executrix of Otis Irene Melton, against G. D. Melton. Judgment for plaintiff, and defendant brings error. Affirmed.

On March 2, 1907, Gustavus D. Melton and his wife, Otis Irene Melton, entered into the following contract:

"State of Georgia, County of Bibb. This agreement, made and entered into this the second day of March, 1907, between Gustavus D. Melton, of the first part, and his wife, Otis Irene Melton, of the second part, witnesseth: That the said Gustavus D. Melton, husband, and the said Otis Irene Melton, wife, have agreed to a voluntary separation as man and wife, and hereby agree for the future to live separate and apart, and have agreed upon the following as the terms and conditions of such separation, to wit: That the said Gustavus D. Melton, husband, agrees to pay to his said wife, Otis Irene Melton, the sum of fourteen hundred and forty (\$1,440.00) dollars in full, ample, and complete settlement of all claims that his said wife, Otis Irene Melton, may have upon him for alimony, either temporary or permanent, or for present or future support that he may owe to her. That in consideration of said sum so agreed to be paid by the said Gustavus D. Melton to his said wife, Otis Irene Melton, she hereby agrees and does release him from all claim that she may now have, or may hereafter have, for any alimony, either temporary or permanent, and for support; and if at any time in the future she may bring suit for divorce, she hereby agrees to release the said Gustavus D. Melton from any claim for attorney's fees to which she might be entitled under the law. The said sum of money so agreed upon as aforesaid by the parties to this contract to be paid by the said Gustavus D. Melton in the sum of forty (\$40.00) dollars per month for the period of thirty-six (36) consecutive months until paid, beginning on the first day of March, 1907, and it is to fall due on the first day of each succeeding month until paid. And it is further agreed between the parties to this contract that the minor child, Eston Melton, the only child of said marriage, is to remain in the possession, custody, and control of her said husband, Gustavus D. Melton, who is alone under this contract chargeable with the support, maintenance, and education of said minor child. The sum of money agreed to be paid under this contract to the said Otis Irene Melton is to belong absolutely to her, and is not chargeable

in any way with the support of said child." Signed and witnessed.

Thereafter Mrs. Melton died testate, and her executrix brought suit to recover the installments due under the contract, and also prayed to recover such installments as would fall due pending the suit. The defendant demurred generally and specially to the petition. The demurrers were overruled, and the defendant excepted.

Arthur L. Dasher and W. A. McClellan, for plaintiff in error. Ryals, Grace & Anderson, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur, except

ATKINSON, J. (dissenting). I concur in each of the rulings except that expressed in the fifth headnote. Under a proper construction the contract in question was not a result of separation, but was intended to promote separation, between husband and wife, and contrary to public policy. In addition to the cases cited by the majority, see, also, Hill v. Hill, 74 N. H. 288, 67 Atl. 406, 12 L. R. A. (N. S.) 848, and note, 124 Am. St. Rep. 966.

(126 Ga. 173)

SANDERS et al. v. ALLEN et al.
(Supreme Court of Georgia. Sept. 27, 1910.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS (§ 127*)—AMENDED PLEADING.

Where suit was filed to the January term, 1901, for damages from breach of contract to deliver cotton in 1900, and the damage alleged was the difference between the contract price and the price which the plaintiffs were compelled to pay in order to procure other cotton to supply the place of that specified in the contract, and an amendment was allowed and filed on January 14, 1907, laying the measure of damages for the same breach of contract as the difference between the contract price and the market price at the time and place of delivery, the amendment related back to the time of filing the suit, and was not barred by the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

2. REVIEW ON APPEAL.

The evidence did not demand a verdict for the defendants.

3. SALES (§ 421*)—ACTIONS—INSTRUCTIONS.

The evidence discloses that for a valuable consideration the parties contracted for the sale and actual delivery of cotton, which the sellers did not have, but which they expected to procure from producers, to whom they had sold and were selling fertilizers, for which thereafter notes might be given payable in cotton; and there was no evidence to show that the parties contemplated that the contract could not be complied with otherwise than by actual delivery of cotton. The evidence was not sufficient to show that the transaction was speculative, as contemplated by the provisions of Civ. Code 1895, § 3537, or that it was a gambling contract: and it was erroneous to instruct the jury

as follows: "The law provides that a bare contingency or possibility cannot be subject of sale, unless there exist a certain right in the person selling to a future benefit; so a contract for the sale of goods to be delivered at a future day, where both parties are aware that the seller expects to purchase himself to fulfill his contract, and no skill or labor or expense enters into consideration, but the same is pure speculation upon chances, is contrary to the policy of the law, and cannot be enforced by either party. A mere gambling contract is not enforceable; it is void. A mere contingency cannot be sold; it would be void. Such a contract is not enforceable." In this connection, see *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 23; *Watson v. Hazlehurst & McAllister*, 127 Ga. 298, 56 S. E. 459; *Bearden Mercantile Co. v. Madison Oil Co.*, 128 Ga. 698, 58 S. E. 200; *Northington-Munger-Pratt Co. v. Farmers' Gin & Warehouse Co.*, 119 Ga. 851, 47 S. E. 200, 100 Am. St. Rep. 210.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1203; Dec. Dig. § 421.*]

4. QUESTION FOR JURY—AMOUNT OF RECOVERY.

The amount of recovery, as well as the right of one partner to bind the other to the contract, was a question which, under the evidence, it was proper to submit to the jury; and it was not erroneous to refuse a request to charge which had the effect of excluding the amount of recovery from the consideration of the jury.

5. REVIEW ON APPEAL.

The evidence demanded a verdict for the plaintiffs against the defendant Cooper for such an amount as the jury, under the evidence, might have found in their favor.

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Action between J. W. Sanders and others, survivors, and S. H. Allen, administrator, and others. From the judgment, Sanders and others bring error. Reversed.

W. I. Hobbs and H. H. Dean, for plaintiffs in error. H. H. Perry and Howard Thompson, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(135 Ga. 215)

WOODRUFF v. COLUMBUS INV. CO.
(Supreme Court of Georgia. Sept. 30, 1910.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 180*)—ACT UNDER ILLEGAL AMENDMENT TO CHARTER—REMEDY OF STOCKHOLDER.

If an unauthorized and illegal amendment to its charter has been accepted by a corporation and is about to be acted upon, a stockholder, who has not assented thereto or become estopped from complaining, may bring an equitable proceeding to enjoin or set aside any action by the corporation under the amendment. 1 Cook on Stock and Stockholders (3d Ed.) pp. 638-641, §§ 502, 503.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 706-722; Dec. Dig. § 189.*]

2. CORPORATIONS (§ 155*)—ACTION FOR DIVIDEND.

But where an amendment to a charter of a corporation was obtained and accepted, reducing the capital stock, and all of the stockholders

(of whom there were apparently many), save two, surrendered their shares upon the terms provided in the amendment, and received amounts of money and the lesser amounts of stock in accordance therewith, and where the corporation proceeded to do business upon the new basis for about a year, with the knowledge of one of the nonconsenting stockholders, and a dividend of a certain per cent. was then declared, he could not recognize such a declaration and sue and recover the dividend, basing the amount of his recovery upon the amount of his stock unreduced and the per cent. declared, while others were paid on the basis of the reduced stock; no proceeding having been instituted to set aside the illegal action complained of by him.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 560-563, 568, 576-578, 593-603; Dec. Dig. § 155.*]

3. CORPORATIONS (§ 155*)—ACTION FOR DIVIDEND.

Under such a suit to recover the dividend so declared, the only question being as to the amount which the plaintiff was entitled to recover, there was no error in directing a verdict for the amount of dividend only on the reduced basis.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 593-603; Dec. Dig. § 155.*]

4. OTHER RULINGS NOT DISCUSSED.

The rulings above made control the case, and render it unnecessary to discuss in detail other rulings of which complaint was made.

Error from Superior Court, Muscogee County; S. P. Gilbert, Judge.

Action by H. L. Woodruff against the Columbus Investment Company. There was a directed verdict for plaintiff, granting inadequate relief, and he brings error. Affirmed.

Wm. A. Little and Jas. L. Willis, for plaintiff in error. J. H. Martin, F. U. Garrard, W. C. Neill, and A. W. Cozart, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(135 Ga. 122)

SOUTHERN RY. CO. v. HARBIN et al.
(Supreme Court of Georgia. Sept. 22, 1910.)

(Syllabus by the Court.)

1. RAILROADS (§ 266*)—LIABILITY FOR INJURY TO THIRD PERSON.

In an action against a railway company and its servant to recover damages for the homicide of the plaintiff's son solely in consequence of the servant's misfeasance, where a verdict is returned finding the servant not liable, but finding in favor of the plaintiff against the railway company, such verdict should be set aside and a new trial granted.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 854-858; Dec. Dig. § 266.*]

(Additional Syllabus by Editorial Staff.)

2. RAILROADS (§ 266*)—INJURIES TO THIRD PERSON—ACTIONS AGAINST MASTER AND SERVANT.

A railroad company and its engineer may be jointly sued for negligent homicide, where the

negligence of the company results solely from the act of the engineer.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 854-858; Dec. Dig. § 266.*]

Holden, J., dissenting.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by W. J. Harbin and others against the Southern Railway Company and another. Judgment for plaintiff against the railway company, which brings error. Reversed.

W. J. Harbin brought suit against the Southern Railway Company and James Michael to recover damages for the homicide of a son, James Harbin, who was struck and killed by a locomotive of the defendant company which was being operated on its tracks by the codefendant James Michael, who was an engineer in the employment of the company. The suit was "brought jointly against said defendants for their concurrent acts of negligence which caused the homicide." It was alleged in the petition that the decedent was in the employment as a switchman on a yard crew, and that in the discharge of his duties he had to throw two switches which connected what is known as a shop track with the north-bound main line, in order to allow the engine with which he was working to pass on and over said main line and eventually to get to the south-bound main line; that it was necessary for him to go along the tracks a certain distance to another switch in the discharge of his duties; that while proceeding along the track and changing the switches he could easily have been seen by the engineer and fireman, who were directing the engine which killed him, for a distance of 500 feet from the place where he was struck; that he had to work with his face towards the north, and, in the exercise of due care, he proceeded to walk upon the south-bound main line so as to have his face in the direction from which trains or engines might come upon him, and while so walking, in plain view of the employees operating the engine which struck him, he was run down without any warning or any effort to stop the engine until after he was struck; that the engine was operated at a high and negligent rate of speed; that the engineer, one of the defendants, failed to blow the whistle or ring the bell of said engine or cause the same to be rung, and failed to keep proper lookout ahead, and failed to check his engine and to slow up as the engine approached the switch point, as ordinary care required; that this conduct of the defendant Michael was very negligent in view of the crowded condition of the yard at that time and the loud noises being made with escaping steam from other engines; that instead of running

in the proper direction on the south-bound track—that is, towards the south—Michael was running his engine north on said track; that the engine which killed decedent was being run in violation of law, in that there was on a street which crosses the defendant company's tracks at grade a line of electric railroad, and the defendant engineer failed to cause the engine to come to a full stop within 50 feet of the place of crossing and then to move slowly forward in violation of section 515 of the Penal Code, as well as in violation of the rules of the defendant company; and that in running across and beyond said crossing the engineer was violating the laws of the state, and that he also violated a valid ordinance of the city of Atlanta by running at a speed exceeding the limit fixed by the ordinance. And it was alleged that "the said Michael, being in sole charge of the movement of said engine, was the entire representative of the defendant railway in the movements thereof."

There was evidence supporting the allegations of negligence upon the part of the engineer. The jury returned a verdict in favor of the plaintiff against the railway company, but in favor of the company's codefendant, James Michael. The railway company made a motion for a new trial, which was overruled, and it excepted.

McDaniel, Alston & Black, for plaintiff in error. A. H. Davis and Jackson & Orme, for defendants in error.

BECK, J. (after stating the facts as above). Under the decision of this court in the case of *Southern Railway Co. v. Grizzle*, 124 Ga. 735, 53 S. E. 244, 110 Am. St. Rep. 191, a railway company and its engineer may be jointly sued for a negligent homicide, where the negligence of the company results solely from the act and conduct of the engineer. And in the case at bar counsel for defendant relies for authority to support the finding in favor of the plaintiff against the railway company (while in the same verdict the codefendant, the engineer, whose actual negligence is alleged to have caused the homicide, is exonerated) upon decisions of this and other courts and the rule laid down in text-books, to the effect that, where several are sued as joint tort-feasors, there may be a finding against one or all of the defendants joined in the action. But we do not think that this rule, in view of the acts of negligence pleaded in this case, is applicable. Under the allegations of negligence in the petition made to show liability upon the part of the defendants, the only acts of negligence were committed by the engineer who was operating the engine at the time it struck and killed the deceased, James Harbin; and under

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the decision in the case of *Southern Railway Co. v. Grizzle*, supra, the negligence alleged in the present case constituted misfeasance upon the part of the railway company's employé, its codefendant. If he were guilty of the negligence pleaded, the railway company, of course, was liable upon the principle of respondeat superior. The company itself was not, and could not have been, guilty of any negligence independently of the acts of misfeasance upon the part of its engineer. By the verdict of the jury Michael was found not guilty of negligence causing the death of the plaintiff's son; and, where the codefendant was not and could not have been guilty of negligence that would render it liable save on the principle of respondeat superior, we do not think that liability could be imputed to it where its employé was exonerated, when he alone performed the act which constitutes the basis for the charge of negligence.

In the case of *McGinnis v. Railway Co.*, 200 Mo. 347, 98 S. W. 590, 9 L. R. A. (N. S.) 880, 118 Am. St. Rep. 661, where a verdict was found exonerating the servant in an action against the master and servant for personal injuries caused by the misfeasance of the servant, the Missouri Supreme Court said: "We are firmly of the opinion that in cases where the right to recover is dependent solely upon the doctrine of respondeat superior, and there is a finding that the servant, through whose negligence the master is attempted to be held liable, has not been negligent, as was true in the case in hand, there should be no judgment against the master. The verdict in this case is a monstrosity. The jury say French was guilty of no negligence, yet, in the same breath, say the company was guilty of negligence, although nothing further was done by the company than what it did through French, its servant." And in the case of *Doremus v. Root*, 23 Wash. 715, 63 Pac. 574 (54 L. R. A. 649), the court says: "Joint tort-feasors are liable to the injured person (other than that he may have but one satisfaction) as if the act causing the injury was the separate act of each of them, and they have, except in certain special cases, no right of contribution among themselves. But the defendants in this character of action are in no sense joint tort-feasors, nor does their liability to the plaintiff rest upon the same or like grounds. The act of an employé, even in legal intendment, is not the act of his employer, unless the employer either previously directs the act to be done or subsequently ratifies it. For injuries caused by the negligence of an employé not directed or ratified by the employer, the employé is liable because he committed the act which caused the injury, while the employer is liable, not as if the act was done by himself, but because of the doctrine of respondeat superior, the rule of law which holds the mas-

ter responsible for the negligent act of his servant committed while the servant is acting within the general scope of his employment and engaged in his master's business. The primary liability to answer for such an act, therefore, rests upon the employé, and, when the employer is compelled to answer in damages therefor, he can recover over against the employé. *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 31 N. E. 987, 30 Am. St. Rep. 685, note to *Carterville v. Cook*, 16 Am. St. Rep. 248; 1 *Shearm. & Redf. Neg.* (5th Ed.) § 242; 2 *Van Fleet on Former Adjudication*, p. 1162." Again, on page 716 of 23 Wash., on page 574 of 63 Pac. (54 L. R. A. 649), Fullerton, J., in that case, further says: "So, also, in such an action, whether brought against the employer severally or jointly with the employé, the gravamen of the charge is, and must be, the negligence of the employé, and no recovery can be had unless it be proved, and found by the jury, that the employé was negligent. Stated in another way: If the employé who causes the injury is free from liability therefor, his employer must also be free from liability. This was held in *New Orleans & N. E. R. Co. v. Jones*, 142 U. S. 18, 12 Sup. Ct. 109, 35 L. Ed. 919." In the note to case of *McGinnis v. Railroad*, supra, 200 Mo. 347, 98 S. W. 590, 9 L. R. A. (N. S.) 881, 118 Am. St. Rep. 661, it is said: "In *Montfort v. Hughes*, 3 E. D. Smith [N. Y.] 591, it was held that if in a joint action against master and servant, founded solely upon the negligence of the servant, the master not being present nor acting in the matter, the servant is acquitted, there can be no recovery against the master. In such a case a verdict against the master and in favor of the servant would be self-contradictory. *Indiana Nitroglycerine & Torpedo Co. v. Lippincott Glass Co.*, 165 Ind. 361, 75 N. E. 649." See in same connection note to the *McGinnis Case* in 19 Am. & Eng. Ann. Cases, 660. And in the case of *Furnace Corporation v. Crowder's Adm'r*, 110 Va. 387, 66 S. E. 63, the Supreme Court of Appeals of Virginia, affirming the judgment of the court below in overruling a motion in arrest of judgment and a motion for a judgment notwithstanding a verdict, said: "If the court had adhered to its original position and entered judgment upon the verdict for \$3,500 which was first rendered by the jury, and the case in that situation had been brought before us upon the petition of the *Ivanhoe Furnace Corporation*, *McGinnis v. Chicago, Rock Island, etc., Ry. Co.*, 200 Mo. 347 [98 S. W. 590, 9 L. R. A. (N. S.) 880, 118 Am. St. Rep. 661], and *Doremus v. Root*, 23 Wash. 710 [63 Pac. 572, 54 L. R. A. 649], relied upon by plaintiff in error, would have been pertinent and entitled to very grave consideration; but the case before us differs materially from the cases cited." Other cases in support of the conclusion which we have

reached might be cited, but the question involved is elaborately discussed in the decisions which we have referred to and in the cases there cited.

Judgment reversed. All the Justices concur, except

HOLDEN, J. (dissenting). I cannot concur in the ruling made by a majority of the court, and must dissent from the judgment of reversal. In a suit for damages brought against a railroad company and its engineer for the killing of the son of the plaintiff, where the sole ground upon which liability of the defendants is claimed is the misfeasance of the engineer, the servant of the company, in operating one of its trains, it is not proper to rule that a verdict in favor of the engineer and against the company cannot stand because it is contradictory. If the proof of the facts raising a presumption that the railroad company was guilty of the acts of negligence alleged did under the law raise such presumption against the engineer as well as against the railroad company, or if such proof raised no presumption against either, a verdict finding against the railroad company and in favor of the engineer might be said to be contradictory, and it might be proper to set it aside for this reason. But the presumption of negligence of the railroad company created by the law of this state upon proof by the plaintiff that the company in the operation of its train killed the son of the plaintiff without fault of the deceased is not applicable to the servant who is charged with the acts causing the homicide in a suit against the latter and the railroad company. Under Civ. Code 1895, § 2321, upon the trial of such a case, upon proof that without fault of the deceased he was killed by the running of the train of the company, the presumption that the company was negligent as alleged in the declaration of plaintiff arises. Such proof alone would raise no presumption of negligence against the engineer, the other defendant, or that he did the acts of which complaint is made. *Southern Railroad Company v. Cash*, 131 Ga. 537, 62 S. E. 823. If upon the trial the plaintiff proved the homicide, and that it occurred without fault of the deceased, and no other evidence was introduced by plaintiff, or by either of the defendants, the evidence introduced would authorize a recovery against the railroad company, but there would be no evidence before the jury authorizing a recovery against the engineer. If, after plaintiff introduced such evidence making the proof of the facts above stated, other evidence was introduced by plaintiff and defendants, and this other evidence was equally balanced in its effect upon the mind of the jury upon the question as to whether or not the engineer was guilty of the acts com-

plained of, it would be the duty of the jury to render a verdict against the railroad company because it had not rebutted the presumption of negligence against it, and to render a verdict in favor of the engineer because the plaintiff had not shown by a preponderance of the testimony that the engineer was guilty of such acts. The law gave the plaintiff the right to sue the defendants jointly; and it is not proper to set aside the verdict of the jury because it was rendered in accordance with, and in the observance of, the rules of evidence prescribed by the law, to be applied by the jury in trying the case and rendering a verdict.

(135 Ga. 171)

BRYAN v. MADISON SUPPLY CO.

MADISON SUPPLY CO. v. BRYAN.

(Supreme Court of Georgia. Sept. 23, 1910.)

(*Syllabus by the Court.*)

1. MASTER AND SERVANT (§ 82*)—LABORER'S LIEN—FORECLOSURE—AFFIDAVIT—SUFFICIENCY.

The method of foreclosing a laborer's lien on personal property is as provided in Civ. Code 1895, § 2816. Among the essentials to such a foreclosure is the requirement that the person asserting the lien must, by himself, his agent, or attorney, make affidavit showing all the facts necessary to constitute a lien under the Code.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 128-134; Dec. Dig. § 82.*]

2. MASTER AND SERVANT (§ 82*)—LABORER'S LIEN—FORECLOSURE—AFFIDAVIT—SUFFICIENCY.

Where, in an effort to foreclose, the person asserting the lien procured a justice of the peace to "write out the lien and the affidavit," and then "signed," and the justice of the peace "attested" his signature, without the administration of any oath, the paper so executed did not constitute a valid affidavit. *Britt v. Davis*, 130 Ga. 74, 60 S. E. 180.

(a) A paper of this character was not rendered valid by testimony delivered by the purported affiant as a witness on the trial of a money-rule case, where it was sought to subject the money to the payment of an execution issued upon the pretended foreclosure, to the effect that the facts stated in the paper were true.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 128-134; Dec. Dig. § 82.*]

3. MASTER AND SERVANT (§ 82*)—LABORER'S LIEN—FORECLOSURE—AFFIDAVIT—SUFFICIENCY.

No valid execution can issue upon a paper purporting to be an affidavit foreclosing a laborer's lien, which is void for the reasons indicated in the preceding notes.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 128-134; Dec. Dig. § 82.*]

4. LANDLORD AND TENANT (§ 248*)—LABORER'S LIEN—NECESSITY FOR FORECLOSURE.

In the absence of equitable grounds, a laborer's lien which is not foreclosed cannot participate in a fund brought into court under other process, which is the subject of controversy in a money-rule case. *Cumming v. Wright*, 72 Ga. 767. See, also, in this connection, *Berrie v. Smith*, 97 Ga. 782, 25 S. E. 757. In such a case, where the contest is between an unfore-

closed laborer's lien and an execution based on a duly foreclosed landlord's lien for supplies, the latter is entitled to so much of the fund as is necessary to its discharge, without regard to the rank of the respective liens.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 243.*]

5. JURY (§ 16*)—EXECUTION—ESTABLISHMENT OF CLAIMS OF THIRD PERSONS—RIGHT TO JURY TRIAL.

This being a money-rule case, which involved only a question of law, the judge had the power to dispose of the case without submitting it to the jury or causing them to render a verdict. *Durden v. Belt*, 61 Ga. 545.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 84; Dec. Dig. § 16.*]

6. MASTER AND SERVANT (§ 82*)—EXECUTION—ESTABLISHMENT OF CLAIMS OF THIRD PERSONS.

The motion to quash the execution based on the alleged laborer's lien, because the undisputed evidence showed that the alleged affidavit upon which it was based was not sworn to by the affiant, was in effect a motion to award the fund to the contesting lien; and as the cross-bill of exceptions assigns error on the refusal of such motion: the point raised by the cross-bill controls the whole case, and renders it unnecessary to consider the main bill.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 128-134; Dec. Dig. § 82.*]

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Action between John Bryan and the Madison Supply Company. From the judgment, Bryan brings error; the Supply Company filing cross-exceptions. Judgment on main bill of exceptions dismissed, and judgment on cross-bill reversed.

J. H. Holland and Brown & Shipp, for plaintiff in error. M. C. Few, for defendant in error.

ATKINSON, J. Judgment on cross-bill of exceptions reversed; main bill dismissed. All the Justices concur.

(135 Ga. 124)

HODGES v. PINE PRODUCT CO.

(Supreme Court of Georgia. Sept. 23, 1910.)

(Syllabus by the Court.)

1. WATERS AND WATER COURSES (§ 76*)—FISH (§ 6*)—POLLUTION OF STREAM—MEASURE OF DAMAGES.

The plaintiff brought suit against the defendant, making among other allegations substantially the following: The defendant is engaged in a certain business, in the operation of which it discharges into a ditch water which flows into a creek running through a tract of land owned by the plaintiff, part of which is used as a pasture. The water thus discharged is poisoned with gases and chemicals extracted from pine wood, and the water in such stream is thereby polluted and adulterated, rendering it unfit for the stock of the plaintiff to drink, and causing to the plaintiff damages in specified ways. *Held*: (1) The adulteration of such stream by artificial means constitutes an invasion of the property rights of the plaintiff, for which he is entitled to nominal damages, even

though he shows no special damages. (2) If one by artificial means pollutes the water in the stream on land of another, whereby the fishing privileges of the latter of a pecuniary value are destroyed or injured, he is entitled to recover damages therefor. (3) If, by reason of the conduct of the defendant in polluting the stream, the land was rendered unfit or less valuable for use as a pasture, or other purposes for which it was adapted with the stream running through it unpolluted, in the absence of other items of special damages, the measure of damages of the owner would be the diminution in the market value of the property, if the injury was of a permanent nature, or the diminution in the rental value, if the injury was of a temporary nature.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 55-57; Dec. Dig. § 76.* *Fish*, Dec. Dig. § 6.*]

(Additional Syllabus by Editorial Staff.)

2. NUISANCE (§ 44*)—PRIVATE NUISANCE.

A private nuisance gives a right of action to the person injured thereby under the express provisions of Civ. Code 1895, § 3853, and, under the express provisions of section 3861, that the act may be otherwise lawful does not keep it from being a nuisance.

[Ed. Note.—For other cases, see *Nuisance*, Dec. Dig. § 44.*]

Error from Superior Court, Tattnall County; B. T. Rawlings, Judge.

Action by W. H. P. Hodges against the Pine Product Company. Judgment for defendant, and plaintiff brings error. Reversed.

W. T. Burkhalter and Hines & Jordan, for plaintiff in error. O'Byrne, Hartridge & Wright and H. H. Elders, for defendant in error.

HOLDEN, J. The plaintiff brought suit against the defendant for damages, making, among others, substantially the following allegations: Defendant is engaged in the business of extracting from wood, at its plant, "rosin, turpentine, creosote, etc., including all the poisonous gases and chemicals contained in pine wood." From an artesian well the defendant pumps every day thousands of gallons of water, which is discharged into a ditch used to convey the water into Cedar creek. "The said poisonous gases and chemicals extracted from the said wood contaminates the said artesian water as used and discharged from further service in said plant and let flow by said defendant into a ditch and over lands and on into Cedar creek." Cedar creek runs through a described tract of land of 1,000 acres, more or less, owned by the plaintiff, and is "especially adapted for fishing and water for the stock of petitioner." Prior to the conduct of the defendant complained of, the plaintiff had fenced this tract of land. "Your petitioner is a sheep owner and stock raiser, and had this pasture especially prepared for his stock, consisting of sheep, cattle, hogs, goats, etc.; that their dependence for water was on said creek. Petitioner alleges, and shows to the court, that the said poisonous waters from defendant's

plant has already destroyed all the fish in said stream; that your petitioner has no way to water his said stock in said pasture, because the said waters in the said creek have been poisoned by the said defendant. * * * Your petitioner shows to the court that the said contaminated, poisonous waters kills vegetation and some trees; * * * that the said tract of land has been further damaged by the said poisonous waters in the opinion of this plaintiff by the said waters killing some of the small growth and timber and grasses growing thereon," and an offensive odor comes from the stream. Other allegations of the petition will be hereinafter stated. To the order of the court sustaining the general and special demurrers of the defendant and dismissing the petition, the plaintiff excepted.

1. While the petition was subject to some of the grounds of special demurrer, as will be hereinafter pointed out, we do not think it was subject to general demurrer. Civ. Code 1895, § 3879, provides: "The owner of land is entitled to the free and exclusive enjoyment of all water courses, not navigable, flowing over his land; and the diverting of the stream, * * * or the adulterating thereof so as to interfere with its value to him, is a trespass upon his property." Section 3057 provides: "Running water, while on land, belongs to the owner of it, but he has no power to divert it from the usual channel, nor can he so use or adulterate it as to interfere with the enjoyment of it by the next owner." And section 3061 is as follows: "The owner of a stream not navigable is entitled to the same exclusive possession thereof as he has to any other part of his land; and the Legislature has no power to compel or interfere with him in its lawful use, for the benefit of those above or below him on the stream, except to restrain nuisances." A private nuisance gives a right of action to the person injured thereby, and the fact that the act may be otherwise lawful does not keep it from being a nuisance. See Civ. Code 1895, §§ 3858-3861. Any unlawful interference by one with the enjoyment by another of his private property gives a cause of action. Civ. Code 1895, § 3874. In 2 Farnham on Water and Water Rights, § 462, pp. 1565, 1566, it is said: "The right to have a natural water course continue its physical existence upon one's property is as much property as is the right to have the hills or forests remain in place. * * * Such flow and use belong to the land through which it passes, as an incident, convenience, or easement which inseparably connects itself therewith as a part thereof, and frequently gives or adds value thereto; and is a private property right in the proprietor thereof within the protection of the constitutional provision that private property shall be forever held inviolate, subject to the public welfare, and shall not be taken for public use without compensation being first made. The property, therefore,

consists, not in the water itself, but in the added value which the stream gives to the land through which it flows. This is made up of the power which may be obtained from the flow of the stream, from the increased fertility of the adjoining fields because of the presence of the water, and of the value of the water for the uses to which it may be put. The right to the continued existence of these conditions is property, to protect which the owner may resort to any or all of the instrumentalities which may be employed for the protection of private property rights." According to the allegations of the petition, the defendant, in the operation of its plant, was continuously adulterating the waters of the stream passing through the land of the plaintiff, and the plaintiff was entitled to recover whatever damages he sustained by reason thereof. *Horton v. Fulton*, 130 Ga. 468, 60 S. E. 1059; *Satterfield v. Rowan*, 83 Ga. 187, 9 S. E. 677; *Price v. High Shoals Mfg. Co.*, 132 Ga. 246, 64 S. E. 87, 22 L. R. A. (N. S.) 684; *Parker v. American Woolen Co.*, 195 Mass. 591, 81 N. E. 468, 10 L. R. A. (N. S.) 584; *Bowling Coal Co. v. Ruffner*, 117 Tenn. 180, 100 S. W. 116, 9 L. R. A. (N. S.) 923, 10 Am. & Eng. Ann. Cas. 581. There was an illegal invasion of the property rights of the plaintiff, and he was entitled to recover nominal damages, if he sustained no special damages. *Price v. High Shoals Mfg. Co.*, supra.

2. The pollution of a stream by one riparian owner so as to pollute the water as it passes through the land of a lower riparian owner gives a right of action to the latter. If no measure of damages is furnished beyond the mere commission of the tort, nominal damages may be recovered. In the present case there is no allegation of diminution of market value of the land, or of its rental value. The only suggestion in that direction is an allegation that the plaintiff has been damaged in being deprived of the use of his pasture at least \$100 a year. This is not a sufficient allegation as to rental value. The plaintiff relies upon items of special damages sought to be set up by him. One of these is comprised in allegations to the effect that the fish in the creek which passes through the plaintiff's land down to its mouth at the river had been totally destroyed, and that the fish in the river had been practically destroyed; also, that the plaintiff had been deprived of his fishing privileges in the creek passing through his land, which he had enjoyed all his life and which had been valuable to him; and that thereby he had been damaged in the sum of \$300. This allegation also states that the privilege was valuable to him, his family, and his settlement. Of course, the statements of value to his family and his settlement are wholly irrelevant, and furnish no ground for recovery. The allegation is also imperfect in not distinctly alleging the value of the fishing privilege owned by the plaintiff; but the demurrer does not rest on either of these last two points.

While, therefore, the allegation is imperfect, it amounts to a statement that the plaintiff owned a fishing privilege in the creek passing through his land which had a pecuniary value; that this had been destroyed by the conduct of the defendant; and that the plaintiff had been damaged in the sum of \$300. Game running wild upon the plaintiff's land is not owned absolutely by him, and fish swimming in a stream running through his land are not his absolute property. He cannot recover the value of fish destroyed in the stream, or game killed on the land, by reason of the pollution of the stream, but a fishing privilege shown to have a pecuniary value is a property right, for the destruction of which damages are recoverable. As against the demurrer filed, it was error to strike the allegations on the subject of the plaintiff's fishing privilege and its destruction or injury by the defendant. As the plaintiff alleged an injury to his fishing privilege of pecuniary value, the allegation that the fish in the stream on his land were destroyed should not have been stricken. See, in this connection, 9 Cyc. 988-991, 1000; 32 Am. Dig. "Fish," § 11. There was no allegation that there was any injury to or destruction of plaintiff's hunting privileges of any pecuniary value, and the allegation that game was destroyed should have been stricken. The demurrer admitted the facts alleged for the purpose of the argument. What the evidence may show will develop on the trial.

3. The petition also alleged: "Your petitioner shows that he has been actually damaged the cost of building his said pasture fence around the said 1,000 acres of land in the sum of \$500, or some other large sum. Your petitioner further shows that, in addition to this damage, he has been damaged in being deprived of the use of said pasture at least \$100 a year, and this damage is a continuous one; that the said damage in being deprived of the use of said pasture will amount to at least \$1,500." The demurrer to this paragraph should have been sustained, as the damages alleged were not such as were recoverable. The measure of his damages would not be the expense he incurred in building a pasture fence, as the pasture fence was not destroyed or injured by the pollution of the stream, nor would his measure of damages be the actual value of the pasture to him during any period. If, by reason of the conduct of the defendant in polluting the stream, the land was rendered unfit or less valuable for use as a pasture, or other purposes for which it was adapted with the stream running through it unpolluted, in the absence of other items of special damages, the measure of damages of the owner would be the diminution in the market value of the property if the injury was of a permanent nature, or the diminution in the rental value. If the injury was of a temporary nature. See *Muncie Pulp Co. v. Kees-*

ling, 166 Ind. 479, 76 N. E. 1002, 9 Am. & Eng. Ann. Cas. 530, and authorities cited in the note on page 534. It is also alleged "that the evaporation of the said waters from the said creek contaminated by the said poisonous gases and chemicals give out an odor in vapor when said stream is drying, or the waters evaporating, that is indeed offensive. Your petitioner shows to the court that the said contaminated poisonous waters kills vegetation and some trees." These allegations were too general in their nature, and were properly stricken on special demurrer. The petition further alleged: "Your petitioner shows that the said defendant operates its plant on Sunday in disregard of the laws of God and man, and setting an example to the said town of Collins to the injury of the morals and good citizenship of the inhabitants of that community, and especially the young boys therein." The demurrer to this allegation on the ground that it was irrelevant and set up no liability "as against this defendant in favor of said plaintiff" should have been sustained. The fact that the conduct of the defendant operates "to the injury of the morals and good citizenship of that community, and especially the young boys therein," however reprehensible from a moral standpoint, gave to the defendant no legal right to damages because of such conduct, nor did the facts alleged illustrate any question involved in the case.

The allegation that the plaintiff was entitled to punitive and exemplary damages because of the destruction of the fish in the stream should have been stricken on demurrer, as there were no allegations in the petition entitling the plaintiff to recover damages of this nature.

The petition alleged: "Your petitioner further alleges and shows that the said defendant first turned its said poisonous waters down alongside the Seaboard Air-Line right of way, and got into trouble by reason of the injury they were doing said parties, and the said defendant changed its said poisonous waste waters into Cedar creek to avoid the trouble damages they had incurred on themselves by turning water down alongside the said Seaboard Air-Line Railway. Your petitioner shows that the said defendant has no regard for the rights of other folks or the welfare of the people, and especially your petitioner." These allegations were demurred to on the ground that they were irrelevant, and the demurrer should have been sustained. Proof of these allegations would give the plaintiff no right to damages, and would illustrate no question involved in the case.

The third paragraph of the petition was not subject to the demurrer filed thereto. The thirteenth paragraph of the petition was subject to the demurrer filed thereto, and should have been stricken.

Judgment reversed. All the Justices concur.

(135 Ga. 172)

GUTHRIE v. GWINNETT COUNTY.

(Supreme Court of Georgia. Sept. 27, 1910.)

*(Syllabus by the Court.)***REVIEW ON APPEAL.**

The verdict was authorized by the evidence. The amended grounds of the motion for new trial complain of certain excerpts from the charge of the court, in some instances of omissions to charge (though not requested in writing), and in other instances that the evidence did not authorize the charge. The charge was not altogether free from criticism, but, considering the evidence and the charge in its entirety, there was no such error as to require a new trial for any reason assigned.

Error from Superior Court, Gwinnett County; D. W. Meadow, Judge.

Action between H. J. Guthrie and Gwinnett County. From the judgment, Guthrie brings error. Affirmed.

N. L. Hutchins and M. D. Irwin, for plaintiff in error. J. A. Perry, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(135 Ga. 170)

PENNSYLVANIA R. CO. v. GOETCHIUS & CAPERTON.

(Supreme Court of Georgia. Sept. 26, 1910.)

*(Syllabus by the Court.)***1. CARRIERS (§ 120*)—CARRIAGE OF GOODS—INJURY THROUGH NATURAL DETERIORATION—LIABILITY—ACTIONS—INSTRUCTIONS.**

After having issued and levied an attachment against a nonresident railroad company, consignors filed a declaration in attachment, making substantially the following allegations: The plaintiff shipped from Rome, Ga., to named consignees in New York City, by way of the Southern Railway Company, a car load of peaches, which was delivered by that company to the defendant, and the latter carried the peaches to their destination, where they arrived in good condition on July 30th. The defendant gave the consignee no opportunity to unload the car the day of its arrival, but it was sent to Jersey City, where it was allowed to remain without icing, or any steps taken to prevent decay of the fruit, until the 1st day of August. The failure of the defendant to deliver the car promptly on the day of its arrival, or to ice it, was the cause of the peaches becoming unmarketable, and the consignees refused to accept them when finally notified by the defendant that the car was ready for unloading. The peaches were lost to the plaintiffs, and they sue to recover their value. *Held*, if the value of the peaches was lessened because of becoming unsound by reason of natural deterioration while in the possession of the defendant, without any fault on the part of the defendant, it would not be liable in damages to the plaintiffs because of such injury, though it occurred without fault of the consignees.

(a) As the evidence authorized the jury to find that the peaches thus suffered injury while in the possession of the defendant, without fault on its part, it was error to charge: "If, while these peaches were in the possession of the defendant company, you find that they were damaged, and without fault on the part of the con-

signee, Goetchius & Co., of New York, either for the want of payment of freight or otherwise, they became damaged, then the plaintiffs can recover the extent of such damages."

[Ed. Note.—For other cases, see Carriers. Cent. Dig. § 486; Dec. Dig. § 120.*]

2. REVIEW ON APPEAL.

No other error appears from any of the assignments of error, requiring a new trial.

Error from Superior Court, Floyd County; Price Edwards, Judge.

Action by Goetchius & Caperton against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

GEO. A. H. HARRIS & SONS, for plaintiff in error. LIPSCOMB, WILLINGHAM & DOYAL, for defendants in error.

HOLDEN, J. Judgment reversed. All the Justices concur.

(125 Ga. 168)

HILLIARD et al. v. HILLIARD.

(Supreme Court of Georgia. Sept. 26, 1910.)

*(Syllabus by the Court.)***1. HOMESTEAD (§ 22*)—PERSONS ENTITLED.**

A child formally adopted under Civ. Code 1895, § 2497, by a person who was the head of a family, became a beneficiary of an existing homestead estate which had been set apart to the adopter under the Constitution of 1868.

[Ed. Note.—For other cases, see Homestead. Cent. Dig. § 31; Dec. Dig. § 22.*]

2. HOMESTEAD (§ 142*)—PERSONS ENTITLED.

Where, after a child in the manner just indicated had become a beneficiary of a homestead estate, the head of the family died, and the homestead estate terminated as to the other beneficiaries, but not as to this child, she was entitled to possession of the homestead estate.

[Ed. Note.—For other cases, see Homestead. Dec. Dig. § 142.*]

3. OBJECTIONS WITHOUT MERIT.

In view of the entire petition as amended, the objections raised by demurrer to certain paragraphs of the petition were without merit.

4. DEMURRER PROPERLY OVERRULED.

There was no error in overruling the demurrer.

Error from Superior Court, Hart County; D. W. Meadow, Judge.

Action by Lydia Hilliard, by next friend, against A. D. Hilliard and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Lydia Hilliard, a minor, by next friend, brought suit against A. D. Hilliard, J. M. Cannon, Sr., G. W. Grizzle, O. C. Madden, F. A. Weaver, R. C. Madden, and L. T. Welton for recovery of possession of certain land and the value of its rents. The petition, as amended, in substance alleged that the defendants were claiming the land under a purchaser at a sheriff's sale held on the first Tuesday in May, 1900, where the property was sold as the property of W. A. Hilliard; that under the Constitution of 1868 the land

had been set apart as a homestead to William A. Hilliard as the head of a family, and was so held when, at the March term, 1890, of Hart superior court, the plaintiff, being a child, was formally adopted by W. A. Hilliard and given his name; that thereupon she became a member of the family of W. A. Hilliard and a co-beneficiary of the homestead estate, the other members of the family being his wife and minor son; that William A. Hilliard is dead, and the plaintiff is the only beneficiary of the homestead estate, and as such is entitled to possession of the land and the rents therefrom; that the executions under which the land was sold were based upon debts contracted after the land had been set apart as a homestead, for which the homestead property was not subject, and the sale was void. Paragraphs 3 and 4 were as follows: "(3) That petitioner is a female under the age of 21 years, and as the adopted child of the said Wm. A. Hilliard is a beneficiary of said homestead and entitled to possession of said tract of land and to the rents and profits thereof. (4) That said defendants, or those under whom they claim, have been in possession of said tract of land since the 5th of May, 1900, and receiving the rents and profits thereof, going into possession under some pretended, illegal, and void claim." The defendants demurred to the petition as a whole, on the grounds that it failed to show that the plaintiff was a member of W. A. Hilliard's family at the time the homestead was set apart, and that the petition failed to set forth a cause of action against the defendants, or either of them. They demurred to paragraph 3, on the ground that the facts set forth did not make the plaintiff a beneficiary of the homestead, and to paragraph 4, on the grounds that it did not allege sufficient facts to put the defendants on notice wherein their possession of the land was illegal, and under what void claims they took possession of the land, and that the language used in the paragraph was a mere conclusion of the pleader. The court overruled the demurrer, and the defendants excepted.

Jas. H. Skelton, Jos. N. Worley, and A. G. & Julian McCurry, for plaintiffs in error. T. G. Dorough and Sam. B. Swilling, for defendant in error.

ATKINSON, J. 1. The homestead was set apart under article 7 of the Constitution of 1868 (Code 1873, § 5135), which, among other things, declared that "each head of a family, or guardian or trustee of a family of minor children, shall be entitled to a homestead" of realty and personalty, and that it shall be the duty of the General Assembly to provide by law for the setting apart and valuation of the property, and to enact laws for the full and complete "protection and security of the same to the sole use and benefit of

said families as aforesaid." This put the beneficial use in the family. The case of *Dismuke v. Eady & Co.*, 80 Ga. 289, 5 S. E. 494, involved a homestead set apart under the Constitution of 1868, and it was held: "Where, in 1870, a father of minor children obtained a homestead in certain lands, and subsequently, during the minority of the children, he remarried, his wife, by virtue of her marriage, became a beneficiary of the homestead, and it did not terminate upon the arrival of the children at majority, and was not subject to the debts of creditors of the homestead to whom he and his wife conveyed the land, with the approval of the ordinary, to secure such indebtedness." The case of *Nelson v. Commercial Bank*, 80 Ga. 328, 9 S. E. 1075, also involved a homestead set apart under the Constitution of 1868; and it was there held: "Where the head of a family as such secured a homestead for his minor children named and described in the application, then married and had another child, his wife and his child by her became members of the same family of which he was head when the homestead was taken; and that family was not dissolved nor the homestead right terminated when the children for whose benefit the homestead was originally secured attained majority and withdrew from the family. The homestead continued to exist by operation of law, and the wife and her child as beneficiaries." See, also, *Barfield v. Barfield*, 72 Ga. 668. Under these authorities, the second wife and after-born children were held to be beneficiaries of existing homestead estates only on the ground that they lawfully became members of the family. A child adopted under Civ. Code 1895, § 2497, would lawfully come into the family of the person adopting it (*Pace v. Klink*, 51 Ga. 220), and for the same reason as a second wife or after-born children would become a beneficiary of an existing homestead estate set apart and being enjoyed by the family. See on the general subject cases cited in 15 Am. & Eng. Enc. Law, 540, 541.

2-4. The rulings announced in the remaining headnotes do not require elaboration.

Judgment affirmed. All the Justices concur.

(186 Ga. 174)

HUGHES et al. v. PURCELL et al.
(Supreme Court of Georgia. Sept. 23, 1910.)

(Syllabus by the Court.)

1. HOMESTEAD (§ 21*)—PERSONS ENTITLED—ABANDONED WIFE.

Where a husband, being the head of a family consisting of his wife and minor children, abandoned them, and refused to make application to have a homestead set apart out of his land and personal property under the provisions of Civ. Code 1895, § 2806, it was competent for the wife to make such application, where she unequivocally alleged that the husband had refused

to make the application. Civ. Code 1895, § 2842; *Hirsch v. Stinson*, 112 Ga. 348, 37 S. E. 365.

(a) It would not suffice to allege merely that the husband "neglected or refused." *Davis v. Lumpkin*, 106 Ga. 582, 32 S. E. 626.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 29, 30; Dec. Dig. § 21.*]

2. HOMESTEAD (§ 22*)—RIGHT TO POSSESSION—"FAMILY."

Where, upon appropriate application by the wife, land was laid off by the county surveyor and platted, and the plat was duly returned, filed, and recorded by the ordinary, the family became beneficiaries of the homestead and entitled to possession of the land. Civ. Code 1895, § 2874; *Gresham v. Johnson*, 70 Ga. 631.

(a) The term "family," as thus employed, contemplates children born afterwards to the husband and wife as well as those in esse and designated in the homestead proceedings. In this connection, see *Hilliard v. Hilliard* (Ga.) 68 S. E. 1110.

[Ed. Note.—For other cases, see *Homestead*, Dec. Dig. § 22.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2673-2691; vol. 8, p. 7661.]

3. HOMESTEAD (§ 142*)—ACTION FOR POSSESSION—PARTIES.

In a suit to recover possession of land from which the beneficiaries of a homestead exemption have been unlawfully evicted, ordinarily the husband would be a proper party; but if the husband be dead, and the exemption has ceased to exist as to the children in existence at the time the property was set apart by reason of death, marriage, or attainment of majority, but has not ceased to exist as to a child born after the homestead was set apart, the widow for the use of herself and such afterborn child during its minority may maintain the action. In this connection see *Braswell v. McDaniel*, 74 Ga. 319; *Pritchett v. Davis*, 101 Ga. 236, 28 S. E. 666, 65 Am. St. Rep. 298.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 271-280; Dec. Dig. § 142.*]

4. HOMESTEAD (§ 213*)—ACTION FOR POSSESSION—PLEADING.

In such an action, where it was alleged that the husband was the owner of the land, seised and possessed thereof, and that the wife obtained the homestead and took possession thereunder and with the children remained in possession for more than seven years, this was sufficient allegation of title and interest to withstand a general demurrer.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 394-396; Dec. Dig. § 213.*]

5. LIMITATION OF ACTIONS (§ 19*)—RECOVERY OF HOMESTEAD.

The action being at law, the fact that 16 years may have intervened between the date of eviction and institution of the suit will not bar the action. *McWhorter v. Cheney*, 121 Ga. 541, 49 S. E. 603, being an equitable action, the ruling there made does not apply.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 73-85; Dec. Dig. § 19.*]

6. SUFFICIENCY OF PLEADING.

The allegations relative to the ouster and possession by defendants were not of such character as to make it affirmatively appear on the face of the petition that a title adverse to the beneficiaries of the homestead had been acquired by prescription.

7. LIMITATION OF ACTIONS (§ 19*)—SUITS TO RECOVER LAND.

The petition stated a cause of action in the nature of a complaint for land and for mesne profits. No equitable relief is prayed. The statute of limitations does not apply to suits to recover land; lapse of time being only available in aid of any prescriptive title which the defendant may set up. As against a general demurrer, the petition set forth a cause of action.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 73-85; Dec. Dig. § 19.*]

Lumpkin and Beck, JJ., dissenting.

Error from Superior Court, Cherokee County; *N. A. Morris*, Judge.

Action by *M. A. Hughes* and others against *J. H. Purcell* and others. Judgment for defendants, and plaintiffs bring error. Reversed.

F. M. Hughes and *R. P. Blackburn*, for plaintiffs in error. *J. P. Brooke* and *P. P. Du Pre*, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except

LUMPKIN and *BECK, JJ.* (dissenting). The allegations indicate an equitable petition rather than an action of ejectment or complaint for land. The plaintiff stated that, "for herself and the minor child," she "brings this her equitable petition," and at the close of the allegations she again said: "Wherefore, your petitioner's husband being dead, and she and her minor child being the only beneficiaries left, she brings this her equitable petition, and prays," etc. She alleged that "petitioner further shows that she was ignorant of her rights under her homestead, and not knowing of the rights of defendant, *James H. Purcell*, she and her minor children vacated said homestead by reason of the demands and threats made by the defendant, *James H. Purcell*, and that he immediately took charge and possession of same." It was further alleged that at the time when the demand was made by defendant he insisted that he had title to the property, and it appeared that this occurred about sixteen years before the suit was brought. The prayers of the petition were for restoration of the possession, to recover the profits of the homestead, together with the value of the timber which it was alleged that the principal defendant (*Purcell*) had removed and sold, receiving value therefor, "that she have such other and further relief in this case as in equity and justice may seem meet and proper" and for process. We think the action was an equitable one, and that the case is controlled by the decisions in *Taylor v. James*, 109 Ga. 327 (4) (5), 34 S. E. 674, and *McWhorter v. Cheney*, 121 Ga. 541, 49 S. E. 603.

(135 Ga. 155)

SOUTHERN EXPRESS CO. v. SINCLAIR.

(Supreme Court of Georgia. Sept. 24, 1910.)

*(Syllabus by the Court.)***1. LIMITATION OF ACTIONS (§ 130*)—ACTION ON CONTRACT.**

This was an action against a common carrier for the value of lost goods, founded upon a breach of the contract of shipment, and was barred by the statute of limitations.

(a) The suit was not saved from the bar of the statute on account of the dismissal of a similar action, which occurred more than six months prior to the institution of the present action; nor by the fact that the present action was instituted within less than six months after the final disposition of a suit in trover in favor of the plaintiff against the defendant for recovery of the same property, in which it was held that the plaintiff was not entitled to recover in trover.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 553-566; Dec. Dig. § 130.*]

2. QUESTIONS NOT CONSIDERED.

It is unnecessary to deal with other questions presented in the record.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by Thomas Sinclair against the Southern Express Company. Judgment for plaintiff, and defendant brings error. Reversed.

See, also, 130 Ga. 372, 60 S. E. 849.

W. K. Miller, for plaintiff in error. C. H. & R. S. Cohen, for defendant in error.

ATKINSON, J. A number of questions are presented by the record; but, under the view we take of the case, it is unnecessary to deal with but one. The action was for the value of a trunk and its contents, which was received by the Southern Express Company on March 23, 1904, to be forwarded to New York. It was carried to Washington City, and there delivered to the Adams Express Company, which undertook to deliver it to the person to whom it was addressed in New York. It reached New York on the 25th of March, 1904, and, on account of the failure to deliver it to the addressee on that date, it was stored in the office of the Adams Express Company. On the morning of March 26, 1904, the office was burned, and the trunk destroyed by fire. Valuing the trunk and its contents at \$380, the plaintiff on May 25, 1903, more than four years from the date of the loss of the trunk, filed suit for the above-stated value as principal, with interest thereon from March 23, 1904.

The action was founded upon the breach of the contract, and, being such, was barred. Civ. Code 1895, § 3774; *Patterson v. Augusta & Savannah R. Co.*, 94 Ga. 140, 21 S. E. 283; *Palmer v. Southern Express Co.*, 52 Ga. 240. This was the third action which the plaintiff had instituted. The first was one of a similar character, filed July 11, 1904; but that was dismissed by the plaintiff more than six

months previous to the institution of the third action. The second action was a suit in trover, which was different in character both from the first and third, and was not a recommencement of the first suit; nor was the third action a renewal of the second. There was no dismissal of the second action, but it was prosecuted to a final determination on its merits, and brought to this court (*Southern Express Co. v. Sinclair*, 130 Ga. 372, 60 S. E. 849), where the judgment of the trial court, which had gone in favor of the plaintiff, was reversed. It is provided in Civ. Code 1895, § 3786, that "if a plaintiff shall be nonsuited, or shall discontinue or dismiss his case, and shall recommence it within six months, such renewed case shall stand upon the same footing as to limitation as the original case; but this privilege of dismissal and renewal shall be exercised only once under this clause." It is manifest that the pendency of the former actions above recited will not suffice to remove the bar of the statute.

Judgment reversed. All the Justices concur.

(135 Ga. 132)

DENSON v. GEORGIA RY. & ELECTRIC CO.

(Supreme Court of Georgia. Sept. 23, 1910.)

*(Syllabus by the Court.)***1. NEGLIGENCE (§ 4*)—ELECTRICITY (§§ 14, 19*)—"ORDINARY CARE"—MASTER AND SERVANT—INJURY TO EMPLOYEE—INSTRUCTIONS.**

In an action for damages on account of the homicide of the plaintiff's husband, under the pleading and the evidence the following facts appeared: The plaintiff's husband was in the employment of one of the defendant's patrons, and was charged with the duty of repairing shafting, machinery, "and the like." The defendant contracted to deliver into the plant of the company where the plaintiff's husband worked currents of 220 volts of electricity on a wire for supplying power and 110 volts on each of two other wires used for feeding electric lights. While engaged in his duties, the plaintiff's husband came into contact with the wire or bulb on an extension cord connected with a wire feeding one of the electric lights, and received a shock causing his death. The defendant carried on its primary wires to a transformer located near the plant a current of 2,300 volts; said transformer being for the purpose of reducing the current to that which the defendant was to supply to the plant. Various acts of negligence were alleged to have been committed by the defendant, which resulted in allowing the wire with which the plaintiff came in contact to become charged with an excessive and deadly current, and with respect to its failure to provide suitable appliances whereby this could have been prevented. The jury found for the defendant, and the plaintiff excepted to the order of the court denying her motion for a new trial. *Held*, that "ordinary care" is a relative term, and the diligence which will amount to ordinary care varies according to the circumstances of each particular case. *Central R., etc., Co. v. Ryles*, 84 Ga. 420, 11 S. E. 499.

(a) A power company, in furnishing electric-

ty to patrons, with respect to employes of the latter rightfully on the premises of the patron and likely to come into contact with wires carrying the current supplied, is bound to use ordinary care, which demands that the power company shall use such diligence in preventing injuries to such employes as is commensurate with the danger involved in the use and control of such a subtle and deadly agency as electricity. 1 Thompson on Negligence, § 804.

(b) The court charged the jury as follows: "If you find, under the evidence and the law as given you in charge, that the defendant was supplying electricity to the building in which the plaintiff's husband was employed and at work, and that the defendant exercised ordinary care in supplying electric current and in supplying such appliances as were in general use at the time of the death of plaintiff's husband, then the plaintiff could not recover. The defendant is not required to put in every latest device. It is only required to use the kind of machinery in general use and that is reasonably suited for the purpose for which it was intended; and you are to consider this at the time of the accident." The court gave the jury other charges of a similar nature. Such charges were erroneous, for the reason that it was a question for the jury to determine as to whether or not the defendant, relatively to an employe of one of its patrons to whom it was supplying electricity, had exercised ordinary care if it did not use the "latest devices," but only used "the kind of machinery in general use and that is reasonably suited for the purpose for which it was intended."

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 4; Electricity, Cent. Dig. § 7; Dec. Dig. §§ 14, 19.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5029-5042; vol. 8, pp. 7739, 7740.]

2. CONTRIBUTORY NEGLIGENCE.

As between the plaintiff and the defendant, there was no evidence to authorize a charge upon the subject of negligence on the part of the plaintiff's husband. (Lumpkin, J., dissenting as to the point dealt with in this headnote.)

3. TRIAL (§ 253*)—INSTRUCTIONS—FAILURE TO PRESENT ALL ISSUES.

The charge: "To render the defendant liable for such negligence as would entitle the plaintiff to recover under the law as given you in charge, the evidence must by a preponderance go further, and show that the defendant knew of the defective condition of the wires, if any is shown, or of their operation, if shown, by the exercise of ordinary care as explained, could have discovered it or correct it"—was not accurate, as it confined the negligence of the defendant for which a recovery might be had to "the defective condition of the wires * * * or of their operation," whereas there were other grounds of negligence involved.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

4. INSTRUCTIONS.

The use of the words "in your discretion" by the court in the charge complained of in the tenth ground of the amended motion for a new trial, while an inapt expression, was not likely to mislead the jury as to their province with respect to the subject-matter of the charge.

5. REVIEW ON APPEAL.

There was no error, for any reason assigned, requiring a new trial, with respect to the matters complained of in the other assignments of error.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by A. M. Denson against the Georgia Railway & Electric Company. Judgment

for defendant, and plaintiff brings error. Reversed.

Jas. L. Key, for plaintiff in error. Rosser & Brandon and Colquitt & Conyers, for defendant in error.

HOLDEN, J. Judgment reversed. All the Justices concur.

(125 Ga. 149)

STILWELL v. WATKINS.

(Supreme Court of Georgia. Sept. 23, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 637*)—BILL OF EXCEPTIONS—DISMISSAL.

A bill of exceptions, reciting that it was tendered within 30 days from the adjournment of the court, and followed by the usual certificate of the judge, will not be dismissed, although not actually certified by the judge until after the time allowed by law for tendering the same had expired, unless it be made to appear that the failure of the judge to certify the same within the period allowed for tendering the bill of exceptions was due to some act of the plaintiff in error or his counsel. *Dyson v. Southern Ry. Co.*, 113 Ga. 327, 38 S. E. 749; *Proctor v. Piedmont Portland Cement & Lime Co.*, 134 Ga. 391, 67 S. E. 942.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2784; Dec. Dig. § 637.*]

2. EXCEPTIONS, BILL OF (§ 56*)—ADDITIONAL CERTIFICATE.

Where a bill of exceptions is duly and regularly certified according to law, an additional certificate, following the one required by statute, will be ignored and treated as surplusage. *Dyson v. Southern Ry. Co.*, supra; *Atkins v. Winter*, 121 Ga. 75, 48 S. E. 717; *Cordray v. Savannah Union Station Co.*, 134 Ga. 865, 68 S. E. 697.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 94-96; Dec. Dig. § 56.*]

3. APPEAL AND ERROR (§ 592*)—BILL OF EXCEPTIONS—DISMISSAL.

Under the ruling in *Southern Mining Co. v. Brown*, 107 Ga. 264, 33 S. E. 73, the bill of exceptions will not be dismissed on the ground that there was no bona fide effort to brief the evidence contained in the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2618, 2620, 3126; Dec. Dig. § 592.*]

4. FORCIBLE ENTRY AND DETAINER (§ 6*)—DEFENDANT CLAIMING RIGHT OF POSSESSION IN GOOD FAITH.

In a proceeding under Civ. Code 1895, § 4808, against an intruder, the defendant cannot be evicted if in good faith he claims a right to the possession of the land. *Thompson v. Glover*, 120 Ga. 440, 47 S. E. 935; *Lane v. Williams*, 114 Ga. 124, 39 S. E. 919. Under this rule, the evidence, being conflicting, was not of such character as to authorize the direction of a verdict against the defendant.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 29-33; Dec. Dig. § 6.*]

Error from Superior Court, Gilmer County; N. A. Morris, Judge.

Action between Walter Stilwell and E. W. Watkins, Sr. From the judgment, Stilwell brings error. Reversed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index.—

J. Z. Foster and A. H. Burtz, for plaintiff in error. Wm. Butt, J. P. Brooke, and D. W. Blair, for defendant in error.

ATKINS, J. Judgment reversed. All the Justices concur.

(135 Ga. 161)

WATTS v. LANGSTON et al.

(Supreme Court of Georgia. Sept. 24, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§§ 69, 327*)—RIGHT OF REVIEW—PARTIES.

Where an attachment was sued out by a creditor against a firm composed of two members, on the ground that they resided out of the state, and was levied upon sufficient property to make the amount of the debt sought to be collected, and a replevy bond was given, with defendants in attachment as principals and certain persons as sureties, and where afterwards an order was taken suggesting the death of one of the principals and authorizing the case to proceed against the firm and the surviving partner and against the sureties on the replevy bond, and upon the trial a verdict was obtained in favor of the plaintiff against one of the principals as surviving partner and in his individual capacity, and against the said sureties, and where after this verdict a motion for a new trial was made and granted by the court, and the case came on for trial a second time, and the sureties were allowed to intervene, setting up, among others, a defense based on the ground that their risk had been increased, etc., "because the plaintiff had dismissed one of the principal defendants," and the issue made by this intervention was tried independently of the main case and prior thereto, the main case standing on the docket for trial, it was competent for the plaintiff in attachment, upon the determination of the issue made by the intervention of the sureties by a verdict of the jury, after having made a motion for a new trial, to sue out a direct bill of exceptions and bring to this court for review the judgment overruling the motion for a new trial, as well as the rulings made by the court during the trial of the issue made by the intervention.

(a) The defendant in attachment was not a necessary party to this bill of exceptions, as the determination of the issue involved concerned only the plaintiff in attachment and the sureties on the replevy bond; and the failure to make the surviving defendant in attachment a party will not work a dismissal of the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1814-1820; Dec. Dig. §§ 69, 327.*]

2. ABATEMENT AND REVIVAL (§ 77*)—DEATH OF ONE DEFENDANT—PROCEEDING AGAINST OTHER DEFENDANT.

Under the facts stated in the first head-note relative to the suing out of the attachment against the debtor firm and the giving of a replevy bond, it was proper, upon an order taken suggesting the death of one of the members of the defendant firm, to allow the case to proceed against the firm and the surviving partner and against the sureties on the replevy bond; and the court should have stricken the intervention filed by the sureties, setting up as a defense against liability on the bond the fact that the deceased member of the firm had been stricken from the case, and the case ordered to proceed against the surviving partner, who is alleged to have been insolvent, and against the firm, which was also alleged to be

insolvent, while the estate of the deceased partner was solvent, and that the surviving partner failed and refused to defend the case, although, as the interveners set up, the grounds of the attachment were not true, as the firm and both members thereof were residents of the state of Georgia, and did not reside out of the state at the time of suing out the attachment, and that the risk of the sureties was increased by the dismissal of the deceased partner from the case and in consequence of the other facts set up in the intervention. Civ. Code 1895, § 5041; Stewart v. Barrow, 55 Ga. 864; Crapp v. Dodd, 92 Ga. 405 (3), 17 S. E. 666.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 488-494; Dec. Dig. § 77.*]

Error from Superior Court, Rabun County; J. J. Kimsey, Judge.

Action by M. B. Watts against J. I. Langston and others. Judgment for defendants, and plaintiff brings error. Reversed.

Jos. T. Davis, W. S. Paris, and Robt. McMillan, for plaintiff in error. W. A. Charters and H. H. Dean, for defendants in error.

BECK, J. Judgment reversed. All the Justices concur.

(135 Ga. 182)

WAGENER, for Use of BANK OF CUMMING, v. FORSYTH COUNTY.

(Supreme Court of Georgia. Sept. 24, 1910.)

(Syllabus by the Court.)

1. COUNTIES (§ 121*)—CONTRACTS.

Where one entered into a contract with the proper county authorities for the furnishing of material and for the building of a courthouse, and the work contemplated by the contract was finished and accepted by the proper county authorities before the contract was entered on the minutes of the ordinary, such a contract was unenforceable until entered on the minutes of the ordinary; but where this was done after the completion of the work, in compliance with a judgment in mandamus proceedings instituted to compel the entry of the contract on the minutes, the defect resulting from a failure to enter the contract on the minutes before the work was begun or completed was cured, and the contract was enforceable by an action instituted therefor.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 121.*]

2. COUNTIES (§ 222*)—ACTIONS—PLEADING.

There were sufficient allegations in the petition of the presentation of plaintiffs' demand and claim against the county within the time prescribed by statute, and of the acceptance of the building erected under the contract sued on; consequently the grounds of general demurrer attacking the petition for the lack of such allegations should have been overruled.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 222.*]

Error from Superior Court, Forsyth County; N. A. Morris, Judge.

Action by Fred Wagener, for use of the Bank of Cumming, against Forsyth County. Judgment of dismissal, and plaintiff brings error. Reversed.

Fred Wagener, who sued for the use of the Bank of Cumming, brought his petition against Forsyth county, alleging as follows: H. V. Jones, as ordinary of said county, being duly authorized under the law so to do, in behalf of the county entered into a contract in writing with petitioner, wherein it was agreed that the latter would furnish material and erect a courthouse for said county, according to plans and specifications prescribed for the same, for \$24,000, to be paid in installments, and that the work should be completed and accepted as therein set out. Petitioner executed a bond for the faithful performance of his contract. He fully complied with the obligations of the contract, and delivered up the building to the ordinary in perfect repair, clean, and in good condition, and free of all claims and liens whatsoever, in March, 1906, and it was accepted by the ordinary and the committee duly appointed on the part of the county, subject to certain additional work to be done on the upstairs floor, the plastering and columns, which additional work was completed to the satisfaction of the ordinary in May, 1906. The building has been occupied by the authorized officers of the county, for all the purposes for which the same was intended, continuously since said date to the filing of the petition. In the progress of the work on the building, and in order to enable him to pay for the necessary material and labor therefor, petitioner gave to the Bank of Cumming orders upon the ordinary, requesting him to deliver to the said bank the county warrants falling due for the fourth, fifth, and sixth payments, upon the faith of which orders the bank furnished to petitioner the full amounts due upon each of said payments; but the said ordinary refuses to pay to petitioner or to the Bank of Cumming the sixth and last payment due upon the contract, amounting to \$3,600. Written demand for the county warrant covering said payment was presented to said defendant by said Bank of Cumming, through its attorney, on the 23d of March, 1907. Petitioner also sues for the additional sum of \$165 for extra work done upon the building, consisting of putting a double floor both on the first and second stories, a steel ceiling instead of plastering overhead at the east entrance to the building, and substituting metal columns for wooden columns at the north, south, and west doors, all of which, it is alleged, was agreed upon and the price fixed before said work was commenced, as prescribed in the specifications furnished by the architect.

The defendant demurred upon the following, among other, grounds: (1) No cause of action is set out. (2) Plaintiff is not entitled to any relief under the facts stated. (3) It does not appear from said petition that the plaintiff's claim or demand was presented to the proper authorities of the county for payment within 12 months after it became payable. (4) It is not alleged that the contract

sued upon was entered upon the minutes of the court of ordinary of said county before the work thereunder was done. (5) The petition does not allege that the courthouse was accepted by the ordinary of Forsyth county and its architects. (6) It is not stated when the contract was entered of record upon the minutes of the ordinary. (7) The petition does not set forth any facts which make this defendant liable for the extra work alleged to have been done by the plaintiff; it not being alleged that said work was let according to law.

H. L. Patterson and H. H. Perry, for plaintiff in error. J. P. Brooke and Hines & Jordan, for defendant in error.

BECK, J. (after stating the facts as above). As appears from the bill of exceptions and the judgment of the court rendered in this case, the plaintiff's petition was dismissed by the court upon the general demurrer.

1. The contract with the county, relied on by the plaintiff as the foundation of his right to recover against defendant, was in writing, as is required by law; but it was not entered on the minutes, as prescribed in section 343 of the Political Code of 1895, before the work of erecting the courthouse had begun, nor even during the progress of that work. Subsequently to the completion of the building and the delivery of it to the county authorities, a demand was made upon the ordinary to enter the contract upon his minutes, and this demand was refused, whereupon application for mandamus was filed by the Bank of Cumming, the use in the present case, which resulted in a mandamus absolute requiring the entry of the contract on the minutes, and in accordance with this order the contract sued on was actually entered on the minutes, all of which appears in the report of the case of Jones v. Bank of Cumming, 131 Ga. 614, 63 S. E. 36.

The controlling question in this case, as it stands at present, is whether the entry of the contract on the minutes of the ordinary subsequently to the completion of the work provided for in the contract, at the command of the court in mandamus proceedings, could give to the party contracting with the county the same rights under the contract as if that contract had been entered on the minutes previously to the commencement of the work or during its progress. The court below was of the opinion that, if the contract "is kept off the minutes until the contract has been fully executed and the work finished," it could not be enforced at the instance of the party contracting with the county. It has been repeatedly ruled that in a suit against the county upon a contract like this one an allegation that the same was in writing and had been entered on the minutes was necessary to the maintenance of the suit; but it has never been held, and nothing in the statute requires such a holding, that the con-

tract could not be enforced where it had been entered prior to the time of bringing the suit for its enforcement, although the entry was not made before the commencement of the work or during its progress.

In the case of *Jones v. Bank of Cumming*, supra, where the judgment of the court below granting mandamus absolute against the ordinary and requiring him to enter the contract in question upon his minutes was under consideration, Justice Lumpkin has collected the cases bearing upon the question of the validity of contracts with a county of the character of that involved in this case, and (page 624 of 131 Ga., page 40 of 63 S. E.), after reviewing them, says: "The statement that the object of the law requiring the entry of such contracts on the minutes is to give information, easily accessible to the public, as to the character of contracts being made by the county authorities, is equally true, whether the provision as to entering on the minutes be treated as mandatory or directory. If the failure of the ordinary to enter the formal written contract upon the minutes promptly rendered it wholly void, when did it become so? What would have been the effect if he had recorded it on the day after it was made, or some day soon thereafter? At what point did the failure of the ordinary to perform his duty, as the public may presume he will do, render his written contract an absolute nullity? If the contract was 'invalid' until recorded, only in the sense that it was not perfected or completed in matter of formal entry, so as to form a basis for a suit, could the county get the courthouse and use it, and, when called on to pay, respond that its official made the contract in writing, but failed to record it, and that, if it should now be recorded, it would still be a nullity? It was suggested that the contract might have been recorded at any time before the contractor began work, but, if not then recorded, it became a nullity. The statute makes no such declaration, and prescribes no time within which the written contract remains inchoate and at end of which it becomes null because not entered."

And it seems to us that the conclusion from this argument, when it is considered in connection with other portions of the opinion from which it is taken, is that the contract was not absolutely void or invalid before it

was recorded, except "in the sense that it was not perfected or completed, * * * so as to form a basis for a suit"; and when that defect in the contract had been remedied, either by the voluntary act of the ordinary in entering it upon his minutes, or in entering it at the behest of the court, it might, if properly executed by parties having authority to execute it on the part of the county, and if complied with by the other contracting party, be enforced by him just as if it had been entered on the minutes of the ordinary before the commencement of the work. And while the precise question which we have under consideration here, as to whether or not the entry of the contract on the minutes of the ordinary in obedience to the writ of mandamus after the completion of the work provided for in the contract would have the effect to render the contract enforceable in an action based thereon, was not directly involved in the case of *Jones v. Bank of Cumming*, supra, the conclusion reached in that case, that mandamus should have issued to compel the entry of the contract on the minutes, is strongly persuasive, and supports us in the conclusion which we have announced above, because, unless an entry of the contract on the minutes of the ordinary cured the defect which prevented the enforcement of the contract, it would seem that a judgment ordering the entry, in mandamus proceedings, would have been entirely nugatory and vain, and the court would not have undertaken by a judgment to direct the performance of a vain act.

.2. There were sufficient allegations in the petition of the presentation of plaintiff's demand and claim against the county within the time prescribed by statute, and of the acceptance of the building erected under the contract sued on; consequently the grounds of general demurrer attacking the petition for the lack of such allegations should have been overruled.

The special demurrers were not passed upon by the court below; but, as stated above, the petition was dismissed upon grounds taken in the general demurrer, and the questions covered by the special demurrers are left open for determination by the court below.

Judgment reversed. All the Justices concur.

MEMORANDUM DECISIONS

COHEN v. BEALL. (Supreme Court of Georgia. Sept. 23, 1910.) Error from Superior Court, Washington County; P. E. Seabrook, Judge. Action between Louis Cohen and O. H. P. Beall. From the judgment, Cohen brings error. Affirmed by divided court. Wright & Hyman, for plaintiff in error. J. K. Hines and R. L. Gamble, for defendant in error.

PER CURIAM. This case came before this court upon a writ of error; and, the same being for decision by a full bench of six Justices, who are evenly divided in opinion, Justices LUMPKIN, BECK, and HOLDEN being in favor of a reversal, and Chief Justice FISH, Presiding Justice EVANS, and Justice ATKINSON being in favor of an affirmance, it is considered and adjudged that the judgment of the court below stand affirmed by operation of law.

BROOKS MFG. CO. v. SOUTHERN RY. CO. (Supreme Court of North Carolina. April 13, 1910.) Appeal from Superior Court, Guilford County. Action by the Brooks Manufacturing Company against the Southern Railway Company. Justice & Broadhurst, for plaintiff. Wilson & Ferguson, for defendant.

PER CURIAM. Affirmed, on authority of *Wall-Huske Co. v. Railroad*, 147 N. C. 407, 61 S. E. 277.

BUCHANAN v. BUCHANAN. (Supreme Court of North Carolina. April 6, 1910.) Appeal from Superior Court, Lee County. Action by one Buchanan against one Buchanan. H. F. Seawell, for plaintiff. Seawell & McIver, for defendant.

PER CURIAM. Affirmed.

COWAN, McCLUNG & CO. v. WARD. (Supreme Court of North Carolina. May 25, 1910.) Appeal from Superior Court, Swain County. Action by Cowan, McClung & Co. against one Ward. A. M. Fry and G. L. Jones, for plaintiffs. F. C. Fisher, for defendant.

PER CURIAM. Affirmed.

COZAD v. McADEN. (Supreme Court of North Carolina. April 22, 1910.) Appeal from Superior Court, Graham County. Action by one Cozad against one McAden. Zebulon Weaver and J. D. Murphy, for plaintiff. Tillett & Guthrie, Merrick & Barnard, and Dillard & Bell, for defendant.

PER CURIAM. Petition to dismiss by consent.

EARLY v. SOUTHERN RY. CO. (Supreme Court of North Carolina. May 25, 1910.) Appeal from Superior Court, Buncombe County. Action by one Early against the Southern Railway Company. Zebulon Weaver, Gay Weaver, and Craig, Martin & Thomason, for plaintiff. Moore & Rollins, for defendant.

PER CURIAM. Affirmed, on authority of *Vassor v. Railroad*, 142 N. C. 69, 54 S. E. 849, 7 L. R. A. (N. S.) 950.

GRESHAM MFG. CO. v. CARTHAGE BUGGY CO. (Supreme Court of North Carolina. April 6, 1910.) Appeal from Superior

Court, Moore County. Action by the Gresham Manufacturing Company against the Carthage Buggy Company. Aycock & Winston, for plaintiff. H. F. Seawell and U. L. Spence, for defendant.

PER CURIAM. Affirmed.

MONROE v. OWEN. (Supreme Court of North Carolina. April 6, 1910.) Appeal from Superior Court, Cumberland County. Action by one Monroe against one Owen. Sinclair & Dye, for plaintiff. A. S. Hall, for defendant.

PER CURIAM. Affirmed.

OWENS v. NAVIGATION CO. (Supreme Court of North Carolina. Feb. 24, 1910.) Appeal from Superior Court, Chowan County. Action by one Owens against the Navigation Company. W. S. Privott and W. M. Bond, for plaintiff. Pruden & Pruden, for defendant.

PER CURIAM. Affirmed.

PADGETT v. SEABOARD AIR LINE RY. CO. (Supreme Court of North Carolina. May 17, 1910.) Appeal from Superior Court, Rutherford County. Action by one Padgett against the Seaboard Air Line Railway Company. B. A. Justice and R. S. Eaves, for plaintiff. J. D. Shaw, Ryburn & Hoey, and Murray Allen, for defendant.

PER CURIAM. Affirmed.

REDMOND v. SOUTHERN RY. CO. (Supreme Court of North Carolina. May 25, 1910.) Appeal from Superior Court, Buncombe County. Action by one Redmond against the Southern Railway Company. Frank Carter and H. C. Chedester, for plaintiff. Craig, Martin & Thomason, for defendant.

PER CURIAM. Affirmed.

SIKES v. WILLIAMS. (Supreme Court of North Carolina. April 6, 1910.) Appeal from Superior Court, Union County. Action by one Sikes against one Williams. Redwine & Sikes, for plaintiff. J. J. Parker, for defendant.

PER CURIAM. Affirmed.

STATE v. BLIZZARD. (Supreme Court of North Carolina. May 25, 1910.) Appeal from Superior Court, Duplin County. Proceeding by the State against one Blizzard. The Attorney General, for the State. Stevens, Beasley & Weeks, for defendant.

PER CURIAM. Affirmed.

STATE v. CATON. (Supreme Court of North Carolina. May 4, 1910.) Appeal from Superior Court, Mecklenburg County. Proceeding by the State against one Caton. G. L. Jones, for the State. T. A. Adams, for defendant.

PER CURIAM. Affirmed.

STATE v. FAIRCLOTH. (Supreme Court of North Carolina. March 16, 1910.) Appeal from Superior Court, Sampson County. Proceeding by the State against one Faircloth. The

Attorney General, for the State. Fowler & Crumpler, for defendant.

PER CURIAM. Affirmed.

STATE v. KILGORE. (Supreme Court of North Carolina. May 17, 1910.) Appeal from Superior Court, Henderson County. Proceeding by the State against one Kilgore. The Attorney General and G. L. Jones, for the State.

PER CURIAM. Affirmed.

STATE v. LEWIS. (Supreme Court of North Carolina. 1910.) Appeal from Superior Court, Nash County. Proceeding by the State against one Lewis. The Attorney General, for the State. T. T. Thorne, for defendant.

PER CURIAM. Motion to reinstate appeal denied.

STATE v. SMITH. (Supreme Court of North Carolina. May 17, 1910.) Appeal from Superior Court, Burke County. Proceeding by the State against one Smith. G. L. Jones, for the State. A. A. Whitener, R. L. Huffman, and J. M. Mull, for defendant.

PER CURIAM. Affirmed.

STEVENS v. SOUTHERN RY. CO. (Supreme Court of North Carolina. May 25, 1910.) Appeal from Superior Court, Madison County. Action by one Stevens against the Southern Railway Company. C. R. Mashburn and Gudder & McElroy, for plaintiff. Moore & Rollins, for defendant.

PER CURIAM. Affirmed.

WILLIAMS v. BRANCH. (Supreme Court of North Carolina. May 17, 1910.) Appeal from Superior Court, Burke County. Action by one Williams against one Branch. Avery & Avery, for plaintiff. S. J. Ervin, J. F. Spainhour, and J. M. Mull, for defendant.

PER CURIAM. Affirmed.

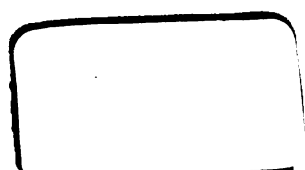
STATE ex rel. LYON, Atty. Gen., v. CITY OF COLUMBIA et al. (Supreme Court of South Carolina. March 5, 1910.) Suit by the

State, on the relation of Lyon, Attorney General, against the Columbia Water Power Company, the City of Columbia, and others. Decree for complainant. Proceeding in the original jurisdiction of the court by Attorney General Lyon against the Columbia Water Power Company, the Columbia Street Railway, Light & Power Company, and the City of Columbia. Attorney General Lyon and Porter A. McMaster, for the motion. Green & Green, opposed.

PER CURIAM. Upon reading and filing the report of A. D. McFadden, Esq., special master herein, of 22d January, 1910, and on motion of the Attorney General: It is ordered, adjudged, and decreed that the respondent, the city of Columbia, and the mayor and aldermen of the city of Columbia, and each of them, are hereby enjoined and required to remove, within eight months from the date of this order, the water mains and bridge constructed across the Columbia Canal by the city of Columbia, and located near the city water pumping station, a fuller description of said bridge and water mains appearing in the petition. It is further ordered that a certified copy of this order be served upon the city of Columbia, by delivering the same to the mayor and clerk of said city, and also served upon the mayor and each of the aldermen of said city, and that this original order be exhibited to each of them. It is further ordered that the costs and disbursements be taxed by the clerk of this court, and be paid by the city of Columbia.

PHENIX INS. CO. OF BROOKLYN, N. Y., v. SHERMAN. (Supreme Court of Appeals of Virginia. June 6, 1910.) Error to Circuit Court, Wise County. Action by J. B. Sherman against the Phenix Insurance Company of Brooklyn, N. Y. Judgment for plaintiff. Defendant brings error. Reversed. Phlegar & Powell and Irvine & Morrison, for plaintiff in error. Bullitt & Chalkley and W. S. Mathews, for defendant in error.

PER CURIAM. The court being of opinion that this case is controlled by the opinion and judgment of this court in the case of Phoenix Insurance Company of Hartford, Conn., v. J. B. Sherman, decided November 18, 1909, and reported in 66 S. E. 81, it is therefore ordered that the judgment of the circuit court of Wise county be reversed, and this court will enter such judgment as the circuit court should have entered. Reversed.



Fred Wagener, who sued for the use of the Bank of Cumming, brought his petition against Forsyth county, alleging as follows: H. V. Jones, as ordinary of said county, being duly authorized under the law so to do, in behalf of the county entered into a contract in writing with petitioner, wherein it was agreed that the latter would furnish material and erect a courthouse for said county, according to plans and specifications prescribed for the same, for \$24,000, to be paid in installments, and that the work should be completed and accepted as therein set out. Petitioner executed a bond for the faithful performance of his contract. He fully complied with the obligations of the contract, and delivered up the building to the ordinary in perfect repair, clean, and in good condition, and free of all claims and liens whatsoever, in March, 1906, and it was accepted by the ordinary and the committee duly appointed on the part of the county, subject to certain additional work to be done on the upstairs floor, the plastering and columns, which additional work was completed to the satisfaction of the ordinary in May, 1906. The building has been occupied by the authorized officers of the county, for all the purposes for which the same was intended, continuously since said date to the filing of the petition. In the progress of the work on the building, and in order to enable him to pay for the necessary material and labor therefor, petitioner gave to the Bank of Cumming orders upon the ordinary, requesting him to deliver to the said bank the county warrants falling due for the fourth, fifth, and sixth payments, upon the faith of which orders the bank furnished to petitioner the full amounts due upon each of said payments; but the said ordinary refuses to pay to petitioner or to the Bank of Cumming the sixth and last payment due upon the contract, amounting to \$3,600. Written demand for the county warrant covering said payment was presented to said defendant by said Bank of Cumming, through its attorney, on the 23d of March, 1907. Petitioner also sues for the additional sum of \$165 for extra work done upon the building, consisting of putting a double floor both on the first and second stories, a steel ceiling instead of plastering overhead at the east entrance to the building, and substituting metal columns for wooden columns at the north, south, and west doors, all of which, it is alleged, was agreed upon and the price fixed before said work was commenced, as prescribed in the specifications furnished by the architect.

The defendant demurred upon the following, among other, grounds: (1) No cause of action is set out. (2) Plaintiff is not entitled to any relief under the facts stated. (3) It does not appear from said petition that the plaintiff's claim or demand was presented to the proper authorities of the county for payment within 12 months after it became payable. (4) It is not alleged that the contract

sued upon was entered upon the minutes of the court of ordinary of said county before the work thereunder was done. (5) The petition does not allege that the courthouse was accepted by the ordinary of Forsyth county and its architects. (6) It is not stated when the contract was entered of record upon the minutes of the ordinary. (7) The petition does not set forth any facts which make this defendant liable for the extra work alleged to have been done by the plaintiff; it not being alleged that said work was let according to law.

H. L. Patterson and H. H. Perry, for plaintiff in error. J. P. Brooke and Hines & Jordan, for defendant in error.

BECK, J. (after stating the facts as above). As appears from the bill of exceptions and the judgment of the court rendered in this case, the plaintiff's petition was dismissed by the court upon the general demurrer.

1. The contract with the county, relied on by the plaintiff as the foundation of his right to recover against defendant, was in writing, as is required by law; but it was not entered on the minutes, as prescribed in section 343 of the Political Code of 1895, before the work of erecting the courthouse had begun, nor even during the progress of that work. Subsequently to the completion of the building and the delivery of it to the county authorities, a demand was made upon the ordinary to enter the contract upon his minutes, and this demand was refused, whereupon application for mandamus was filed by the Bank of Cumming, the use in the present case, which resulted in a mandamus absolute requiring the entry of the contract on the minutes, and in accordance with this order the contract sued on was actually entered on the minutes, all of which appears in the report of the case of Jones v. Bank of Cumming, 131 Ga. 614, 63 S. E. 36.

The controlling question in this case, as it stands at present, is whether the entry of the contract on the minutes of the ordinary subsequently to the completion of the work provided for in the contract, at the command of the court in mandamus proceedings, could give to the party contracting with the county the same rights under the contract as if that contract had been entered on the minutes previously to the commencement of the work or during its progress. The court below was of the opinion that, if the contract "is kept off the minutes until the contract has been fully executed and the work finished," it could not be enforced at the instance of the party contracting with the county. It has been repeatedly ruled that in a suit against the county upon a contract like this one an allegation that the same was in writing and had been entered on the minutes was necessary to the maintenance of the suit; but it has never been held, and nothing in the statute requires such a holding, that the con-

tract could not be enforced where it had been entered prior to the time of bringing the suit for its enforcement, although the entry was not made before the commencement of the work or during its progress.

In the case of *Jones v. Bank of Cumming*, supra, where the judgment of the court below granting mandamus absolute against the ordinary and requiring him to enter the contract in question upon his minutes was under consideration, Justice Lumpkin has collected the cases bearing upon the question of the validity of contracts with a county of the character of that involved in this case, and (page 624 of 131 Ga., page 40 of 63 S. E.), after reviewing them, says: "The statement that the object of the law requiring the entry of such contracts on the minutes is to give information, easily accessible to the public, as to the character of contracts being made by the county authorities, is equally true, whether the provision as to entering on the minutes be treated as mandatory or directory. If the failure of the ordinary to enter the formal written contract upon the minutes promptly rendered it wholly void, when did it become so? What would have been the effect if he had recorded it on the day after it was made, or some day soon thereafter? At what point did the failure of the ordinary to perform his duty, as the public may presume he will do, render his written contract an absolute nullity? If the contract was 'invalid' until recorded, only in the sense that it was not perfected or completed in matter of formal entry, so as to form a basis for a suit, could the county get the courthouse and use it, and, when called on to pay, respond that its official made the contract in writing, but failed to record it, and that, if it should now be recorded, it would still be a nullity? It was suggested that the contract might have been recorded at any time before the contractor began work, but, if not then recorded, it became a nullity. The statute makes no such declaration, and prescribes no time within which the written contract remains inchoate and at end of which it becomes null because not entered."

And it seems to us that the conclusion from this argument, when it is considered in connection with other portions of the opinion from which it is taken, is that the contract was not absolutely void or invalid before it

was recorded, except "in the sense that it was not perfected or completed, * * * so as to form a basis for a suit"; and when that defect in the contract had been remedied, either by the voluntary act of the ordinary in entering it upon his minutes, or in entering it at the behest of the court, it might, if properly executed by parties having authority to execute it on the part of the county, and if complied with by the other contracting party, be enforced by him just as if it had been entered on the minutes of the ordinary before the commencement of the work. And while the precise question which we have under consideration here, as to whether or not the entry of the contract on the minutes of the ordinary in obedience to the writ of mandamus after the completion of the work provided for in the contract would have the effect to render the contract enforceable in an action based thereon, was not directly involved in the case of *Jones v. Bank of Cumming*, supra, the conclusion reached in that case, that mandamus should have issued to compel the entry of the contract on the minutes, is strongly persuasive, and supports us in the conclusion which we have announced above, because, unless an entry of the contract on the minutes of the ordinary cured the defect which prevented the enforcement of the contract, it would seem that a judgment ordering the entry, in mandamus proceedings, would have been entirely nugatory and vain, and the court would not have undertaken by a judgment to direct the performance of a vain act.

.2. There were sufficient allegations in the petition of the presentation of plaintiff's demand and claim against the county within the time prescribed by statute, and of the acceptance of the building erected under the contract sued on; consequently the grounds of general demurrer attacking the petition for the lack of such allegations should have been overruled.

The special demurrers were not passed upon by the court below; but, as stated above, the petition was dismissed upon grounds taken in the general demurrer, and the questions covered by the special demurrers are left open for determination by the court below.

Judgment reversed. All the Justices concur.